

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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I. INTRODUCTION AND SUMMARY

The Foreign Sovereign Immunities Act of the United States (“FSIA” or “Act”),^{1/} which governs the immunity of foreign governments from suit in U.S. courts, is now nearly 25 years old. The statute contains the “sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States.”^{2/} It was the first of a series of statutes enacted around the world to codify the rules of foreign sovereign immunity.^{3/} There is extensive commentary on the FSIA.^{4/}

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

^{1/} 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602 to 1611.

^{2/} H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Admin. News 6610 [subsequent citations to the House Report will be to the page of the “1976 U.S.C.C.A.N.” only]; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

^{3/} See Louis Henkin, Richard Pugh, Oscar Schachter, Hans Smit, *International Law* 1127 (3d ed. 1993); 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, 303 (1986).

^{4/} Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* (1988); Mark W. Janis, *An Introduction to International Law* 350-58 (2d ed. 1993); *Restatement (Third) of the Foreign Relations Law of the United States* §§ 451-460 (1987) (“Third Restatement”); Barry E. Carter & Phillip R. Trimble, *International Law* ch. 6 (2d ed. 1995); Louis Henkin, Richard Pugh, Oscar Schachter, Hans Smit, *International Law* 1126-87 (3d ed. 1993); Henry J. Steiner, Detler F. Vagts, Harold Hongju Koh, *Transnational Legal Problems* 753-819 (4th ed. 1994); David Epstein & Jeffrey L. Snyder, *International Litigation: A Guide to Jurisdiction, Practice and Strategy* ch. 7 (2d ed. 1996); Andreas F. Lowenfeld, *International Litigation and Arbitration* ch. 7 (1993); 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 (1986).

jurisdiction.^{5/} The provision forbidding jury trials in federal courts is buried and awkwardly worded.^{6/} Courts lamented the absence of a real definition of “commercial activity” and the circularity of the definitions that the Act does contain^{7/} and, as this Report will show, found other difficulties with interpreting and applying various parts of the Act.

As Congress hoped and expected, the courts have adequately addressed and resolved many of the problems with the FSIA. For example, as we discuss 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 immunity issues.^{8/} 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 second- and third-tier subsidiaries or to corporations majority-owned by two states but not by a single state? 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.

^{5/} 28 U.S.C. § 1330.

^{6/} 28 U.S.C. §§ 1330(a), 1441(d).

^{7/} *Saudi Arabia v. Nelson*, 507 U.S. 349, 358-59 (1993); Andreas F. Lowenfield, *Litigating a Sovereign Immunity Claim – The Haiti Case*, 49 N.Y.U.L. Rev. 377, 435 & n.244 (1974).

^{8/} 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).

court proceeds to decide the case? At the moment, inconsistencies and circuit conflicts exist on these and other questions.

A. Formation of the Working Group and other ABA involvement in FSIA issues

The International Litigation Committee of the Section of International Law and Practice therefore 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 engage in technical law reform. The goal was to recommend reforms, clarifications, and improvements in the Act to provide certainty and predictability for courts, practitioners, and foreign states and those having contact with them.

The Working Group has five members:

- Andrew N. Vollmer, a partner at Wilmer, Cutler & Pickering, chaired the group. His practice includes litigating FSIA cases, advising on the Act, and representing parties in other types of international litigation. He taught or co-taught “International Civil Litigation in U.S. Courts” at Stanford Law School and Georgetown University Law Center.
- David J. Bederman is a professor of law at Emory University in Atlanta. Professor Bederman’s academic and professional career has focused on international law and its practical impact on American government. Aside from holding the Diploma of the Hague Academy of International Law, as well as a Ph.D. in Law from the University of London, he has also served as a Legal Advisor at the Iran-U.S. Claims Tribunal in The

Hague. He has been involved as counsel and advisor in numerous cases implicating foreign sovereign immunities.

- Curtis A. Bradley is a professor at the University of Virginia School of Law, where he teaches a variety of courses relating to international law and international litigation. He has written extensively on international issues, including issues relating to the FSIA. He is the co-author of a forthcoming casebook on U.S. foreign relations law, which contains extensive materials on foreign sovereign immunity. Before going into teaching, Professor Bradley practiced law at Covington & Burling in Washington, D.C.
- Mark A. Cymrot, a partner at Baker & Hostetler LLP in Washington, D.C., specializes in international and commercial litigation and arbitration. He has extensive experience in FSIA cases, having represented a foreign state in a series of cases seeking repayment of the sovereign's debt.
- Joseph W. Dellapenna is a professor of law at Villanova University, where he teaches courses on international and comparative law as well as other subjects. He has taught, practiced, and written about transnational litigation and is the author of *Suing Foreign Governments and Their Corporations* (1988).^{9/}

The ABA has a long history of involvement with the FSIA. At the August 1976 meeting of the House of Delegates, the ABA adopted a resolution urging approval of the bill that became the FSIA.^{10/} At various times, the Section of International Law and Practice had a committee on

^{9/} The Working Group thanks Amber Cottle, an associate at Wilmer, Cutler & Pickering, and Anthony J. Rollins, Emory Law School Class of 1999, for their valuable contributions and assistance.

^{10/} 1976 U.S.C.C.A.N. at 6608.

revision of the FSIA.^{11/} 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.

In preparing this Report and during the course of its work, the Working Group invited views from a wide variety of potentially interested groups. At the outset, members of the Working Group informed personnel on the staffs of Members of both houses of Congress and at the Office of the Legal Adviser of the Department of State about the goals and purposes of the project. The existence of the project was publicized in various ABA publications. Drafts of the Report were circulated to the leadership of the International Litigation Committee and the Section of International Law and Practice. The Working Group had extensive informal discussions with officials from the Legal Adviser's Office about a draft. A partial draft was discussed at a program at the Spring 2000 meeting of the Section and at an April 2000 program sponsored by the American Society of International Law.

B. Guidelines followed by the Working Group

The goal of the Working Group was to address technical legal issues important to foreign states and those having contact with them and to courts and practitioners. Our aim was to reform and clarify the language and areas of the Act that have divided courts or that are potentially ambiguous or confusing. Our recommendations are designed to make application of the Act in future cases more certain, predictable, and efficient.

^{11/} 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).

When considering whether to make a recommendation, the Working Group kept several guidelines in mind. We sought to make recommendations consistent with the Constitution and international law. Many sources were helpful in identifying international law, but we often referred to the International Law Commission's Draft Convention on Jurisdictional Immunities of States and Their Property and the Restatement (Third) of the Foreign Relations Law of the United States. For possible approaches to issues and for indications of the practice of states with similar legal systems, we consulted the U.K., Australian, and Canadian statutes on foreign sovereign immunity. We sought to make our suggestions conform with the general purposes, objectives, policies, and values in the current statute and the current legislative history. That is, we attempted to work within the framework of the existing law; we did not attempt to write an entirely new statute. We wanted changes to be easily understood and applied by lawyers and judges. We wanted to minimize the number of changes in the statutory language and did not propose every change that might have been made. There is a value in retaining language with which courts and advisers are familiar even though it might be clarified or improved. 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. The international human rights area is an example. Given that the FSIA is the exclusive basis for proceeding against a foreign state, human rights lawyers have argued that a foreign state is not immune on the basis of nearly every exception to immunity in the Act. They have achieved only limited

success.^{12/} Indeed, at least one court imposed Rule 11 sanctions on lawyers who argued too strenuously for a human rights claim without a genuine basis in the Act.^{13/} Even suits based on the Nazi holocaust against the Jews or the murder of American citizens have been dismissed.^{14/} Eventually, Congress enacted a new exception to immunity for a very small class of human rights cases.^{15/} 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. Our effort was to make bringing successful human rights claims neither easier nor more difficult than it already is.

The Working Group also decided not to address whether the FSIA applies in criminal cases. Several courts have considered this or related issues,^{16/} but the Working Group concluded that the question has not insignificant policy implications and therefore takes no position on it.

^{12/} See, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (commercial activity); *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1996) (implied waiver); *Hilao v. Estate of Marcos*, 94 F.3d 539, 546 (9th Cir. 1996) (commercial activity); *Cicippio v. Iran*, 30 F.3d 164, 169 (D.C. Cir. 1994) (commercial activity; noncommercial tort); *Princz v. Germany*, 26 F.3d 1166, 1175 (D.C. Cir. 1994) (implied waiver); *Siderman v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1991) (commercial activity; implied waiver; taking property in violation of international law); *Jones v. Petty Ray Geophysical Geosource, Inc.*, 954 F.2d 1061 (5th Cir. 1992) (commercial activity); *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1990) (noncommercial tort); *Frolova v. USSR*, 761 F.2d 370 (7th Cir. 1985) (implied waiver); *de Letelier v. Chile*, 488 F. Supp. 665 (D. D.C. 1980) (implied waiver; noncommercial tort), judgment entered, 502 F. Supp. 259 (D.D.C. 1980), execution ordered, 567 F. Supp. 1490, 575 F. Supp. 1217 (S.D.N.Y. 1983), rev'd, 748 F.2d 790 (2d Cir. 1984).

^{13/} *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989).

^{14/} *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1996); *Princz v. Germany*, 26 F.3d 1166, 1175 (D.C. Cir. 1994); *Von Dardel v. USSR*, 736 F. Supp. 1 (D.D.C. 1990).

^{15/} 28 U.S.C. § 1605(a)(7). See *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999), 74 F. Supp. 2d 18 (D.D.C. 1999) (discussing recent amendments).

^{16/} See *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999) (federal courts have subject-matter jurisdiction under the FSIA in civil RICO actions against foreign states even though a predicate for RICO liability is the existence of "indictable" acts); *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997) (FSIA does not address foreign sovereign immunity in the criminal context); *United States v. Hendron*, 813 F. Supp. 973 (E.D.N.Y. 1993) (refusing to dismiss indictment against an official of an instrumentality because the FSIA applies only in civil proceedings); *Gould v. Mitsui Mining & Smelting Co.*, 750 F. Supp. 838 (N.D. Ohio 1990) (dismissing

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.

C. Summary of the Report

- In Part II, we examine the structure of the Act, which combines the issues of personal jurisdiction, federal-court subject-matter jurisdiction, and immunity from suit. We conclude that no amendment is necessary. Courts have become familiar with the structure, altering the structure could raise a constitutional issue in certain cases, and courts have been alert to the need both to address the potential due process concern of exercising personal jurisdiction over a foreign state or instrumentality with few contacts with the United States and to protect foreign state defendants from burdensome discovery before resolving the immunity issue.
- In Part III, the Working Group considers several questions about the scope of the FSIA. In Part III.A, we propose clarifying the definitions of “foreign state” and “agency or instrumentality” and separating the two definitions for all purposes. The current definition of the phrase “foreign state” is confusing because it sometimes means both states and instrumentalities and sometimes means just states. For clarity and convenience, we propose shortening the phrase “agency or instrumentality” to just “instrumentality.”

civil RICO claims against instrumentalities based on wire and mail fraud because section 1330(a) of the FSIA refers only to civil actions and instrumentalities could not be prosecuted for mail or wire fraud).

- In Part III.B, the Working Group discusses the methods of distinguishing parts of a foreign state from instrumentalities and concludes that the “legal characteristics” test rather than the “core functions” test better serves the goals of the Act. 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, and other governmental units typically viewed as part of the government itself occasionally have some of these characteristics, we recommend that the definition of foreign state make clear that the state includes the departments and ministries of government, the armed forces, and independent regulatory agencies.
- In Part III.C, we examine the “tiering” and “pooling” issues, that is, the question of entities indirectly owned by a foreign state and entities owned by more than one foreign state. We propose statutory language to apply the Act to an entity majority owned by more than one foreign state and to all levels of subsidiaries as long as they are ultimately majority owned by a foreign state. We combine our recommendation on tiering with a proposal to include a rebuttable presumption that an instrumentality owned by another instrumentality rather than the state itself is engaged in commercial activity.
- In Part III.D, we discuss the problem of deciding whether the Act applies when the status of the defendant as a foreign state or instrumentality has changed between the time the claim arose and the time the complaint is filed. We believe the goals of the FSIA are best

effectuated by applying the protections of the Act based on the status of the defendant at either the time the claim arose or the time the complaint is filed.

- In Part III.E, we recommend that the scope of the Act explicitly extend to individuals who are officials or employees of a foreign state or instrumentality and who act within the scope of their office or employment. We do not recommend that the Act also cover heads of state and do not take a position on that issue. With appropriate new provisions for service on individuals, our 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. Our amendments would contain provisions expressly preserving diplomatic and consular immunity.
- The next several parts of the Report address the exceptions from immunity. Part IV deals with three issues concerning the waiver exception. First, although questions have been raised about the absence of a requirement connecting an explicit waiver to the territory of the United States, the Working Group does not recommend any amendment to the current statutory language 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 of the costs and uncertainties associated with 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. Third, the Working Group recommends that the statute be amended to include

language specifying the governing law for determining a person's actual or apparent authority to waive sovereign immunity.

- 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. In Part V, we explain that the Supreme Court’s construction of the current direct effect language has caused confusion 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.
- In Part VI, the Working Group recommends two clarifying amendments to the tort exception. First, the U.S. connection language should be amended to specify that the Act applies only when a substantial portion of the tortious act or omission occurs in the United States and that the place of injury or damage is not relevant. Second, the Act should be amended to make clear 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. The Working Group also examined the part of the tort exception preserving immunity from tort claims for discretionary functions and determined that courts should continue to apply the current statutory language to deal with the issues that arise.

- In Part VII, the Working Group considers several issues concerning service of process. Some courts find “substantial compliance” with service rules adequate for instrumentalities, although courts differ on what constitutes substantial compliance. In the opinion of the Working Group, the 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. We also propose some adjustments to the provision permitting courts to develop a special service approach when a plaintiff has difficulty serving an instrumentality or a director or employee of an instrumentality.
- Under the current FSIA provisions, successful plaintiffs have difficulty in executing a judgment against a foreign state. In Part VIII, the Working Group proposes to address this problem by relaxing the restrictions on the types of foreign state property in the United States subject to execution. In essence, any property in the United States used for a commercial activity would be available to satisfy a U.S. judgment, although the immunity of specific categories of property would be retained and the immunity of official, diplomatic, and consular property would be clarified. Because the current rules for executing a judgment against an instrumentality are similar to these proposed rules, the standards for executing against an instrumentality would be conformed to those for executing against a foreign state.
- The Working Group recognizes that, in certain extreme cases, execution of a judgment and even litigation itself against a foreign state could cause extraordinary hardship of a

kind not faced by an instrumentality or a private entity. In Part IX, the Working Group therefore proposes that, in certain narrow circumstances, courts have a limited authority to stay pre-judgment proceedings or execution against foreign states.

II. 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,^{17/} statutory personal jurisdiction exists with respect to any claim for which there is federal subject matter jurisdiction.^{18/} 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.”^{19/} And the FSIA in turn specifies various exceptions to sovereign immunity.^{20/} 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).^{21/}

^{17/} The rules for service of process on foreign states, their political subdivisions, and their agencies and instrumentalities are set forth at 28 U.S.C. § 1608.

^{18/} 28 U.S.C. § 1330(b).

^{19/} 28 U.S.C. § 1330(a).

^{20/} See 28 U.S.C. §§ 1605, 1607.

^{21/} 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).

A. Possible changes

The Working Group considered the possibility that this structure should be altered so that the issues of subject matter and/or personal jurisdiction would be separated in some way from the issue of sovereign immunity. There are three principal arguments for such separation. First, the current, intertwined structure of the FSIA can be confusing to courts. Indeed, a federal appeals court observed in 1981 that the FSIA's structure had created "considerable confusion in the district courts,"^{22/} and a federal district court in 1982 described the FSIA's structure as "bizarre" and "remarkably obtuse."^{23/} Second, the current structure of the FSIA may raise due process concerns. Under the FSIA's current structure, personal jurisdiction is conferred over foreign sovereign defendants whenever there is proper service and an exception to immunity. The contacts with the United States required by the exceptions to immunity, however, may not always be sufficient to satisfy the requirements of due process. Third, because the issue of jurisdiction in the FSIA is linked to the issue of immunity, courts often will not be able to resolve jurisdictional challenges based on the pleadings. As a result, there is a danger that the intertwined structure of the FSIA will result in unnecessary and potentially burdensome discovery, thereby undermining one of the benefits of sovereign immunity. Indeed, "[s]everal courts have observed the tension between permitting discovery to substantiate exceptions to

^{22/} Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 307 (2d Cir. 1981).

^{23/} Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1105-06 (S.D.N.Y. 1982). This language has been quoted in several subsequent decisions to refer to the overall structure of the FSIA rather than just the jurisdictional structure discussed herein. See Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 576 (7th Cir. 1989); Callejo v. Bancomer, 764 F. 2d 1101, 1107 (5th Cir. 1985); Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., dissenting).

statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery."^{24/}

B. Analysis and conclusions of the Working Group

Notwithstanding the above arguments, the Working Group concluded that the current structure of the FSIA should not be changed, for four reasons. First, the Group concluded that there is no longer substantial confusion in the courts regarding the FSIA's structure. Second, the Group concluded that separating subject matter jurisdiction from immunity might raise new constitutional uncertainties. Third, the Group concluded that the due process problem is not significant and is being addressed adequately by the courts. Fourth, the Group concluded that, while the structure of the FSIA may heighten the potential of unnecessary and burdensome discovery, some discovery on the existence of exceptions to immunity will be inevitable in at least some cases, and courts generally have acted to protect foreign sovereign defendants from the danger of excessive jurisdictional discovery.

1. Confusion in the courts

Although the intertwined structure of the FSIA generated some initial confusion in the courts, this no longer appears to be a significant concern. The FSIA's structure has been described correctly and without much uncertainty in recent Supreme Court decisions. In *Argentine Republic v. Amerada Hess Shipping Co.*,^{25/} for example, the Court stated correctly and matter-of-factly that "Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens

^{24/} *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992).

when a foreign state is not entitled to immunity.”^{26/} Similarly, the lower federal courts in recent years, in part because they have had the benefit of the Supreme Court explanations, appear to have had little difficulty in describing the FSIA’s structure.^{27/}

2. Constitutional concern

Changing the structure of the FSIA might raise constitutional concerns with respect to some applications of the statute. As noted above, the FSIA purports to confer subject matter jurisdiction over any suit against a foreign state when there is an exception to immunity. In order for a federal court constitutionally to hear a case, however, there must be more than statutory authorization – the case must also fall within one of the categories of subject matter jurisdiction specified in Article III of the Constitution. The two most commonly invoked categories cover cases involving diverse parties (“diversity jurisdiction”) and cases arising under federal law (“federal question jurisdiction”). Many of the cases brought under the FSIA involve foreign plaintiffs suing foreign defendants and thus do not fall within diversity jurisdiction.^{28/} In addition, many of these cases involve claims arising under state law or foreign law, so it is arguable that they do not fall within federal question jurisdiction either.

The Supreme Court addressed this Article III concern in *Verlinden B.V. v. Central Bank of Nigeria*.^{29/} There a Dutch company was suing Nigeria’s central bank in U.S. federal court for anticipatory breach of a letter of credit. The case thus involved a foreign plaintiff suing a foreign

^{25/} 488 U.S. 428 (1989).

^{26/} *Id.* at 434; see also, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

^{27/} See, e.g., *Whitehead v. Grand Duchy of Luxembourg*, 1998 U.S. App. Lexis 22307, *10 (4th Cir.); *Wolf v. Federal Republic of Germany*, 95 F.3d 536, 540-41 (7th Cir. 1996); *In re Estate of Marcos*, 25 F.3d 1467, 1469-70 (9th Cir. 1994); *In re Trans Chem. Ltd.*, 978 F. Supp. 266, 276 (S.D. Tex. 1997).

^{28/} See, e.g., *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

defendant on a claim that did not itself arise under federal law. The Court nevertheless concluded that the case fell within the categories of subject matter jurisdiction specified in Article III. In particular, the Court concluded that the case fell within the category of federal question jurisdiction, and the intertwined structure of the FSIA played an important role in the Court's conclusion.

To understand the Court's resolution of the issue, it is important to keep in mind that the mere existence of a federal statute granting jurisdiction over a case is not, by itself, sufficient for the case to arise under federal law.^{30/} (If it were enough, congressional grants of subject matter jurisdiction would never violate Article III.) Rather, to satisfy Article III's federal question provision, the case must involve some issue of substantive federal law. In addition, Article III may require that there be more than a "remote possibility" that the substantive question of federal law will arise in the case.^{31/}

In *Verlinden*, the Court determined that cases brought under the FSIA satisfy both of these requirements because, in every FSIA case, a substantive question of federal law will arise at the outset. The Court explained that "[a]t the threshold of every action in a district court against a foreign state . . . the court must satisfy itself that one of the exceptions [to immunity] applies – and in doing so it must apply the detailed federal law standards set forth in the Act."^{32/} The Court also noted that, in light of the FSIA's intertwined structure, "a suit against a foreign

^{29/} 461 U.S. 480 (1983).

^{30/} See, e.g., *Mesa v. California*, 489 U.S. 121, 136-37 (1989).

^{31/} 461 U.S. at 492-93.

^{32/} *Id.* at 493-94.

state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly ‘arises under’ federal law, as that term is used in Art[icle] III.”^{33/}

This reasoning suggests that, if the jurisdictional structure of the FSIA is changed such that subject matter jurisdiction is separated from immunity, some cases currently brought under the FSIA might be suspect. In that situation, it might no longer be the case that a substantive question of federal law would arise “at the very outset” or “at the threshold” of every FSIA case. Rather, to begin hearing the case, the court would need only to satisfy itself that the test for subject matter jurisdiction is met. That question by itself, however, is not sufficient for a case to fall within the federal question jurisdiction provision of Article III. To be sure, the bounds of Article III are uncertain, and it is possible that separating jurisdiction from immunity in this manner would survive constitutional scrutiny given the likelihood that a substantive issue of immunity would eventually arise in the case.^{34/} But such a change would at least generate some constitutional uncertainty until resolved by the Supreme Court.

3. Due process

The Group has concluded that the due process concern noted above is not substantial enough to warrant changing the structure of the FSIA. First, in most cases, the FSIA’s exceptions to immunity will satisfy the requirements of due process. The FSIA’s legislative history indicates that Congress intended to incorporate notions of due process into the exceptions

^{33/} Id. at 493.

^{34/} In a recent decision, the Supreme Court allowed district courts some flexibility in their application of subject matter jurisdiction requirements. See *Ruhgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (allowing federal district courts in some cases to decide personal jurisdiction before subject matter jurisdiction). There is also broad language in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), suggesting that the Article III federal question provision is satisfied whenever a federal issue is a potential ingredient in the case. The current viability of that suggestion is uncertain, however, and the Supreme Court reserved judgment on it in *Verlinden*. 461 U.S. at 492.

to immunity and hence into the authorization of personal jurisdiction.^{35/} Consistent with this intent, conduct satisfying most exceptions is likely also to satisfy the “minimum contacts” test for due process in all but the most unusual case.^{36/} Thus, for example, the commercial activities exception requires either commercial activity carried on in the United States, an act in the United States in connection with commercial activity elsewhere, or “a direct effect in the United States.”^{37/} And the noncommercial tort exception requires that the injury or damage occur in the United States.^{38/}

Second, although most courts have assumed that foreign sovereign defendants are entitled to the full protections of due process, it is not entirely clear that this is the case. The Supreme Court has held that a State of the Union is not a “person” under the Due Process Clause^{39/} and, in an aside, mentioned the possibility that due process protections do not apply to foreign states.^{40/} One lower court recently so held.^{41/} This issue ultimately is one that the Supreme Court will need to decide, further counseling against an attempt to resolve the matter legislatively. The Working Group takes no position on this issue.

