This document is submitted to the meeting of the Council of The American Law Institute on October 15 (at 9:00 a.m.), and 16 (at 8:30 a.m.), 2015, at the Sofitel, 45 West 44th Street, New York, New York. This Draft is scheduled for discussion on Friday, October 16. As of the date it was printed, it had not been considered by the Council or membership of The American Law Institute, and therefore does not represent the position of the Institute on any of the issues with which it deals.

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Coordinating Reporters
Professor Sarah H. Cleveland  
Columbia University School of Law  
435 West 116th Street  
New York, NY 10027-7237  
Fax: (212) 854-7946  
Email: scleve@law.columbia.edu

Professor Paul B. Stephan  
University of Virginia School of Law  
580 Massie Road  
Charlottesville, VA 22903-1738  
Fax: (434) 924-7536  
Email: pbs@virginia.edu

Reporters – Jurisdiction
Professor William S. Dodge  
University of California, Davis  
School of Law  
400 Mrak Hall Drive  
Davis, CA 95616-5203  
Fax: (530) 752-4704  
Email: wsdodge@ucdavis.edu

Professor Anthea Roberts  
Columbia University School of Law  
921 Jerome Greene Hall  
435 West 116th Street  
New York, NY 10027-7237  
Fax: (212) 854-7946  
Email: roberts_anthea@hotmail.com  
and  
Law Department, London School of Economics New Academic Building  
6.23, Houghton Street, London, WC2A 2AE England  
Fax: (020) 7955-7366  
Email: a.e.roberts@lse.ac.uk

Professor Paul B. Stephan  
(see above)

Reporters – Treaties
Professor Curtis A. Bradley  
Duke University School of Law  
210 Science Drive, Room 3182  
Durham, NC 27708-0360  
Fax: (919) 613-7158  
Email: cbradley@law.duke.edu

Professor Sarah H. Cleveland  
(see above)

Professor Edward T. Swaine  
George Washington University Law School  
2000 H Street NW  
Washington, DC 20052-0026  
Fax: (202) 994-1684  
Email: eswaine@law.gwu.edu
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COORDINATING REPORTERS
SARAH H. CLEVELAND, Columbia University School of Law, New York, NY
PAUL B. STEPHAN, University of Virginia School of Law, Charlottesville, VA

COUNSELORS
JOHN B. BELLINGER III, Arnold & Porter, Washington, DC
DANIEL BETHLEHEM, 20 Essex Street, London, England
DAVID D. CARON, The Dickson Poon School of Law at King’s College London, London, England
JOAN E. DONOGHUE, International Court of Justice, The Hague, Netherlands
CONRAD K. HARPER, Simpson Thacher & Bartlett (retired), New York, NY
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LIAISON

For the American Bar Association Section of International Law

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The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

This project was initiated in 2012. Tentative Draft No. 1, containing §§ 451, 453, 458, and 460, was approved by the membership at the 2015 ALI Annual Meeting.

Earlier versions of the material contained in this Draft can be found in Preliminary Draft No. 2 (2014).
Restatements (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.

a. Nature of a Restatement. Webster’s Third New International Dictionary defines the verb “restate” as “to state again or in a new form” [emphasis added]. This definition neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.

The law of the Restatements is generally common law, the law developed and articulated by judges in the course of deciding specific cases. For the most part Restatements thus assume a body of shared doctrine enabling courts to render their judgments in a consistent and reasonably predictable manner. In the view of the Institute’s founders, however, the underlying principles of the common law had become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States. The 1923 report suggested that, in contrast, the Restatements were to be at once “analytical, critical and constructive.” In seeing each subject clearly and as a whole, they would discern the underlying principles that gave it coherence and thus restore the unity of the common law as properly apprehended.

Unlike the episodic occasions for judicial formulations presented by particular cases, however, Restatements scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed. Restatements—“analytical, critical and constructive”—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute’s founders envisioned a Restatement’s black-letter statement of legal rules as being “made with the care and precision of a well-drawn statute.” They cautioned, however, that “a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended.” Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.

A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what Herbert Wechsler called “a preponderating balance of authority” but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went
the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.

A Restatement consists of an appropriate mix of these four elements, with the relative weighing of these considerations being art and not science. The Institute, however, needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.

An excellent common-law judge is engaged in exactly the same sort of inquiry. In the words of Professor Wechsler, which are quoted on the wall of the conference room in the ALI headquarters in Philadelphia:

We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.

But in the quest to determine the best rule, what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law. The goals envisioned for the Restatement process by the Institute’s founders remain pertinent today:

It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, which it is proper for an organization of lawyers to promote and which make the law better adapted to the needs of life. [emphasis added]
Chapter 5 Immunity of States from Jurisdiction

§§ 451, 453, 458, 460 (TD No. 1) - approved at 2015 Annual Meeting
REPORTERS’ MEMORANDUM

COUNCIL DRAFT NO. 2

RESTATEMENT OF THE LAW FOURTH
THE FOREIGN RELATIONS LAW OF THE UNITED STATES
SOVEREIGN IMMUNITY

CHAPTER 5

IMMUNITY OF STATES FROM JURISDICTION

This Chapter of the Restatement addresses the immunity of foreign states from jurisdiction to adjudicate (Subchapter A), from jurisdiction to prescribe (Subchapter B), and from nonjudicial enforcement (Subchapter C).

Council Draft 2 includes six sections, all of which have previously been submitted to the Advisers in Preliminary Draft 2.

Section 455, Claims Concerning Property Taken in Violation of International Law: Law of the United States, addresses the provisions of FSIA § 1605(a)(3). It amends the black-letter portion of § 455(3) of Restatement Third and substantially expands the Comment and Reporters’ Notes to reflect relevant decisional law, in particular as related to foreign expropriations and nationalizations. The Notes address, inter alia, the questions of exhaustion of domestic remedies and the relationship of this provision to the Act of State doctrine. The discussion of claims based on property in the United States (previously addressed in § 455(1) and (2) of Restatement Third) is now covered in § 456, and claims in admiralty (previously addressed in § 455(4) of Restatement Third) are now taken up in § 459.

Section 456, Claims Based on Rights to Property in the United States, addresses the provisions of FSIA §§ 1605(a)(4). This Section revises and expands upon § 455(1) and (2) of the Restatement Third. It covers property acquired by succession or gift, rights in real property in the forum state, and property used for a commercial activity.

Section 459, Claims in Admiralty: Law of the United States, addresses justification over claims concerning maritime liens and claims to foreclose preferred mortgages under FSIA § 1606(b)-(d), which were previously addressed in § 455(4) of the Restatement Third. The Comment and Reporters’ Notes expand upon the relevant statutory provisions and offer a comparison to analogous provisions of foreign statutes as well as the European and UN Conventions.

Section 461, Service of Process, Venue, Removal: Law of the United States, combines what were §§ 457 and 458 in the Restatement Third. These Sections of the Restatement Third governing commencement and venue (§ 457), and actions commenced in state court (§ 458) were rarely cited. The language on venue in both Sections has been shortened and the two
Sections have been consolidated. The black-letter provisions that remain have been consolidated and reworded. The Comments have been comprehensively redrafted. The old § 457, Comment b, reproduced language from the statute on means of service. In the redrafted § 461, this language is summarized in a shorter Comment. New language describes the case law drawing distinctions between service on foreign states, for which strict compliance with the statute is required, and service on agencies or instrumentalities, for which substantial compliance coupled with actual notice suffices.

**Section 462,** Discovery: Law of the United States, is new in the Restatement Fourth. The Restatement Third addressed discovery in Comment c to § 451. The new Section in the Restatement Fourth reflects the importance of this topic for litigation involving foreign sovereigns. The black letter and the Comments reflect two basic principles: normal discovery rules generally apply in litigation against foreign sovereigns, but trial courts generally have discretion with respect to the scope and management of discovery, and they may exercise that discretion to avoid undue burdens on foreign states and to promote international comity. Section 462 uses the amended language of FRCP 26, which takes effect December 1, 2015, unless Congress takes action to prevent its adoption.

**Section 463,** Default Judgment Against Foreign States: Law of the United States, corresponds to § 459 of the Restatement Third. The black-letter language has been streamlined and simplified. The Comments and Reporters’ Notes have been updated.
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CHAPTER 5

IMMUNITY OF STATES FROM JURISDICTION

§ 455. Claims Concerning Property Taken in Violation of International Law: Law of the United States

Courts in the United States may exercise jurisdiction over a foreign state in any case in which rights to property taken in violation of international law are in issue if

(a) the property (or any property exchanged for such property) is present in the United States in connection with a commercial activity carried on by that foreign state in the United States; or
(b) the property (or any property exchanged for such property) is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in commercial activity in the United States.

