

# THE FOREIGN SOVEREIGN IMMUNITIES ACT'S CRIPPLING EFFECT ON UNITED STATES BUSINESSES

*Victoria A. Valentine,\*  
Shelli Barish Feinberg\*\*  
& Simone R. Fabiilli\*\*\**

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\* Victoria Valentine, Esq., concentrates her practice in the area of domestic and international commercial litigation. She is highly regarded in the area of contract and manufacturer representation law in Metro Detroit, Michigan. She has been an expert contributor for the Institute of Continuing Legal Education.

\*\* Shelli Feinberg, Esq., has been practicing law for over thirty years. She is also highly regarded in the area of contract and manufacturer representation law in Metro Detroit, Michigan.

\*\*\* Simone Fabiilli is a Michigan State University College of Law student and a Managing Editor for *Michigan State International Law Review*.

A most sincere and special thank you to Aaron Lukken, Esq. for his gracious assistance in contributing the service of process issues content that is relevant to the Foreign Sovereign Immunities Act to this Article and the Appendix. He is the founder of Viking Advocates, LLC in Kansas City, Missouri. He is a consulting attorney who provides litigation support to United States and Canadian lawyers seeking to serve process abroad, compel evidence in foreign countries, and enforce judgments overseas. He can be reached at: lukken@vikinglaw.us. An additional special thank you to Mary Robertoy, Chantelle Dial, Kyla Barranco, Jack Sklarski, and the editors of *Michigan State International Law Review*.

## INTRODUCTION

United States business entities that engage in business relationships with business entities owned by foreign governments, sometimes called state-owned enterprises, should be mindful of the legal hurdles over which they may need to jump. These hurdles appear as a result of litigation ensuing with foreign governments and their state-owned entities.<sup>1</sup>

Some of these procedural and practical hurdles include the following:

- Litigation will invariably be costly and time consuming.
- Service abroad may be dependent on the particular country where service is to be effected and whether that particular country is a signatory of a certain treaty;<sup>2</sup> *e.g.*, the Inter-American Convention on Letters Rogatory and Additional Protocol, the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), and the 1963 Vienna Convention on Consular Relations and Optional Protocols.
- Service on a state-owned enterprise is governed exclusively by the Foreign Sovereign Immunities Act (FSIA or the Act), which provides for a four step hierarchical structure for service of process on the “foreign state.”<sup>3</sup>
- Service abroad on a foreign business entity may take months to effectuate and may involve translation of pleadings. Service may additionally be prolonged when litigants are required to go through the appropriate diplomatic channels.
- Even if service is effected, a state-owned enterprise may raise the defense of sovereign immunity under the FSIA, which in turn, may

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1. Under the Foreign Sovereign Immunities Act (FSIA or the Act), foreign states, sovereigns, and their governments, including political subdivisions, agencies, and instrumentalities, are immune from suit by means of jurisdiction, unless a statutory exception applies. 28 U.S.C. § 1603(a) (2005); 28 U.S.C. § 1604 (1976); *see also* 28 U.S.C. § 1605(a) (2008) (listing general exceptions). In this Article, the term “foreign sovereign” is regarded as referring to nations, territories, and governments, whereas the term “foreign state” is expressly defined under the Act. 28 U.S.C. § 1603(a). *See also* discussion *infra* Part III (regarding the definition of “foreign state” under the Act).

2. 28 U.S.C. § 1608(b)(2) (1976).

3. *Id.* § 1608(a)(1)–(4).

further delay litigation and involve costs to defend against a claim, which if denied, is subject to an immediate appeal.<sup>4</sup>

#### A. Service

Several critical issues must be kept in mind when serving any defendant abroad before questions of immunity can be addressed, even when the defendant is a foreign government. In *Volkswagenwerk AG v. Schlunk*, Justice O'Connor, writing for a unanimous court, held where service is to be effected in a Hague member state, the strictures of the Hague Service Convention must be followed.<sup>5</sup> Following the Convention is not optional; instead, it is mandatory<sup>6</sup> and its methods are exclusive.<sup>7</sup> Therefore, while going through the defendant state's Central Authority may in some instances be avoided, the Convention must be honored. Further, where alternative methods of service are available,<sup>8</sup> all methods carry different benefits and risks. The unique characteristics of each country and each method are touched upon in the grid in the Appendix to this Article; however, the Appendix is not intended to be a comprehensive guide.