^{35/} See 1976 U.S.C.C.A.N. at 6612.

^{36/} Due process requires that the defendant have “minimum contacts” with the forum “such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

^{37/} See 28 U.S.C. § 1605(a)(2). As discussed in Part V, the Working Group is recommending that this third clause of the commercial activity exception be amended to require “a direct and substantial effect in the United States.”

^{38/} See 28 U.S.C. § 1605(a)(5). As discussed in Part VI, the Working group is recommending that this requirement be deleted and that the statute require instead that a substantial portion of the tortious acts or omissions occur in the United States.

^{39/} *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966).

^{40/} See *Weltover*, 504 U.S. at 619.

^{41/} See *Flatow*, 999 F. Supp. at 21.

Finally, courts recognize that they are constitutionally required to make a separate, independent determination that the defendant has sufficient contacts with the United States as a whole to satisfy the requirements of due process. Outside of the FSIA context, courts traditionally have engaged in a two-step inquiry in evaluating personal jurisdiction: first, they determine if there is statutory authorization for jurisdiction and service of process, and, if so, they next determine if the grant of personal jurisdiction is consistent with the requirements of due process.^{42/} As a result, there is nothing unusual about a court having to determine both whether the FSIA authorizes personal jurisdiction and whether the authorization is constitutionally permissible, and many courts have done exactly that.^{43/}

4. Discovery

The Group similarly concluded that the structure of the FSIA need not be amended to address the problem of unnecessary discovery. While there may be some instances in which the intertwined structure of the FSIA will result in unnecessary discovery, courts generally have been sensitive to this issue and have acted to protect the interests of foreign sovereign defendants. For example, many courts restrict plaintiffs to limited “jurisdictional discovery” during the early stages of the litigation.^{44/} In addition, courts often will not even allow this sort of discovery absent some indication that it is likely to be helpful to the court’s determination of

^{42/} See, e.g., *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-05 (1987); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997); *International Techs. Consultants, Inc. v. Euroglass S.A.*, 107 F.3d 386 (6th Cir. 1997).

^{43/} 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).

^{44/} See, e.g., *Gould, Inc. v. Pechiney Ugine Kuhlmann & Trefimetaux*, 853 F.2d 445, 451 (6th Cir. 1988); *Gabay v. Mostazafan Found. of Iran*, 151 F.R.D. 250, 257 (S.D.N.Y. 1993).

jurisdiction.^{45/} In situations where a district court does allow overly expansive discovery, appellate courts may be available to provide relief. Indeed, in one recent FSIA case, an appeals court issued a writ of mandamus ordering a district court to consider less intrusive means of discovery.^{46/}

^{45/} See, e.g., *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990); *Crist v. Republic of Turkey*, 995 F. Supp. 5, 12 (D.D.C. 1998); *Greenpeace, Inc. v. France*, 946 F. Supp. 773, 789 (C.D. Cal. 1996); see also *Arriba*, 962 F.2d at 534 (“At the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.”).

^{46/} See *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998).

III. ENTITIES AND PERSONS ENTITLED TO PRESUMPTIVE IMMUNITY

The Working Group had several concerns about the scope of the FSIA, that is, the definition of the entities and persons entitled to presumptive immunity. 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.^{47/} Our concerns were 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, and the absence of any reference to individuals such as government officials. We address these issues, as well as the appropriate time for determining when an entity qualifies for coverage under the Act, in this part of the Report.

Section 1603 currently defines the scope of the Act by defining foreign states and agencies and instrumentalities of foreign states:

For purposes of this chapter–

(a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity–

(1) which is a separate legal person, corporate or otherwise, and

^{47/} 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.

(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 as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603.

A. Separating the definitions of foreign state and instrumentality

In the opinion of the Working Group, the definitions of “foreign state” and “agency or instrumentality of a foreign state” in section 1603 are unnecessarily confusing and have led to difficulties in interpreting the FSIA. We propose several clarifying amendments.

Particularly problematic is the use of a dual definition for foreign state. The term foreign state has one meaning for most of the statute but a different meaning for section 1608, which provides rules for service of process, time to answer, and defaults. Except for section 1608, the term refers both to foreign states proper and agencies and instrumentalities. That has led to confusion in applying the statute. An example is the tiering and pooling issue discussed below. Another is the venue provision. The natural reading of the final venue provision (section 1391(f)(4)) is to allow a suit in the District of Columbia against a foreign state proper but not an agency or instrumentality,^{48/} but a strict reading would permit any foreign state as well as any instrumentality to be sued there. The dual definition also has led to unnecessary complexity. For example, in section 1606 the statute refers to “a foreign state except for an agency or instrumentality.”

^{48/} See Third Restatement § 457(2)(a).

The Working Group, therefore, proposes to separate the definitions of foreign state and instrumentality for all purposes. The intent is not to change the way courts currently determine whether an entity is a foreign state. The Group also proposes to clarify the term foreign state to include the government of the State and its departments, ministries, and political subdivisions. Political subdivisions should include overseas dependencies and territories such as Bermuda and Aruba.

The term “agency or instrumentality” would be shortened to “instrumentality” of a foreign state. The use of the term “agency” has created confusion since it appeared to include departments or ministries that were intended to be part of the foreign state. It also made the term unnecessarily long and cumbersome. Nonetheless, the Working Group intends that the extensive case law interpreting the term “agency or instrumentality” would apply to “instrumentality” to the extent appropriate in light of the other amendments to the definition. With the separation of instrumentalities from the foreign state, it is necessary to make a variety of conforming amendments throughout the Act. We propose these amendments in the revised version of the Act attached to this Report.

B. Distinguishing between a foreign state and an instrumentality

The courts are split over how to determine whether a foreign entity is a foreign state or an instrumentality of a foreign state. The distinction can be significant because it affects the degree of protection that the entity receives in several sections of the FSIA, including the service of process, venue, and execution provisions.^{49/}

^{49/} For example, the service of process requirements in section 1608 are much less stringent for instrumentalities than for foreign states. Section 1391(f) appears to make the District of Columbia a proper venue in

One line of cases holds that a determination of instrumentality status should be based on whether the entity displays legal characteristics signifying its independence from the foreign state: ability to contract, sue and be sued, and hold property in its own name. Another line of cases bases the distinction on the entity’s “core function”: if the core functions are primarily commercial, rather than governmental, the entity is considered an instrumentality. An approximately equal number of trial courts subscribe to each test, although the core function test is the only one with the endorsement of an appeals court and the U.S. State Department. As we will explain, the Working Group prefers the legal characteristics test as the appropriate test for distinguishing between a foreign state and an instrumentality.

1. The core function test

The leading case applying the core function test is *Transaero, Inc. v. La Fuerza Aerea Boliviana*.^{50/} In *Transaero*, the Bolivian Air Force argued that it had not been properly served with a summons and complaint because it was a political subdivision of a foreign state after the plaintiff had relied on the service rules for an instrumentality. In an amicus curiae brief, the State Department created the concept of a “core function” test. The Department was concerned that a large number of government entities would be considered “separate legal persons” if the determination of status was based on whether the entity could “sue or be sued in its own name, contract in its own name or hold property in its own name,” which is the list of criteria provided in the legislative history.

any case against a foreign state but not an instrumentality. Under section 1606, punitive damages may be awarded against an instrumentality but not against the foreign state.

^{50/} 30 F.3d 148 (D.C. Cir. 1994).

The legislative history of the original FSIA stated that the “separate legal person” criteria “is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.”^{51/} It also explained that an instrumentality of a foreign state could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.^{52/}

This list appears misleading because it includes as instrumentalities entities that have traditionally been considered part of the state, particularly departments or ministries. The State Department thus expressed concern that departments with authority to sue and be sued, such as the U.S. Air Force, would be mischaracterized as instrumentalities, even though they are not separate legal persons under the laws of the United States. The State Department proposed a two-part test to determine whether the entity was part of the foreign state. The court should look (1) at the core function, assigning governmental entities to the foreign state, and (2) at the substance behind the criteria to determine whether the state’s assets would be subject to the judgment.

The D.C. Circuit took a similar approach to the State Department’s but found that, if the core function is commercial, the entity should be an instrumentality.^{53/} Although some of the language in the legislative history seemed to indicate that the test of instrumentality status should

^{51/} 1976 U.S.C.C.A.N. at 6614 (emphasis added).

^{52/} Id. (emphasis added).

^{53/} 30 F.3d at 151-52.

be based on certain “legal characteristics” like the ability to contract and sue, this language was not dispositive, according to the *Transaero* court.^{54/} For example, the United States may find it convenient to give contract and litigation powers to the Departments of State and Defense, but those entities clearly should be political subdivisions rather than agencies or instrumentalities, the court said.^{55/} Finally, the core function test, in the court’s view, was easier to apply than the legal characteristics test, because courts and parties already are accustomed to making the governmental/commercial distinction found in other parts of the FSIA. In the court’s view, the determination should be tied to “obvious functions, rather than the uncertain powers of the foreign defendant.”^{56/} Applying the core function test, the court held that the armed forces of a foreign sovereign “are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the ‘foreign state’ itself rather than a separate ‘agency or instrumentality’ of the state.”^{57/}

In *Segni v. Commercial Office of Spain*,^{58/} the Northern District of Illinois applied the core function test to determine whether the Commercial Office of Spain was a political subdivision or an instrumentality. The court here too found that the language of the FSIA was not helpful in differentiating between the two categories but, based on the legislative history, found that the “distinction is between an entity that is an integral part of a foreign state’s political structure, and an entity whose structure and function is predominately commercial.”^{59/} The court then found

^{54/} Id. at 152.

^{55/} Id.

^{56/} Id.

^{57/} Id.

^{58/} 650 F. Supp. 1040 (N.D. Ill. 1986) (contract dispute).

^{59/} Id. at 1041-42.

that the Commercial Office of Spain was a political subdivision of the government of Spain because its duties were so bound up in official government activities.^{60/}

2. The legal characteristics test

The leading case applying the legal characteristics test is *Hyatt Corp. v. Stanton*,^{61/} where the court decided whether Finland's Government Guarantee Fund ("GGF")^{62/} qualified as an instrumentality. The Southern District of New York found that both the text and the legislative history of the FSIA indicated that "legal characteristics" was the proper test.^{63/} First, the court found that the plain meaning of "separate legal person" – part of the definition of "agency or instrumentality" under the statute – was that the entity could operate independently of the state.^{64/} The court referred to the legislative history, which noted that instrumentalities were entities that could sue or be sued, contract, or hold property, and said that these "legal characteristics" should form the basis of the test.^{65/} The court also declined to follow the core function test, finding that the FSIA did not distinguish between commercial and governmental entities in the definition of agency or instrumentality and that the legislative history gave examples of both commercial and

^{60/} Id. at 1042. See also *Underwood v. United Republic of Tanzania*, 1995 WL 46383 (D.D.C.) (applying the core function test in holding that an embassy is a political subdivision despite the fact that the embassy may have certain independent "legal characteristics"); *IBJ Schroeder Bank & Trust Co. v. Bank for Foreign Economic Affairs of the USSR*, 647 N.Y.S.2d 930 (Sup. Ct. 1996) (applying the core function test to determine whether the commercial activity exception to the FSIA applied); *Gray v. Permanent Mission of People's Republic of the Congo*, 443 F. Supp. 816 (S.D.N.Y.), aff'd mem., 580 F.2d 1044 (2d Cir. 1978) (not specifying which test was used, but nevertheless finding that the Congo's permanent mission to the United Nations was a political subdivision because a U.N. mission is a "pure[] embodiment of a foreign state"); *2 Tudor City Place Associates v. Libyan Arab Republic Mission*, 470 N.Y.S.2d 301 (Civ. Ct. 1983) (citing *Gray* and finding that Libya's mission to the U.N. was a political subdivision).

^{61/} 945 F. Supp. 675 (S.D.N.Y. 1996); see also Jane H. Griggs, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. New Eng. L. Rev. 387, 413-19 (1998) (discussing *Hyatt*).

^{62/} The Government Guarantee Fund was created by the Finnish Parliament to safeguard Finnish banks and otherwise handle Finnish bank crises.

^{63/} 945 F. Supp. at 683-84.

^{64/} Id. at 684.

^{65/} Id.

non-commercial entities in describing these entities.^{66/} Finally, the court found that because the FSIA’s commercial activity exception ultimately deprives commercial entities from immunity, it was not necessary to make the governmental/commercial distinction at this stage. If Congress had intended for the distinction to be drawn in identifying the foreign state from an agency or instrumentality, it would have done so explicitly, the court said.^{67/} Using the legal characteristics test, the Southern District of New York found that, despite the exercise of Finnish control over many of the GGF’s functions, the GGF was an agency or instrumentality because it could “sue and be sued, own property, and contract, all in its own name.”^{68/} The GGF also could own shares in deposit banks and asset management companies and could guarantee loans.^{69/}

In *Unidyne Corp. v. Aerolineas Argentinas*,^{70/} the Eastern District of Virginia used an implied legal characteristics test in determining that the Argentine Naval Commission (“ANC”), a department of the Argentine Navy, was a political subdivision under the FSIA. The court found that the distinction between political subdivisions and agencies or instrumentalities was that political subdivisions included “all governmental units beneath the central government” whereas agencies or instrumentalities must be able to sue or be sued, contract, and hold property in their own names.^{71/} The court then found that the ANC was a political subdivision.^{72/} The ANC’s staff consisted entirely of Argentine Naval Officers, who reported to the Argentine

^{66/} Id.

^{67/} Id.

^{68/} Id. at 685.

^{69/} Id.

^{70/} 590 F. Supp. 398 (E.D. Va. 1984).

^{71/} Id. at 400 (citing *Williams v. Shipping Corp. of India*, 489 F. Supp. 526, 531 (E.D. Va. 1980), *aff’d*, 653 F.2d 875 (4th Cir. 1981)).

^{72/} See *Unidyne*, 590 F. Supp. at 400.

ambassador and were treated as diplomats.^{73/} The Argentine Navy itself negotiated all contracts on behalf of the ANC, and the ANC could not own property or litigate in its own name.^{74/} As a “separate legal person” that did not display any “legal characteristics” showing its independence from the Argentine government, the ANC was a political subdivision.^{75/}

Several other cases also support the legal characteristics test.^{76/} These cases sought to determine whether state corporations should be considered part of the state itself (an “alter-ego” of the government) or whether they were “separate juridical entities” to decide questions of liability rather than immunity. Even if entities were “foreign states” for immunity purposes, they might be considered “separate” for liability purposes.^{77/} Nevertheless, the distinctions drawn in determining separate juridical status are helpful in drawing the distinction between political subdivisions and instrumentalities.

In *First National City Bank v. Banco Para el Comercio Exterior de Cuba* (“*Bancec*”),^{78/} the Supreme Court decided that Cuba had acted in violation of international law by re-transferring assets to separate juridical entities for the purpose of avoiding liability and permitted

^{73/} Id.

^{74/} Id.

^{75/} Id.; see also *Bowers v. Transportes Navieros Ecuatorianos*, 719 F. Supp. 166 (S.D.N.Y. 1989) (using an implied legal characteristics test to determine that an Ecuadorian steamship carrier was an agency or instrumentality rather than a political subdivision because it had its own assets and budget, could establish its own branches, and conduct business and contracts in its own name).

^{76/} See *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *De Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984); *Minpeco, S.A. v. Hunt*, 686 F. Supp. 427 (S.D.N.Y. 1988).

^{77/} See William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 577-78 (1991).

^{78/} *Bancec* involved a Cuban bank that tried to collect on a letter of credit issued by Citibank. Before Citibank responded, Cuba seized and nationalized all Citibank’s Cuban assets. *Bancec* brought an action in the United States to recover on the letter of credit, and Citibank counterclaimed, arguing that it should be able to set off the value of the seized Cuban assets. The court then had to determine whether *Bancec* was a “separate juridical entity” to decide if Citibank could apply the setoff.

Citibank to offset assets of a Cuban bank against Citibank’s claim for the expropriation of its assets by the Cuban government. As part of its analysis, the Court looked to traditional international law to determine that government corporations treated as separate juridical entities by a foreign state are generally not liable for claims against the state. The Court described characteristics that would influence whether state corporations could be considered separate entities from the state for purposes of determining liability.^{79/} These characteristics included establishment of the instrumentality as a “separate juridical entity, with the powers to hold and sell property and to sue and be sued.”^{80/} Additionally, the court said that separate instrumentalities should be “primarily responsible for [their] own finances” and be a “distinct economic enterprise . . . not subject to the same budgetary and personnel requirements with which government agencies must comply.”^{81/} They are also free from close political scrutiny.^{82/} Furthermore, the Supreme Court created a presumption “in favor of honoring a foreign government’s determination that its instrumentality is to be accorded separate legal status” for liability purposes, although the presumption could be overcome by a showing that such a determination would be inequitable or unjust.^{83/} The court also declined to adopt a test similar to the core function test, saying that the test was not “whether the instrumentality in question performed a ‘governmental function.’”^{84/}

^{79/} 462 U.S. at 624-25.

^{80/} Id. at 624.

^{81/} Id.

^{82/} Id.

^{83/} Id. at 626-28 (citing the FSIA’s legislative history and applying traditional corporate law to test for separate status).

3. Working Group Recommendation.

The Working Group's view is that the legal characteristics test is the more appropriate test. It is the standard established by international law and is supported by a substantial body of case law that makes it the more consistent and predictable test. Nonetheless, some concerns identified by those preferring the core function test are legitimate and should be taken into account.

As set forth in *Bancec*, the legal characteristics test is the approach used in international law for determining whether an entity has autonomy from the state. Based upon the plain meaning of the FSIA, it appears to be the test that Congress contemplated. The core function test is and has proven to be indeterminate, unpredictable, and, as a practical matter, duplicative of the commercial activity analysis more appropriately applied later to determine whether the defendant is immune or not.

Thus, in the view of the Working Group, the courts should determine whether an entity is separate legal person under section 1603(b) by reviewing legal characteristics such as whether the entity maintains a distinct personality, was sufficiently capitalized, observes corporate formalities, maintains corporate records, holds property in its own name, contracts in its own name, and is able to sue and be sued. *Bancec* and its progeny should be a guide. *Bancec* relied on a broad list of factors to determine whether an entity is a separate legal person, and these factors have been applied in a substantial number of international and domestic cases dealing

^{84/} Id. at 634 n. 27. The courts in *Letelier* and *Minpeco*, cited above, applied *Bancec* to determine whether a government or a different state entity should bear liability for the other.

with piercing corporate veils.^{85/} Thus, a substantial body of case law is available to guide the courts in applying the legal characteristics test.

As *Transaero* pointed out, a court should also recognize that, for convenience, some governments give contract and litigation powers to certain entities, but that does not mean that the entity operates independently of the state itself. Government departments, ministries, and regulatory agencies can be in this position. Thus, to address some of the concerns by those favoring a “core function” approach, courts should look at factors in addition to those mentioned above and in the 1976 legislative history when distinguishing between parts of the foreign state itself and separate legal entities that are instrumentalities. As additional factors in determining whether an entity is a separate juridical entity from the state, a court should consider whether the state’s assets would be subject to execution if the plaintiff obtained a judgment against the defendant, whether and to what extent the entity provides its own financing or receives government appropriations, and whether the entity hires public employees.

Based on this approach and to avoid any ambiguity in certain cases, the Working Group proposes that the definition of “foreign state” explicitly mention and include certain categories of entities. We already recommended a modification to the definition of “foreign state” to make clear that the state includes departments and ministries of government. Similarly, the armed services and independent regulatory agencies should be included as part of the state because they are traditionally viewed as part of the state itself and generally are staffed with public employees and funded largely with government appropriations. We do not believe a change to the statutory

^{85/} See, e.g., 1 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 63 (perm. ed. rev. vol. 1990) (“If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.”)

language to implement the legal characteristics test is necessary and therefore do not propose one.

The Working Group decided to retain the word and concept “organ” as part of the category of instrumentalities. Several courts have used the concept in a few unusual situations to include within coverage of the FSIA entities that might not be majority owned by the state or might not have ownership interests familiar to U.S. judges or lawyers but have sufficiently close connections with the state that completely excluding them from coverage could raise foreign relations issues. These courts have developed a variety of factors to be examined to identify an organ.^{86/} Our recommendation is that an entity should be found to be an organ and therefore covered by the Act in relatively rare situations, such as when the foreign state is closely involved with, supervises, or controls the entity. For example, privately held central banks have been viewed as organs.^{87/}

^{86/} See, e.g., *Kelly v. Syria Shell Petroleum Development B.V.*, 213 F.3d 841, 846-48 (5th Cir.), cert. denied, 121 S. Ct. 426 (2000) (company indirectly 50 percent owned by foreign state was an organ because of extensive state control); *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078 (9th Cir. 1999); *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996) (second tier subsidiary of Mexico was an “organ of a foreign state” because of several factors such as control by government appointees and use of public servants and therefore was an instrumentality); *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995) (finding that a marketing board for hog producers was an organ because of the government’s active supervisory role); *United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*, 1999 WL 307666, *5 (S.D.N.Y.).

^{87/} Ernest T. Patrikis, then Deputy General Counsel of the Federal Reserve Bank of New York, opined that central banks are organs under the FSIA. Patrikis, “Foreign Central Bank Property: Immunity from Attachment in the United States,” 1982 U. Ill. L. Rev. 265, 266 (1982). The Working Group recognizes that central banks are one category of entities that often do not fit the majority owned rule but whose exclusion from the statute could cause significant foreign relations problems. See 1994 U.S. Code Cong. & Admin. News 6630 (execution against reserves of foreign states could cause significant foreign relations problems). Central banks are not specifically mentioned in the jurisdictional sections of the FSIA but have specific immunity from attachment and execution in section 1611(b).

C. Applying the FSIA to entities indirectly owned by a foreign state or owned by two or more foreign states

The FSIA applies not only to foreign states but also to foreign corporations that are majority owned by foreign states.^{88/} These foreign corporations are one type of instrumentality under the Act. 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% of the corporation ("pooled" entity). The same is true for many types of separate legal entities, such as partnerships, but for ease of reference we will refer only to corporations.

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. 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 the procedural protections in the Act and (2) it does not require majority ownership by a single foreign state and that a foreign corporation therefore may receive presumptive immunity and the

^{88/} See 28 U.S.C. § 1603(a)-(b).

procedural protections in the Act by “pooling” the ownership interests of two or more foreign states to satisfy the majority-ownership requirement.

1. Purpose of Section 1603(b)

Before Congress enacted the FSIA, courts applied the “separate-entity” rule to corporations owned by foreign states. Pursuant to this rule, courts presumed that a corporation with a separate legal existence owned by a foreign state was not immune.^{89/} The courts would disregard this presumption and grant immunity to such corporations only if the “corporation function[ed] as a public agency or institution or where evidence of a corporate separateness from the government was not strong.”^{90/} Congress, in enacting the FSIA, rejected the separate-entity rule and reversed this presumption. Section 1603(b) now presumes that corporations with a separate legal existence owned by a foreign state are immune unless their actions fall within one of the Act’s exceptions.