Source Note:

Comment:

a. Rights in property taken in violation of international law. To come within the expropriation exception, a case must satisfy four criteria: (1) rights in property must be at issue, (2) the property must have been taken, (3) in violation of international law, and (4) the seized property (or property exchanged for that property) must be either (a) present in the United States “in connection with a commercial activity carried on in the United States by the foreign state” or (b) “owned or operated by an agency or instrumentality of the foreign state [that] is engaged in a commercial activity in the United States.”

b. Connection to the United States. In the former instance, either the property that was taken or, more likely, the “property exchanged for it” must be present in the United States. The nexus with the United States is thus provided by the presence of the property as well as the commercial activity of the foreign state in the United States. With respect to an agency or instrumentality, the nexus is supplied by the commercial activities of the agency or instrumentality in the United States. In both instances, the statute itself provides the jurisdictional
basis for adjudicating the claim against the foreign state, so that the action is neither in rem nor quasi in rem.

c. Violation of international law. The statute creates a significant, if limited, exception to immunity for certain actions involving takings of rights in property that violate international law. The statute provides neither a definition of the term “taking” nor any specific guidance for determining when a taking of property, or rights in property, violates international law. U.S. courts have thus looked to customary international law, or the text of an applicable treaty, to determine the relevant standards for assessing the legality of a particular taking for the purposes of jurisdiction. [See §§ 711-712.] Interpreting this exception, U.S. courts have typically found that a violation has occurred when a foreign state has expropriated or nationalized the property of a national of another state, and the taking was not for a public purpose, or was discriminatory, or was not accompanied by prompt, adequate, and effective compensation.

d. Rights in property. The statute does not define the term “rights in property,” but courts have held that it extends beyond actions based solely on title to, or possessory interests in, real or tangible property or claims for compensation for the taking of that property. In practice, the exception has been interpreted to encompass alleged “takings” of both tangible and intangible property as well as contractual rights. Claims for money damages for breach of contract are not, however, covered by this subsection of the statute.

REPORTERS’ NOTES

1. Scope. For the “expropriation” exception to apply, a U.S. court must find that: (1) rights in property are at issue, (2) those rights were taken, (3) the taking was in violation of international law, and (4) a specific jurisdictional nexus exists between the defendant and the United States. Failure to establish any of these elements results in a rejection of the suit for lack of jurisdiction. See, e.g., Freund v. Société Nationale des Chemins de Fer Français, 391 Fed. Appx. 939 (2d Cir. 2010); Alperin v. Vatican Bank, 360 Fed. Appx. 847 (9th Cir. 2009), amended in part, 365 Fed. Appx. 74 (9th Cir. 2010); Zappia Middle East Const. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000).

2. Nexus. The required jurisdictional nexus is established (i) if the taken property (or property exchanged for it) is present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or (ii) if the property is owned or operated by the agency or instrumentality, and that agency or instrumentality is engaged in a commercial activity in the United States. In the latter instance, the property itself need not be present in the United States and neither must it be connected to the commercial activities of the
(D.C. Cir. 2008). For a discussion of what constitutes “commercial activity” under the statute,
see § 454.

3. Rights in property. The statute provides no definition of “rights in property” nor does it
indicate what choice-of-law principles are applicable to determine such rights. Despite earlier
narrow interpretations, see, e.g., Peterson v. Kingdom of Saudi Arabia, 416 F.3d 83, 86-89 (D.C.
Cir. 2005); Gutch v. Federal Republic of Germany, 444 F. Supp. 2d 1 (D.D.C. 2006); and
Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 528 F. Supp. 1337, 1346
(S.D.N.Y.1982), the term has recently been interpreted more broadly to encompass interests in
both tangible and intangible (as well as real) property. Helmerich & Payne Intern. Drilling Co. v.
Bolivarian Republic of Venezuela, 784 F.3d 804, 815 (D.C. Cir. 2015) (“corporate ownership
aside, shareholders may have rights in corporate property” (citing § 712 of the Restatement
Third, Foreign Relations Law of the United States)); Abelesz v. Magyar Nemzeti Bank, 692 F.3d
661 (7th Cir. 2012) (bank accounts); Nemeriam v. Federal Democratic Republic of Ethiopia, 491
F.3d 470 (D.C. Cir. 2007) (same); cf. Agudas Chasidei Chabad of U.S. v. Russian Fed’n, 528
F.3d 934 (D.C. Cir. 2008) (property rights in library of Jewish religious books and manuscripts).
Cf. Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 197-
201 (2007) (interpreting the term “rights in immovable property” to extend beyond questions of
title, ownership, or possession).

Several courts have permitted actions under this section based on alleged “takings” of
contractual rights. See, e.g., Smith Rocke Ltd. v. Republica Bolivariana de Venezuela, 2014 WL
288705, No. 12 Cv. 736(LGS) (S.D.N.Y. Jan. 27, 2014) (rights to payment under notes); de
agreements related to seizure of art collection); Victims of Hungarian Holocaust v. Hungarian
State Railways, 798 F. Supp. 2d 934 (N.D. Ill. 2011) (claims based on railways’ alleged role in
taking personal possessions, funds, property, and contractual rights). By distinction, claims based
solely on a state party’s breach of its obligations under a specific contract should not constitute a
“taking” for purposes of this exception. Cf. Zappia Middle East Construction Co. Ltd., v.
Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000) (breach of a commercial contract alone
does not constitute a taking in violation of international law).

4. Taking in violation of international law. The statute’s legislative history makes clear that
the intent was to cover “the nationalization or expropriation of property without payment of the
prompt adequate and effective compensation required by international law” as well as “takings
which are arbitrary or discriminatory in nature.” H. R. Rep. No. 94-1487 at 19-20, reprinted in
1976 U.S.C.C.A.N. 6604, 6618. This subsection of the FSIA is purely jurisdictional and is not
itself the source of the relevant substantive law but refers to international law. Republic of
Austria v. Altmann, 541 U.S. 677, 695 n.15 (2004); Cassirer v. Kingdom of Spain, 616 F.3d
1019, 1026 (9th Cir. 2010) (en banc); McKesson v. Islamic Republic of Iran, 672 F.3d 1066,
A taking “offends international law when it does not serve a public purpose, when it discriminates against those who are not nationals of the country, or when it is not accomplished with payment of just compensation.” Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1027 (9th Cir. 2010). In Zappia Middle East Const. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000), the court referred to the statute’s legislative history in concluding that “[t]he term ‘taken’ thus clearly refers to acts of a sovereign, not a private enterprise, that deprive a plaintiff of property without adequate compensation.” In this sense, expropriations or nationalizations are sovereign (or “public”) rather than commercial acts and thus courts have concluded that such claims are not encompassed by the commercial activities exception in § 1605(a)(2). See, e.g., Smith Rocke Ltd. v. Republica Bolivariana de Venezuela, 2014 WL 288705, No. 12 Cv. 736(LGS) (S.D.N.Y. Jan. 27, 2014); but see McKesson v. Islamic Republic of Iran, 271 F.3d 1101, 1103 (D.C. Cir. 2001), cert. denied 537 U.S. 941 (2002) (holding that § 1605(a)(2) authorized McKesson’s suit against Iran for expropriation of its investment in an Iranian dairy where agents of the Iranian government took over the dairy’s board of directors, “froze out McKesson’s board members, and stopped paying McKesson’s dividends.”), confirmed by McKesson v. Islamic Republic of Iran, 672 F.3d 1066, 1080-1083 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1582 (2013).

The taking may be “direct” (as in the legal or physical takeover of an ongoing enterprise) or “indirect” (as in the seizure of the shares of the corporation). For example, in Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia, 616 F. Supp. 660 (W.D. Mich. 1985), the court found that the sovereign’s expropriation of U.S.-owned stock in a foreign corporation was a taking within the scope of the exception. Similarly, in McKesson, Iran was found liable for an indirect or “creeping” expropriation of McKesson’s shareholder rights through a series of actions that ripened into a taking, compensable under a treaty between Iran and the United States. McKesson v. Islamic Republic of Iran, 672 F.3d 1066, 1072 (D.C. Cir. 2012). Where the government declares shares to be state assets and claims them as a sovereign, the opposite conclusion may be reached. See Rong v. Liaoning Provincial Government, 452 F.3d 883 (D.C. Cir. 2006). A governmental takeover to satisfy a debt that has been declared valid by a foreign court is not a taking for the purposes of this exception. Best Medical Belgium, Inc. v. Kingdom of Belgium, 913 F. Supp. 2d 230 (E.D. Va. 2012).

5. Proper defendant. As enacted, the statute contemplates that actions will typically be brought against the foreign state responsible for the taking in violation of international law. Some courts have allowed actions under the second “prong” of this exception to be brought against the foreign state in question. See, e.g., Augudas Chasidei Chabad v. Russian Fed’n, 528 F.3d 934 (D.C. Cir. 2008); Siderman v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); de Csepel v. Republic of Hungary, 808 F. Supp. 2d 113 (D.D.C. 2011, aff’d on other grounds, 714 F.3d 591 (D.C. Cir. 2013). Others have disagreed. See Garb v. Poland, 440 F.3d 579 (2d Cir. 2006) (dictum). Under the former interpretation, the statute permits actions against the responsible state even when the agency or instrumentality owning or operating the property was the means by which the responsible state initially accomplished the “taking.”
One court of appeal has held that § 1605(a)(3) does not require that the foreign state against which the claim is made must be the same one that took the property in violation of international law, as long as the other requirements of the statute are met. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1028 (9th Cir. 2010) (suit permitted against Spain regarding painting in its possession that had originally been taken by Germany); see also Agudas Chasidei Chabad of U.S. v. Russian Fed’n, 466 F. Supp. 2d 6, 20 (D.D.C. 2006).


This rule has occasionally been relaxed in unique situations, for instance when the claimants’ citizenship has been revoked by the government as part of a discriminatory program. See, e.g., Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157, 1165-1166 (C.D. Cal. 2006), aff’d in part, 616 F.3d 1019 (9th Cir. 2010) (applying expropriation exception to Nazi Germany’s seizure of German national’s property where plaintiff argued that Nazi citizenship laws precluded citizenship for Jews).