#### B. Service by Mail

The most heavily litigated issue in the Hague service arena is the validity of service by mail under Article 10(a) of the Hague Service Convention.<sup>9</sup> The Eighth and Fifth Circuits have held (arguably

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4. *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 153 (2d Cir. 2007); *see also* 28 U.S.C. § 1602 (1976); 28 U.S.C. § 1604; *Gould, Inc. v. Pechiney Ugine Kullman*, 853 F.2d 445, 451 (6th Cir. 1998) (discussing an automatic right to appeal under the FSIA pertinent to the collateral order doctrine).

5. *See* 486 U.S. 694, 707 (1988) (interpreting the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters art. 10, Nov. 15, 1965, 20 U.S.T. 361 [hereinafter Hague Service Convention]).

6. *Id.* at 699.

7. *Id.* at 706.

8. Hague Service Convention, *supra* note 5, art. 10.

9. Article 10 of the Hague Service Convention is subject to a circuit split. *See Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173–74 (8th Cir. 1989) (holding that mail is an invalid method of service under the Hague Convention); *Nuovo Pignone, SpA v. Storman Asia M/V*, 310 F.3d 374, 384–85 (5th Cir. 2002) (holding that mail is an invalid method of service under the Hague Convention); *Ackermann v. Levine*, 788

incorrectly) that, due to a drafting error in Article 10(a), mail service is invalid under the Convention.<sup>10</sup> The Second and Ninth Circuits take the opposite (arguably correct) view, posing a very simple question: *why would service via mail have a sub-article all to itself if it were not valid?*<sup>11</sup>

Obviously, foreign Central Authorities, which are designated agencies tasked with executing service requests under Article 5 of the Convention,<sup>12</sup> have the prerogative to refuse to serve their own governments, and they occasionally do.<sup>13</sup> In such cases, section 1608 of the FSIA seems to require that service by mail be attempted under sections 1608(a)(3) and (b)(3).<sup>14</sup> However, proper adherence to the Convention is still necessary—and where the foreign government objects to Article 10(a), then sections 1608(a)(3) and (b)(3) are nullified.<sup>15</sup>

F.2d 830, 834 (2d Cir. 1986) (holding that mail is a valid method of service under the Hague Convention); *Brockmeyer v. May*, 383 F.3d 798, 808–09 (9th Cir. 2004) (holding that mail is a valid method of service under the Hague Convention).

10. *Bankston*, 889 F.2d at 173–74; *Nuovo Pignone, SpA*, 310 F.3d at 384–85.

11. *Ackermann*, 788 F.2d at 839; *Brockmeyer*, 383 F.3d at 802–03.

12. Hague Service Convention, *supra* note 5, arts. 2, 5.

13. Patterns and suggestions relating to individual countries' approaches to accepting service of process have been determined from the knowledge and experience of Aaron Lukken, Esq., who provides litigation support in serving process abroad, compelling evidence in foreign countries, and enforcing judgments overseas. Such patterns and suggestions are presented in the Appendix to this Article.

14. Section 1608(a) establishes the following hierarchy of steps to achieve service: (1) if there is a special arrangement in place, serve according to the arrangement; (2) if there is no special arrangement, serve according to an applicable treaty; (3) if service cannot be effected according to a treaty or if there is no treaty, then resort to mail, assuming the forum court's rules apply; (4) and finally, if after all of the above, service cannot be effected, then one must go through the State Department for service to be effected. 28 U.S.C. § 1608(a)(1)–(4). *See also* 28 U.S.C. § 1608(b)(3) (listing additional alternatives pertaining to agencies and instrumentalities of foreign states). *See discussion infra* Part III (regarding the definition of “foreign state” under the Act).