When Congress enacted the FSIA and extended sovereign immunity to corporations owned by foreign governments, it sought to provide certainty and consistency to litigants in U.S. courts by defining the principles and standards of foreign sovereign immunity.^{91/} It also sought to

^{89/} See Jane H. Griggs, Note, International Law – The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?, 20 W. New Eng. L. Rev. 387, 390-92 (1998); William C. Hoffman, The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?, 65 Tul. L. Rev. 535, 542-46 (1991).

^{90/} Hoffman, *supra* note 2, at 546 (quoting *Et Ve Balik Kurumu v. B.N.S. Int’l Sales Corp.*, 204 N.Y.S.2d 971, 975 (N.Y. Sup. Ct. 1960)).

^{91/} See 1976 U.S.C.C.A.N. at 6605 (noting that pre-FSIA law did “not provide firm standards as to when a foreign state [could] validly assert the defense of sovereign immunity”); *id.* at 6606 (“A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.”); *id.* at 6607 (noting that under pre-FSIA law, private litigants faced “considerable uncertainty” because they did not know whether their legal disputes with foreign states would “be decided on the basis of nonlegal considerations through the foreign government’s intercession with the Department of State”).

promote uniformity in cases against foreign states and their entities to prevent the adverse foreign relations consequences that may result from disparate treatment.^{92/}

2. Judicial Interpretations

The courts have interpreted section 1603(b)(2) inconsistently and have issued conflicting opinions as to whether foreign states may tier or pool their ownership interests and still benefit from the protections of the majority-ownership provision of the FSIA.

(a) Tiering

The position of the majority of courts is that corporations indirectly owned by a foreign state through intermediary parent corporations fall within the FSIA.^{93/} Many of these courts, however, did not analyze whether the FSIA permits tiering; they simply concluded without discussion that the corporation fell within the FSIA if foreign state ownership, direct or indirect, exceeded 50 percent.^{94/} Courts that have analyzed the issue generally have relied on the statutory text of section 1603. They have noted that section 1603(a) defines the term “foreign state” broadly to include a political subdivision of a foreign state and an “agency or instrumentality” of a foreign state and that section 1603(a) provides that this broad definition of foreign state applies to all sections in the FSIA except section 1608.^{95/} The courts therefore have reasoned that

^{92/} 1976 U.S.C.C.A.N. at 6611 (“[J]urisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.”); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 422 (5th Cir. 1982) (“By including . . . suits against corporations owned by foreign sovereigns, Congress obviously intended to extend the policy of uniformity to these entities.”).

^{93/} See, e.g., *Delgado v. Shell Oil Co.*, 2000 WL 1551196 (5th Cir.); *In re Air Crash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 96 F.3d 932, 939-41 (7th Cir. 1996); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 109 (6th Cir. 1995); *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449-50 (6th Cir. 1988); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982); *Trump Taj Mahal Assocs. v. Construzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143, 1148-50 (D.N.J. 1991), *aff’d without opinion*, 958 F.2d 365 (3d Cir. 1992).

^{94/} See, e.g., *Antoine*, 66 F.3d at 109; *Straub*, 38 F.3d at 451; *Gilson*, 682 F.2d at 1026.

^{95/} See, e.g., *Roselawn*, 96 F.3d at 940.

section 1603(b)(2), which defines an “agency or instrumentality” as entities majority owned by a “foreign state,” includes entities majority owned by an “agency or instrumentality.”^{96/} As a result, the courts have concluded that a corporation majority owned by another corporation falls within the FSIA as long as an ultimate parent corporation is itself majority owned by a foreign state.^{97/}

Other courts held that corporations indirectly owned by a foreign state do not fall within the FSIA.^{98/} These courts relied on a different construction of the statutory text of section 1603 and concluded that an instrumentality must be majority owned by a foreign state or political subdivision and not by another instrumentality. They have noted that section 1603(b)(2) defines an “agency or instrumentality” as an entity majority owned by a “foreign state or a political subdivision thereof.”^{99/} If, as the majority of courts have reasoned, the term “foreign state” in section 1603(b)(2) means the same thing as in section 1603(a), that is, as including a “political subdivision of a foreign state or an agency or instrumentality of a foreign state,” then the phrase “or a political subdivision” in section 1603(b)(2) would be superfluous.^{100/} In other words, following the reasoning of the majority of courts, section 1603(b)(2) would provide that an “agency or instrumentality” means any entity majority owned by a “foreign state or political subdivision or agency or instrumentality or political subdivision.”

^{96/} Id.

^{97/} Id. at 939.

^{98/} See, e.g., *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461-63 (9th Cir. 1995); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 n.12 (3d Cir. 1993) (dicta); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 685-90 (S.D.N.Y. 1996); *Martinez v. Dow Chem. Co.*, 1996 WL 502461, at *2 (E.D. La); *United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*, 1999 WL 307666 (S.D.N.Y.); *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A.*, 896 F. Supp. 125, 130-31 (S.D.N.Y. 1995).

^{99/} See, e.g., *Federal Ins. Co.*, 12 F.3d at 1285 n.12.

^{100/} Id.

The courts in the minority noted that the legislative history of the FSIA supports their conclusion that section 1603(b)(2) only includes entities majority owned by a “foreign state or political subdivision,” not entities majority owned by an instrumentality.^{101/} In the House Report accompanying the FSIA, for example, Congress explained that, to fall within section 1603(b)’s majority-ownership provision, “a majority of the entity’s shares or other ownership interest [must] be owned by a foreign state (or by a foreign state’s political subdivision).”^{102/} Since Congress seemed aware of the differences between foreign states and political subdivisions, as well as the differences between instrumentalities and political subdivisions, it could have stated in the statutory text that “agencies or instrumentalities” could also be majority owned by other agencies or instrumentalities if it so intended, but it did not do so.^{103/}

The minority of courts also justified their decision by pointing out the broad practical implications of holding that the FSIA protects entities indirectly owned by foreign states. One court, for example, reasoned that the FSIA already provides potential immunity to foreign states, organs and political subdivisions of foreign states, and instrumentalities of foreign states or political subdivisions. “To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares

^{101/} See, e.g., *Gates*, 54 F.3d at 1462.

^{102/} 1976 U.S.C.C.A.N. at 6614. Congress also provided in the House Report that “[w]here ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state’s political subdivision.” *Id.*

^{103/} *Gates*, 54 F.3d at 1462.

owned by the foreign state or political subdivision.”^{104/} The court concluded that it would not “assume that Congress intended such a result.”^{105/}

Finally, the minority of courts also noted that the reasons for according sovereign treatment dissipate as a legal entity becomes more remote from the sovereign. Sovereign management and control are more distant in tiered corporations, which justifies the elimination of the presumption that the entity is engaged in sovereign or governmental acts and therefore deserves the special protection of the Act.^{106/}

(b) Pooling

In cases where two or more foreign states directly own a majority of the ownership of a corporation but each state individually owns less than 50 percent of the corporation, most courts have allowed the corporation to “pool” the interests of all of the foreign states to reach the majority ownership required by section 1603(b)(2).^{107/} Although the courts have acknowledged that section 1603(b)(2) does not explicitly allow pooling, they have concluded that pooling better serves the FSIA’s purposes.^{108/} They also have noted that a refusal to allow pooling would lead to absurd results – a company owned 50.01 percent by one foreign state and the remainder by

^{104/} Id.

^{105/} Id.

^{106/} See, e.g., *Hyatt*, 945 F. Supp. at 689 (noting that if the Act applies to corporations indirectly owned by foreign states, “[m]any corporations with distant government investment, even if far removed from sovereign control, would be covered”).

^{107/} 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).

^{108/} See, e.g., *LeDonne*, 700 F. Supp. at 1406.

private interests would receive immunity protection, but an entity owned 50 percent each by two foreign states with no private ownership would not.^{109/}

These courts have rejected arguments raised by plaintiffs in such cases that section 1603(b)(3) prohibits pooling. Section 1603(b)(3) excludes corporations “created under the laws of any third country” from the Act’s protections.^{110/} Plaintiffs have argued that since pooled corporations generally are created under the laws of only one of their foreign state owners, the corporation is “created under the laws of a[] third country” as to the other foreign state owner and that foreign state’s ownership interest therefore must be excluded.^{111/} The courts have concluded, however, that such arguments “read the applicable statutes too prosaically,” and have instead held that a corporation satisfies section 1603(b)(3)’s requirement as long as the corporation is created under the laws of one of the foreign state owners.^{112/}

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.^{113/} Another court allowed pooling only when the

^{109/} See *Roselawn*, 96 F.3d at 938.

^{110/} Congress excluded such corporations based on a presumption that “when a foreign state establishes a company under the laws of yet another state or acquires a company created by another country, the intention is to engage in private commercial activity, not public, non-commercial activity.” *LeDonne*, 700 F. Supp. at 1406.

^{111/} See, e.g., *Roselawn*, 96 F.3d at 938; *Mangattu*, 35 F.3d at 209.

^{112/} *Roselawn*, 96 F.3d at 938.

^{113/} See *Linton v. Airbus Industrie*, 794 F. Supp. 650, 652 (S.D. Tex. 1992), appeal dismissed, 30 F.3d 592 (5th Cir. 1994).

corporation was created by an international treaty or was otherwise a multinational joint venture.^{114/}

3. The FSIA Should Be Clarified To Apply to Both Tiered and Pooled Entities.

The conflicting opinions over which foreign corporations qualify for the protections of the FSIA undermine the FSIA's goal of creating a predictable, uniform jurisdictional scheme and create pitfalls for plaintiffs and defendants in U.S. courts. Congress therefore should amend the FSIA to address and clarify the tiering and pooling issues. After carefully considering the caselaw and the purposes and structure of the Act, the Working Group concluded that the Act should be applied both to entities majority owned or held by an instrumentality and to entities majority owned by more than one foreign state.

(a) Tiering

The principal reason the Working Group recommends that presumptive sovereign immunity apply to corporations indirectly majority owned by foreign states is that at least some states structure important areas of national interest, such as natural resources, through several levels of corporations. For example, Mexico is the sole owner of the country's petroleum interests and, in 1992, restructured its ownership by establishing a holding company with four operating subsidiaries.^{115/} Similarly, the Republic of the Honduras apparently holds interests in its lumber industry through at least two corporate layers.^{116/} The strength of a foreign state's

^{114/} See *Gardiner Stone Hunter Int'l*, 896 F. Supp. at 131.

^{115/} See *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 653-54 (9th Cir. 1996).

^{116/} See *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 382 (5th Cir. 1999).

sovereign interests in an area do not necessarily dissipate when employing more complicated legal structures resembling those used by modern private businesses.

We nonetheless recognize the merit in some of the points made by the courts refusing to accord the protections of the Act to tiered entities. For example, we understand that, under the approach we are recommending, a potentially large number of corporations could have presumptive immunity and receive the procedural benefits of the FSIA. We also understand that, 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. We propose addressing these issues with a further recommended change to the Act and with two suggestions.

The Act should address these issues by containing an explicit presumption that a separate legal entity majority owned by an instrumentality as opposed to the foreign state itself is engaged in commercial activity. Although the Working Group is prepared to extend presumptive immunity and the procedural benefits of the FSIA to tiered corporations because foreign sovereign interests do not necessarily diminish down a corporate chain, we believe that in the vast majority of cases a lower tier corporation will be involved in commercial activity. That was true for the Mexican petroleum entity and the Honduran lumber entity involved in the cases mentioned above^{117/} and in other reported cases involving tiered entities.^{118/} Both for that reason

^{117/} The Ninth Circuit did not reach this conclusion in the Mexican petroleum case but observed that the relevant subsidiary was responsible for refining, manufacturing, and distributing products derived from petroleum, actions that are commercial activity under the standards in the FSIA. See *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 653-54 (9th Cir. 1996); see also *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 390-91 (5th Cir. 1999).

and because the entity is in fact more remote from governmental operations, a foreign state's sovereign interest in a lower tier corporation is far more likely to be significantly less than in a corporation directly owned. As a result, corporations majority owned by an instrumentality should be presumed to be engaged in commercial activity. Even after a defendant introduces sufficient evidence that it is an instrumentality of a foreign state, a plaintiff should not need to introduce evidence that the defendant is engaged in commercial activity to establish an exception from immunity; the defendant should bear the burden of production on the inapplicability of the commercial activity exception and continue to bear the ultimate burden of persuasion on immunity.^{119/} The presumption should extend only to the presence of commercial activity and not to the plaintiff's obligation to introduce evidence that the necessary U.S. connection exists (this obligation is discussed below). With this approach – extending presumptive immunity to all tiered legal entities but creating a rebuttable presumption that second tier and lower entities are engaged in commercial activity – we believe the Act would balance the U.S. interest in maintaining good international relations with its trading partners while not imposing unfair discovery and proof burdens on a plaintiff.

Our two suggestions concern the frequent difficulty of knowing that an entity is an instrumentality and ultimately owned by a foreign state. As Congress noted in enacting the FSIA, a plaintiff often may not even know that an entity with whom he or she is dealing has ties

^{118/} See, e.g., *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285, 1286-87 (3d Cir. 1993) (Dutch civil service pension fund); *America West Airlines, Inc. v. GPA Group Ltd.*, 877 F.2d 793, 795, 796 (9th Cir. 1989) (Irish aviation business).

^{119/} Under current law, a defendant retains the ultimate burden of persuasion on establishing that it is immune and an exception does not exist. The general rule is that the defendant must present a prima facie case that it is a foreign sovereign or an instrumentality. The plaintiff must then offer evidence that an exception applies. The burden then reverts to the defendant to prove by a preponderance of evidence that an exception does not apply. See, e.g., 1976 U.S.C.C.A.N. at 6616; *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 305-06 (9th Cir. 1997); *Princz v. Federal Republic of*

to a foreign state until the plaintiff files a claim against the entity.^{120/} Indirect ownership is even harder to ascertain in advance. Frequently neither the name nor method of operations gives any hint that an entity is an instrumentality. By all appearances, the entity is a private business. Therefore our first suggestion is that foreign states should consider adding some designating word or symbol to the name of an instrumentality to indicate the entity's status. The second suggestion is that courts should not penalize a plaintiff that unwittingly uses standard service methods instead of the service provisions of the Act. They should liberally grant permission to re-serve in accordance with the Act. Under current practice, courts often permit a plaintiff to cure defective service on a defendant covered by the FSIA.^{121/} See Part VII.D of the Report.

(b) Pooling

Permitting pooling promotes the foreign policy concerns of the FSIA and has less serious implications for United States plaintiffs. The courts that have refused to allow pooling frustrate the Act's purpose of maintaining good foreign relations with our trading partners. 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. Nor does a treaty requirement or multinational joint venture requirement promote foreign policy interests. A suit against a corporation majority owned by two foreign states will have foreign policy implications whether

Germany, 26 F.3d 1166, 1171 (D.C. Cir. 1994); *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993).

^{120/} See 1976 U.S.C.C.A.N. at 6605 (noting that the situation may arise "when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity").

^{121/} See, e.g., *Finamar Investors v. Republic of Tadjikistan*, 889 F. Supp. 114 (S.D.N.Y. 1995); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 1992 WL 296434 (S.D.N.Y.); *Magnus Electronics v. Royal Bank of Canada*, 620 F. Supp. 387 (N.D. Ill. 1985).

the corporation was created by treaty or otherwise. An interpretation of the majority-ownership provision that prohibits pooling or that imposes conditions on pooling thus does not address the FSIA's foreign policy concerns.

A pooling prohibition does not significantly advance any countervailing policies for United States citizens or plaintiffs either. Although pooling will expand the number of corporations qualifying for the Act's benefits somewhat, the number likely will be much less than the multiple subsidiary corporations involved in tiering situations. Moreover, pooling typically involves direct foreign state ownership, so uncertainty concerns do not arise. The plaintiff likely will be more aware that the corporation potentially could fall within the FSIA if the corporation is directly majority owned by two or more foreign states.

D. Determining when a defendant qualifies as a foreign state or instrumentality

In another area of confusion, 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 Working Group recommends that the FSIA apply to defendants that are foreign states or instrumentalities either at the time the claim arose or at the time of the complaint. 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.

1. Status determined at the time the claim arose

Several courts have held that FSIA presumptive immunity applies if the defendant was a foreign state or instrumentality at the time the events giving rise to the claim occurred, regardless of the defendant's status at the time the complaint is filed.^{122/} Many of these cases rely on *In re The Western Maid*^{123/} for the proposition that a defendant retains immunity even if government ownership is transferred to private ownership.^{124/}

In *General Elec. Capital Co. v. Grossman*, the plaintiffs brought suit against a company that, at the time the claim arose, was owned by the Canadian government, though by the time the suit was filed had become private.^{125/} The Eighth Circuit found that stripping immunity from defendants who were sovereign at the time of the alleged wrongdoing would not serve the FSIA policy of avoiding judicial scrutiny of governmental decisions.^{126/} To avoid passing judgment on what was then a governmental decision, the *Grossman* court found that sovereign immunity applied even though the company was no longer governmental at the time the complaint was filed.

¹²² See, *Peré v. Nuovo Pignone*, 150 F.3d 477 (5th Cir. 1998); *General Elec. Capital Co. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988); *In re Chase & Sanborn Corp*, 835 F.2d 1341 (11th Cir. 1988), rev'd on other grounds, 492 U.S. 33 (1989); *Daly v. Llanes*, 30 F. Supp. 2d 407 (S.D.N.Y. 1998); *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 21 F. Supp. 2d 47 (D.D.C. 1998); *In re Aircrash Disaster Near Monroe*, 987 F. Supp. 975 (E.D. Mich 1997); *Trans. Chem. Ltd. v. China Nat'l Machinery Import & Export*, 978 F. Supp. 266 (S.D. Tex. 1997), aff'd, 161 F.3d 314 (5th Cir. 1998); *Delgado v. Shell Oil Co*, 890 F. Supp 1324 (S.D. Tex. 1995); *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525 (S.D. Tex. 1994).

^{123/} 257 U.S. 419, 433 (1922).

^{124/} See generally Jonndavid S. DeLong, Annotation, Time for Determining Whether Entity Is "Foreign State" for Purposes of Foreign Sovereign Immunities Act, 120 A.L.R. Fed. 537 (1997) (providing a comprehensive general discussion of the timing issues under the FSIA and discussing numerous pre-1998 cases with differing outcomes and rationales).

^{125/} 991 F.2d 1376 (8th Cir. 1993).

^{126/} *Id.* at 1381, 1382 (citing *First Nat'l City Bank*, 406 U.S. at 761-62; *Nixon v. Fitzgerald*, 457 U.S. 731, 749-57 (1982)). See also *Kern*, 867 F. Supp. at 530 (citing *Cargill Int'l v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993), and noting that "[t]he 'potential sensitivity of actions against foreign states' is still a concern even after the majority of the entity is no longer owned by a foreign state.")

In *Peré v. Nuovo Pignone*, the Fifth Circuit adopted the reasoning in *Grossman*, also finding that the FSIA applied so long as the defendant was sovereign at the time the claim arose.^{127/} Neither *Grossman* nor *Peré* directly addressed the question of whether sovereign immunity would apply if the positions were reversed and the defendant became sovereign after the claim arose. The Eleventh Circuit in *In re Chase & Sanborn Corp.* also did not specifically address that question, but it implied that the time the claim arose would be the only relevant time for deciding foreign state status. The court found that because nationalization had occurred after the alleged wrongdoing and after initiation of the lawsuit, the FSIA did not apply.^{128/}

2. Status determined at the time the complaint was filed

A few courts have held that foreign state status should be determined at the time the complaint is filed, regardless of the defendant's status at the time the claim arose.^{129/} In *Straub*, the Ninth Circuit distinguished *Grossman* by noting that *Grossman* had decided only that the FSIA could apply to entities that had been public at the time a claim arose; it had not decided whether the FSIA could apply if the defendant was a foreign state at the time the suit was filed.^{130/} *Straub* held that foreign state status at the time the complaint is filed is one avenue by which the FSIA may apply. Conversely, in *Ocasek v. Flintkote Co.*, the Northern District of Illinois held

^{127/} 150 F.3d 177 (5th Cir. 1998).

^{128/} 835 F.2d 1341, 1347-48 (11th Cir. 1988).

^{129/} 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); *Tjontveit 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 had become public by the time the suit was filed; vacated on grounds of forum non-conveniens).

^{130/} 38 F.3d at 451.

that the time of filing was the exclusive time for determining the application of immunity under the FSIA.^{131/}

3. Status determined at either time

A few courts have explicitly said that foreign state status may be determined at either the time the claim arose or the time the complaint is filed. In *Belgrade v. Sidex Int'l Furniture Corp.*, for example, the court found that “The particular concerns that underlie FSIA jurisdiction are safeguarded under both approaches.”^{132/} The *Belgrade* court said that the correct approach was:

to ask whether the underlying conduct took place on the foreign state’s watch, even if that state is no longer in control of the party by the time of the lawsuit, or, alternatively, whether the defendant is currently a foreign state, regardless of its status at the time of underlying conduct.^{133/}

Other district courts have implied that they also are willing to use either time to determine foreign state status. In *Papapanos v. Lufthansa*,^{134/} the court held that because the defendant had foreign state status at the time the alleged wrongdoing occurred, the FSIA would apply, even though foreign state status had been lost by the time of the lawsuit. The court went on, however, to reconcile cases that held that the time of filing was the appropriate determination time, finding that the use of one approach did not preclude use of the other.

4. Working Group recommendation

Because the current statute does not address or resolve this timing issue, an amendment is necessary to eliminate the confusion and inconsistent judicial decisions. The FSIA generally was

^{131/} 796 F. Supp. 362, 365 (N.D. Ill. 1992).

^{132/} 2 F. Supp. 2d 407, 413 (S.D.N.Y. 1998).

^{133/} Id. at 414. *Accord Sablic v. Croatia Line*, 719 A.2d 172, 175-176 (N.J. Super. Ct. App. Div. 1998).

enacted to provide clear rules for determining claims of sovereign immunity and to avoid prejudice to the foreign relations of the United States when the courts judge actions of foreign sovereigns. These policies favor applying the statute when the defendant was a foreign state or instrumentality either when the claim arose or when the complaint is filed. When the defendant has foreign state status at the time the complaint is filed, the policies of the FSIA mitigate any potential damage to the foreign relations of the United States by providing special procedural protections and clear rules of analysis. Similarly, actions of foreign states remain potentially politically sensitive even after the entity is sold or otherwise loses its status as a foreign state or instrumentality.

One difficulty with this approach is that a person dealing with a private company that later becomes an instrumentality could be put at a disadvantage from application of presumptive immunity. Such a person, who, for example, will not have had an opportunity to bargain for a waiver of sovereign immunity, should not be denied a claim simply because of the change in status of an entity. The solution to this problem is to provide such an entity with the procedural benefits of the FSIA to minimize the potential harm to the foreign relations of the United States but also to provide that an exception from immunity applies so that the litigation may proceed. The Working Group proposes language at the end of this part of the Report to effect these changes.

^{134/} 1995 U.S. Dist. Lexis 9163 (S.D. Fla.).

E. Applying the FSIA to heads of state and officials of a foreign state or instrumentality

U.S. 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 points, 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. 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. As discussed below, the Working Group recommends codification of the current position of the courts. The scope of the Act should be expanded to include foreign officials or employees acting in an official capacity (and who are not otherwise U.S. citizens or permanent residents). We do not recommend that the FSIA apply to foreign heads of state and take no position on whether the FSIA should cover or not cover foreign heads of state.