7. Time of taking. The FSIA itself contains no statute of limitations (although one may be provided by the substantive source of law on which the action is based). In a number of decisions involving takings claims arising from depredations during the Holocaust, the question of the statute’s retroactive application has been raised. In Republic of Austria v. Altmann, 541 U.S. 677 (2004), the U.S. Supreme Court held that the FSIA applies to conduct that occurred prior to its enactment in 1976 and even prior to the United States’ 1952 adoption of the restrictive theory of sovereign immunity. Altmann involved a suit under the expropriation exception brought against the Austrian government and its National Gallery by the American heir of an Austrian citizen whose artworks had been seized by the Nazis or expropriated by the Austrian government following World War II, at which time the government would have enjoyed absolute immunity from suit in the United States. Notwithstanding the general presumption against statutory retroactivity established in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), the Court held that the FSIA was intended to apply to pre-FSIA conduct. Congress’ intent was reflected in the
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preamble that “[c]laims . . . should henceforth be decided by [American] courts . . . in conformity with the principles set forth in this chapter,” § 1602. See Section 451, Comment h.

8. Exhaustion of local remedies. Section 1605(a)(3) makes no reference to a requirement that a claimant first attempt to exhaust available local remedies before bringing an action against the foreign state under the “expropriation” exception. Two circuit courts of appeal have explicitly declined to read such a requirement into the statute. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1034-1037 (9th Cir. 2010) (en banc); Agudas Chasidei Chabad of U.S. v. Russian Fed’n, 528 F.3d 934, 948-949 (D.C. Cir. 2008). Another, however, has held that exhaustion may be required under the expropriation exception on the basis that “the requirement that domestic remedies for expropriation be exhausted before international proceeding may be instituted is a well-established rule of customary international law.” Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 671-695 (7th Cir. 2012) (Holocaust claims); see also Fischer v. Magyar Államvasutak ZRT, 777 F.3d 847, 852 (7th Cir. 2015), cert. denied 136 S.Ct. 2817 (June 8, 2105) (same) (“Principles of international comity make clear that these plaintiffs must attempt to exhaust domestic remedies before foreign courts can provide remedies for those violations”). These decisions add a substantive requirement for jurisdiction that is not supported by the statute or its legislative history. By comparison, consider the “opportunity to arbitrate” precondition that was explicitly included in the text of the state-sponsored terrorism exception at § 1605A(a)(2)(A)(iii). Whether the substantive international law governing expropriation itself requires some direct effort by a claimant to obtain compensation before seeking judicial recourse in another country is beyond the scope of this section, but the rule cited by the Abelesz court applies by its terms to “international,” not domestic, proceedings. Accordingly, the majority’s interpretation of the statute appears to be the proper one. Cf. Republic of Argentina v. NML Capital, Inc., 134 S.Ct. 2250, 2256 (2014) (“Any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.”).

9. Relationship to act of state doctrine. The statutory expropriation exception is distinct from the domestic “act of state” doctrine. As discussed more fully in § XXX, that judicially created doctrine requires U.S. courts to presume the validity of an official act of a foreign sovereign performed within its own country, even when that act is alleged to violate international law. Republic of Austria v. Altmann, 541 U.S. 677, 713 (2004); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). Because § 1605(a)(3) deals solely with issues of immunity from jurisdiction, it makes no change in the applicability of the act of state doctrine. H.R. Rep. No. 94-1487 at 19-20, reprinted in 1976 U.S.C.C.A.N. 6604, 6618. Under the so-called “Second Hickenlooper Amendment,” 22 U.S.C. § 2370(e)(2), a federal court must not decline on act of state grounds to address the merits in a case when a party asserts a “claim of title or other right to property . . . based upon . . . a confiscation or other taking . . . by an act of state in violation of the principles of international law . . . .” 22 U.S.C. § 2370(e)(2) (emphasis added). See also H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 20, reprinted in [1976] U.S.C.C.A.N. 6604, 6618. Enacted in 1964 shortly after Sabbatino was decided, the Amendment was designed to overrule the decision so that the act of state doctrine would not preclude
adjudication of an expropriation claim arising after January 1, 1959 if the court has jurisdiction to hear it.

Section 1605(a)(3) provides such jurisdiction in cases brought against foreign states and their agencies or instrumentalities, although in different terms than the Hickenlooper Amendment. Cf. de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 n.17 (5th Cir. 1985). When the Second Hickenlooper Amendment was enacted, concern was expressed that the phrase “claim of title or other right to property” would be narrowly interpreted to require (i) a claimant to assert a possessory interest (“in the nature of replevin”) in the specific expropriated property and (ii) the property itself to be in the United States. See Lowenfeld, “The Sabbatino Amendment – International Law Meets Civil Procedure,” 59 Am. J. Int’l L. 899, 900 (1965). The author of that article expressed similar concerns during the drafting of the FSIA. See Lowenfeld, “Claims Against Foreign States – A Proposal for Reform of United States Law,” 44 N.Y.U. L. Rev. 901, 916-917 (citing, inter alia, French v. Banco National de Cuba, 23 N.Y.2d 46 (1968)).

Some courts did in fact interpret § 2370(e)(2) not to apply to takings of intangible interests such as the contractual right to receive payment, see e.g., Menendez v. Saks & Co., 485 F.2d 1355, 1372 (2d Cir. 1973), and others applied that interpretation to the FSIA on the ground that the two provisions are, or should be interpreted to be, congruent. See, e.g., Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico, 528 F.Supp. 1337, 1346 (S.D.N.Y. 1982), aff’d, 727 F.2d 274 (2d Cir. 1984). As discussed in Reporters’ Note (3) supra, courts have recently taken a more expansive approach, declining to interpret the expropriation exception’s “rights in property” language to exclude interests in intangible property or to require a possessory interest in the nature of replevin. Moreover, a number of courts have explicitly chosen to interpret the two provisions independently. See, for example, Nemeriam v. Federal Democratic Republic of Ethiopia, 491 F.3d 470, 479 (D.C. Cir. 2007) (“We are . . . free to interpret section 1605(a)(3) independent of the Hickenlooper Amendment”); Smith Rocke Ltd. v. Republica Bolivariana de Venezuela, No. 12 CV. 7316 LGS, 2014 WL 288705, at *9 (S.D.N.Y. Jan. 27, 2014) (“The legislative history to § 1605(3) of the FSIA makes clear . . . that its jurisprudence is distinct from that of the act of state doctrine. Although there are similarities, the two concepts are distinct.”); cf. Rong v. Liaoning Provincial Government, 362 F. Supp. 2d 83, 100 (D.C. Cir. 2006), aff’d on other grounds, 452 F.3d 883 (D.C. Cir. 2007). This view is not accepted unanimously, see Mezerhane v. Republica Bolivariana de Venezuela, 785 F.3d 545, 552 (11th Cir. 2015).

10. Treaty exception. The FSIA’s “treaty exception,” set forth in § 1604, preserves the applicability of preexisting international agreements to settle and resolve claims that might otherwise be cognizable under the statute, including under the “expropriation” exception to immunity. In Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989), the U.S. Supreme Court said that the exception applies “when international agreements ‘expressly conflic[t]’ with the immunity provisions of the FSIA.” In de Csepel v. Republic of Hungary, 714 F.3d 591 (D.C. Cir. 2013), the court of appeals applied this standard to reject the contention that Hungary’s 1947 treaty of peace with the Allied Powers and its 1973 bilateral claims-settlement agreement with the United States barred claims under the FSIA’s

In some instances, specific treaties (such as bilateral investment treaties) may provide relevant standards by which to evaluate a taking. For example, Article 6 of the 2012 U.S. model bilateral investment treaty provides that “[n]either Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment] (1) through (3).” Annex B to that treaty provides that Article 6 covers both “direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure,” and “indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.” See http://www.state.gov/documents/organization/188371.pdf.

An applicable treaty might even provide a cause of action. See McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066 (D.C. Cir. 2012) (bilateral treaty of amity, construed under Iranian law, provided corporation with private right of action against Iran for expropriation).

To date, claims under the expropriation exception based on alleged violations of human-rights treaties have been rejected. See Mezerhane v. Republica Bolivariana de Venezuela, 785 F.3d 545 (11th Cir. 2015); de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985).

11. Practice under foreign and international law. No provision comparable to § 1605(a)(3) has yet been adopted in the domestic immunity statutes of other countries. See Hazel Fox CMG QC and Philippa Webb, The Law of State Immunity 426-427 (3rd ed. 2013). The principle of state responsibility for takings in violation of international law is reflected in the provisions of numerous existing bilateral investment treaties, which typically provide for the submission of such disputes to international arbitration. The 2004 UN Convention on the Jurisdictional Immunities of States and Their Property (not yet in force) contains no specific provision with respect to unlawful takings. However, an annexed “understanding” clarifies that investment matters are covered by article 17, which provides that a State cannot invoke immunity from jurisdiction before a court of another State that is otherwise competent in proceedings regarding agreements to arbitrate “differences relating to a commercial transaction.”

12. Prior Restatement. This section revises the black-letter portion of § 455 of Restatement Third by eliminating the discussion of maritime claims (now covered in § 459), emphasizing the statutory text, and removing the discussion of international law to the Reporters’ Notes and adding substantially thereto. The Comments have been abbreviated, with parts of the discussion moved into the expanded discussion in the Reporters’ Notes. References have been updated throughout.
§ 456. Claims Based on Rights to Property in the United States: Law of the United States

Courts in the United States may exercise jurisdiction over a foreign state in any case in which rights in property in the United States acquired by succession or gift are in issue.

Courts in the United States may exercise jurisdiction over a foreign state in any case in which rights in immovable property situated in the United States are in issue.