15. Specifically when a foreign government objects to Article 10(a) of the Hague Service Convention, mail service becomes invalid, and therefore, sections 1608(a)(3) and (b)(3) of the FSIA are negated. *See* Hague Service Convention, *supra* note 5, art. 10 (providing if “*the State of destination does not object*, the present Convention shall not interfere with – a) the freedom to send judicial documents, by *postal channels*, directly to persons abroad”) (emphasis added). Hague channels are mandatory and exclusive under *Schlunk*. 486 U.S. at 699, 706–07. Simply, if the destination state objects to Article 10(a) of the Convention, then Article 10(a) is not applicable as to that country.

*Schlunk* applies even in FSIA cases, as alluded to in sections 1608(a)(2) and (b)(2).<sup>16</sup> This is absolutely critical with regard to mail “in accordance with an applicable international convention on service of judicial documents”<sup>17</sup> and negates the validity of mail service under sections 1608(a)(3) and (b)(3) if the target country objects to Article 10(a).<sup>18</sup> Regardless of the legal validity of mail service, the method presents massive factual problems; for example, a plaintiff left unable to prove delivery without a return receipt. Thus, factual problems presented upon serving a foreign defendant make the legal hurdles over which United States business entities have to jump only higher as they litigate independent issues under the FSIA.

### C. The Foreign Sovereign Immunities Act

The FSIA, 28 U.S.C. § 1602, *et seq.*, governs all litigation against “foreign states,” which include foreign states’ political subdivisions, agencies, or instrumentalities.<sup>19</sup> The Act is the exclusive basis for obtaining jurisdiction over these entities in the United States<sup>20</sup> and “contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities.”<sup>21</sup>

Because the Act does not distinguish “between the ‘state’ and its ‘government,’” it applies whether the named defendant is any of the following: “China, the People’s Republic of China, the Government of China, or one of its integral governmental components (such as the National People’s Congress, the People’s Liberation Army, or the Ministry of State Security).”<sup>22</sup> Additionally, the Act raises a distinction by expressly defining “foreign state” to include the foreign state’s

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16. See *supra* text accompanying notes 14–15.

17. 28 U.S.C. § 1608(a)(2).

18. Hague Service Convention, *supra* note 5, art. 10(a); see *supra* text accompanying notes 14–15.

19. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). See discussion *infra* Part III.

20. *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

21. *Verlinden*, 461 U.S. at 488.

22. David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, FED. JUD. CENTER, 6 (2013), [http://www.fjc.gov/public/pdf.nsf/lookup/fsiaguide2013.pdf/\\$file/fsiaguide2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/fsiaguide2013.pdf/$file/fsiaguide2013.pdf).

political subdivisions or its agencies or instrumentalities.<sup>23</sup> Political subdivisions are typically observed as “the state (or government).”<sup>24</sup> This means, for example, that suits against China’s provinces, autonomous regions, or municipalities would be equated to a suit against the state or government.<sup>25</sup> Yet, when a defendant is instead “an ‘agency or instrumentality’ (such as the National Bauxite Trading Company of China),” pertinent rules under the Act apply, as opposed to those in a case involving the foreign sovereign itself or its political subdivisions.<sup>26</sup> Such rules applying to “agencies and instrumentalities,” as distinguished from foreign sovereigns, have legal ramifications including those involved with service as well as “venue, punitive damages, attachment, and execution.”<sup>27</sup>

Generally, a “foreign state” enjoys immunity from the jurisdiction of United States federal and state courts unless a plaintiff can prove that one of the distinct exceptions specified in the FSIA applies.<sup>28</sup> Two of those exceptions discussed here include actions where “the foreign state has explicitly or impliedly waived immunity” under section 1605(a)(1) and actions where the foreign state has carried on commercial activities in the United States or its commercial activities have caused a direct effect in the United States under section 1605(a)(2).<sup>29</sup>

In recent years, litigation relating to the FSIA has increased considerably given advancements in technology and globalization, which together, increase the amount of international business dealings and open the door for foreign state-owned enterprises to argue for immunity relating to those dealings in United States courts.<sup>30</sup> In particular,

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23. *Id.* at 7.