1. Background

The FSIA immunizes only “foreign states.”^{135/} A “foreign state” is defined to include “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.”^{136/} An “agency or instrumentality of a foreign state” is defined in section 1603(b), as quoted above. The questions considered here are (a) whether the FSIA should be read to immunize the conduct of individuals, (b) if so, whether such immunity should be limited to individuals acting as officials of a foreign state, and, finally, (c) how official conduct should be defined for purposes of triggering FSIA coverage for individuals.

^{135/} 28 U.S.C. § 1604.

This problem has arisen as a consequence of judicial interpretations of the FSIA. Arguably, the statute by its textual terms precludes application to individuals. The key language can be found in section 1603(b)(1) which, in defining an “agency or instrumentality of a foreign state,” refers only to “an entity” which is a “separate legal person, corporate or otherwise.” Moreover, section 1603(b)(2) mentions an entity which is “an organ of a foreign state or political subdivision thereof.” The use of such terms as “entity,” “legal person,” and “organ” all seem to preclude the possibility that an “agency or instrumentality of a foreign state” can be extended to individuals, even to officials acting in their official capacity.

This textual conclusion appears to have been contemplated in the FSIA’s legislative history of section 1603(b). The House Report, in discussing the term “agency or instrumentality” lists such entities as state trading companies, airlines, steel companies, central banks, export associations, government procurement agencies and ministries.^{137/}

2. Current state of the law for individuals generally

Despite these textual clues and indicators of legislative intent, courts in construing the FSIA have extended it to individuals acting in an official capacity with a foreign government. Some federal district courts reached this result in the 1980s,^{138/} but the well-spring for the proposition that the FSIA covers individuals is *Chuidian v. Philippine National Bank*.^{139/} Chuidian sued the Philippine National Bank on a letter of credit the Bank had issued while

^{136/} Id. § 1603(a).

^{137/} 1976 U.S.C.C.A.N. at 6614.

^{138/} See *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981) (“insofar as Edwards is sued in his official capacity as agent of the instrumentality, he is protected by principles of foreign sovereign immunity.”). See also *Dline v. Kaneko*, 685 F. Supp. 386 (S.D.N.Y. 1988); *American Bonded Warehouse Co. v. Compagnie Nationale Air France*, 653 F. Supp. 861, 863 (N.D. Ill. 1987). But see *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797 (N.D. Cal. 1987) (categorically ruling that FSIA does not apply to individuals) (since overruled on other grounds). See generally Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* § 1.8 (1988).

Ferdinand Marcos was in power. He also sued Raul Daza of the Presidential Commission on Good Government, which was investigating abuses of power by Ferdinand Marcos while he was in office. Daza had ordered the Bank to dishonor the letter of credit. The United States filed a statement of interest in the case arguing that the FSIA did not extend to individuals, although it did suggest that Daza was covered by common-law foreign sovereign immunity principles.^{140/} The Ninth Circuit nonetheless held that individuals were fairly encompassed within section 1603(b)'s definition of "agencies or instrumentalities" of a foreign state. The court of appeals concluded that pre-FSIA law would have extended immunities to individuals acting in an official capacity for a foreign sovereign and that to interpret section 1603(b)'s silence as to individuals as denying them immunity would represent a "substantial unannounced departure from prior common law."^{141/} The Ninth Circuit also concluded that to accept the U.S. position that individuals may seek common law foreign sovereign immunity protection would be simply an invitation to revive the now-discredited practice of Executive branch "suggestions of immunity."^{142/}

Chuidian has remained good authority in the Ninth Circuit.^{143/} The logic of *Chuidian* has also been adopted in the D.C. Circuit.^{144/} Indeed, the D.C. Circuit has refined the *Chuidian* test to determine whether an individual official's conduct can be properly attributed to a foreign

^{139/} 912 F.2d 1095 (9th Cir. 1990).

^{140/} See *id.* at 1099.

^{141/} *Id.* at 1101.

^{142/} See *id.* at 1102-03.

^{143/} See *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306 (9th Cir. 1997); *Trajano v. Marcos*, 978 F.2d 493, 497-98 (9th Cir. 1992); *Intercontinental Dictionary Services v. De Gruyter*, 822 F. Supp. 662, 674 (C.D. Cal. 1993).

^{144/} See *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."); *Byrd v. Corporacion Forestal y Industrial de Olancho, S.A.*, 182 F.3d 380, 388 (5th Cir. 1999).

sovereign. While *Chuidian* seemed to focus on the nature of the individual's alleged actions, and not the alleged motives underlying them (a modification of the test of a commercial activity under the FSIA),^{145/} the D.C. Circuit has also looked to whether the activities were "neither personal nor private, but were undertaken only on behalf of the sovereign."^{146/}

Only the Ninth and D.C. Circuits have conclusively ruled that section 1603(b) can cloak individuals with foreign sovereign immunity. The issue remains open in other circuits. Moreover, there are a handful of cases in which courts, while recognizing that the FSIA might notionally apply to individuals, have refused to do so when the nature of the claim involves human rights abuses (often in matters brought under the Alien Tort Statute).^{147/} These courts have ruled that human rights abuses are beyond the scope of the official's authority for purposes of being conduct immunized under the Act.^{148/}

3. Head of state immunity

The FSIA does not specifically address the possible immunity of foreign heads of state or the like, and nothing in the Act's legislative history refers to such a thing as "head of state immunity." Courts have not addressed the status of foreign head-of-state immunity under the

^{145/} 912 F.2d at 1106-07.

^{146/} *Jungquist v. Nahyan*, 940 F. Supp. 312, 317 (D.D.C. 1996), rev'd on other grounds, 115 F.3d 1020 (D.C. Cir. 1997). See also *First American Corp. v. Sheikh Zayed bin Sultan Al-Nahyan*, 948 F. Supp. 1107, 1120 (D.D.C. 1996) (no immunity for Minister of Defense of UAE and personal holding companies for personal as opposed to official acts).

^{147/} 28 U.S.C. § 1350.

^{148/} See *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995); *Granville Gold Trust - Switzerland v. Commissione del Fallimento/Interchange Bank*, 928 F. Supp. 241, 243 (E.D.N.Y. 1996), aff'd mem., 111 F.3d 123 (2d Cir. 1997); *Trajano*, 978 F.2d at 497-98. See also Joan Fitzpatrick, "The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violations," 15 *Whittier L. Rev.* 465 (1994).

FSIA. If there is immunity for heads of state independently of the provisions of the Act,^{149/} the meaning and scope of that immunity depends on the less precise contours of customary international law and on the binding “suggestions” of the State Department.^{150/} In fact, the very phrase “head of state immunity” is misleading; as discussed below, the purported immunity has been applied to family members of a head of state and to prime ministers and other members of the “government.”

The notion of “head of state immunity,” like the doctrine of the immunity of foreign states is, at bottom, rooted in the sovereign equality of states.^{151/} In particular, some form of immunity is necessary to enable heads of state “to freely perform their duties at home and abroad” on behalf of the sovereign state.^{152/} In fact, before the enactment of the FSIA in 1976, the immunity of heads of state seems to have been part and parcel of the immunity of the state itself. Early sovereign immunity decisions, such as that in *The Schooner Exchange v. McFadden*,^{153/} spoke in highly personal terms of the immunity of the foreign state, using “he” as the pronoun for the foreign sovereign rather than the modern “it.” With the shift in forms of government in the twentieth century, continuation of the identification of a monarch or other head of state with the state itself was no longer meaningful, and the practice gradually fell into disuse.

^{149/} For a discussion of the existence of “head of state immunity” independent of the FSIA, see Joseph W. Dellapenna, Head of state Immunity – FSIA – Suggestion by the State Department: *Lafontant v. Aristide*, 88 Am. J. Int’l L. 528 (1994).

^{150/} See, e.g., *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994), *aff’d mem.*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 131 (E.D.N.Y. 1994); *Saltany v. Reagan*, 720 F. Supp. 319, 320 (D.D.C. 1988), *aff’d*, 886 F.2d 438 (D.C. Cir. 1989).

^{151/} *Id.* at 132.

^{152/} *Id.*

^{153/} 11 U.S. (7 Cranch) 116, 137 (1812).

In the upsurge of litigation against foreign states and foreign-state-related entities in the United States that followed the enactment of the FSIA in 1976, many suits were filed against heads of foreign states rather than against the foreign state itself.^{154/} In most of the head of state immunity cases, the court simply deferred to a suggestion of the State Department that it accord immunity to the foreign head of state. By means of such suggestions, “head of state immunity” was extended to a prime minister rather than a head of state^{155/} and to the wife and other family members of a head of state.^{156/} Immunity was even extended to a former president who had been living in exile for more than two years before the decision, the court feeling bound by the continuing recognition by our Executive Branch of the defendant as the President of Haiti.^{157/} In that case, the court held that the Torture Victim Protection Act, making holders of public office in foreign states subject to suit in the United States if they are found here and are charged with “torture or extra judicial killing,” did not repeal the personal immunity from suit of a head of a foreign state.^{158/} When the State Department has declined to suggest head of state immunity, on

^{154/} See, e.g., *First American Corp. v. Sheikh Zayed bin Sultan Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996); *Tannenbaum v. Rabin*, 1996 WL 75283 (E.D.N.Y.); *Alicog v. Saudi Arabia*, 860 F. Supp. 379 (S.D. Tex. 1994), *aff’d mem.*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 131 (E.D.N.Y. 1994); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1992); *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988), *aff’d*, 886 F.2d 438 (D.C. Cir. 1989), *aff’d after remand sub nom. Saltany v. Bush*, 960 F.2d 1060 (D.C. Cir. 1992). See also *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (criminal prosecution); *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir.) (same).

^{155/} *Tannenbaum v. Rabin*, 1996 WL 75283 (E.D.N.Y.); *Saltany v. Reagan*, 702 F. Supp. 319, *aff’d*, 886 F.2d 438 (D.C. Cir. 1989), *aff’d after remand sub nom. Saltany v. Bush*, 960 F.2d 1060 (D.C. Cir. 1992). See also *Kline v. Kaneko*, 535 N.Y.S.2d 303 (Sup. Ct. 1988), *aff’d mem. sub nom. Kline v. Cordero de la Madrid*, 546 N.Y.S.2d 506 (App. Div. 1989) (secretary of the Cabinet of Mexico).

^{156/} *Kilroy v. Windsor*, reported in *Special Mission & Trade Delegations*, 1978 Digest 641 (N.D. Ohio 1978), reprinted in 81 I.L.R. 127 (1990) (Charles, Prince of Wales); *Kline v. Kaneko*, 535 N.Y.S.2d 303 (Sup. Ct. 1988), *aff’d mem. sub nom. Kline v. Cordero de la Madrid*, 546 N.Y.S.2d 506 (App. Div. 1989) (the wife of President of Mexico).

^{157/} *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

^{158/} For decisions refusing to accord immunity to lesser officials sued under the Torture Victims Protection Act, see *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996); *Flatow v. Iran*, 999 F. Supp. 1 (D.D.C. 1998).

the other hand, the courts have examined claims of head-of-state immunity with careful scrutiny and applied the doctrine narrowly, often rejecting immunity for one reason or another.^{159/}

These decisions rest on the proposition that foreign heads of state are protected by an absolute immunity under customary international law invoked at the suggestion of the State Department. By this proposition, a foreign head of state is immune even if subject to long-arm jurisdiction in a proceeding based upon private or commercial activities wholly unrelated to official duties arising from events that occurred while traveling to or in the United States.^{160/}

4. Service on individuals

To the extent the FSIA applies to foreign officials, whether they are heads of state or not, the Act should treat them differently from foreign states in one way: the way in which they are served with process. The United States has treaty obligations conferring certain jurisdictional immunities on diplomatic and consular officials, and these should be respected and not modified.^{161/} Service of process and a consequent claim of personal jurisdiction on a foreign head of state or government official on official business causes a personal affront and can be a

^{159/} See, e.g., *United States v. Noriega*, 117 F.3d 1206, 1211-12 (11th Cir. 1997) (no head-of-state immunity for de facto leader of Panama because no U.S. suggestion of immunity and U.S. criminal prosecution manifested clear sentiment that immunity should be denied); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992) (no immunity for the daughter of a former head of state who had acted on her own behalf); *In re Estate of Ferdinand Marcos Human Rts. Litigation*, 25 F.3d 1467, 1472 (9th Cir. 1994) (discussing inapplicability of act of state doctrine and referring to letter from Philippine government stating that officials may not claim state immunity for acts in violation of Philippine law), appeal after remand sub nom. *In re Estate of Ferdinand Marcos Human Rts. Litigation*, 94 F.3d 539 (9th Cir. 1996); *In re Doe*, 860 F.2d 40 (2d Cir. 1988) (a former head of state defying grand jury subpoena); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1987); *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987) (although contours of head-of-state immunity not settled, court recognized immunity waiver by government of former head of state); *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) (former head of state defying grand jury subpoena); *First Am. Corp. v. Sheikh Zayed bin Sultan Al-Nahyan*, 948 F. Supp. 1107, 1121 (D.D.C. 1996) (no suggestion of head-of-state immunity and no immunity for members of the ruling family of Dubai); *Estate of Domingo v. Philippines*, 694 F. Supp. 782, 785-86 (D. Haw. 1988) (same); *Lasidi, S.A. v. Financiera Avenida, S.A.*, 538 N.E.2d 332 (N.Y. 1989).

^{160/} See *First Am. Corp. v. Sheikh Zayed bin Sultan Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996).

^{161/} See *Vienna Convention on Diplomatic Relations*, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; *Vienna Convention on Consular Relations*, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

violation of diplomatic immunity.^{162/} For these reasons, the methods of service for government officials must take into account their special circumstances. The foreign state should not be asked to assist with such service through its formal or diplomatic channels. In addition, a foreign government official should remain immune from personal service while in the United States and be immune from personal jurisdiction if (but only if) personal jurisdiction is based solely upon personal service of process while in the United States on an official visit or official business. Special service rules would not apply to any person not qualifying for diplomatic or consular immunity at the time of service.

5. Working Group recommendation

After considering these issues and for the reasons given below, the Working Group recommends codification of the current position of the courts. No court has applied the FSIA to a head of state, and we decided not to recommend that the Act cover heads of state. On the other hand, we do recommend that the Act cover other government officials and employees and employees of instrumentalities.

The Working Group gave serious consideration to clarifying and codifying the immunity of heads of state but ultimately decided to take no position on whether heads of state should be covered by the FSIA. We considered the matter for a variety of reasons. First was the appeal of the argument that heads of state, like foreign states, should be subject to suit when they descend from the heights of sovereignty to the plane of private or commercial activity or otherwise behave so that the shield of immunity is lost. This is the approach in the British State Immunity Act, which defines a foreign state to include the sovereign or other head of the state,^{163/} and the

^{162/} See 1 Oppenheim's International Law § 451 (9th ed. Robert Jennings & Arthur Watts eds. 1992).

^{163/} British State Immunity Act, ch. 33, §§ 14(1), 20(1) (1978), reprinted in 17 ILM 1123, 1127, 1128 (1978).

International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property.^{164/} Second, the role of the Department of State in suggesting immunity is similar to the role the Department had in determining the immunity of foreign states before the Act deliberately removed it,^{165/} and, as a rule of customary international law, the area of head-of-state immunity is less well-defined and certain than a statute could be. Nonetheless, for other reasons, we finally decided not to recommend that the Act include heads of state. In the main, we decided that the proper treatment of heads of state should be left to the appropriate authorities to continue to develop. No court has applied the FSIA to a head of state, and head-of-state immunity is the subject of a separate body of developing law in the United States. The question of head-of-state immunity does not arise often, and most cases are resolved reasonably promptly by the courts and the Executive Branch to the satisfaction of the foreign officials and states concerned. Moreover, 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.

The Working Group does recommend that the FSIA be amended to cure the omission of officials from the Act's coverage. 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 agency or instrumentality. A congressional codification of a rule extending foreign sovereign immunities to individuals is preferable to

^{164/} International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property art. 2(1)(b)(i), (v), G.A. Supp. No. 10, A/46/10 (July 19, 1991). The commentary is explicit that the definition of state includes a head of state in his public capacity and that a head of state is entitled to immunity to the same extent as the state itself. *Id.* at 16, 24. The ILC draft also preserves customary law on the immunity of heads of state for private acts. *Id.* art. 3(2) (exceptions from immunity without prejudice to the privileges and immunities relating to the person of the head of state); at 35.

courts applying judicially-created standards that may not be successfully harmonized with the provisions relating to the immunity of the state itself.

These objectives could be accomplished by augmenting the definitions of “foreign state” and “instrumentality” in section 1603(a) to include any officer or employee of a foreign state or instrumentality of a foreign state for a claim based on an act or omission of that person while acting within the scope of the person’s office or employment, so long as that individual is not a citizen or permanent resident of the United States. As mentioned above, including officials and employees of a foreign state is not intended to apply to heads of state. The Working Group’s proposal is that an individual is entitled to presumptive immunity under the FSIA and all the procedural protections of the Act when he or she is an official (or was at the relevant time) and is sued for official conduct. That might be demonstrated by showing that the individual defendant’s conduct was within the scope of official authority or within the scope of employment at the time the conduct occurred. An individual who acts in an official capacity and who is associated with a foreign state should be treated exactly like a foreign state and an individual who acts in an official or employment capacity and who is associated with an instrumentality should be treated like an instrumentality. If an exception from immunity applies, the suit may proceed against the individual.

As section 1606 would continue to make clear, this approach of applying the exceptions from immunity to individuals is not intended to expand the scope of their liability under the applicable law. For example, a government official signing a contract in an official capacity on behalf of the foreign state should not be personally liable under the commercial activity

^{165/} *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). See also Joseph W. Dellapenna, *Suing Foreign Governments*, note 4 above, § 1.3, at 10.

exception for a breach of the contract by the foreign state. The foreign official should be dismissed from such a case.^{166/}

The Working Group chose the term “scope of the person’s office or employment” because the same term is used in the tort exception in section 1605(a)(5). We intend the phrases to be construed and applied identically. We appreciate that, in suits against foreign state officials based on alleged international human rights abuses, questions can arise about whether the conduct was in the “scope of the person’s office or employment” or, if it was, whether, under the tort exception, the state or official should remain immune because the conduct was discretionary. As we discuss more extensively in the section addressing the tort exception, we propose no language to amend the parts of section 1605 and propose to leave these issues to the courts for case by case determinations. Similarly, as mentioned above in Part I.B, the Working Group does not address and takes no position on whether the FSIA applies in criminal cases against foreign states, instrumentalities, or individuals now proposed to be covered by the Act.

The Working Group believes that only individuals who are not citizens or permanent residents of the United States may make an initial assertion of foreign sovereign immunity under this provision. We therefore propose including language to this effect. The added provision

^{166/} The general rule is that, so long as an agent acts with actual or apparent authority on behalf of, or if the agent’s actions are ratified by, a disclosed principal, the agent has no personal liability on any resulting contract. Restatement (Second) of Agency § 320 (1958). In such a case the other party did not expect the agent to be bound. *Publicker Industries, Inc. v. Roman Ceramics Corp.*, 652 F.2d 340, 343-44 (3d Cir. 1981); *Duncan v. Peninger*, 624 F.2d 486, 490 (4th Cir. 1980). Any suit against the agent based on the contract under these circumstances should be dismissed on the merits as soon as a proper motion is made to the court. See, e.g., *Barker v. Sac Osage Elec. Co-op., Inc.*, 857 F.2d 486, 489 (8th Cir. 1988) (dismissing individual corporate officers in a breach of contract case and explaining: “Where a corporate officer or director makes an authorized contract in the name of the corporation so as to bind the corporation, the contract is with the corporation alone; corporate directors are not personally liable for breach of corporate contracts”). A similar rule applies to public officials of a U.S. state. See, e.g., *Wilson v. Strange*, 219 S.E.2d 88, 95 (Ga. 1975); *Woytowich v. Edwards*, 1998 WL 150756, *2 (Conn. Super.).

would resemble the current language of section 1603(b)(3)'s limitation on the citizenship of entities entitled to treatment as agencies or instrumentalities of a foreign sovereign.

The proposal to have the definition of foreign state embrace officials is not meant to supersede existing treaty and statutory protections for certain individuals who might also benefit from these additions to the FSIA. Thus, for example, courts should continue to apply diplomatic and consular immunity in appropriate cases in accordance with the terms of existing federal law. Diplomatic immunity is sufficiently important that the Act should explicitly preserve it. Section 1604, the section stating the general rule of immunity for foreign states, therefore should be modified to provide: *‘Nothing in this Act alters or supersedes any diplomatic or consular immunity under any other provision of federal law.’*

If individuals are to be brought within the coverage of the FSIA, the statute must provide for serving process on them because it does not now have such a provision. The Working Group recommends that Congress amend section 1608 (the provision relating to service of process under the FSIA) to include service provisions for individuals sued for conduct while they were an official of a foreign state or of an instrumentality. Again, the language should be explicit that diplomatic or consular immunity from service is not affected. We propose language below.

F. Proposed amendment

Based on all the concerns about section 1603 discussed above, the Working Group recommends that Congress amend the section as follows:

(a) A “foreign state” includes its government and its political subdivisions, departments, ministries, armed services, and independent regulatory agencies. It also includes its officials and employees (but not a head of state) when a claim is based on an act or omission of that person while acting within the scope of the

person's office or employment, so long as the individual is not a citizen or permanent resident of the United States. Foreign state does not include an instrumentality of the state.

(b) An "instrumentality" of a foreign state means any entity that –

(1) is a separate legal person, corporate or otherwise, and

(2) is an organ of a foreign state or has a majority of its shares or other ownership interest owned directly, or indirectly through one or more other instrumentalities, by one or more foreign states, and

(3) is created under the laws of one or more of the states to which section 1603(b)(2) refers and is not a citizen of a State of the United States as defined in section 1332(c) and (d) of this title.

(c) An instrumentality of a foreign state includes its directors, officers, employees, and individuals in similar positions when a claim is based on an act or omission of that person while acting within the scope of the person's office or employment, so long as the individual is not a citizen or permanent resident of the United States.

(d) A defendant shall be treated as a foreign state or instrumentality if it had that status at the time the claim arose or at the time the complaint was filed.

Congress also should amend the commercial activity exception, section 1605(a)(2), to establish the presumption that second tier and lower agencies and instrumentalities are engaged in commercial activity: *"An instrumentality directly owned by another instrumentality rather than the foreign state itself is presumed to be engaged in commercial activity. The defendant instrumentality may rebut the presumption by establishing by the preponderance of the evidence that it is not engaged in commercial activity. The plaintiff has the initial burden of producing evidence that the defendant's commercial activity had the required connection to the United States."*

Congress should add an exception from immunity for those entities that were private or that were not a foreign state at the time a claim arose but later became a foreign state or instrumentality.

A new subsection (a)(8) should be added to section 1605: *“in which the foreign state or instrumentality did not have that status at the time the claim arose.”*

Finally, Congress should amend the service section of the Act, section 1608, to provide for service on individuals brought within the scope of the Act:

(c) Service in the courts of the United States and of the States shall be effected upon an individual within the definitions of section 1603 as follows, but nothing in this section 1608(c) alters or supersedes any diplomatic or consular immunity from service under any other provision of federal law:

(1) if the individual at the time of service is an official or employee of a foreign state, in accordance with section 1608(a)(1) or (2) but not (a)(3) or (4) or, if service cannot be made under section 1608(a)(1) or (2), then by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(2) if the individual at the time of service is a director, officer, employee, or individual in a similar position of an instrumentality, by delivery to the individual or an agent of the individual for purposes of service of process by a method specified in section 1608(b) but not by delivery to an officer or managing or general or other agent of and not by mail directly by the plaintiff to the instrumentality; or

(3) if section 1608(c)(1)-(2) does not apply to the individual at the time of service, in accordance with the Federal Rules of Civil Procedure or the applicable state court rules.