Source Note:

Comment:

a. Rights in property acquired by succession or gift. If a foreign state has acquired an interest through succession to private property, whether as legatee under a will, as purchaser from an heir or legatee, or as claimant by escheat, it can claim no immunity from adjudication by a U.S. court of a dispute regarding its interest in the property by the courts of the state where the property is located. The same is true of property acquired by gift.

b. Rights in immovable property. Title to land and to buildings on land is traditionally subject to adjudication by the courts of the state where the land is situated. The fact that the land (or buildings, apartments, or appurtenances) in controversy may be owned or leased by a foreign state does not detract from the desirability of having disputes related thereto adjudicated in local courts. Premises used for an embassy, consulate, or other diplomatic mission come under this rule, so that controversies that put in issue rights of ownership, possession, occupation, or use are subject to adjudication in the local courts. However, such property may be inviolable or otherwise subject to immunity (see §§ XX-XX on diplomatic and consular immunities), and execution is typically not available against such property (see FSIA § 460(2)(e)).

c. Substantive law. This section addresses only the question of immunity from jurisdiction. FSIA § 1605(a)(4) does not create a cause of action or provide the substantive law related to the claims at issue. Under U.S. law, interests (rights) in property acquired by succession or gift as well as rights in immovable property generally fall within the domain of state, rather than federal, law. Hence, actions concerning such rights may be initially brought in state courts pursuant to local procedures, but a defendant foreign state is entitled to remove the action to the federal courts. See § [458(3)]. In either event, the questions of title will ordinarily remain an issue of state law.
d. Attachment and execution. This exception does not address issues concerning the immunity of state-owned property from attachment and execution. Such issues are dealt with in FSIA §§ 1609 and 1610(a)(1) and addressed separately in § 464 of this Chapter. As a general matter, the property of a foreign state, including immovable property, is, absent waiver, immune from all forms of prejudgment attachment.

REPORTERS’ NOTES

1. Rights acquired by gift or succession. The first clause of § 1605(a)(4) (sometimes referred to as the “successor” exception) provides the courts of the United States with subject matter jurisdiction where rights in property located in the United States are at issue when they have been acquired by a foreign sovereign by virtue of succession or gift from a private party. The exception was intended to place the foreign state in the same position as the private person from whom the rights were acquired and is therefore limited to circumstances where the foreign state is “party by virtue of its succession to [or is gifted with] a private party’s claim or putative liability.” See In re Republic of the Philippines, 309 F.3d 1143, 1150–51 (9th Cir. 2002) (citing H. Rep. No. 94–1487, 94th Cong. 2d Sess. 6619); Fickling v. Commonwealth of Austl., 775 F.Supp. 66, 72 (E.D.N.Y. 1991) (“[Congress] did not intend to open the courts to all suits involving inherited or donated property.”); Asociacion de Reclamantes v. United Mexican States, 561 F. Supp. 1190, 1197 (D.D.C. 1983), aff’d on other grounds, 735 F.2d 1517 (D.C. Cir. 1984).

2. Rights in real property. The second clause (the “immovable property” exception) applies to disputes directly involving real property. Under common law prior to the FSIA’s enactment, the analogous exception to immunity applied only to cases in which rights of ownership were at issue and was not understood to abrogate immunity for actions that otherwise touched on or arose from the state’s interest in real estate. That interpretation was applied in a number of early cases brought under § 1605(a)(4). See, e.g., Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (exception covers issues of property rights or possessory interests); MacArthur Area Citizens Ass’n v. Republic of Peru, 809 F.3d 918, 21 (D.C. Cir. 1987) (exception must not be broadly construed so as to “abrogate immunity for any action touching upon real estate”); Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1, 13 (1st Cir. 2002) (the exception “applies only in cases in which rights of ownership, use, or possession are at issue”).

In Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007), however, the U.S. Supreme Court held that “§ 1605(a)(4) does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession” and, in consequence, that a lawsuit to declare the validity of tax liens arising out of unpaid taxes imposed on real property owned by a foreign sovereign fell within the immovable-property exception. New York City sought to recover unpaid property taxes assessed on portions of buildings owned and used by the governments of India and the People’s Republic of Mongolia.
both for diplomatic offices and as residences for certain members of their UN missions. Under New York law, real property owned by a foreign government is exempt from taxation if it is “used exclusively” for diplomatic offices or for the quarters of a diplomat with the rank of ambassador or minister plenipotentiary to the United Nations. India and Mongolia refused to pay property taxes for those portions of the property used for housing lower-level diplomatic employees and their families. The Court held that, because a lien on real property runs with the land and is enforceable against subsequent purchasers, a tax lien inhibits a quintessential property ownership right (the right to convey) and that a suit to establish a tax lien’s validity directly implicates “rights in immovable property” within the scope of the statutory exception.

Following that decision, several courts have dismissed suits against foreign states when rights to, or interests in, property were not found to be directly in issue. Universal Trading & Inv. Co., Inc. v. Bureau for Representing Ukrainian Interests in Int’l & Foreign Courts, 898 F. Supp. 2d 301 (D.Mass. 2012); Gotham Asset Locators Inc. v. State of Israel, 27 F. Supp. 3d 409 (S.D.N.Y. 2014).

3. Situs of property. Under both branches of this exception, the property in question must be located in the United States. Ordinarily, intangible movables may be regarded as situated at the domicile of the owner, but in some situations they may acquire an actual situs. For example, the shares of a corporation (or comparable juridical entity) are considered to have their situs at the corporation’s place of incorporation; debt obligations are generally considered to be located at the domicile or place of incorporation of the debtor, but may have been contractually fixed by the parties at some other place, such as the head office of a bank or trustee. By contrast, intangible property rights created or protected by a state, such as patents, trademarks, and copyrights, are generally considered to have their situs in the state that created them, regardless of the location of the physical evidence of ownership. However, the law on this subject is far from clear, and intangible property may have different situs for different purposes, and none at all for some purposes.

4. Foreign and international law and practice. U.S. law appears to be more restrictive in this regard than some foreign laws and international provisions. For example, the UK State Immunity Act, in subsection 6(1), removes immunity of foreign states with respect to (a) proceedings relating to any “interest” of the state in, or its possession or use of, immovable property in the United Kingdom; or (b) any obligation of the state arising out of its interest in, or its possession or use of, any such property. In subsection (2), it removes immunity with respect to proceedings relating to any interest of the State in movable or immovable property, such as an interest arising by way of succession, gift, or bona vacantia. Subsection 3 provides that the fact that a state has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind, or to insolvency, the winding up of companies, or the administration of trusts.

Under the Canadian statute, a foreign state is not immune from the jurisdiction of Canadian courts in any proceedings that relate to an interest in property or, in the Province of Quebec, a “right” of the state in property that arises by way of succession, gift, or bona vacantia.
Article 9 of the European Convention on State Immunity provides that a Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to its rights or interests in, or its use or possession of, immovable property or its obligations arising out of its rights or interests in, or use or possession of, immovable property and the property is situated in the territory of the State of the forum.

The 2004 UN Convention on the Jurisdiction Immunities of States and their Property (not yet in force) provides, in article 13, that unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding relating to the determination of (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; (b) any right or interest of the State in movable or immovable property arising by way of succession, gift, or bona vacantia; or (c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

5. Prior Restatement. This section substantially revises § 455(1) of the Restatement Third.
§ 459. Claims in Admiralty: Law of the United States

United States courts have jurisdiction of claims in admiralty (i) to enforce maritime liens on vessels or cargo of a foreign state based on a commercial activity and (ii) to foreclose preferred ship mortgages in cases in which the courts would have jurisdiction if the vessel or cargo were not owned or operated by a foreign state or its agency or instrumentality.

Source Note:

Foreign Sovereign Immunities Act, § 1605(b), (c), (d).

Comment:

a. Maritime liens. Maritime liens may arise by operation of law in a variety of circumstances, including from the provision of services to vessels, as a result of debts or injuries caused by the operation of vessels or other maritime property, or from security interests in the vessels or their cargoes. In the United States, such liens are governed by the Federal Commercial Instruments and Maritime Liens Act, codified at 46 U.S.C. §§ 31301-31343, and may be enforced by civil actions in rem in federal court against the vessels and their cargoes. When the vessel or cargo owned by a foreign state is operated or used for commercial trading purposes, FSIA § 1605(b) permits such actions to proceed in personam. This option reflects the sensitivities which may arise when the restraints of in rem jurisdiction are placed directly on vessels or cargo owned by foreign states. When foreign public vessels are not operated for commercial use, they retain their immunity from attachment and arrest with respect to actions to enforce maritime liens.

b. Notice requirements. The FSIA requires notice of the suit to be given both to the person (or his or her agent) having possession of the vessel or cargo against which the maritime lien is asserted, as well as to the foreign state in accordance with FSIA § 1608. A suit to enforce the maritime lien is “determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained.” FSIA § 1605(c). Decrees are subject to appeal and revision as in other cases within federal admiralty and maritime jurisdiction. Id.

c. Preferred ship mortgages. Under federal law, preferred ship mortgages are valid against third parties with no actual notice of the mortgage, and they take priority over competing maritime liens. See 5 U.S.C. §§ 31321-26. Under FSIA § 1605(d), foreign states are not immune
from the jurisdiction of U.S. courts in actions brought to foreclose preferred mortgages whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained.

REPORTERS’ NOTES

1. **Maritime liens.** Maritime liens are special property rights developed as a necessary incident of the operation of vessels; they secure creditors who provide the supplies needed to keep the ship functioning. The provision for maritime liens in FSIA § 1605(b) reflects the desire of Congress to preserve bases for jurisdiction that existed prior to adoption of the Act. That section pertains specifically to suits in admiralty that are “brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon commercial activity of the foreign state.”

2. **Notice requirements.** The statute imposes several requirements regarding the form of notice to be given to the foreign state in cases under § 1605(b). Notice may be given by delivery of a copy of the summons and complaint to the person (or his agent) having possession of the vessel or cargo in question. If the party bringing the suit arrests the vessel, that party will become liable for any damages sustained by the foreign state as a result of the arrest, provided that the arresting party had knowledge that the cargo or vessel of a foreign state was involved. This penalty for arresting the vessel is intended to deter claimants from initiating suits through in rem proceedings, which tie up the assets of foreign states and can cause friction in foreign relations. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989).