24. *Id.*

25. *Id.*

26. *Id.* at 6–7.

27. *Id.* at 7.

28. 28 U.S.C. § 1604; *Verlinden*, 461 U.S. at 488.

29. *Verlinden*, 461 U.S. at 488. “The Act also contains exceptions for certain actions ‘in which rights in property taken in violation of international law are in issue,’ § 1605(a)(3); actions involving rights in real estate and in inherited and gift property located in the United States, § 1605(a)(4); actions for certain noncommercial torts within the United States, § 1605(a)(5); certain actions involving maritime liens, §1605(b); and certain counterclaims, § 1607.” *Id.* at 489 n. 11.

30. See Crowell & Moring LLP, *The Foreign Sovereign Immunities Act: 2012 Year in Review*, 20 LAW & BUS. REV. AM. 565, 566 (2014).

circumstances attributable to the increase in FSIA litigation are the “[e]ver increasing globalization of business and the increased use of international arbitration as a dispute resolution mechanism (with enforcement left to domestic courts)[, which] have resulted in an increase in purely commercial litigation involving foreign states.”<sup>31</sup> Furthermore, much of the litigation revolves around the FSIA’s commercial activity exception, which in turn, affects contracts entered into between United States business entities and foreign sovereigns and business entities owned by such sovereigns. Further concerns emanate from the fact that, while our world continues to become smaller, state-owned enterprises are increasing and becoming players in the global marketplace, and they use the FSIA as a shield of protection for their actions.<sup>32</sup>

In fact, foreign sovereigns have exploited the FSIA and its gateway to jurisdictional immunity to avoid liability.<sup>33</sup> From the time the FSIA was enacted in the seventies, “foreign sovereigns have increasingly utilized discrete corporate structures to conduct their commercial affairs.”<sup>34</sup> Resultantly, foreign sovereigns’ enterprises enjoy the FSIA’s “presumption of immunity,” notwithstanding their commercial characteristics and legally distinct personalities.<sup>35</sup> Thus, “[b]y attaching the presumption of immunity to their commercial corporations, foreign sovereigns may extend sovereign immunity to their commercial counterparts while limiting their liability for commercial acts.”<sup>36</sup> Because plaintiffs “are often unaware that the corporation with whom they are contracting may be entitled to immunity,” these plaintiffs are “disadvantaged.”<sup>37</sup>

To avoid being a “disadvantaged plaintiff,” this Article encourages United States business entities to be educated on (1) the Act; (2) the nature of foreign business entities with whom they are dealing; and (3) provisions, such as waiver provisions, to be included in agreements with

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31. *Id.*

32. See Matthew Engellenner, *The Disadvantaged Plaintiff: Is it Time to Revisit the Foreign Sovereign Immunities Act?*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 375, 375–76 (2012).

33. *Id.*

34. *Id.* at 375.

35. *Id.* at 375–76.

36. *Id.* at 376.

37. *Id.* at 398.

such foreign entities as state-owned enterprises. This Article recommends mindful attention to the Act and its provisions, along with the nature of foreign contracting parties in a transaction, to avoid excessively exhausting resources in order to jump over time-consuming and financially draining legal hurdles. To be clear, this Article is not written to discourage business relationships with companies owned by foreign governments. Rather, the intention is to encourage United States companies to enter into such relationships with full knowledge of what is involved in resolving any disputes that may arise between the parties through litigation.