IV. 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.”^{167/} 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. The Working Group recommends several statutory amendments to address these issues.

A. Jurisdictional nexus

As with the other exceptions to immunity, if the waiver exception is satisfied and there is proper service of process, the FSIA authorizes personal jurisdiction over the foreign state defendant.^{168/} Unlike the other exceptions to immunity, however, the waiver exception does not specify any jurisdictional nexus between the foreign state defendant and the United States. The Supreme Court observed this difference but did not decide whether, by waiving immunity, a foreign state could consent to suit based on activities unrelated to the United States.^{169/} Some courts have expressed the concern that the waiver exception will in some cases allow for

^{167/} 28 U.S.C. § 1605(a)(1).

^{168/} 28 U.S.C. § 1330(b).

^{169/} *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983).

exercises of personal jurisdiction that are inconsistent with constitutional requirements of due process.^{170/}

For several reasons, the Working Group believes that the lack of a nexus requirement in the waiver exception does not pose a serious due process concern. As an initial matter, there is some reason to question whether due process restrictions on personal jurisdiction even apply in suits against foreign states,^{171/} an issue on which the Working Group does not take a position. In any event, it is well settled that due process is not violated by exercising personal jurisdiction over a party that has consented to such jurisdiction either in advance or at the time of the litigation.^{172/} If a foreign state has waived its immunity from the jurisdiction of U.S. courts under the FSIA, it has, given the structure of the Act, also consented to personal jurisdiction.^{173/} A consent to jurisdiction that is separate from and in addition to a waiver from immunity is not necessary. Moreover, as discussed below, the Working Group is recommending that implied waivers be substantially limited, which will further reduce due process concerns. Finally, if a foreign state defendant's contacts with the forum are attenuated, courts will still have the discretion to dismiss the case under the doctrine of *forum non conveniens*.^{174/}

^{170/} See, e.g., *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela*, 760 F.2d 390, 393 (2d Cir. 1985); *Verlinden BV v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1300-02 (S.D.N.Y. 1980), *aff'd* on other grounds, 647 F.2d 320 (2d Cir. 1981), *rev'd* on other grounds, 461 U.S. 480 (1983).

^{171/} See *Argentina v. Weltover*, 504 U.S. 607, 619 (1992) (questioning whether foreign states are "persons" for purposes of the Fourteenth Amendment); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 19 (D.D.C. 1998) (reasoning that foreign states are not "persons" under the due process clause). See Part II.B.3 of the Report.

^{172/} See *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites*, 456 U.S. 694, 702, 704 (1982); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964).

^{173/} See, e.g., *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1350 (11th Cir. 1992); *Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703, 709-11 (D.D.C. 1985).

^{174/} See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983); *Blanco v. Banco Industriel de Venezuela*, 997 F.2d 974 (2d Cir. 1993).

As a result, the Working Group concludes that there should not be any jurisdictional nexus requirement for the waiver exception. When a foreign state or instrumentality has explicitly waived immunity (implicit waivers are discussed below), the sole question is one of contract interpretation: Did the defendant express consent to be sued in the United States. If a waiver is explicitly general, permitting suit anywhere in the world, determining its geographic scope does not present a problem.^{175/} Courts should apply traditional methods of contract interpretation to determine whether the parties intended some geographical limitation and whether they intended to consent to jurisdiction in a U.S. court. If a waiver is limited to a specific jurisdiction, U.S. courts should respect that limitation. An agreement to litigate in a forum outside the United States should not be construed as a waiver to the jurisdiction of U.S. courts.^{176/}

There has been some confusion about the scope of waivers relating to arbitration. Some courts held that an agreement to arbitrate constituted a general consent to be sued, whereas other courts limited the waiver to the forum chosen for arbitration.^{177/} To a significant extent, that uncertainty was cleared up by 1988 amendments to the Act that specifically address arbitral

^{175/} See, e.g., *Proyecfin de Venezuela, SA v. Banco Industrial de Venezuela*, 760 F.2d 390, 393 (2d Cir. 1985).

^{176/} *Creighton Ltd. v. Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 538-39 (5th Cir. 1992).

^{177/} Some courts found that an agreement to arbitrate was a general consent to suit outside the chosen forum: *SA Mineraçao da Trindade-Samitri v. Utah Int'l Inc.*, 576 F. Supp. 566 (S.D.N.Y. 1983) (arbitration to be in Paris); *Muck v. Royal Zenith Corp.*, No. 82 C 4900 (N.D. Ill. Nov. 4, 1983) (arbitration to be in the German Dem. Rep.); *Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (S.D. Tex. 1980) (dictum).

Some courts limited jurisdiction to the indicated forum: *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281, 1285 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985); *Verlinden BV v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1300-02 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

agreements.^{178/} We do not need to address these issues further because they arose generally in the context of implied waivers, which we propose to narrow considerably.

B. Implied waivers

The aspect of the waiver exception that has caused the most uncertainty has been its allowance of implicit waivers. The FSIA's legislative history states that courts have found implicit waivers "in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern the contract." It also states that implicit waivers "should . . . include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity."^{179/}

Courts have had particular difficulty with implied waivers, although they have rejected the argument that a country violating jus cogens norms implicitly waives immunity.^{180/} They generally construe alleged waivers narrowly^{181/} and look for words or conduct that indicate a willingness to be sued.^{182/} The Supreme Court has held that a purported waiver must either mention waiver of immunity from suit or clearly indicate a willingness to participate in

^{178/} See 28 U.S.C. § 1605(a)(6).

^{179/} 1976 U.S.C.C.A.N. at 6617.

^{180/} See, e.g., *Prinz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

^{181/} See, e.g. *Creighton Ltd. v. Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999); *In re Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999); *Cabiri v. Ghana*, 165 F.3d 193, 201-03 (2d Cir. 1999); *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 482 (5th Cir. 1998); *Hilao v. Estate of Marcos*, 94 F.3d 539, 546-48 (9th Cir. 1996); *Corporacion Mexicana de Servicios Maritimos, SA v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996); *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers*, 12 F.3d 317, 325 (2d Cir. 1993); *Rodriguez v. Transnave Inc.*, 8 F.3d 284 (5th Cir. 1993); *Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 577 (2d Cir. 1993); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Frolova v. USSR*, 761 F.2d 370, 377 (7th Cir. 1985).

^{182/} *Creighton Ltd. v. Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999); *In re Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999); *Hilao v. Estate of Marcos*, 94 F.3d 539, 546-48 (9th Cir. 1996); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1386 (8th Cir. 1993); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990). But see *Continental Graphics v. Hiller Industries, Inc.*, 614 F. Supp. 1125, 1129 (C.D. Utah 1985) (an apparent finding of an implied waiver from doing an act for which suit would be convenient in the United States; explicable as a poorly expressed application of the commercial activity exception).

litigation.^{183/} The difficulty arises because many situations are ambiguous about the willingness of the defendant to be sued in the United States. Examples include contract clauses selecting U.S. law or a foreign law or submitting to the jurisdiction of a foreign court.^{184/}

The Working Group concludes that the Act should be amended to limit the circumstances under which waivers may be implied. The area has created confusion, inconsistency, and uncertainty. It has embroiled foreign states in protracted litigation about the existence of a waiver and, given the narrow construction of implied waivers, has not produced waiver principles significantly benefiting plaintiffs. Allowing free ranging litigation over the existence of an implied waiver seriously undercuts one of the major goals of the Act, which is settling and clarifying the standards for determining when a foreign state is subject to suit in the United States. Moreover, in commercial settings, parties unable to obtain an express waiver from the foreign state should not be allowed to revise the terms of their contractual relationship by arguing for an implied waiver.

The Working Group therefore proposes that implicit waivers be limited to situations in which, through litigation conduct, the foreign state indicates a willingness to be sued. The Act already addresses one aspect of such conduct by providing that if a foreign state brings a suit in a U.S. court, it will be denied immunity with respect to certain counterclaims.^{185/} The Working

^{183/} *Argentina v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441-43 (1989).

^{184/} Selecting U.S. law is generally viewed as a waiver. See *Eckert Int'l, Inc. v. Fiji*, 32 F.3d 77 (4th Cir. 1994); *Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703 (D.D.C. 1985). Selecting a foreign law is generally not a waiver. See, e.g., *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1102 n.13 (D.C. Cir. 1982); *Eaglet Corp. v. Banco Central de Nicaragua*, 839 F. Supp. 232 (S.D.N.Y. 1993), *aff'd*, 23 F.3d 641 (2d Cir. 1994). Submitting to jurisdiction in a foreign forum is usually not a waiver. See *Ohntrup v. Firearms Center*, 516 F. Supp. 1281, 1285 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985). See also *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 482 (5th Cir. 1998); Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* § 6.34 1988.

^{185/} 29 U.S.C. § 1607.

Group proposes that immunity also should be deemed waived when the foreign state participates in litigation in the United States without raising the defense of immunity in its first responsive pleading. This is the same standard used in Rule 12(h)(1) of the Federal Rules of Civil Procedure to determine that a defense of lack of personal jurisdiction is waived.

The Working Group's proposal is consistent with international practice. For example, the Australian, British, and Canadian state immunity statutes limit implied waivers to situations in which the foreign state participates in litigation.^{186/} Similarly, the Draft Articles on the Jurisdictional Immunities of States and Their Property, prepared by the International Law Commission of the United Nations, also would limit implied waivers to "participation in a proceeding before a court."^{187/} Finally, the Draft Articles for a Convention on State Immunity, prepared by the International Law Association in 1994, also would limit implied waivers to "participation before a tribunal in the forum state."^{188/}

C. Authority to waive

Determining whether an official or employee of a foreign state or an instrumentality was authorized to waive (explicitly or implicitly) the state's immunity presents a potentially difficult choice-of-law problem. Some authorities have grappled with the question, and, to avoid the uncertainty and costs of addressing the issue in specific cases, the Working Group proposes to resolve the issue with an addition to the statute.

^{186/} Australian Foreign Sovereign Immunities Act §§ 10(6)-(10) (1985), reprinted in 25 ILM 715 (1986); British State Immunity Act §§ 2(3)-(6) (1978), reprinted in 17 ILM 1123 (1978); Canadian State Immunity Act §§ 4(2)-(4) (1982), reprinted in 21 ILM 798 (1982).

^{187/} International Law Commission, Draft Articles on the Jurisdictional Immunities of States and Their Property art. 8 (1991).

^{188/} International Law Association, Revised Draft Articles for a Convention on State Immunity, art. III(A)(2)(a) (Rep. of 66th Conf., Buenos Aires 1994).

Authority to waive could be determined by the law of the state on behalf of which the officer or employee acts, by the law of the state in which the purported waiver occurs, by the law of the forum, or perhaps by some other body of law. Unlike the immunity acts of some other countries, Congress did not address the law applicable to authority to waive immunity in either the Foreign Sovereign Immunities Act or its legislative history.

One might assume that authority to waive immunity must be determined by the law of the state on behalf of which the officer or employee purports to act.^{189/} This rule, after all, applies to officers or employees of the federal government.^{190/} And Congress intended to make the treatment of foreign states in our courts largely similar with the treatment of the federal government before our courts.^{191/}

Some courts and several commentators, on the other hand, have concluded that because the law to be applied to determine authority to waive immunity is at bottom a question of interpreting the FSIA, it must be purely a question of U.S. law.^{192/} No court has directly decided the question of authority to waive. Some lower courts have used the law of the forum to decide whether to attribute a noncommercial tort to a foreign state.^{193/} The Supreme Court applied

^{189/} Id. § 6.27.

^{190/} Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984); Schweiker v. Hanson, 450 U.S. 785, 788-789 (1981).

^{191/} See Joseph W. Dellapenna, *Suing Foreign Sovereigns and Their Corporations* § 1.3 (1988).

^{192/} See, e.g., *Aquamar SA v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1293-94 (11th Cir. 1999); Charles Brower, F. Walter Bristline, Jr., & George Loomis, Jr., *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 *Am. J. Int'l L.* 200, 206-07 (1979); George Kahale, *State Loan Transactions: Foreign Law Restrictions on Waivers of Immunity and submissions to Jurisdiction*, 37 *Bus. Law.* 1549, 1560-64 (1982).

^{193/} *Skeen v. Brazil*, 566 F. Supp. 1414, 1417-18 (D. D.C. 1983); *Castro v. Saudi Arabia*, 510 F. Supp. 309 312-313 (W.D. Tex. 1980).

international law for the most part to determine whether an instrumentality should be liable for the acts of the foreign state owning the instrumentality.^{194/}

The Working Group suggests that the appropriate approach is to distinguish between actual and apparent authority. Actual authority must be decided by the law of the state from which authority flows. Apparent authority is based on estoppel by conduct and ought to be decided by the law with the most significant relationship to the event, which is often the law of the place where the conduct occurs or the forum. Thus, the initial reference for authority to waive will be to the law of the foreign state itself, followed by inquiry into apparent authority despite the lack of actual authority. Equalizing the treatment of foreign states to the treatment of the federal government supports this analysis.

The laws of some foreign states forbid waivers of immunity by the government or its instrumentalities. This would be a matter of actual authority. As a matter of apparent authority, under the approach of the British State Immunity Act, for example, the head of the foreign state's diplomatic mission in the United States would always have apparent authority to waive immunity, and a person with authority to make a contract would always have apparent authority to waive immunity with respect to that contract.^{195/} Several American cases have taken this approach under the FSIA.^{196/}

Because of the risk that U.S. courts will face issues of the appropriate law to determine authority to waive and could devote resources to resolving that issue, the Working Group

^{194/} First Nat'l City Bank v. Banco Para el Comercio, 462 U.S. 611, 621-22 (1983).

^{195/} British State Immunity Act § 2(7) (1978), reprinted in 17 ILM 1123 (1978).

^{196/} Aquamar SA v. Del Monte Fresh Produce NA, Inc., 179 F.3d 1279, 1294-1300 (11th Cir. 1999); Jota v. Texaco, Inc., 157 F.3d 153, 162-63 (2d Cir. 1998).

proposes that an amendment to the statute dispose of it. As explained above, we suggest that the question of actual authority be governed by the law of the foreign state or instrumentality and that the question of apparent authority be determined by the law of the place where the words were received.

D. Working Group recommendation

The Working Group proposes the following revisions to section 1605(a)(1):

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly by any form of words expressing consent to be sued in the United States or by participation as a defendant, or as a claimant under Supplemental Admiralty Rule C, in litigation in the United States without raising the defense of immunity in the time required to preserve a defense of lack of jurisdiction over the person under the Federal Rules of Civil Procedure or the applicable state court rules; in applying this paragraph (1):

(A) any person exercising actual authority under the law of the foreign state or exercising apparent authority under the law of the place where the words were received may make an explicit waiver;

(B) a foreign state may not withdraw a waiver except in accordance with the terms of the waiver; and

(C) no separate express consent to jurisdiction shall be required in addition to the waiver itself.

The proposed statute codifies the conclusions reached in the analysis concerning waivers under the Act. Even after enacting the foregoing language, the outcome will be highly fact specific in each case of a purported waiver. Courts will always have considerable, but not unlimited, discretion to determine whether a waiver was intended and, if so, how far the waiver goes.

V. 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 commercial activity exception in section 1605(a)(2) has three clauses. It provides that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case:

in which the action is based [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] 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.

Each clause requires an evaluation of the conduct on which the action is based, a determination that the conduct is or is related to “commercial activity,” and some sort of connection with the United States.

A. The “based upon” requirement

The Working Group proposes no change to the Supreme Court’s interpretation of the “based upon” language. An action is “based upon” the conduct the plaintiff needs to prove to satisfy the elements of a claim that would entitle it to relief under its theory of the case, although not each and every element of a claim needs to be commercial activity by a foreign state.^{197/}

B. The definition of “commercial activity”

^{197/} Saudi Arabia v. Nelson, 507 U.S. 349, 356-58 (Souter, J.), 364 (White, J.), 370 (Kennedy, J.) (1993).

The Working Group proposes no change to the definition of commercial activity in section 1603(d), although that definition is less than enlightening and has been a source of confusion. We propose no change because, in the majority opinions in *Republic of Argentina v. Weltover*^{198/} and *Saudi Arabia v. Nelson*, the Supreme Court substantially elaborated and clarified the meaning of commercial activity in a manner that was consistent with the 1976 legislative history of the FSIA. The Court also explained the reason that section 1603(d) distinguishes between the nature and purpose of the relevant conduct.^{199/}

The Supreme Court said that a foreign state engages in commercial activity under the FSIA when it participates in the marketplace in the manner of a private citizen or corporation, exercises only those powers than a private citizen can exercise, and does not exercise powers peculiar to sovereigns:

[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are “commercial” within the meaning of the FSIA. ... [T]he issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in “trade and traffic or commerce”^{200/}

Similarly, the legislative history stated that commercial activity includes “a broad spectrum of endeavor,” activities “customarily carried on for profit,” “a contract which might be made by a private person,” and activities such as sale of a service or a product, leasing of property, borrowing money, employment or engagement of laborers or agents, and investment in a security. “[T]hat goods or services to be procured through a contract are to be used for a public purpose is irrelevant Thus, a contract by a foreign government to buy provisions or

^{198/} 504 U.S. 607 (1992).

^{199/} Id. at 617.

^{200/} Id. at 614 (emphasis in original); see also Nelson, 507 U.S. at 359-61.

equipment for its armed forces or to construct a government building constitutes a commercial activity.”^{201/}

In general, the Working Group agrees with this approach to defining commercial activity. In the future, courts should refer to the *Weltover* and *Nelson* opinions and the discussion of commercial activity in the 1976 legislative history. Although some potential for confusion remains with this language, the Working Group concluded that no reformulation of the statutory language would eliminate the risk.

Unusual circumstances and difficulties in applying the standards inevitably will occur in specific cases, and courts should have some leeway in addressing them. When faced with an unusual situation, courts should avoid applying the standards mechanically, should evaluate all the circumstances bearing on the nature of the conduct, and should not allow any one factor to be dispositive or to carry undue weight. For example, the existence of a contract or a profit motive often but not invariably points toward commercial activity. Another issue concerns natural resources. Some courts have said that the regulation of natural resources is a sovereign function,^{202/} but that decision must be made within the context of the law and legal system of the relevant sovereign. If a foreign state agency grants mineral exploration rights in a particular area and the local law authorizes only the sovereign to grant such rights, the grant would be

^{201/} 1976 U.S.C.C.A.N. at 6614-15.

^{202/} See, e.g., *In re SEDCO, Inc.*, 767 F.2d 1140 (5th Cir. 1985) (exploration for oil in territorial waters was sovereign activity; control of natural resources an attribute of sovereignty); *MOL, Inc. v. People’s Republic of Bangladesh*, 736 F.2d 1326 (9th Cir. 1984) (license agreement for export of monkeys was part of sovereign prerogative to regulate exports and natural resources); *International Assoc. of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 427 F. Supp. 553 (C.D. Cal. 1979), *aff’d* on other grounds, 649 F.2d 1354 (9th Cir. 1981).

sovereign.^{203/} If local law permits private real property owners to grant such rights in their property, the grant would be commercial.

C. The requirement of a connection to the United States

Our principal concern in the commercial activity area is with the way courts have interpreted the degree to which conduct forming the basis of the litigation must be connected to the United States. This concern arises particularly in cases relying on the third clause of section 1605(a)(2), which applies to a claim based on “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.” Judicial interpretations of the “direct effect” requirement have caused confusion and disarray and have blurred the distinctions among the three clauses of the commercial activity exception.

The plan of this part of the report is to describe the U.S. connections associated with each of the three clauses of section 1605(a)(2), the explanations for them in the 1976 legislative history, and the purposes of requiring a connection. We then discuss how the courts have construed the direct effect requirement and, finally, propose a clarifying amendment to the Act.

1. The statutory language and legislative history

The three clauses of the commercial activity exception describe connections of increasing distance from and diminishing significance with the territory of the United States. The first clause applies when a claim is based on commercial activity carried on in the United States or

^{203/} See, e.g., *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 653 (9th Cir. 1996) (Mexican constitution states that only the government may own and exploit the country’s natural resources).

“having substantial contact with the United States.”^{204/} The legislative history of the first clause states that it applies to “cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States,” the negotiation or execution of a loan agreement in the United States, or the receipt of “financing from a private or public lending institution located in the United States.”^{205/}

The second clause requires an act or conduct in the United States in connection with commercial activity outside the United States. The legislative history gives the following examples: a representation in the United States leading to a claim for unjust enrichment, an act in the United States that violates the federal securities laws, or the wrongful discharge in the United States of an employee working on commercial activity carried on in a third country.^{206/}

Not many cases discuss the second clause, but some passing remarks in two Fifth Circuit opinions unfortunately suggest that the U.S. act is “generally understood to apply to non-commercial acts in the United States that relate to commercial acts abroad.”^{207/} That is not correct. Nothing in the Act, the legislative history, or the Supreme Court decision on which the remarks are based limits the act specified in the second clause to non-commercial acts. Characterizing an act as either commercial or non-commercial will not necessarily be an easy task, but, in any event, the distinction does not seem to matter. The second clause is satisfied whenever an act of some type occurs in the United States and is in connection with commercial

^{204/} 28 U.S.C. § 1603(e); Nelson, 507 U.S. at 356.

^{205/} 1976 U.S.C.C.A.N. at 6615-16. The separate opinions of Justices White, Kennedy, and Stevens in *Nelson* provide some guidance about the level of activity required to constitute substantial contact with the United States.

^{206/} 1976 U.S.C.C.A.N. at 6615-16.

^{207/} *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 n.5 (5th Cir. 1998); see also *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 390 (5th Cir. 1999).

activity abroad. Moreover, when a U.S. act is significant enough on its own, it might qualify as commercial activity in the United States and satisfy the first clause.

The third clause applies when both the act causing the claim and the commercial activity occur outside the United States but the act creates a “direct effect” in the United States. The legislative history described the third clause in this way: “The third situation ... would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).”^{208/}

This third category of cases raises concerns about connections to the United States most often because it involves the fewest and most attenuated contacts with the United States. When conduct in or connections to the United States are clear and significant, as they typically are in cases brought under the first two clauses of section 1605(a)(2), the cases have presented no serious difficulty for the courts. Only when the contact or connection with the United States is more remote, typically in case brought under the direct effect test of the third clause, have the difficulties occurred.

^{208/} 1976 U.S.C.C.A.N. at 6618. The title of section 18 is “Jurisdiction to Prescribe with Respect to Effect within Territory.” Jurisdiction to prescribe refers to the “capacity of a state under international law to make a rule of law, whether this capacity be exercised by the legislative branch or by some other branch of government.” Restatement (Second) of the Foreign Relations Law of the United States § 6, cmt. a (1965) (“Second Restatement”). Section 18 provided: “A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if either (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort ... or (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with” generally recognized principles of justice.

Section 402 of the Third Restatement is one of the successor provisions. 2 Third Restatement 479. It is entitled “Bases of Jurisdiction to Prescribe,” and it provides in section 402(1)(c) that a state has jurisdiction to

2. The purposes of the connection requirement

There are two reasons for requiring a connection with the territory of the United States. One is to ensure the presence of an appropriate foundation under U.S. and international law for applying the U.S. law on foreign sovereign immunity to the particular case. The specific U.S. approach to exposing foreign states to litigation and execution is not available whenever any person has a grievance against a foreign government for events occurring someplace in the world. The United States must have a reasonable basis for and interest in applying its law and permitting legal action to proceed in its courts, and the statutory requirement for establishing a U.S. connection provides this basis.