3. **Statutory basis.** Under § 1605(c), the suit to enforce a maritime lien will be “heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained.” Two United States statutes were relevant in fashioning the FSIA provision for maritime liens against vessels owned by foreign states. One concerns the predicates for obtaining a maritime lien generally; the other concerns maritime liens against merchant vessels owned by the United States. The Federal Maritime Commercial Instruments and Liens Act (referred to as the Maritime Lien Act), codified at 46 U.S.C. §§ 31301-31343., sets forth the persons entitled to maritime liens, including persons furnishing repairs, supplies, towage, use of dry docks, etc., without distinction as to the flag of the vessel or the place where the services or materials were furnished.

The United States did not adhere to the Brussels Convention of 1926, whereby state parties waived immunity of their state-owned vessels from jurisdiction in courts of other states. The United States did, in the Suits in Admiralty Act of 1920, now codified at 46 U.S.C. §§ 30901 et seq., waive immunity in the courts of the United States for its own merchant vessels. That Act modified the procedure for maritime liens in such suits, on the ground that security was not needed in suits against the United States.
Accordingly, the FSIA makes provision for a suit in personam, without authority for arrest or seizure of the vessel and without any requirement for bonding. It adopts an analogous solution for claims against merchant vessels or cargoes owned by foreign states. The lien is asserted by a prescribed form of notice, but the vessel may not be seized nor a bond required in lieu of seizure. Once the lien has been perfected by delivery of notice, the action proceeds like any other action under the Foreign Sovereign Immunities Act, except that a judgment resulting from the action is limited to the value of the vessel or cargo on which the lien arose. See O’Connell Machinery Co., Inc. v. M.V. “Americana,” 734 F.2d 115 (2d Cir. 1984).

4. **Damages.** Rather than barring the entire claim, FSIA §1605(b) provides for an award for damages sustained by the foreign state resulting from the wrongful arrest of a vessel owned by a foreign state. It also allows the claim to proceed under in personam jurisdiction under the procedures set forth in the FSIA. In China Nat. Chemical Import & Export Corp. v M/V Lago Hualaihue, 504 F. Supp. 684 (D. Md. 1981), the court considered an action brought by the owner and insurer of a cargo of chemical fertilizer damaged in a collision between the vessel in which it was carried and the defendant vessel owned and operated by the defendant merchant marine of a foreign state. It concluded that subsection (b) is not limited to cases where there is a commercial relationship between the injured party and the foreign state but includes situations where the alleged maritime tort lien arises out of a commercial activity of a foreign state, that is, the operation of a commercial cargo vessel as distinguished from the operation of a naval vessel. Accordingly, the court denied the defendants’ motion to dismiss the suit for lack of jurisdiction under the Act. It explained that the legislative history of the Act indicated that § 1605(b) was designed to provide a substitute for the usual in rem proceeding and include collision claims among those claims that might be asserted against a foreign state where the provisions of § 1605(b) were complied with. If Congress had not included all maritime torts within the coverage of § 1605(b) and only included those tort claims where there was a commercial relationship between the plaintiff and the foreign state, the court said, many litigants who could have maintained an action in the courts of this country during the period prior to the effective date of the Act would now find themselves without a remedy in the American courts.

5. **Scope.** Section 1605(b) is not limited to cases where a commercial relationship exists between an injured party and a foreign state, but includes situations where the alleged maritime tort lien arises out of the commercial activity of a foreign state, that is, operations of a commercial cargo vessel as distinguished from operation of a naval vessel. See China Nat. Chemical Import & Export Corp. v M/V Lago Hualaihue, 504 F. Supp. 684 (D. Md. 1981).

6. **Arrest of vessel.** This statute renders the arrest of the vessel unnecessary by extending to the plaintiffs an in personam remedy, limited to the value of the vessel or cargo, and it provides a uniform statutory procedure that must be followed. Borgships Inc. v. M/V Macarena, 1993 WL 278453 (E.D. La. 1993). This protection also has been extended to vessels possessed by a foreign state as owner pro hac vice.

7. **Preferred ship mortgages.** A foreign state is not immune from the jurisdiction of the courts of the United States in any action “brought to foreclose a preferred mortgage,” as that
term is defined in the Ship Mortgage Act 1920, codified at 46 U.S.C. §§ 31301. The action “shall be brought, heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained.” 28 U.S.C. § 1605(d).

8. **International and foreign law and practice.** With respect to admiralty and maritime jurisdiction, the FSIA’s exceptions to immunity are narrower than those provided in other domestic legislation or in international conventions. For example, section 10(2) of the UK State Immunity Act provides that a State “is not immune as respects (a) an action in rem against a ship belonging to that State; or (b) an action *in personam* for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.” Under section 4 of that statute, a state “is not immune as respects (a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or (b) an action *in personam* for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid. For these purposes, references to “a ship or cargo belonging to a State” include references to a ship or cargo in its possession or control or in which it claims an interest.

The European Convention contains no specific exception related to ships owned or operated by states in commercial use or their cargoes.

Article 16(1) of the UN Convention of the Immunity of States and Their Property (not yet in force) provides that, “[u]nless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.” That exception does not apply to warships, naval auxiliaries or “other vessels owned or operated by a State and used, for the time being, only on government non-commercial service.”

Article 16(3) further provides that, unless otherwise agreed, a state may not invoke immunity from jurisdiction before an otherwise competent court of another state in a proceeding related to the carriage of cargo on board a ship owned or operated by that state “if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.” Under paragraph 4, that provision does not apply to cargo carried on board the ship or to any cargo owned by a state and “used or intended for use exclusively for government non-commercial purposes.”

Under paragraph 6 of that Article, if a question arises relating to the government and noncommercial character of a ship owned or operated by a state or cargo owned by a state, a certificate signed by a diplomatic representative or other competent authority of that state and communicated to the court shall serve as evidence of the character of that ship or cargo.

9. **Prior Restatement.** Section 459 revises and expands upon § 455(4) of the Restatement Third.

(1) Service upon a foreign state or its agency or instrumentality, whether in an action in state or federal court, may be made only in a manner prescribed by federal statute.

(2) In an action brought in a federal court against

(a) a foreign state or its agency or instrumentality, venue will lie in any judicial district

(i) in which a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the property is located; or

(ii) in which property is located on which a maritime lien is asserted.

(b) a foreign state, venue will also lie in the District of Columbia.

(c) an agency or instrumentality of a foreign state, venue will also lie in any judicial district in which the agency or instrumentality is doing business or is licensed to do business.

(3) An action brought in state court against a foreign state or its agency or instrumentality may be removed to federal court in the district where the action is pending, regardless of the basis for the claim.

(4) An action against a foreign state or its agency or instrumentality that is brought in or removed to a court of the United States shall be tried by a judge without a jury.

Source Note:


Comment:

a. Service upon foreign state and upon agencies or instrumentalities of a foreign state distinguished. The means of service prescribed in the Foreign Sovereign Immunities Act (FSIA) for suits against a foreign state reflect the special status of states. Thus, the statute provides for service through diplomatic channels for actions against states, but not for actions against state agencies or instrumentalities. State agencies and instrumentalities, in contrast to states themselves, may function as business entities; unlike the premises of diplomatic missions, those of state instrumentalities are not ordinarily entitled to immunities under the Vienna Convention on Diplomatic Relations. State instrumentalities may have a variety of officers such as managing
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directors, presidents, or general agents, and they may have a variety of locations in the United States or elsewhere that are appropriate for service of process. Accordingly, the statute provides for service on a state agency or instrumentality in the same manner as on a corporation. It also provides for other methods of service upon agencies and instrumentalties that are not generally available against states. See 28 U.S.C. §§ 1608(a) and (b), Comments b and c, RN 1.

b. Priority of means of service upon foreign state. Service upon a foreign state in federal or state court shall be made: 1) in accordance with any special arrangement for service between the plaintiff and the foreign state; or 2) pursuant to an international convention; or 3) by any form of mail requiring a signed receipt, addressed to the head of the ministry of foreign affairs of the foreign state, and addressed and dispatched by the clerk of court; or 4) if service on the ministry of foreign affairs cannot be made within 30 days, then by mail to the Secretary of State, who shall transmit the papers through diplomatic channels to the foreign state. These four methods of service are hierarchical; plaintiffs must attempt them in order and may resort to a subsequent method only if service cannot be effectuated by a prior method. Service on a foreign state must also otherwise be made in strict compliance with the statute, including the documents to be served and translations, if any. See Comment d. Substantial compliance with the statute coupled with actual notice is insufficient.

c. Priority of means of service upon state agencies or instrumentalities. Service upon an agency or instrumentality of a foreign state in state or federal court shall be made: 1) in accordance with any special agreement for service between the plaintiff and the agency or instrumentality; or 2) by delivery to an officer, a managing or general agent, or any other agent authorized to receive service of process in the United States, or in accordance with an international convention; or 3) if reasonably calculated to give actual notice, as directed by the foreign state in response to a letters rogatory or request, or by any form of mail requiring a signed receipt to be addressed and by the clerk of court to the agency or instrumentality to be served, or as directed by order of the court consistent with the law of the place where service is to be made. These three categories of methods of service are hierarchical; plaintiffs must attempt them in order and may resort to subsequent methods only if service cannot be effectuated by a prior method. Service on an agency or instrumentality must substantially comply with the statute and must provide actual notice to the defendant so that the defendant is not prejudiced by lack of strict compliance with the statute.
d. Documents to be served. Commencement of an action against a foreign state or its agencies or instrumentalities requires delivery of a copy or copies of the summons and complaint. In addition, service upon a foreign state, if made by mail or through diplomatic channels, requires a notice of suit addressed to the foreign state and in a form prescribed by the Secretary of State by regulation. See 22 C.F.R. § 93.2. Service upon a foreign state or upon an agency or instrumentality, if made by mail, through diplomatic channels, through letters rogatory, or by order of the court, requires a translation of all documents into the official language of the foreign state.