With regard to agreements reached between United States business entities and state-owned enterprises and service, the “special arrangement” clauses of sections 1608(a)(1) and (b)(1) of the Act offer the most practical way to prevent the need to serve according to the Hague Service Convention.<sup>38</sup> Truly, whether contracting with foreign sovereigns, private entities, or individuals, parties should always include a designated agent or manner of service in the initial contract.<sup>39</sup> This could be as simple as the designation of an agent for service or a waiver of the traditional prohibition on serving diplomats within the United States. This Article further encourages United States business entities to aggressively negotiate for explicit waivers to be executed by the foreign sovereigns and foreign states in mutual agreements in order to alleviate the daunting time and expense associated with litigation under the FSIA.

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38. Under section 1608(a)(1) of the FSIA, if a plaintiff serves according to the terms of a special arrangement, more than likely, the plaintiff is serving in the United States, rendering a situation where adherence to the Hague Service Convention is unnecessary. *See* 28 U.S.C. § 1608(a)(1) (applying to “a foreign state or political subdivision of a foreign state”); 28 U.S.C. § 1608(a)(1) (applying to “an agency or instrumentality of a foreign state”); *see also supra* text accompanying notes 14–15 (regarding the hierarchy depicted in section 1608(a)).

39. *See supra* text accompanying note 13. If a United States business entity designates an agent or manner in its contracts, then those contracts will necessarily implicate FSIA sections 1608(a)(1) and (b)(1) and not the later steps in the hierarchy depicted under section 1608(a). *See supra* text accompanying notes 13–14.

## I. A BRIEF HISTORY OF THE FSIA

Review of the origin of foreign sovereign immunity as a doctrine creates the framework in which the FSIA is viewed today. Foreign sovereign immunity evolved through common law before the FSIA's enactment in 1976.<sup>40</sup> In fact, for more than two hundred years, foreign sovereigns were granted absolute and complete immunity from suits in the United States.<sup>41</sup> Dating back to 1812, in *Schooner v. McFaddon*, Justice John Marshall of the United States Supreme Court held that the United States lacked jurisdiction over an armed French warship docked in Philadelphia.<sup>42</sup> This decision, known as the "Schooner Exchange" decision, became recognized as extending virtually absolute immunity to foreign sovereigns as "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."<sup>43</sup>

Accordingly, decisions as to whether to exercise jurisdiction in actions against foreign sovereigns and their instrumentalities were deferred to the Executive Branch.<sup>44</sup> Prior to 1952, "the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns."<sup>45</sup> But sentiments on this policy soon changed.

Meanwhile, for various reasons[,] governments were increasingly becoming engaged in state-trading and various commercial activities. Lawyers, scholars and private parties urged that the complete immunity of states engaged in commercial activities was not required by international law and was undesirable because absolute immunity (even for friendly nations) deprived private parties that dealt with state enterprises of judicial remedies and gave state businesses an unfair competitive advantage.<sup>46</sup>

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40. *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010).

41. *Schooner Exch. v. McFaddon*, 11 U.S. 116, 145–47 (1812).

42. *Id.* at 147.

43. *Verlinden*, 461 U.S. at 486.

44. *Id.*

45. *Rep. of Austria v. Altmann*, 541 U.S. 677, 689 (2004).

46. Tom McNamara, *A Primer on Foreign Sovereign Immunities Act*, DAVIS GRAHAM & STUBBS LLP (July 26, 2006), [http://www.dgslaw.com/images/materials/TMCN\\_PrimerForeignSovereignImmunity.pdf](http://www.dgslaw.com/images/materials/TMCN_PrimerForeignSovereignImmunity.pdf).