The second purpose for requiring a U.S. connection to satisfy the commercial activity exception is to ensure statutory support for another part of the statute, section 1330(a), which permits a court to assert personal jurisdiction over the defendant when an exception from immunity exists.^{209/} By requiring a defendant to have a certain quantity of connections with the United States for the commercial activity exception, Congress provided a basis for a U.S. court's exercise of personal jurisdiction over the defendant and therefore for the statutory personal jurisdiction provision.

Consideration of these U.S. connections for purposes of satisfying the commercial activity exception under the statute should not be confused with a determination of whether an entity or person has constitutionally sufficient contacts under the Due Process Clause to support

prescribe law with respect to "conduct outside its territory that has or is intended to have substantial effect within its territory."

^{209/} 1976 U.S.C.C.A.N. at 6612; *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (establishing personal jurisdiction requires proper service, a statutory basis of amenability to service, and constitutionally sufficient contacts).

the exercise of a court's personal jurisdiction.^{210/} They are separate inquiries,^{211/} although, of course, a connection sufficient to satisfy the statutory requirement is also likely to suffice under the Due Process Clause unless some unusual circumstance exists.^{212/}

3. Judicial interpretations of the direct effect requirement

In *Weltover*, the Supreme Court interpreted the "direct effect" language in the third clause. The case concerned Argentina's decision to reschedule payments on government bonds that provided for repayment in U.S. dollars through transfer on the New York, London, Zurich, or Frankfurt market, at the creditor's election. When Argentina decided unilaterally to postpone payments owed on the bonds, three non-U.S. entities that had designated New York as the place of payment and that had received payments there before the rescheduling sued Argentina in U.S. federal court.

The Court considered whether the actions of Argentina caused a direct effect in the United States. It concluded that an effect must be more than trivial but did not need to be substantial or foreseeable to be a direct effect. It considered the reference to section 18 of the Second Restatement in the legislative history, dismissed it, and then held that an effect is "direct" if it "follows as an immediate consequence of the defendant's activity." The Court held that Argentina's unilateral postponement of payments on bonds had a "direct effect" in the United States:

[Plaintiffs] had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it

^{210/} See, e.g., *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

^{211/} *Texas Trading & Milling Corp. v. Federal Rep. of Nigeria*, 647 F.2d 300, 308, 313 (2d Cir. 1981).

^{212/} 1976 U.S.C.C.A.N. at 6612. The Working Group takes no position on whether a foreign state is a person protected by the Due Process Clause. See *Weltover*, 504 U.S. at 619. See Part II.B.3 of the Report.

was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming. We reject Argentina's suggestion that the "direct effect" requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States.^{213/}

The *Weltover* Court's discussion of "direct effect" has caused two problems. First, the Court defined direct effect too broadly, made it too easily satisfied, and therefore made U.S. courts available to resolve disputes that have only the most distant relationship with the United States. That means that cases could arise in which foreign states question or object to the application of U.S. law on foreign sovereign immunity. Second, by referring to New York as the place of performance for Argentina's contractual obligations, the Court created confusion and disarray over whether, in a case dependent on the third clause, a contract must require some performance in the United States (a situation already addressed by the first clause) or whether some other "legally significant act" must occur in the United States.

Several recent decisions illustrate these problems. For example, some courts have given undue weight to the reference in *Weltover* to New York as the place of performance. In *Goodman Holdings v. Rafidain Bank*, the D.C. Circuit sustained the immunity of an Iraqi bank on the ground that letters of credit did not specify a location in the United States as the place of performance, even though the Iraqi bank had made earlier installment payments mostly from accounts in U.S. banks.^{214/} To the contrary are two circuit opinions, one of which is discussed below, that do not require the letter of credit to specify a U.S. place of payment and find a direct effect when the contract obliges payment to a place designated by a recipient of the funds and the

^{213/} *Weltover*, 504 U.S. at 619.

^{214/} See, e.g., *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146-47 (D.C. Cir. 1994).

recipient designates a place in the United States.^{215/} Other letter of credit cases have turned on whether payment into the U.S. bank accounts of intermediaries rather than the plaintiffs was sufficient,^{216/} whether the issuing bank selected a U.S. advising bank,^{217/} and whether the payment is to a foreign or U.S. office of a U.S. financial institution.^{218/}

Recent decisions from the Second and Fifth Circuits further exemplify the discord and confusion in this area. The Second Circuit decision in *Hanil Bank v. PT. Bank Negara Indonesia*^{219/} demonstrated that, after *Weltover*, cases with only the most tenuous connection with the United States may be brought under the third clause. The decision also created significant uncertainty about the “legally significant acts” test that the Second Circuit had applied in an earlier opinion. *Hanil Bank* involved the sale of parts from a Korean company in Korea to an Indonesian company in Indonesia and a letter of credit issued by an Indonesian bank. The sole connection to the United States other than the litigation was that the Korean bank in Korea negotiating the letter of credit for the Korean parts supplier instructed the issuing Indonesian bank to pay the money to the Korean bank’s Citibank account in New York. The Indonesian bank refused to make the payment. The Second Circuit found a direct effect under the third clause of the commercial activity exception because the letter of credit obliged the Indonesian bank to pay into the bank account designated by the negotiating bank and because the Korean negotiating bank had designated an account in the United States.

^{215/} See also *Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997).

^{216/} *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238 (2d Cir. 1994).

^{217/} *Reed Int’l Trading Corp. v. Donau Bank AG*, 866 F. Supp. 750 (S.D.N.Y. 1994). See also *Caribbean Trading v. Nigerian Nat’l Petroleum Co.*, 1993 WL 541236 (S.D.N.Y. 1993).

^{218/} See *Chemarketing Indus., Inc. v. CVG Industria Venezolana de Alumino, C.A.*, 1998 WL 199937 (S.D.N.Y.) (no direct effect when defendant failed to make an agreed payment on a letter of credit through a foreign office of bank organized in the United States).

^{219/} 1998 WL 334342 (2d Cir.).

The Second Circuit then went on to raise questions about the applicability of its “legally significant acts” test from an earlier case. The court observed that *Weltover* does not require that the place of performance must be in the United States for a financial transaction to cause a direct effect here, hinting that its “legally significant acts” test applied only to tort claims. It then went on to say, however, that in *Hanil Bank* “the most legally significant act – the breach of contract – occurred in the United States” when the Indonesian bank failed to make the payment to the designated U.S. account. It therefore affirmed the trial court’s conclusion that the Indonesian bank could be sued in the United States.

The Fifth Circuit decision created a circuit split over whether a “legally significant act” must occur in the United States. In *Voest-Alpine Trading USA Corp. v. Bank of China*,^{220/} the question was whether a foreign bank had created a direct effect in the United States by failing to pay an amount owed to a U.S. corporation when the foreign bank was not obliged to pay into a U.S. account but conceded that its practice would have been to pay into the U.S. account. The court rejected the position of several other federal courts of appeals defining a direct effect as a legally significant act, that is, an action in the United States giving rise to the cause of action,^{221/} and held that the foreign bank’s decision not to pay had the immediate consequence and therefore the direct effect of the nonreceipt of money in a U.S. account.

Notwithstanding these problems with the application of the direct effect test, other situations brought under the third clause have not created disagreement. Most authorities agree that a direct effect occurs when a product manufactured and sold outside of the United States is

^{220/} 142 F.3d 887 (5th Cir. 1998). See also *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380 (5th Cir. 1999).

^{221/} 142 F.3d at 894 (citing among other decisions *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997), and *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993)).

present here and causes an injury because of a defect.^{222/} In addition, most courts have concluded that financial injury to a U.S. business or personal injury to a U.S. person from events abroad is not a sufficient direct effect.^{223/}

4. Working Group recommendation

The Working Group believes the *Weltover* Court was wrong to reject the need for substantial effects in the United States to justify application of the direct effect clause of the commercial activity exception. As explained above, the requirement for a U.S. connection serves important functions. The relationship between the claim against the foreign state and the United States must be sufficiently strong to justify the application of U.S. standards on foreign sovereign immunity, justify the legitimacy of the judgment of the U.S. court, and decrease the chance that foreign nations will take offense at the presence of litigation in the United States. Under the direct effect requirement as currently defined by the Supreme Court and applied by lower courts, U.S. courts are adjudicating disputes with only remote or tenuous connections to the United States. We therefore propose adding the word “substantial” to the third clause so it applies to a claim based on “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 *and substantial* effects in the United States.”

^{222/} See *Aldy v. Valmet Paper Machinery*, 74 F.3d 72 (5th Cir. 1996) (injury in the United States from machinery made and sold outside the United States qualifies as direct effect); 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, 317 (1986).

^{223/} See, e.g., *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232 (10th Cir. 1994); *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994); *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993); *Dominican Energy Ltd. v. Dominican Republic*, 903 F. Supp. 1507 (M.D. Fla. 1995) (financial loss by a person in the United States is not sufficient to constitute a direct effect); *Coleman v. Alcolac, Inc.*, 1995 WL 348023, *11 (S.D. Tex. 1995); *Maizus v. Weldor Trust Reg.*, 820 F. Supp. 101 (S.D.N.Y. 1993).

The proposed additional word “substantial” should mean significant or weighty. The purpose of adding the word substantial is to remind courts to follow the principle that the law of the United States on the immunity of foreign states ought not be applied without a comfortably adequate basis under international and U.S. constitutional law for the United States to be one of the sovereigns to regulate the immunity rules. No formulation of words can define this judgment with precision for all future cases. All of the circumstances of the case and its connections with the United States should be taken into account. A court should inquire whether the consequences of the defendant’s actions were felt in a serious and significant way within the territory of the United States. Below we provide more specific examples of situations that, in our view, would satisfy a standard requiring substantial U.S. effects.

We retain the word “direct” because we agree with the *Weltover* Court that the U.S. effect must be an immediate consequence, not too remote and attenuated, and not simply traceable through one or more intermediate stages to a foreign act. As the Tenth Circuit said, “Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States.”^{224/}

We do not propose adding a “foreseeability” requirement because the question about the applicability of the U.S. rules on sovereign immunity should depend on actual effects in the United States. A U.S. court should be able to adjudicate a case when sufficient effects occur in the United States whether or not the foreign state intended or could foresee the effects. By omitting a foreseeability requirement from the statute, however, we do not mean to suggest that

^{224/} United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n, 33 F.3d 1232, 1238 (10th Cir. 1994).

it should not be applied to the extent required when evaluating whether the Constitution permits the exercise of personal jurisdiction.

We cannot anticipate all the different factual situations that will raise questions in future cases about the sufficiency of the U.S. connection for purposes of the effects clause of the commercial activity exception revised along the lines we propose, but we offer the following guidance based on issues in cases decided in the past. In our view, the U.S. effect does not need to be contractually designated performance or the failure to perform a legally significant act in the United States. Substantial effects under the third clause are not the same as the substantial contacts contemplated by the first clause. The first clause refers to commercial activity carried on in the United States, which section 1603(e) defines as commercial activity having substantial contact with the United States. According to the legislative history, substantial contact “includes cases based on commercial transactions performed in whole or in part in the United States.” As a result, as the Fifth Circuit in *Voest-Alpine Trading* observed, requiring a U.S. place of performance to satisfy the direct effect test blurs distinctions in the other clauses of the commercial activity exception. Thus, when a non-trivial aspect of the performance of a contract or commercial transaction occurs in the United States, a claim based on the contract or transaction would typically satisfy either the first or second clause of the commercial activity exception. For that reason, cases based on a foreign state’s failure to meet a contractual obligation to pay or perform at a location in the United States, such as *Weltover*, are properly analyzed under the first clause.

A variety of situations could satisfy a third clause containing a direct and substantial effects test, although all the relevant facts and circumstances would need to be taken into account. Such situations include the failure to provide a service or to ship a product into the

United States, even if the location of the performance was not specified in a contract. They also include a false or misleading statement outside the United States that harms U.S. based holders of securities or a concerted refusal to deal or other anticompetitive conduct by foreign state entities abroad that harms consumers in the United States.

A direct and substantial effects requirement would not be met when the sole U.S. effect in a contract action or a commercial tort case is a payment from a bank account opened in the United States or the foreign bank account of a U.S. citizen, resident, or business entity; a financial loss or reduced profit of a U.S. citizen, resident, or business entity; or physical damage to a U.S. citizen or resident. The necessary U.S. connection would not be present when the conduct and injury in a commercial tort occur completely outside of the territory of the United States^{225/} or when the sole connection of a contract to the United States is that one of the parties is a U.S. citizen, resident, or business entity. None of these facts, standing alone, creates a direct and substantial U.S. effect, but they are factors that should be taken into account and that, when considered with other factors such as the location of the business operations involved in the commercial transaction, could lead to a conclusion that substantial and direct U.S. effects occurred.

In our view, this means that, under an amended “direct and substantial effects” standard, a U.S. court would not have had jurisdiction in *Weltover*, *Hanil Bank*, or *Goodman Holdings*. The U.S. repercussions from the conduct in those cases were too remote and too attenuated to justify the application of the U.S. law on sovereign immunity. *Voest-Alpine Trading* would be a closer case, but on balance a decision to apply the third clause would be reasonable. The Fifth

Circuit found FSIA jurisdiction because the plaintiff was a U.S. corporation and the payment would have been made to a U.S. bank account. These factors might not be enough under the new standard, but, if the affected operations of the plaintiff also were located in the United States, as the court suggested, the required U.S. effect would be present.

D. General jurisdiction under the commercial activity exception

A further issue causing some controversy has been whether a foreign state's commercial activities in the United States may be so extensive that the state is subject to general jurisdiction here. General jurisdiction is a personal jurisdiction concept meaning that the defendant may be sued at a particular location on any claim, whether the claim has any connections with that location or not.

Justice Stevens in *Nelson* suggested that the first clause of section 1605(a)(2) authorizes general jurisdiction,^{226/} but most courts insist on a connection between the claim and the U.S. contacts.^{227/} These courts have relied on the plain language of the statute, which makes clear that “the action” in each particular case must be “based upon” the commercial activity, act, or effect connected with the United States, and the key legislative history, which states that each of the

^{225/} *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172-73 (D.C. Cir. 1994) (citing cases for the proposition that “courts applying the FSIA have uniformly rejected the argument that a personal injury suffered overseas produces a direct effect in the United States when the injured person later returns home”).

^{226/} *Nelson*, 507 U.S. at 379 & n.3 (Stevens, J., dissenting).

^{227/} See, e.g., *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146 (D.C. Cir. 1994) (the “commercial activity” requirement and the “U.S. connection” requirement combine in cases brought under the first clause to require that at least one element of a plaintiff’s claim be based on commercial activity alleged to have occurred in the United States); *Santos v. Compagnie Nationale Air France*, 934 F.2d 890 (7th Cir. 1991); *Vencedora Oceanica Navigacion v. Compagnie National Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984); *Nazarian v. Compagnie Nationale Air France*, 989 F. Supp. 504 (S.D.N.Y. 1998) (FSIA jurisdiction only over those claims whose elements require proof of Air France’s commercial activity in the United States). See also 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, 305 (1986) (the “claim must be related to acts connected with the jurisdiction. Jurisdiction cannot be established simply because a foreign government agency is ‘doing business’ in the United States”).

immunity provisions except the waiver provision “requires some connection between the lawsuit and the United States.”^{228/}

Like most the courts that considered the question, the Working Group rejects this notion that a foreign state may be subject to the general jurisdiction of U.S. courts. Permitting general jurisdiction in the United States over a foreign state would be inconsistent with the plan and structure of the FSIA. We agree that the language of the statute does not admit of serious doubt on the point and therefore do not propose an amendment.

VI. THE TORT EXCEPTION

The FSIA’s tort exception, 28 U.S.C. § 1605(a)(5), provides that a foreign state shall not be immune from jurisdiction in any case

not otherwise encompassed [by the commercial activity exception], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The House Report to the FSIA explains that the noncommercial tort exception was “directed primarily at the problem of traffic accidents” but was nevertheless “cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by [the

^{228/} 1976 U.S.C.C.A.N. at 6612 (emphasis added).

commercial activity exception].”^{229/} The Reports also states that, for the exception to apply, “the tortious act or omission must occur within the jurisdiction of the United States.”^{230/} Finally, it makes clear that the exception is “meant to include causes of action which are based on strict liability as well as on negligence.”^{231/}

A. Possible changes

There are several issues relating to the tort exception that may warrant clarification. First, while it is clear from the statutory language that the exception applies only when the plaintiff’s injury or damage occurs in the United States, it is not clear from that language whether the defendant’s tortious act or omission must also occur in the United States. Second, it is not clear whether or to what extent the discretionary function limitation on the tort exception applies to illegal acts. Third, it is not clear whether a claim that is expressly exempted from the tort exception (e.g., for libel) can be brought under other exceptions, such as the commercial activity exception.

The Working Group recommends statutory changes to address the first and third of these issues. These recommended changes would, for the most part, simply codify the majority view in the courts concerning the scope of the tort exception. To the extent the changes differ from current case law, they would, for the reasons discussed below, have the effect of slightly reducing foreign sovereign immunity in this area.

^{229/} 1976 U.S.C.C.A.N. at 6619

^{230/} Id.

^{231/} Id. at 6620.

B. The situs issue

One uncertainty faced by courts in applying the tort exception has been its territorial scope. The text of the provision makes clear that the injury or damage in question must occur within the United States. There is no express requirement, however, that the tortious act or omission also must occur in the United States. Nevertheless, most courts that have addressed the issue have held that both the tortious conduct and the injury must occur in the United States.^{232/} There is also dicta to this effect in a Supreme Court decision.^{233/}

Despite the substantial case authority, there are reasons for questioning the conclusion that the noncommercial tort exception, as currently drafted, requires the tortious act or omission to occur in the United States. First, this requirement is not reflected in the plain language of the statute, and the statute's inclusion of a territorial restriction with respect to the damage or injury could be read as precluding other territorial restrictions. Second, the courts that have required the tortious act or omission to occur in the United States have placed substantial weight on the statement in the FSIA's legislative history that "the tortious act or omission must occur within the jurisdiction of the United States." That statement is ambiguous, however, since "within the jurisdiction of the United States" does not necessarily mean "within the territory of the United States." Third, the American Law Institute's influential *Restatement (Third) of the Foreign Relations Law of the United States* has construed the noncommercial tort exception to apply whenever the injury occurs in the United States, "regardless of where the act or omission causing

^{232/} See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379-80 (7th Cir. 1985); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-43 (D.C. Cir. 1984); *In re SEDCO, Inc.*, 543 F. Supp. 561, 567 (S.D. Tex. 1982).

^{233/} See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 441 (1989). The statement is dicta because in that case even the injury occurred outside the United States. See *id.* at 441 ("[R]espondents' injury unquestionably occurred well outside the 3-mile limit then in effect for the territorial waters of the United States").

the injury took place.”^{234/} Finally, the Supreme Court has not yet squarely addressed this issue, and some of its current members place substantial weight on plain language and tend to look skeptically on the use of legislative history.

In addition to this uncertainty regarding whether the tortious act or omission must occur in the United States, courts have faced difficulties applying the tort exception in situations where only a portion of the tortious act or omission occurs in the United States. In one case, for example, an airplane owned and operated by the Mexican government was flying to Tijuana but crashed inside the United States. A number of acts and omissions were alleged to have contributed to the crash, some of which occurred in Mexico and others of which occurred in the United States. Citing language from other decisions, Mexico argued that, for the situs requirement to be met, all of the tortious acts or omissions must occur in the United States. The Ninth Circuit rejected this argument, however, reasoning that it would be unjust to confer immunity on foreign state defendants for tortious acts or omissions in the United States simply because they could show that some of their tortious conduct happened to occur outside the United States.^{235/}

Because of these uncertainties, the Working Group recommends that the FSIA be amended to clarify the situs requirement for the noncommercial tort exception. Specifically, the Group recommends that the amendment require that a *substantial portion of the tortious acts or omissions occur in the United States*. In addition, it recommends that there be no requirement that the injury or damage occur in the United States.

^{234/} Restatement (Third) of the Foreign Relations Law of the United States § 454, cmt. e (1987).

^{235/} See *Olsen ex rel Sheldon v. Government of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984).

The Working Group concluded, as most courts have held, that there should be a territorial restriction on the tortious act or omission. As courts have explained,^{236/} 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. They might be subject, for example, to claims for emotional distress, loss of consortium, and other non-physical injuries stemming from foreign conduct,^{237/} as well as latent injuries that developed in the United States from earlier exposure to substances or conduct abroad.^{238/} These cases would likely be especially offensive to foreign sovereigns, raise difficult questions of causation, and burden an already overloaded federal court system. They would also make application of the noncommercial tort exception more complex and uncertain. In addition, allowing these suits would create an anomaly whereby some direct victims of foreign torts could not sue under the FSIA (because the tort and injury occurred abroad), but some third parties affected by the very same torts would be able to sue. Finally, the category of foreign tort cases that might seem most desirable to allow in U.S. courts – product liability claims involving products manufactured abroad but causing injury in the United States – can already generally be adjudicated under the FSIA’s commercial activity exception.^{239/}

The Working Group further concluded that, to take account of multi-country tort situations like the Mexican air crash case described above, the statute should require only that a “substantial portion” of the acts or omissions occur in the United States. This requirement would

^{236/} See, e.g., *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-43 (D.C. Cir. 1984); *Kline v. Republic of El Salvador*, 603 F. Supp. 1313, 1316 (D.D.C. 1985).

^{237/} In addition to the cases cited in note 8, see also, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985).

^{238/} See, e.g., *Coleman v. Alcolac*, 888 F. Supp. 1388 (S.D.N.Y. 1995).

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. Although there admittedly is some vagueness associated with the phrase “substantial portion,” it is similar to, and no more vague than, other standards currently employed in the FSIA.^{240/}

Finally, the Working Group concluded that the current requirement that the injury or damage occur in the United States should be eliminated. The Group reached this conclusion for several reasons. First, the determination of where injury or damage occurs (although sometimes required, outside the FSIA context, by state personal jurisdiction statutes) can be complicated and difficult, especially with respect to business torts.^{241/} Second, the principal reason for having a strict situs requirement in the tort area is to avoid allowing jurisdiction to be based merely upon effects in the United States. This goal is satisfied, however, as long as a substantial portion of the acts or omissions occur in the United States; there is no need to have an additional situs requirement for the injury or damage. Removing that requirement would also allow U.S. courts to exercise jurisdiction in situations in which a foreign state defendant is using the United States as a base of operations from which to cause damage or injury elsewhere. In other contexts, such as in the application of securities fraud rules, courts have recognized that there is a U.S. interest in preventing the U.S. territory from being used in this way.^{242/}

^{239/} See, e.g., *Aldy v. Valmet Paper Machinery*, 74 F.3d 72 (5th Cir. 1996); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993).

^{240/} See, e.g., 28 U.S.C. 1603(e) (“substantial contact”); *id.* 1605(a)(2) (“in connection with”).

^{241/} See, e.g., *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1064-65 (3d Cir. 1982) (collecting domestic cases addressing this issue).

^{242/} See, e.g., *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (“We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.”).