e. Venue in actions against states and actions against state agencies or instrumentalities distinguished. Any action against a foreign state may be brought in the District of Columbia, regardless of where the claim arose. By contrast, any action against an agency or instrumentality of a foreign state may be brought in a judicial district in which the agency or instrumentality is doing business or is licensed to do business. Actions against a foreign state or its agency or instrumentality, like actions against private defendants, may be brought in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the property is located.

f. Forum non conveniens and motions to transfer venue. The FSIA explicitly sets out the courts in which claims against a foreign state may be brought, but does not indicate whether transfer is permissible to or among those courts, or whether the doctrine of forum non conveniens is applicable. Both motions to transfer (see 28 U.S.C. §§ 1404 and 1406) and motions to dismiss for forum non conveniens are generally permitted in cases against foreign states or their agencies or instrumentalities. However, some courts have held that forum non conveniens dismissals are prohibited in cases brought under the FSIA’s state-sponsored terrorism exception (28 U.S.C. § 1605A) in light of the United States’ interests in providing U.S. victims of state-sponsored terrorism with an opportunity to seek adequate redress and in light of the statutory requirement that the state be given a prior opportunity to arbitrate. Where a waiver of immunity serves also as a forum-selection clause [see § 421, Comment h], transfer from the court selected or dismissal on grounds of forum non conveniens is not ordinarily available.

g. Suits by aliens. The FSIA makes no reference to the nationality, domicile, or residence of plaintiffs in actions against foreign states in U.S. courts. The Supreme Court has held that an action against a foreign state is an action arising under federal law, so that the requirements for
diversity jurisdiction in the federal courts need not be met. Accordingly, aliens, including nonresident aliens and foreign corporations, may bring actions against foreign states or their agencies or instrumentalities, provided that their actions meet the requirements of the FSIA.

REPORTERS’ NOTES

1. Means of commencing action exclusive. The means for commencing an action set forth in this section are ordinarily exclusive. Service by mail on a foreign ambassador or on a consul general in Washington, for example, is not valid. Magness v. Russian Fed’n, 247 F.3d 609 (5th Cir. 2001); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994); Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250 (7th Cir. 1983). Where none of the methods of service against foreign states is available, however, one court has ordered substituted forms of service as permitted generally under the Federal Rules of Civil Procedure. See New England Merchants Nat’l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73 (S.D.N.Y. 1980) (substituted service ordered because there were no diplomatic relations or ordinary mail service); see also Magness v. Russian Fed’n, 247 F.3d 609, 619 (5th Cir. 2001) (leaving open “the possibility that, under extraordinary circumstances not present in this case, when service of process according to the express provisions of § 1608(a) is a manifest impossibility, other methods of service that fully satisfy the goals of section 1608(a) might be sufficient”). In suits against an agency or instrumentality of a foreign state, the authority for courts to devise means of service is expressly confirmed by the FSIA. 28 U.S.C. § 1608(b)(3)(C).

2. Service on an agency or instrumentality requires substantial compliance with the act. Service of process on a foreign state or a political subdivision of a foreign state requires strict adherence to the service provisions of the FSIA § 1608(a). See Gerritsen v. Consulado Gen. de Mex., 989 F.2d 340, 345 (9th Cir. 1993); Alberti v. Empresa Nicaraguense de La Carne, 705 F.2d 250, 253 (7th Cir. 1983). By contrast, several courts have upheld service on an agency or instrumentality of a foreign state when the serving party “substantially complied” with the requirements of the FSIA under § 1608(b) and actual notice was received. See, e.g., Sherer v. Construcciones Aeronauticas, S.A., 987 F.2d 1246, 1250 (6th Cir.1993). Courts have found substantial compliance even when the complaint was not dispatched by the clerk of courts or when the plaintiff failed to serve a translation of the complaint on the defendant, as long as the defendant received actual notice. See Sherer v. Construcciones Aeronauticas, S.A., 987 F.2d 1246 (6th Cir.1993); Banco Metropolitano, S.A. v. Desarrollo de Autopistas y Carreteras de Guat., Sociedad Anonima, 616 F. Supp. 301, 304 (S.D.N.Y. 1985); but see Gerritsen v. Consulado Gen. de Mex., 989 F.2d 340, 345 (9th Cir. 1993) (holding that substantial compliance is not met if the complaint is not delivered in the correct language).

3. No right to a jury trial. In the matter of jury trial, as in several other respects, the Foreign Sovereign Immunities Act aims to place foreign states sued in U.S. courts in the same position as the United States when it is a defendant. The United States is subject to suit in tort or
contract only in a non-jury civil action, 28 U.S.C. § 2402, and the FSIA permits only non-jury civil actions against foreign states. Since actions against foreign sovereigns did not lie at common law, courts have held that the Seventh Amendment is not violated. Ruggiero v. Compania Peruana de Vapores “Inca Capac Yupanqui”, 639 F.2d 872 (2d Cir. 1981); Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61 (3d Cir. 1981); In re Aircrash Disaster Near Roselawn, Ind. on October 31, 1994, 909 F. Supp. 1083 (N.D. Ill. 1995). Loss of the opportunity for jury trial in a state court is not a basis for denying removal to a federal court under FSIA § 1441(d). Bailey v. Grand Trunk Lines New England, 805 F.2d 1097 (2d Cir. 1986).

4. Suits by aliens against foreign states. In Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983), a Dutch corporation brought suit against the Central Bank of Nigeria in federal court in New York. The Supreme Court held that although the cause of action in the litigation was based on state law, the case nonetheless arose under federal law for the purposes of Article III, because the FSIA sets out detailed standards governing the immunity of foreign states from suit.


6. International practice. The U.S. Foreign Sovereign Immunities Act distinguishes between methods of service on foreign states and somewhat more lenient methods of service on a foreign state’s agencies or instrumentalities. The state immunity acts in Canada and Israel also take this general approach. The U.N. Convention on the Jurisdictional Immunities of States and Their Property does not, however, distinguish between service upon foreign states and upon their agencies or instrumentalities. See Article 22(1), U.N. Convention on the Jurisdictional Immunities of States and Their Property (not yet in force) (See Introductory Note). The U.N. Convention provides for service pursuant to an international convention binding upon the forum
state and the state on whom service is made, or in accordance with any special agreement
between the plaintiff and state, or if there is no such convention or agreement, through
diplomatic channels or by any other means accepted by the state on whom service is made, if not
precluded by the law of the forum state.
§ 462. Discovery: Law of the United States

A foreign state is ordinarily subject to discovery and other procedures associated with the adjudication of an action against it, except as provided by statute. Federal district courts exercise their discretion over discovery, including jurisdictional discovery, to protect the interests of foreign sovereigns and to promote international comity.

Source Note:
Federal Rule of Civil Procedure 26(b).

Comment:

a. Discovery in federal court. If a foreign state is a party to an action in court in the United States, whether as plaintiff or as defendant, the normal procedures associated with adjudication in that court are usually applicable, except as otherwise provided by the Foreign Sovereign Immunities Act (FSIA). The FSIA addresses discovery only in one provision: discovery maybe be limited upon the request of the U.S. Attorney General in cases under § 1605A against state sponsors of terrorism. 28 U.S.C. § 1605(g). A foreign state is otherwise generally subject to discovery in connection with a suit against it. In federal court, parties may obtain discovery relevant to any party’s claim or defense, as long as it is proportional to the needs of the case. Proportionality includes the importance of the issues at stake in the case, the parties’ resources, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b) (as amended, effective December 1, 2015). Federal district courts exercise their discretion over the scope and management of discovery so as to limit the burdens on foreign states and to promote international comity.

b. Jurisdictional discovery. Discovery about an entity’s status as a foreign state and about the applicability of any exceptions to immunity is termed “jurisdictional discovery,” because, under the FSIA, a federal court has subject matter and personal jurisdiction over a foreign state if an exception to immunity applies. See Introductory Note. Federal district courts generally tailor jurisdictional discovery to protect the interests of foreign states and to promote international comity with respect to an entity that may ultimately be deemed immune from suit, while also permitting the discovery necessary to determine whether immunity applies.

c. Discovery from a nonparty foreign state. Section 1604 of the FSIA provides for the immunity of foreign states. There is no exception to immunity for discovery against nonparty
foreign states. Such discovery is precluded, at least to the extent it is based on the foreign sovereign’s amenability to judicial process in the forum state.

d. Posting of security. The FSIA limits some otherwise applicable requirements to provide security or a bond in cases brought against a foreign state. Under U.S. law, an order requiring a foreign state to post security or a bond is considered the functional equivalent of an attachment of property and is precluded unless immunity has been waived. FSIA § 1609. Prejudgment attachment for the purposes of security is precluded, absent a waiver when property is used for commercial activity. FSIA § 1610(d); see [§ 464, Comment d].

e. Discovery sanctions. A monetary contempt sanction ordered by a court in the United States against a foreign sovereign, including for noncompliance with a discovery order, is not enforceable in the United States unless it satisfies an exception to immunity from execution under the FSIA. Section 1610 of the FSIA contains no exception to immunity from execution that applies generally to contempt sanctions. By contrast, discovery sanctions related to the merits of the litigation may generally be imposed on foreign states, although the FSIA provides special procedures for default judgments against foreign states. See [§ 463, Comment d.]

REPORTERS’ NOTES

1. Discovery and the FSIA. In the context of a post-judgment execution action, the Supreme Court declined to infer that the FSIA imposes limitations on discovery about a foreign state’s assets located outside the United States. NML Capital v. Argentina, __ U.S __, 134 S.Ct. 2250 (2014). In that case, NML sought information about Argentina’s assets from two nonparty banks. Argentina argued that discovery about its assets outside of the United States was impermissible because those assets were not subject to execution under the FSIA. The Supreme Court assumed that discovery about Argentina’s extraterritorial assets was permitted under the Federal Rules of Civil Procedure and held that the FSIA did not impose additional limitations on the available discovery. The Court noted, however, that the Federal Rules of Civil Procedure require that discovery be relevant and that discovery requests focusing solely on assets not subject to execution would not be relevant in an execution action. The Court also suggested that district courts may limit discovery based on discretionary factors such as comity and the burden of the discovery on the foreign state. 134 S. Ct. at 2258, n.6. Other courts have also recognized the broad discretion that district courts enjoy over discovery in cases against foreign sovereigns. See, e.g., Aurelius Capital Master, Ltd. v. Republic of Argentina, 589 F. App’x 16, 18 (2d Cir. 2014) (“[W]e stress that Argentina—like all foreign sovereigns—is entitled to a degree of grace and comity. Cf. Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004). These considerations are of particular weight when it comes to a foreign sovereign's diplomatic and military affairs.
Accordingly, we urge the district court to closely consider Argentina's sovereign interests in managing discovery, and to prioritize discovery of those documents that are unlikely to prove invasive of sovereign dignity.”); Exp.-Imp. Bank of the Republic of China v. Grenada, 768 F.3d 75, 93 n.23 (2d Cir. 2014) (reasoning that “although a district court ‘has broad discretion to limit discovery in a prudential and proportionate way,’ discovery in aid of execution ‘is the norm in federal and New York state courts’” (citation omitted)).

2. Jurisdictional discovery. Discovery to determine whether an entity is a foreign state and, if so, to determine whether an exception to immunity applies is jurisdictional. If a defendant is a foreign state entitled to immunity, then the federal courts lack subject matter jurisdiction over the case. If the defendant is a foreign state, but an exception to immunity applies, federal courts have both subject matter jurisdiction over the case and personal jurisdiction over the defendant so long as service has been made in accordance with the statute. In determining the scope of jurisdictional discovery, district courts balance the discovery necessary to determine whether the entity is a foreign state entitled to immunity against the burdens and costs of discovery against an entity that may ultimately be immune from suit. See, e.g., In re Papandreou, 139 F.3d 247, 253 (D.C.Cir.1998) (noting that a district court “authorizing discovery to determine whether immunity bars jurisdiction must proceed with circumspection, lest the evaluation of the immunity itself encroach unduly on the benefits the immunity was to ensure.”); see also First City, Texas--Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 176 (2d Cir. 1998); Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1284 n. 11 (3d Cir. 1993); Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992).


4. Posting of security. Under the FSIA, requiring a foreign sovereign to post prejudgment security is understood as the equivalent of an attachment and is thus barred unless the foreign sovereign has explicitly waived its immunity. Kensington Int’l Ltd. v. Republic of Congo, 461 F.3d 238 (2d Cir. 2005); Stephens v. Nat’l Distillers & Chem. Corp., 69 F.3d 1226, 1229 (2d Cir. 1995).

5. Monetary contempt sanctions. Some courts have held that monetary contempt sanctions may be ordered against foreign sovereigns, including for violations of discovery orders, although the courts may lack the ability to enforce such orders. See FG Hemisphere Assocs., LLC v. Democratic Republic of Congo, 637 F.3d 373 (D.C. Cir. 2011); Autotech Techs. LP v. Integral Research & Dev., 499 F.3d 737 (7th Cir. 2007); see also Walters v. People’s
Republic of China, 72 F. Supp. 3d 8, 13 (D.D.C. 2014). The U.S. government has argued, however, that courts should not order monetary contempt sanctions against foreign sovereigns, based in part on international practice and on the court’s inability to enforce monetary sanctions absent a foreign state’s waiver of immunity from execution. Brief of United States as Amicus Curiae, FG Hemisphere Assocs., LLC v. Democratic Republic of Congo, No. 10-7046, (D.C. Cir. Oct. 7, 2010); see also AF-CAP, Inc. v. Republic of Congo, 462 F.3d 417 (5th Cir. 2006).

6. Non-monetary contempt sanctions. Unlike some monetary sanctions, non-monetary discovery sanctions can be enforced without the attachment and execution of property. For example, a federal district court sanctioned the Republic of Argentina for failing to comply with a discovery order related to the assets of the Republic. The discovery order required the disclosure of the location and use of Argentina’s property. Plaintiffs sought this information so that they could attach assets which were located in the United States and which were used for a commercial activity. See FSIA § 1610. Argentina did not comply with the discovery order. The district court ordered the following sanction: “any property of the Republic in the United States except diplomatic or military property is deemed to be used for a commercial activity.” Aurelius v. Republic of Argentina, Case No. 1:09-cv-01708-TPG, Order, (Aug. 13, 2015); see also Fed. R. Civ. P. 37(b)(2)(A)(ii).

7. International law and practice. Under international law, discovery against a foreign state is generally governed by the law of the forum state. However, some limitations from discovery would be imposed by the U.N. Convention on the Jurisdictional Immunities of States (which is not yet in force). For example, the Convention provides that any failure to comply with a court order to perform a specific act, including the production of documents or disclosure of information, may have consequences in relation to the merits of the case but may not result in a fine or penalty. U.N. Convention on the Jurisdictional Immunities of States and Their Property (not yet in force), art. 24(1) (see introductory note). The U.S. government views Article 24(1) as reflecting current international norms and practices. Brief of United States as Amicus Curiae, FG Hemisphere Assocs., LLC v. Democratic Republic of Congo, No. 10-7046, (D.C. Cir. Oct. 7, 2010). Accord U.S. practice, see Comment d. The U.N. Convention also provides in art. 24(2) that a respondent state in a proceeding before a court of another state shall not be required to provide any security, bond, or deposit to guarantee the payment of judicial costs or expenses. Accord U.S. practice, see Comment c.

8. Prior Restatement. This section is new and reflects the significance of, and cases relating to, discovery in cases involving foreign states. The Restatement Third briefly addressed discovery in Comment c to Section 451.
§ 463. Default Judgment Against Foreign State: Law of the United States

A court in the United States may not render a default judgment against a foreign state unless

(1) after having been duly served, the state fails to make a timely answer to the complaint, fails to appear at trial, or otherwise fails to defend the action in accordance with applicable procedure; and

(2) the claimant has established the claim or right to relief by evidence satisfactory to the court.

Source Note:

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1608 (d)-(e), 1610(c); Federal Rule of Civil Procedure 55.

Comment:

a. Default judgment against a foreign state. Before entering a default judgment, a federal court must satisfy itself that it has subject matter and personal jurisdiction. In cases against foreign states, federal courts must accordingly determine that an exception to immunity exists before entering a default judgment. Default judgments are generally disfavored, particularly in suits against foreign states.

b. Evidence satisfactory to the court. In both state and federal courts, in order to prevail in a default proceeding, a claimant must establish its substantive claim or right to relief by evidence satisfactory to the court. Evidence is satisfactory when it supports each element of the claim upon which relief is sought and establishes a prima facie case that the claimant is entitled to relief. The burden is on the moving party to demonstrate that it is appropriate for the court to enter a default judgment. Courts may accept uncontroverted evidence as true and they are not required to hold a hearing before entering default judgment, but they may not rely on conclusory allegations.

c. Foreign state treated like the United States. The provisions of the Foreign Sovereign Immunities Act setting time limits for responsive pleading and providing for default parallel those in the Federal Rules of Civil Procedure for suits against the United States. Fed. R. Civ. P. 12(a), 55(d). Thus, default judgments may not be entered against a foreign state by the clerk of court, but only by the court itself upon application by the claimant on notice to the defendant. Moreover, a default judgment may not be entered against a foreign state simply on the basis of a
d. Opportunity to set aside default or default judgment; execution of default judgment.

After entry of a default judgment, a copy of that judgment must be served upon the foreign sovereign. Execution against the property of a foreign state is available only after sufficient time has elapsed following entry of a default judgment and the giving of the required notice. FSIA §§ 1610 (c); 1608 (d). For actions in federal court, the foreign state may move for relief from a default judgment pursuant to Fed. R. Civ. P. 60(b) and may also move to set aside a default before judgment has been entered pursuant to Fed. R. Civ. P. 55 (a) and(c).

e. Default judgment as sanction for failing to comply with discovery. An unjustified failure to comply with discovery requests can result in entry of a default judgment against a foreign state pursuant to Federal Rule of Civil Procedure 37(b)(2)(A)(vi).

REPORTERS’ NOTES

1. Default. The party seeking a default judgment must establish with sufficient evidence both the claim or cause of action and the foreign state’s lack of immunity under the FSIA. A showing that the foreign state is not immune also establishes the subject matter jurisdiction of the federal courts. The FSIA does not create a cause of action except for claims brought against state sponsors of terrorism. Most default judgments are based on claims brought against state sponsors of terrorism and in these cases the evidence that establishes the lack of immunity also establishes a cause of action. See Han Kim v. Democratic People’s Republic of Korea, 774 F. 3d 1044 (D.C. Cir. 2014)); Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 64-69 (D.D.C. 2008).