C. Discretionary function limitation

A second uncertainty relating to the noncommercial tort exception is the scope of the “discretionary function” limitation. The tort exception does not apply to “any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.” This discretionary function limitation in the FSIA was modeled on a similar provision in the Federal Tort Claims Act (“FTCA”),^{243/} which governs suits against the U.S. federal government. As a result, in applying the FSIA’s discretionary function provision, courts often have looked to decisions from the FTCA area.^{244/} Those decisions state, among other things, that discretionary functions involve situations in which there “is a room for policy judgment and decision”^{245/} and that the discretionary function limitation is designed to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”^{246/} Based upon those decisions, courts generally have focused on the nature of the conduct in question; the more the conduct involves the exercise of judgment and the more it appears to be grounded in social, economic, or political policy, the more likely courts will find it to be a discretionary function.^{247/} In general, the Working Group believes that courts have acted properly in looking to this FTCA precedent in applying the FSIA’s discretionary function provision.

^{243/} See 28 U.S.C. § 2680(a); see also 1976 U.S.C.C.A.N. at 6620.

^{244/} See, e.g., *Joseph v. Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987); *MacArthur Area Citizen Assn. v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987).

^{245/} *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953).

^{246/} *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

^{247/} Some courts also have focused on the level of government responsible for the decision in question, holding that decisions are discretionary if they emanate from the “planning” as opposed to “operational” level. See, e.g., *Olsen ex rel Sheldon v. Government of Mexico*, 729 F.2d 641, 647 (9th Cir. 1984). However, the Supreme Court has now disapproved of this distinction in the FTCA context, see *United States v. Gaubert*, 499 U.S. 315, 325 (1991); *United States v. Varig*, 467 U.S. 797, 813 (1984), so courts may decide to discontinue applying it in FSIA

There is some disagreement in the courts, however, over whether foreign officials who engage in illegal conduct may invoke this discretionary function provision. Some courts have held that the illegality of conduct does not necessarily preclude it from falling within the discretionary function provision.^{248/} Other courts have held that conduct that is clearly illegal under a foreign official's own domestic law does not fall within the discretionary function provision.^{249/} One court, in a case involving an assassination carried out in the United States, broadly stated that "there is no discretion to commit, or to have one's officers or agents commit, an illegal act."^{250/}

The Supreme Court has held that the FTCA's discretionary function exception does not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because in this situation "the employee has no rightful option but to adhere to the directive."^{251/} Lower courts have interpreted this holding to mean that conduct by a federal official that is prohibited under federal constitutional, statutory, or regulatory law does not fall within the FTCA's discretionary function exception.^{252/} In this circumstance, courts have reasoned, the official engaged in the conduct is acting outside of his or her discretionary authority. By analogy, one might conclude that conduct by a foreign state's official that is

cases. See, e.g., *Risk v. Halvorson*, 936 F.2d 393, 396 (9th Cir. 1991) (abandoning this distinction in light of FTCA decisions).

^{248/} See, e.g., *Risk*, 936 F.2d at 396-97.

^{249/} See, e.g., *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989).

^{250/} *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980).

^{251/} *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

^{252/} See, e.g., *Bell v. United States*, 127 F.3d 1226, 1230 (10th Cir. 1997); *Garcia v. United States*, 896 F. Supp. 467, 473 (E.D. Pa. 1995); *Koch v. United States*, 814 F. Supp. 1221, 1228 (M.D. Pa. 1993); see also *United States v. Gaubert*, 499 U.S. 315, 324 (1991) ("If the employee violates [a] mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.").

prohibited by the foreign state's domestic law should not fall within the FSIA's discretionary function exception.

There are reasons to be cautious, however, before applying the FTCA precedents concerning the legality of conduct to the FSIA. As recognized by the act of state doctrine, for example, adjudication of the validity of foreign government acts under foreign law raises special foreign relations issues.^{253/} Moreover, courts may face special difficulties in determining the precise requirements and prohibitions of foreign law. As a result, the FTCA precedent may be of less help to courts in resolving this aspect of the FSIA's discretionary function exception.

Taking into account these various considerations, the Working Group recommends that the discretionary function provision in the FSIA not be altered at this time. Although there is some disagreement in the courts over the legality issue, there are relatively few decisions addressing it, and there is no severe conflict of authority. In addition, the Working Group favors a common law rather than statutory approach to this issue. Even in the FTCA context, the legality limitation has been developed by the courts rather than by statute. Such a common law approach allows courts, among other things, to make distinctions between types of illegality. A case-by-case approach would seem to be especially desirable in the FSIA context, given the additional foreign relations issues.

D. Relationship with commercial activities exception

The tort exception does not apply to all torts. As discussed above, it does not apply to torts involving the exercise or failure to exercise a discretionary function. In addition, it does not

^{253/} Under the act of state doctrine, U.S. courts generally will decline to pass judgment on the validity of foreign government acts taken within their own territory. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

apply to “any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” There is currently some division in the courts over whether these limitations apply to other exceptions to immunity, in particular the exception for commercial activity.

The plain language of the noncommercial tort exception suggests that these limitations apply only to the tort exception and do not restrict the scope of other exceptions. The limitations apply to “this paragraph,” which seems clearly to be a reference to the paragraph containing the tort exception. Moreover, the noncommercial tort exception as a whole applies to cases “not otherwise encompassed [by the commercial activity exception].” In large part because of this language, most courts have concluded that other exceptions to immunity, such as the commercial activity exception, are not subject to the limitations listed in the tort exception.^{254/} Some of these courts also have noted that the limitations are structured so that either none of them applies to other exceptions or all of them do, and they have reasoned that it would make no sense to apply the discretionary function limitation to the commercial activities exception because to do so would render that exception largely meaningless.^{255/}

Nevertheless, at least one court has held to the contrary. In *Bryks v. Canadian Broadcasting Corp.*, the court held that defamation claims could not be brought under the commercial activity exception by virtue of the express exclusion of such claims from the tort exception.^{256/} The court reasoned that it would be odd for Congress to have gone to the trouble of

^{254/} See, e.g., *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1219 (10th Cir. 1999); *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1473-76 (9th Cir. 1995); *Southway v. Central Bank of Nigeria*, 994 F. Supp. 1299, 1310-11 (D. Colo. 1998); *Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209, 224 (S.D.N.Y. 1997).

^{255/} See, e.g., *Export Group*, 54 F.3d at 1474.

^{256/} 906 F. Supp. 204, 208-10 (S.D.N.Y. 1995).

exempting certain claims from the noncommercial tort exception, only to implicitly allow the same claims to be asserted under other exceptions. In addition, the court noted that some of the claims exempted, such as interference with contract rights, typically will involve commercial activity, such that their exemption would be essentially meaningless if it did not limit the commercial activities exception. Finally, the court noted that the tort exception was modeled on the FTCA and that the federal government may not be sued for defamation claims. There is dicta in another decision containing similar reasoning.^{257/}

In the view of the Working Group, the FSIA should be amended to confirm the majority view. Each exception to immunity contains its own requirements and limitations, and there is no significant justification for applying the limitations in the tort exception to the other exceptions. In the context of the commercial activity exception, for example, the adjudication of misrepresentation, defamation, and similar claims is unlikely to pose serious foreign relations difficulties given the commercial context of the cases. Moreover, adjudication of such claims would be consistent with the restrictive theory of immunity reflected in the FSIA. 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. The Working Group therefore proposes adding a clause in section 1605(a)(5) making clear that the limitations listed there apply only to the noncommercial tort exception.

^{257/} See *Gregorian v. Izvestia*, 871 F.2d 1515, 1522 n.4 (9th Cir. 1989).

E. Working Group recommendation

Based on the above discussion, we recommend the following changes to the beginning text of section 1605(a)(5):

not otherwise encompassed [by the commercial activity exception], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, ~~occurring in the United States and~~ caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of ~~his~~ *the person's* office or employment, *a substantial portion of which act or omission occurs in the United States*; except this paragraph shall not apply to

Subsections (A) and (B) would remain the same. We would add a sentence to the commercial activity exception to make clear that the limitations in subsections (A) and (B) do not apply in a case based on commercial activity: *“An action [relying on the commercial activity exception] may assert a claim described in paragraph (5)(A) or (B).”*

VII. SERVICE OF PROCESS

The FSIA contains special service of process provisions in 28 U.S.C. § 1608. Section 1608(a) prescribes guidelines for service on foreign states, and section 1608(b) has service rules for instrumentalities. Courts disagree over whether strict compliance with these service requirements is necessary. Some courts find “substantial compliance” with service rules adequate for instrumentalities, although courts differ on what constitutes substantial compliance. Some courts permit nearly any method of service as long as the defendant has actual notice of suit, while others find that only the most technical violations of the statute will excuse perfect service. In the opinion of the Working Group, the 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. A further change should be made to encourage courts to find satisfactory service approaches when a plaintiff has difficulty serving an instrumentality or an individual associated with an instrumentality.

A. Service on instrumentalities

A line of cases has developed approving “substantial compliance” with the service of process rules in section 1608(b) for instrumentalities of foreign states.^{258/} For instance, in *Straub*

^{258/} Section 1608(b) provides:

- (b) Service in the courts of the United States and of the States 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—

v. A.P. Green, the Ninth Circuit adopted the substantial compliance test and found that service was valid even though it had not been dispatched by the clerk of the court as required under section 1608(b)(3).^{259/} In *Straub*, the court decided that “the pivotal factor is whether the defendant receives actual notice and was not prejudiced by the lack of compliance with the FSIA.”^{260/}

Consistency of application, however, has been one of the problems with the substantial compliance rule. In *Gerritsen v. Consulado General de Mexico*, the Ninth Circuit found that the failure to provide a translation of the summons and complaint rendered service defective.^{261/} The *Straub* court distinguished *Gerritsen* saying that failure to provide translations was such a “fundamental defect that it failed both a ‘strict compliance’ and a ‘substantial compliance’ test.”^{262/} By contrast, in *Sherer v. Construcciones Aeronauticas, S.A.*, the Sixth Circuit found that the plaintiff had substantially complied with section 1608(b) even though it failed to provide a translation of the summons and complaint.^{263/}

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- (A) as directed by an authority of the foreign state or political sub-division in response to a letter rogatory or request or
 - (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or
 - (C) as directed by order of the court consistent with the law of the place where service is to be made.

^{259/} 38 F.3d 448 (9th Cir. 1994).

^{260/} 38 F.3d at 453. See also *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344 (11th Cir. 1982) (“The failure to follow precisely those steps in § 1608 designed to insure that actual notice be made should not override and invalidate the fact that in this case notice was actually received.”); *Obenchain Corp. v. Corporation Nationale de Inversiones*, 656 F. Supp. 435 (W.D. Pa. 1987) (finding that service was sufficient even though the complaint had been dispatched by the plaintiff rather than by the clerk of the court and no notice of suit was included), *aff’d in part and rev’d in part*, 898 F.2d 1242 (3d Cir. 1990) .

^{261/} 989 F.2d 340 (9th Cir. 1993).

^{262/} 38 F.3d at 453.

^{263/} 987 F.2d 1246 (6th Cir. 1993). See also *Banco Metropolitano v. Desarrollo de Autopistas*, 616 F. Supp. 301 (S.D.N.Y. 1985) (finding substantial compliance where defendant had actual notice of the suit, despite plaintiff’s failure to include a translation of the complaint); *LeDonne v. Gulf Air*, 700 F. Supp. 1400 (E.D. Va. 1988)

Not all courts accept the substantial compliance rule.^{264/} In addition, some courts that require strict compliance have allowed plaintiffs to cure the defective service, if feasible.^{265/}

B. Service on foreign states

In contrast to the treatment of instrumentalities, courts are more likely to apply the FSIA service requirements strictly when the defendant is a foreign state.^{266/} In *Transaero v. La Fuerza*

(finding service deficient where summons and complaint served on improper foreign representative and no translation was included, even though defendant had actual notice of the suit); *Doty v. Magnum Research*, 994 F. Supp. 894 (N.D. Ohio 1997) (finding service adequate even though service was effected on the wrong person, but defendant nevertheless had actual notice).

^{264/} See *Copelco Capital, Inc. v. General Consul of Bolivia*, 940 F. Supp. 93 (S.D.N.Y. 1996) (finding that, although defendant had actual notice of the suit, failure to comply with the special arrangement between the parties under section 1608(b)(1) rendered service invalid); *Bybee v. Oper Der Standt Bonn*, 899 F. Supp. 1217 (S.D.N.Y. 1995) (finding that service was defective where it did not comply with the Hague Convention under section 1608(b)(2)).

^{265/} See *First City v. Rafidain Bank*, 1992 WL 296434 (S.D.N.Y.) (finding that service was deficient where summons and complaint were delivered to the improper foreign representative but allowing plaintiff reasonable time to re-serve effectively); *Lippus v. Dahlgren Manufacturing Co.*, 644 F. Supp. 1473 (E.D.N.Y. 1986) (finding that service was defective where no translation accompanied the summons and complaint but allowing plaintiff to cure the defect).

^{266/} Section 1608(a) provides:

- (a) Service in the courts of the United States and of the States 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.

Aerea Boliviana,^{267/} the D.C. Circuit held that strict compliance with service procedures under in section 1608(a) was necessary when dealing with a foreign state. The court dismissed the complaint because the plaintiff had not served the proper representative. The court looked to the legislative history to determine that service on foreign states should be treated more strictly than instrumentalities. For example, the court said that the legislative history for section 1608(a) “sets forth the exclusive procedures for service on a foreign state”^{268/} but noted that the legislative history for section 1608(b) contains no such provision.^{269/} Additionally, the court said that section 1608(b) “allows simple delivery ‘if reasonably calculated to give actual notice,’”^{270/} but found that section 1608(a) says nothing about actual notice.^{269/} The court also said that one reason Congress distinguished between instrumentalities and foreign states was to give foreign states more and better notice.^{270/} Unlike the generally commercial instrumentalities that frequently participate in international commerce, foreign governments are less likely to understand the American legal system.^{271/} Accordingly, the court held that foreign states or political subdivisions must be served in strict compliance with the terms of section 1608(a); otherwise claims against them would be dismissed.^{272/}

In *Alberti v. Empresa Nicaraguense de la Carne*, the Seventh Circuit found that the legislative history of section 1608(a) specifically precludes service on the diplomatic mission of the foreign state, and deeming such service to be “substantial compliance” would directly

^{267/} 30 F.3d 148 (D.C. Cir. 1994).

^{268/} Id. (citing 1976 U.S.C.C.A.N. at 6632).

^{269/} Id.

^{270/} Id.

^{271/} See id.

^{272/} See also *Finamar Investors v. Republic of Tadjikistan*, 889 F. Supp. 114, 117-18 (S.D.N.Y. 1995) (citing *Transaero* and reciting same legislative history and statutory language to come to the same conclusion that strict compliance is proper test for foreign states and political subdivisions).

contradict congressional intent. Service on an ambassador rather than the “head of the ministry of foreign affairs” thus rendered service fatally defective.^{273/}

Though applying the “strict compliance” test, some courts allow plaintiffs suing foreign states to cure defective service.^{274/} Finally, a minority of courts have suggested that substantial compliance is sufficient even when the defendant is a foreign state.^{275/}

C. Working Group recommendation

The courts traditionally have required strict compliance with service of process rules, even for private persons.^{276/} This practice should apply equally to service upon foreign states and their instrumentalities. The substantial compliance rule is inconsistent with this traditional practice, is difficult to apply uniformly, and has a potential effect on international relations,

^{273/} 705 F.2d 250 (7th Cir. 1983). See also *Shen v. Japan Airlines*, 918 F. Supp. 686 (S.D.N.Y. 1994) (finding that service by mail to the “Japan Dept. of Justice, Immigration Bureau” instead of the Japanese “head of the ministry of foreign affairs” rendered service defective); *Gray v. Permanent Mission of People’s Republic of the Congo to the U.N.*, 443 F. Supp. 816, 821 (S.D.N.Y. 1978) (“informal notification through channels clearly outside the obvious requirements of the applicable statute cannot be substituted for those which meet the requirements”), *aff’d mem.*, 580 F.2d 1044 (2d Cir. 1978); *2 Tudor City Place v. Libyan Arab Republic Mission to the U.N.*, 470 N.Y.S. 2d 301 (Civ. Ct. 1983) (finding that mail is an inadequate method of service).

^{274/} See *Finamar Investors v. Republic of Tadjikistan*, 889 F. Supp. 114 (1995) (finding that service was defective where the plaintiff served the improper party in the incorrect language but allowing the plaintiff to cure the defects if done in a reasonable time); *Magnus Electronics v. Royal Bank of Canada*, 620 F. Supp. 387 (N.D. Ill. 1985) (finding that the noncompliance with the FSIA’s literal requirements rendered service defective but noting that cure sometimes may be allowed).

^{275/} See *Berdakin v. Consulado de la Republica El Salvador*, 912 F. Supp. 458 (C.D. Cal. 1995) (noting that the Ninth Circuit has adopted a substantial compliance test but finding that where the plaintiff failed to comply with the translation requirement, failed to effect service by a form of mail requiring a signed receipt, and failed to address the process to the correct person, the plaintiff failed even the substantial compliance test); *Marlowe v. Argentine Naval Commission*, 604 F. Supp. 703 (D.D.C. 1985) (finding that substantial compliance was the correct test, and holding that where plaintiff substantially complied with terms of an agreement between the parties, service was effective); *International Schools Service v. Iran*, 505 F. Supp. 178 (D. N.J. 1981) (allowing service to be accomplished by telex, although telex was not a method contemplated by section 1608(a)).

^{276/} *Veck v. Community Enters. Inc.*, 487 F.2d 423, 426 (9th Cir. 1973) (in personam jurisdiction can be obtained only by defendant’s voluntary appearance in the action or service of the court’s process on him in strict conformance with a valid statute authorizing it”); see also *R. Griggs Group Ltd. v. Filanto Spa.*, 920 F. Supp. 1100, 1103 (D. Nev. 1996); *Leab v. Streit*, 584 F. Supp. 748 (S.D.N.Y. 1984); but see *Sanderford v. Prudential Ins. Co. of America*, 902 F.2d 893 (11th Cir. 1990) (defendant waived defense of insufficient service when it did not respond to a summons that was in substantial compliance with Rule 4).

comity, and the enforceability of U.S. judgments. In the Working Group's view, the better practice would be to require strict compliance and to add the phrase "*strictly in accordance with the following provisions*" to the introduction of sections 1608(a) and (b) (and the proposed new subsection (c) to address service on individuals) to make clear that strict compliance is required.

This rule of strict compliance should not prevent courts from assisting plaintiffs that encounter unexpected problems serving an instrumentality or an individual associated with an instrumentality in a specific case. For example, we have already discussed that on occasion a plaintiff acting in good faith and with due diligence might not be aware that a defendant is an instrumentality of a foreign state and might therefore serve the entity as if it were a private person. As we mentioned in Part III.C and above, courts should continue to be prepared to remedy this situation by allowing a plaintiff additional time to cure the deficiency and re-serve the defendant in accordance with the Act.

In addition, the Working Group recommends 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. Under the Working Group's recommended approach, this provision would apply to a director, officer, or employee of an instrumentality as well as an instrumentality but would not apply to foreign states proper (service by 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).

The relevant provision is section 1608(b)(3)(C), which permits a court to direct a method of service on an instrumentality when (i) the method is consistent with the law of the place of service, (ii) service cannot be made under subsections (b)(1)-(2), (iii) the service is reasonably calculated to give actual notice, and (iv) the summons and complaint are translated into the official language of the foreign state. We recommend that one further qualification be added and that a comparable provision be added to the rules for serving individuals.

The Federal Rules of Civil Procedure also have an analogous provision. In certain circumstances, Rule 4(f)(3) permits service on a person outside of the United States by means “not prohibited by international agreement as may be directed by the court.” Courts use the authority of Rule 4(f)(3) when a plaintiff has some excusable problem in effecting service properly.^{277278/}

Although Rule 4(f)(3) permits a method of service that violates foreign law,^{279/} the Working Group does not favor such an approach for serving instrumentalities or their associated individuals. We recommend that a new section of the FSIA authorizing a court to direct a special method of service contain, in addition to all the prerequisites that currently pertain to use of section 1608(b)(3), both the current language of section 1608(b)(3)(C) on service methods that do not violate the law of the place of service and the language of Rule 4(f)(3) on compliance with international agreements. This would make the FSIA service provisions conform more closely with Rule 4(f)(3) and would ensure that courts do not direct a method inconsistent with an applicable international agreement.

^{278/} See Federal Home Loan Mortgage Corp. v. Mirchandani, 1996 WL 534821 (E.D.N.Y. 1996); Kim v. Mohn, 909 F. Supp. 474 (S.D. Tex. 1995).

The Working Group proposes that, aside from language requiring strict compliance, as described above, its recommendations on service be implemented with the following language:

If service cannot reasonably be made under [the provisions for service on instrumentalities or individuals], as applicable, the court on motion of the plaintiff may by order direct a method of delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state, that is reasonably calculated to give actual notice, consistent with the law of the place where service is to be made, and not prohibited by international agreement. This section does not apply to service [on foreign states or foreign government officials].

^{279/} Compare Fed. R. Civ. P. 4(f)(2) and 4(f)(3); see Advisory Committee Notes on the 1993 Amendments, 146 F.R.D. 569.

VIII. EXECUTION

The execution immunity provisions of the Act, and particularly section 1610, are generally regarded as among the most confusing and ineffectual in the statute. Successful plaintiffs encounter difficulty in executing judgments against foreign states. In response, the Working Group proposes a revision of section 1610(a) to simplify the language and allow attachments and executions of foreign state property without the need to show a nexus to an underlying claim. These proposed revisions relate only to attachment and execution on a judgment and not to pre-judgment attachment. All of the remaining safeguards of sections 1609, 1610, and 1611 for execution immunity are retained, and the protections for property covered by diplomatic or consular immunity are clarified.

A. FSIA provisions at issue and background

The FSIA has three sections dealing with 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. In general, the exceptions parallel the exceptions in section 1605(a) from immunity from suit:

The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

- (2) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

- (3) the property is or was used for the commercial activity upon which the claim is based, or
- (4) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or
- (5) the execution relates to a judgment establishing rights in property –
 - (A) which is acquired by succession or gift, or
 - (B) which is immovable and situated in the United States: Provided, that such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or
- (6) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or
- (7) the 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, or
- (8) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

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.” Section 1610(d) deals with “attachment prior to the entry of judgment.”

Section 1611 defines certain types of property that are always immune from execution. They include funds being disbursed by international organizations, property “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,” and property “used in connection with a military activity.”

B. Current state of the law

Several problems have been identified in relation to the execution provisions of the FSIA. To begin with, it is by no means beyond doubt whether there is – or ever has been – a need for separate provisions on foreign sovereign immunity from execution of judgments or enforcement of remedies, as distinct from the broader treatment of foreign sovereign immunities. While jurisdiction to adjudicate may be analytically distinct from jurisdiction to enforce,^{280/} it is open to question whether a court’s ability to enforce its judgments or remedies should be subject to any different analysis from the threshold question of whether that court has jurisdiction over the foreign sovereign in the first place.^{281/} Nonetheless the FSIA draws the distinction.

The question becomes, then, the nature and scope of a foreign sovereign’s immunity from execution, a question addressed by section 1610. As a matter of structure, section 1610 suffers from two defects.

The first is that, in a statute of substantial complexity, section 1610 is among the most confusing. One source of structural confusion is that section 1610 grants foreign states proper and instrumentalities a higher level of execution immunity in subsection (a) than it grants in subsection (b) to instrumentalities engaged in commercial activity in the United States. A second distinction drawn in section 1610 is between attachment in aid of execution or execution

^{280/} See Restatement (Third) of the Foreign Relations Law of the United States § 401(c) (1987).