2. Evidentiary standard. Courts have used varying language to describe the “evidence satisfactory to the court” standard. A few courts have said that the evidence before them was clear and convincing, but without holding or reasoning that the evidence must meet that standard; others have said that clear and convincing evidence is required to support punitive damages in a default judgment; some have suggested that the standard should be drawn from summary judgment or judgment as a matter of law. See Han Kim v. Democratic People’s Republic of Korea, 950 F. Supp. 2d 29 (D.D.C. 2013); Kilburn v. Islamic Republic of Iran, 699 F. Supp. 2d 136, 155 (D.D.C. 2010); Ungar v. Islamic Republic of Iran, 211 F. Supp. 2d 91, 98 (D.D.C. 2002) Comment a adopts the prima facie case test used by most courts. Most default judgments do not involve much discovery, making the tests for summary judgment and judgment as a matter of law inapplicable. The “satisfactory to the court” language vests discretion with the district court. A hearing or explicit factual findings are not always required, although the court must at a minimum consider the evidentiary basis for factual allegations rather than accepting

3. **Default judgments disfavored.** In every action against a foreign state, the district court must satisfy itself that there is jurisdiction under the FSIA. The failure of a state to make an appearance or otherwise defend an action does not automatically lead to a default judgment. Instead, as described above in Comments a and c, § 1608(e) provides foreign sovereigns with the same protections from default judgments that the federal government enjoys under Federal Rule of Civil Procedure 55(d).

4. **Setting aside an entry of default and relief from a default judgment.** Under the Federal Rules of Civil Procedure, a party may move to set aside entry of default or for relief from a judgment of default. Fed. R. Civ. P. 55(c), 60(b). If a foreign state does not appear and a default judgment is entered against it, the foreign state may assert a jurisdictional objection when enforcement of the judgment is attempted. The Federal Rules of Civil Procedure allow for relief from a final judgment if the judgment is void and for any other reason that justifies relief. FRCP 60(b)(4) and (6). See Practical Concepts, Inc. v. Republic of Bolivia, 811 F 2d 1543 (D.C. Cir. 1987) (holding that a foreign state could raise jurisdictional defenses under Rule 60(b)(4) and (6) after entry of a default judgment against it). In making Rule 55(c) and Rule 60 determinations, courts will consider whether default was willful, the merits of the defense, and whether setting aside the default or judgment would prejudice the other side. A foreign state’s belief that it is entitled to immunity, even if mistaken, may suggest that the default was not willful. See Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 243-245 (2d Cir. 1994); First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda-Permanent Mission, 877 F.2d 189, 196 (2d Cir. 1989).

5. **International practice.** The U.N. Convention on Jurisdictional Immunities of States and Their Property provides that a default judgment shall not be entered against a state unless it has been properly served, at least four months have passed between the effective date of service and the entry of a default judgment, and jurisdiction is not precluded by the Convention. U.N. Convention on Jurisdictional Immunities of the State, art. 23(1), Dec. 2, 2004 (not in force; United States not a signatory or party). The third condition requires the court of the forum state to determine whether the foreign state is entitled to immunity. Id. art. (6)(1); see also Tarcisio Gazzini, Article 23, in The United Nations Convention on the Jurisdictional Immunities of States and Their Properties: A Commentary (Roger O’Keefe, Christian Tams, eds. 2013). The European Convention on State Immunity, as well as the state immunity acts in Australia, Canada, and the United Kingdom, all stipulate that a specific period of time must have elapsed between service of process and entry of a default judgment. European Convention on State Immunity 1972, art. 16 (2 months); Australia Foreign States Immunities Act of 1985, art. 28 (two months); Canada State Immunity Act 1985, art. 10(1) (60 days); U.K. State Immunity Act, art. 12 (two months).
Appendix A.
Black Letter of Council Draft No. 2

§ 455. Claims Concerning Property Taken in Violation of International Law: Law of the United States

Courts in the United States may exercise jurisdiction over a foreign state in any case in which rights to property taken in violation of international law are in issue if

(a) the property (or any property exchanged for such property) is present in the United States in connection with a commercial activity carried on by that foreign state in the United States; or

(b) the property (or any property exchanged for such property) is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in commercial activity in the United States.

§ 456. Claims Based on Rights to Property in the United States: Law of the United States

Courts in the United States may exercise jurisdiction over a foreign state in any case in which rights in property in the United States acquired by succession or gift are in issue.

Courts in the United States may exercise jurisdiction over a foreign state in any case in which rights in immovable property situated in the United States are in issue.

§ 459. Claims in Admiralty: Law of the United States

United States courts have jurisdiction of claims in admiralty (i) to enforce maritime liens on vessels or cargo of a foreign state based on a commercial activity and (ii) to foreclose preferred ship mortgages in cases in which the courts would have jurisdiction if the vessel or cargo were not owned or operated by a foreign state or its agency or instrumentality.


(1) Service upon a foreign state or its agency or instrumentality, whether in an action in state or federal court, may be made only in a manner prescribed by federal statute.
(2) In an action brought in a federal court against
   (a) a foreign state or its agency or instrumentality, venue will lie in any judicial district
       (i) in which a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the property is located; or
       (ii) in which property is located on which a maritime lien is asserted.
   (b) a foreign state, venue will also lie in the District of Columbia.
   (c) an agency or instrumentality of a foreign state, venue will also lie in any judicial district in which the agency or instrumentality is doing business or is licensed to do business.

(3) An action brought in state court against a foreign state or its agency or instrumentality may be removed to federal court in the district where the action is pending, regardless of the basis for the claim.

(4) An action against a foreign state or its agency or instrumentality that is brought in or removed to a court of the United States shall be tried by a judge without a jury.

§ 462. Discovery: Law of the United States

A foreign state is ordinarily subject to discovery and other procedures associated with the adjudication of an action against it, except as provided by statute. Federal district courts exercise their discretion over discovery, including jurisdictional discovery, to protect the interests of foreign sovereigns and to promote international comity.

§ 463. Default Judgment Against Foreign State: Law of the United States

A court in the United States may not render a default judgment against a foreign state unless

(1) after having been duly served, the state fails to make a timely answer to the complaint, fails to appear at trial, or otherwise fails to defend the action in accordance with applicable procedure; and

(2) the claimant has established the claim or right to relief by evidence satisfactory to the court.
Appendix B
Other Relevant Black-Letter Text

§ 451. Immunity of Foreign State from Jurisdiction to Adjudicate (TD No. 1)(approved 2015)

Under international law and the law of the United States, a state is immune from the jurisdiction of the courts of another state, subject to exceptions.

§ 453. Waiver and Counterclaims (TD No. 1)(approved 2015)

(1) Under the law of the United States, courts have jurisdiction over foreign states in cases in which the foreign state has waived its immunity either explicitly or by implication.

(2) Initiation by a foreign state of an action in a court in the United States is an implied waiver of immunity from jurisdiction to adjudicate

(a) any counterclaim arising out of the transaction or occurrence that is the subject matter of the action, without limit as to the amount of recovery on the counterclaim; and

(b) any counterclaim not arising out of the transaction or occurrence which is the subject matter of the action, but any recovery on such counterclaim is limited to the amount of the recovery in the principal action.

(3) Submission of a responsive pleading or other filing (such as a motion to dismiss) by or on behalf of the foreign state in an action in U.S. courts, without asserting the defense of immunity, is generally considered an implied waiver of that state’s immunity from jurisdiction to adjudicate that action.
(4) Under the law of the United States, a waiver of immunity from the jurisdiction of U.S. courts to adjudicate a dispute does not constitute a waiver of immunity with respect to enforcement of the resulting judgment against the foreign state.

(5) Under the law of the United States, a waiver of immunity, whether from jurisdiction to adjudicate, from attachment of property, or from execution, may not be withdrawn, except in accordance with the terms of the waiver or by consent of all parties to whom (or for whose benefit or protection) the waiver was made.

(6) Under international law

(a) a state is permitted to waive its immunity from the jurisdiction of the courts of other states either expressly or by implication, either before or after a dispute arises;

(b) a state is permitted to waive its immunity from attachment of its property or from execution against its property, but a waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit.

§ 458. Claims Arising from Agreements to Arbitrate: Law of the United States (TD No. 1)(approved 2015)

Under the law of the United States, an agreement by a foreign state to arbitrate constitutes a waiver of immunity from jurisdiction in an action to compel arbitration pursuant to the agreement, or in an action to enforce an arbitral award rendered pursuant to the agreement, if:

(a) the arbitration takes place or is intended to take place in the United States;
Appendix B

(b) the agreement or award is or may be governed by a treaty in force for the United States for the recognition and enforcement of arbitral awards;

(c) the underlying claim could have been brought under the Foreign Sovereign Immunities Act in U.S. courts absent the agreement to arbitrate; or

(d) the foreign state has otherwise waived its immunity.

§ 460. Claims Against State Sponsors of Terrorism: Law of the United States (TD No. 1)(approved 2015)

(1) Under the law of the United States, some foreign states are not immune from the jurisdiction of courts in the United States with respect to certain claims arising out of state-sponsored terrorism as set out in this Section.

(2) Courts in the United States may exercise jurisdiction over claims against a foreign state for personal injury or death arising out of an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if

(a) the foreign state was designated as a state sponsor of terrorism at the time of or as the result of such act;

(b) such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency;

(c) the claimant or victim was at the time of the act a U.S. national, a member of the armed forces, or otherwise an employee of the U.S. government, or an individual performing a contract awarded by the U.S. government, acting within the scope of the employee’s employment;
(d) money damages are sought; and

(e) when the acts in question occurred within the territory of the foreign state, the claimant has afforded the state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.