^{281/} British State Immunity Act § 13 (1978), reprinted in 17 ILM 1123, 1126 (1978); European Convention on State Immunity, 1972, art. 23, reprinted in 11 ILM 470, 478 (1972) (both of which contain restrictive provisions on execution).

in subsections (a) and (b) and pre-judgment attachments in subsection (d). The grounds for obtaining a pre-judgment attachment are even more limited than the ability to execute a judgment or attach in aid of execution. A third is that the waiver exceptions in the execution and attachment area suggest that a contracting party desiring a complete waiver of sovereign immunity must obtain separate waivers of immunity from jurisdiction, execution, and pre-judgment attachment.

The second problem is that the practical application of section 1610's provisions produces an extremely restrictive regime for enforcement of judgments against foreign sovereigns. Courts have applied section 1610(a) (as well as the limitations in section 1611) to prevent the enforcement of judgments even where the court had found that it otherwise properly had jurisdiction to adjudicate over the foreign sovereign.^{282/} This has meant that successful plaintiffs have been denied satisfaction when the foreign state defendant has refused to comply voluntarily with an adverse judgment.

Several factors combine to make execution against foreign states extremely restrictive. First is the threshold requirement in section 1610(a) 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." At the outset, this eliminates large classes of property that might be candidates for execution in satisfaction of a judgment against a foreign sovereign. Section 1611 further (and categorically) restricts the types and nature of property that may be executed against.

^{282/} 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).

A party seeking execution against a foreign sovereign thus must proceed against property used for a commercial activity and then must satisfy an additional exception provided in section 1610(a). These exceptions share the analytic structure of the provisions of section 1605(a) on immunity from adjudication. To date, some of these exceptions such as those concerning rights in property taken in violation of international law (subsection (a)(3)), rights in succession, gifted, or real property (subsection (a)(4)), and enforcement of arbitral awards (subsection (a)(6)), have not raised significant difficulties, mainly because they are seldom used. In addition, Congress recently amended section 1610 to allow executions against foreign sovereigns engaged in certain terrorist activities addressed in section 1605(a)(7). We do not plan on discussing this exception from execution immunity further except to note that it, and particularly the grant of discretion to the President to block enforcement in certain cases has been controversial.

The main points of contention concerning the exceptions to execution immunity are contained in sections 1610(a)(1), (a)(2), and (a)(5). Section 1610(a)(1) provides that an exception exists where a foreign sovereign has waived its immunity to execution either explicitly or by implication. In and of itself, this provision (and its coordinate provision in 1605(a)(1)) is unobjectionable. But courts have had some difficulty with it, particularly its allowance for implied waivers. As with implied waivers of immunity from suit, courts construe implied waivers of execution immunity narrowly and tend to reject them.^{283/} For the reasons we discussed earlier in connection with waiver of immunity from suit,^{284/} the statutory language permitting an implied waiver of execution immunity should be deleted. Although explicit waivers of execution

^{283/} See, e.g., *Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205 (5th Cir. 1994); *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980).

^{284/} See Part IV above.

immunity are becoming more common in transactions involving foreign sovereigns, they are infrequently litigated.

Subsection (a)(2) grants an exception for execution against property that “is or was used for the commercial activity upon which the claim is based.” This exception is meant to parallel the commercial activity exception for immunity from suit. If the underlying claim is based on a commercial activity, the property executed against must be related to that claim. 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. The real difficulty is in understanding the meaning of property used for the commercial activity that was the basis of the claim. Only in rare instances would a foreign state have property in the United States, perhaps an office, warehouse, or goods awaiting export, “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. Given that cases employing the commercial activity exception predominate, the awkwardness in the language of section 1610(a)(5) is particularly troublesome.

Subsection (a)(5) is an exception for liability or casualty insurance policies and is meant to relate to the non-commercial tort exception in section 1605(a)(5). 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.^{285/}

^{285/} See, e.g., *Brewer v. Socialist People’s Republic of Iraq*, 890 F.2d 97, 102 (8th Cir. 1989).

In addition to all of these process restrictions on the ability of claimants to defeat a foreign sovereign's execution immunity, the FSIA states that certain property is not eligible at all for execution. Most of these property-specific exclusions are found in section 1611. These exceptions regarding the nature of executable property include: (1) funds to be disbursed to a foreign sovereign from an international organization (section 1611(a)); (2) in the absence of waiver, property of a foreign central bank or monetary authority (section 1611(b)(1)); (3) property used in connection with a military activity (section 1611(b)(2)); and (4) property used for maintaining a diplomatic or consular mission or the residence of the Chief of that mission (section 1610(a)(4)(B)). These exclusions have been relatively uncontroversial, although courts have had some difficulty in determining the immunity of embassy bank accounts.^{286/}

C. Working Group recommendation

The Working Group believes that the execution provisions should be strengthened so that a successful plaintiff has a better chance of recovery from a foreign state that does not voluntarily pay a judgment. We propose to cure the two most glaring deficiencies of the execution immunity provisions: the requirement in section 1610(a)(2) that execution in a commercial activity case be limited to property related to the same commercial activity and the lack of an execution remedy, other than access to a U.S. insurance policy, for non-commercial tort cases covered by section 1605(a)(5). This initiative would be a partial legislative response to concerns expressed about limitations on execution against foreign states.^{287/} As commentators

^{286/} See *Liberian Eastern Timber Co.*, 659 F. Supp. at 608; *Birch Shipping Corp.*, 507 F. Supp. at 312-13.

^{287/} See, e.g., *De Letelier v. Republic of Chile*, 567 F. Supp. 1490, 1499-1500 (S.D.N.Y. 1983), rev'd, 748 F.2d 790 (2d Cir. 1984).

have noted, however,^{288/} deleting the requirement in section 1610(a)(2) of a connection to the commercial claim would not address the issue of separate entities. That issue arose in the *Bancec* case,^{289/} which the Working Group generally approves and proposes to leave unaffected, as well as the *Letelier* case in connection with the treatment of the Chilean National Airline (LAN) as a separate entity from Chile itself. Nevertheless, eliminating the requirement that the commercial property against which execution is being sought must be related to the underlying claim would provide additional property to satisfy judgments.

The Working Group's proposed changes to the execution provisions of the FSIA would thus focus on the exceptions in section 1610(a). The introductory language would remain the same. The waiver exception in subsection (a)(1) would be changed to delete the possibility of waiver by implication and to make the other changes explained in Part IV in connection with waiver of jurisdictional immunity, except that waiver by participation in litigation would not apply to waiver of execution immunity. The remainder of section 1610(a) would be deleted and replaced with a new subsection (a)(2):

- (2) *the judgment relates to a claim for which the foreign state is not immune under section 1605, provided that, where a judgment is based on an order confirming an arbitral award rendered against the foreign state, the attachment in aid of execution, or execution, shall not be inconsistent with any provision in the arbitral agreement.*

This proposed change in section 1610(a) vastly simplifies the language of that provision. It removes unnecessary and redundant provisions concerning judgments establishing rights in property taken in violation of international law (former section 1610(a)(3)), rights in property

^{288/} See Stacey P. Nakasian, Note, Proposed Amendments to the Provisions of the Foreign Sovereign Immunities Act of 1976 Governing Execution of Judgments, 23 Geo. Wash. J. Int'l L. & Econ. 179, 200-03 (1989).

^{289/} First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983).

(section 1610(a)(4)), proceeds of insurance policies (section 1610(a)(5)), judgments confirming arbitral awards (section 1610(a)(6)), and matters arising under section 1605(a)(7) (section 1610(a)(7)). It should be noted that the important proviso of former section 1610(a)(6) on arbitration awards is retained but in a much clearer fashion as a caveat to a new section 1610(a)(2). By consolidating execution immunities and connecting them to the appropriate language of 1605(a), the new section 1610(a)(2) language retains important aspects of execution immunity while making clear that (i) the commercial property of a foreign sovereign may be available to satisfy judgments arising under the non-commercial tort exception of 1605(a)(5) and (ii) there is no requirement of a nexus between the property being attached or executed against and the underlying dispute. The Working Group believes that these changes, aside from simplifying the statutory language and thus ensuring consistent respect for execution immunities, would also be consistent with the international law on this subject.

The Working Group also believes that, in view of the proposed revision of section 1610(a), which applies to executions against both foreign states and instrumentalities of foreign states, the separate provision on execution against instrumentalities in section 1610(b) is no longer necessary. Relaxing the restrictions on execution in section 1610(a) brings that provision more in line with the current statute's approach to execution against the property of instrumentalities and makes an additional provision on instrumentalities superfluous. Moreover, none of the other statutory codifications of sovereign immunity – to the extent they even address execution immunity – makes a distinction between foreign states proper and instrumentalities for purposes of execution.^{290/}

^{290/} Australian Foreign Sovereign Immunities Act §§ 30-35 (1985), reprinted in 25 ILM 715, 721-22 (1986); British State Immunity Act §§ 13, 14 (1978), reprinted in 17 ILM 1123, 1126-27 (1978).

Otherwise, the Working Group would leave the execution sections largely intact. The general presumption of execution immunity in section 1609 should be retained. Likewise, no changes should be made in the pre-judgment attachment provisions or in the property-specific exclusions from execution in section 1611. The only additional change we suggest is clarification of the immunity of property qualifying for diplomatic and consular protection, aspects of which are in sections 1610(a)(4)(B) and 1611(c). To complement the principle that only foreign state property used for a commercial activity is to be available for execution, the Act should exempt from execution any official, diplomatic, or consular property protected by treaty or another provision of federal law. This clarification would not alter the special provision on execution of a judgment based on the state terrorism exception, which makes blocked financial assets available for execution, section 1610(f)(1), because this provision was recently enacted and was the subject of congressional attention in 2000. The language we propose would be added to section 1611(b) and would state: *“subject to section 1610(f)(1), the property is protected from execution or attachment by the Vienna Convention on Diplomatic Relations (April 18, 1961, 23 U.S.T. 3227), the Vienna Convention on Consular Relations (April 24, 1963, 21 U.S.T. 77), or any other treaty, international convention, international agreement, or provision of federal law related to property of foreign states or instrumentalities of foreign states.”*

IX. STAYS OF PRE-JUDGMENT PROCEEDINGS AND OF EXECUTIONS

Although the Working Group is recommending rules to narrow FSIA immunity from attachment and execution, it recognizes that corresponding protections for foreign states should be enacted to prevent extreme hardship. As international commerce has increased, U.S. law has evolved from a rule of absolute immunity to more limited immunity from attachment and execution. The Working Group's recommendations for further narrowing this immunity will give contracting parties greater assurance of enforcing obligations undertaken by foreign states. Yet, while foreign states are more frequently subjected to the rules of the marketplace, they do not receive the same protection available to other market participants, particularly when they are in financial distress. For instance, bankruptcy and insolvency laws do not apply to foreign states. In order to prevent an imbalance between creditor rights and debtor protections, the Working Group recommends providing the courts with explicit authority to stay proceedings or enforcement in certain narrow circumstances.

Courts have found discretion to stay proceedings and regulate execution of judgments under a variety of legal principles and state statutes. The Working Group's proposal is designed to provide limited, specific authority for the court to provide foreign states with protection when the existence of the proceeding or the timing of execution will inflict extreme hardship. The Working Group's proposal does not affect the enforceability of contracts, which remains an important concern. Only the timing of enforcement is affected.

A. Authority of courts to control proceedings

The Supreme Court has held that federal courts have inherent authority to stay lawsuits.^{291/} This power has been applied in lawsuits involving foreign parties. For instance, U.S. court proceedings have been stayed or dismissed under principles of international comity in deference to bankruptcy or insolvency proceedings in foreign states.^{292/} While United States public policy strongly supports the enforceability of contracts and obligations,^{293/} a court's authority to stay or regulate enforcement has not threatened this important principle. For instance, one court entered summary judgment enforcing a debt instrument, despite the foreign state's entreaties, supported by the International Monetary Fund ("IMF"), that the judgment would have "a devastating financial impact."^{294/}

The Executive Branch, however, has recognized that lawsuits can be used inappropriately to inflict injury upon a foreign state. In a Statement of Interest in a lawsuit brought by a lone creditor that was disrupting Brazil's debt-restructuring negotiations, the Justice Department reiterated the strong U.S. policy towards ensuring the enforceability of contracts, saying "[t]he entire strategy is grounded in the understanding that, while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and

^{291/} In *Landis v. North American Co.*, the Court said: "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." 299 U.S. 248, 254 (1936). See also *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Limonium Maritime, S.A. v. Mizushima Marinera, S.A.*, 201 F.3d 431 (2d Cir. 1999).

^{292/} See, e.g., *Canada Southern Ry. v. Gebhard*, 109 U.S. 527 (1883); *Cunard S.S. Co. v. Salen Reefers Servs. AB*, 773 F.2d 452 (2d Cir. 1985); *Drexel Burnham Lambert Group, Ltd. v. Galadari*, 777 F.2d 877 (2d Cir. 1985) (Dubai liquidation proceedings).

^{293/} See *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985); *Pravin Banker Associates, Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997).

^{294/} *A.I. Credit Corp. v. Government of Jamaica*, 666 F. Supp. 629, 633 (S.D.N.Y. 1987). See also *National Union Fire Ins. Co. v. Peoples Republic of the Congo*, 729 F. Supp. 936, 944 (S.D.N.Y. 1989).

enforceable.”^{295/} The Justice Department, however, asked the court to guard against the misuse of litigation, saying:

[T]he United States is also concerned that this lawsuit could unduly encourage other commercial creditors to *try to extract through litigation concessions from sovereign debtors that they were not able to obtain through good faith negotiations.*^{296/}

In a similar situation, the Second Circuit noted with approval the district court’s 18-month stay of the lawsuit brought by a lone creditor against the Peruvian government.^{297/} The district court had found that the lawsuit would disrupt Peru’s economic adjustment program, described by the IMF as “courageous and far-reaching,” and its efforts to negotiate a debt restructuring under the U.S.-sponsored Brady Plan. After the expiration of the second stay, the district court entered summary judgment for the plaintiff creditor. The court of appeals affirmed summary judgment, but also concluded that the stays were appropriate and “did not threaten the long-term enforceability of the debt.”^{298/}

The enactment of a stay provision would not be inconsistent with existing practice. The courts have exercised their discretion to prevent undue hardships in a variety of circumstances. Federal courts have denied prejudgment attachment orders against foreign states and instrumentalities when such orders would create undue hardship. In *Meridien Int’l Bank v. Liberia*, the court vacated an ex parte order of prejudgment attachment against Liberia’s maritime trust fund because of the “harsh consequences that the Attachment has had and will

^{295/} Statement of Interest of the United States of America in Opposition To the First Amended Complaint, CIBC Bank and Trust Co., Ltd. v. Banco Central Do Brasil Banco Do Brasil, S.A. And Citibank, N.A, 94 Civ. 4733 at 11 (S.D.N.Y. 1994), citing *Allied*, 757 F.2d at 519-520.

^{296/} *Id.* at 7 (emphasis added).

^{297/} *Pravin Banker Associates Ltd. v. Banco Popular del Peru*, 165 B.R. 379, 388 (S.D.N.Y. 1994), *aff’d*, 109 F.3d 850 (2d Cir. 1997).

^{298/} *Pravin Banker*, 109 F.3d at 854.

continue to have on the people of Liberia.”^{299/} Liberia, supported by a Statement of Interest from the United States, had argued that Liberia was in “desperate need of hard currency” to address the instability, suffering, disease, and death brought about by a six-year civil war.^{300/} In *Interpetrol Bermuda Ltd. v. Trinidad and Tobago Oil Co.*, the court vacated an attachment order based upon the plaintiff’s failure to demonstrate the continued need for the attachment and the defendant’s showing of “demonstrated hardship” from increased borrowing costs caused by the attachment.^{301/} In *Elliott Associates, L.P. v. Republic of Peru*, the court denied an order of pre-judgment attachment that created “an avoidable risk of jeopardizing” a debt restructuring agreement between Peru and its other commercial creditors.^{302/} After judgment, one district court exercised its discretion to limit a supersedeas bond to the amount of overdue interest.^{303/} The court found that the immediate enforcement of the judgment would impact the government of Palau severely while the plaintiff’s ability to collect on a final judgment would not be affected.^{304/}

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.”^{305/} Post-judgment attachment and execution, therefore, can only occur by court order.^{306/} The purpose of this

^{299/} 1996 WL 22338 at *6 (S.D.N.Y.).

^{300/} *Id.* at *4.

^{301/} 513 N.Y.S.2d 598, 604-05 (Sup. Ct. 1987).

^{302/} 948 F. Supp. 1203, 1213-14 (S.D.N.Y. 1996).

^{303/} *Morgan Guaranty Trust Co. v. Republic of Palau*, 702 F. Supp. 60, 66 (S.D.N.Y. 1988), vacated on other grounds, 924 F.2d 1237 (2d Cir. 1991).

^{304/} *Id.* at 65-66.

^{305/} 28 U.S.C. § 1610(c). See *Practical Concepts, Inc. v. Republic of Bolivia*, 613 F. Supp. 863 (D.D.C. 1985), vacated on other grounds, 811 F.2d 1543 (D.C. Cir. 1987) (attachment order issued after 15 months); *Singleton v. Guangzhou Ocean Shipping Co.*, 1994 WL 518049 (E.D. La. 1994) (motion for attachment order against Chinese company denied after 16 days).

^{306/} *Gadsby 7 Hannah v. Socialist Republic of Romania*, 698 F. Supp. 483 (S.D.N.Y. 1988); *Ferrostaal Metals Corp. v. S.S. Lash Pacifico*, 652 F. Supp. 420, 423 (S.D.N.Y. 1987); but see, *Raji v. Bank Sepah-Iran*, 529 N.Y.S.2d 420 (Sup. Ct. 1988).

section is to permit sufficient time for the foreign state to conduct its usual procedures for paying judgments, including legislation, before steps are taken to enforce judgments.^{307/} One court went beyond the limits of section 1610 and exercised its discretion to deny a judgment creditor the right to execute against the funds brought to the United States to make a quarterly interest payment. The court found that execution against these funds would “unfairly prejudice” the rights of those creditors who have agreed to settle their claims under the country’s Brady Plan.^{308/}

Some state and federal laws provide the courts with authority to regulate the manner and timing of enforcement of judgments.^{309/} According to the Second Circuit, these provisions provide the courts with a “practical method to protect judgment debtors from the often harsh results of lawful enforcement procedures,” which it may use in order to prevent unreasonable disadvantage or other prejudice through its “broad discretionary power to control and regulate the enforcement of a money judgment.”^{310/} In exercising this power, the courts should prevent “exploitive overreaching.”^{311/}

B. Working Group recommendation

To mitigate the potentially harsh consequences of limiting sovereign immunity and to provide foreign states with protections similar to the ones other market participants have, the Working Group proposes to add statutory language to make explicit that courts have authority to

^{307/} 1976 U.S.C.C.A.N. at 6629.

^{308/} *Pravin Banker Associates, Ltd. v. Banco Popular del Peru*, 1996 WL 734887 (S.D.N.Y.).

^{309/} New York Civil Practices Law & Rules § 5240 (McKinney’s 1999); Federal Debt Collection Procedure, 28 U.S.C. § 3013. Both statutes have similar language. The federal statute states:

The court may at any time on its own initiative or the motion of any interested person, and after such notice as it may require, make an order denying, limiting, conditioning, regulating, extending, or modifying the use of any enforcement procedure under this chapter.

^{310/} *In re Persky*, 893 F.2d 15, 18 (2d Cir. 1989).

^{311/} *Mikulec v. United States*, 705 F.2d 599, 601 (2d Cir. 1983).

stay lawsuits and executions against foreign states.^{312/} This authority would not apply in cases against instrumentalities.

The amendments would address the limited circumstances in which the existence of the lawsuit or the immediate enforcement of a judgment would inflict extreme hardship. Examples of such cases are natural disasters, civil wars, or extreme economic disruption. For instance, the Armenia earthquake of February 1989 or the Bangladesh typhoon of May 1991 so paralyzed those countries that a court faced with a similar natural disaster might delay a lawsuit against those countries. The Iraqi invasion of Kuwait or the Liberian civil war were other situations where a court might act to stay a lawsuit to avoid an injustice. The *Pravin Banker* court found that failure to stay the lawsuit would have disrupted Peru's debt restructuring and could have ruined seven years of economic redevelopment and injured hundreds of other creditors.

^{312/} For several reasons, one member of the Working Group, Andrew Vollmer, does not support the proposal to provide courts with statutory authority to stay pre-judgment proceedings. First, including a statutory provision on stays of pre-judgment proceedings would encourage its use. Foreign states would seek such stays more frequently than they do now and would seek to expand the standard for granting stays. Such a provision would increase the costs of litigation and result in a greater number of stays.

Second, in general, the law should discourage not encourage stays of litigation. Stays harm the quality of justice by forcing reliance on old evidence. See *Clinton v. Jones*, 520 U.S. 681 (1997). Stays also delay resolution of claims, and society has a compelling interest in seeing that the procedures it offers for resolving disputes peacefully are meaningful and result in prompt decisions.

Third, pre-judgment stays could harm the financial interest of plaintiffs. Pre-judgment interest is not likely to be mandatory or routine under all potentially applicable laws.

Fourth, a statutory provision is not necessary to protect the interests of foreign states. Courts already have the inherent authority to stay their proceedings. This authority provides sufficient protection for those rare situations in which the pendency of litigation itself would significantly prejudice the interests of a foreign state. *Pravin Banker* shows that courts are alert to the possibility of delaying litigation against a foreign state.

Another member of the Working Group, Mark A. Cymrot, believes that the stay provisions do not go far enough and the execution provisions should not be liberalized until a comprehensive review of the laws and policies affecting sovereign debt defaults has been made. This review is beyond the scope of the Working Group. He feels that with the absence of an international bankruptcy or insolvency law or other similar mechanism for sovereigns, the current legal system is unfair to defaulting sovereigns and economically inefficient. Sovereign debtors are not given the same opportunity for a fresh start that the law gives to corporations and individuals. As a result, they are not given a sufficient opportunity to reorder their resources to become economically efficient.

The Working Group's recommendation is intended to improve the existing, inherent authority of courts to impose stays. It is designed to provide uniformity in the application of this authority to foreign states. It is also intended to reduce the need for litigation over a court's authority to impose a stay and the appropriate standard to be applied for such relief. This proposal is not intended to affect existing rights of creditors or other affected parties. In the Working Group's opinion, this proposed amendment should not undermine the enforceability of debts.

The Working Group proposes the following additions to the FSIA:

§ 1608(f). In an action against a foreign state, the court may stay the proceedings upon a motion and showing by the foreign state that the continuation of the proceedings would inflict extreme hardship upon the foreign state. The stay may be for a duration of no more than six months but may be renewed upon the motion of the foreign state for subsequent six-month periods up to a maximum term of three years from the date of the first stay order.

§ 1610 (c)(1). [Existing section 1610(c)].

(2) *The court may stay an order of attachment or execution under subsections (a) or (b) of this section upon a motion and showing by the foreign state that the enforcement of a judgment would inflict extreme hardship upon the foreign state. The stay may be for a duration of no more than six months but may be renewed upon the motion of the foreign state for subsequent six-month periods for a maximum term of three years from the date of the first stay order.*