In response to this concern, in 1952, the United States Department of State adopted a restrictive theory of sovereign immunity by issuing what came to be known as the “Tate Letter.”<sup>47</sup> The Tate Letter reflects the “view that customary international law had evolved to permit adjudication of disputes arising from a state’s commercial activities (*acta jure gestionis*) while preserving immunity for sovereign or ‘public’ acts (*acta jure imperii*).”<sup>48</sup> This restrictive theory fundamentally expresses “that foreign sovereigns should not enjoy immunity for their commercial acts.”<sup>49</sup>

However, the application of the restrictive theory still proved troublesome. The Executive Branch, acting through the State Department, continued to be initially responsible for deciding questions of sovereign immunity and the courts abided by “‘suggestions of immunity’” from the State Department.<sup>50</sup> Another complication arose because foreign nations had not always made requests to the State Department for immunity.<sup>51</sup> Rather, in such cases, responsibility fell to the courts, which in turn, would refer to prior State Department decisions to determine whether immunity existed.<sup>52</sup> This resulted in “sovereign immunity determinations” being made by two different branches,

47. *Verlinden*, 461 U.S. at 486–87 (citing Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 DEPT. OF STATE BULL. 984–85 (1952), and in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711–15 (1976) (Appendix 2 to opinion of White, J.)). The restrictive theory applied to the FSIA’s scope gives immunity to a foreign state for claims relating to that foreign state’s public or sovereign acts, but claims relating to a foreign state’s commercial or private acts will subject that foreign state to a United States court’s jurisdiction. Joshua Burruss, *Sovereign Disobedience: The Role of U.S. Courts in Curtailing the Proliferation of Sovereign Default*, 25 IND. INT’L & COMP. L. REV. 269, 284 (2015); see also H.R. REP. NO. 94-1487, at 7 (1976) (The FSIA “would codify the so-called ‘restrictive’ principle of sovereign immunity, as presently recognized in international law.”).

48. Stewart, *supra* note 22, at 5. For more background on customary international law, see generally LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW CASES AND MATERIALS I, 59–61 (6th ed. 2014).

49. Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSNAT’L L. & POL’Y 1, 5 (2008).

50. *Verlinden*, 461 U.S. at 487.

51. *Id.*

52. *Id.*

Judicial and Executive, and the standards used were “neither clear nor uniformly applied.”<sup>53</sup>

## II. OVERVIEW OF THE ACT TODAY

Consequently, in 1976, twenty-four years after the issuance of the Tate Letter, Congress passed the FSIA.<sup>54</sup> The Act is a comprehensive statute providing legal standards that govern claims made for immunity in all civil actions against “a foreign state or its political subdivisions, agencies or instrumentalities.”<sup>55</sup> The FSIA “‘codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity,’ . . . and transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch.”<sup>56</sup> The Act is “the sole basis for obtaining jurisdiction over a foreign state in [United States Courts].”<sup>57</sup>

## III. FOREIGN STATES: A DEFINITION

State-owned enterprises continuously request and obtain immunity via corporate structure and ownership because the FSIA’s protection of immunity applies, not only to foreign sovereigns themselves, but also to their “foreign states,” which include their political subdivisions, agencies and instrumentalities.<sup>58</sup> An agency or instrumentality of a foreign state is defined as any entity,

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [(28 U.S.C. §1332(c), (e))] nor created under the laws of any third country.<sup>59</sup>

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53. *Id.* at 488.

54. *See generally* 28 U.S.C. § 1602 *et seq.*; Riblett, *supra* note 49, at 3 (noting that the FSIA was enacted in 1976).

55. *Id.*; *see also supra* text accompanying note 1.

56. *Altmann*, 541 U.S. at 691 (quoting *Verlinden*, 461 U.S. at 488).

57. *Amerada Hess Shipping Corp.*, 488 U.S. at 439.

58. 28 U.S.C. § 1603(a); *see also* Stewart, *supra* note 22, at 6.

59. 28 U.S.C. § 1603(b).

Accordingly, a state-owned enterprise, such as a corporation, may enjoy the immunity protection of its foreign sovereign if the foreign state owns a majority of the corporation's shares at the time the complaint is filed and holds its shares directly, rather than through an intermediate entity.<sup>60</sup> Therefore, United States business entities and their legal departments need to know and understand with whom those business entities engage in business—especially in light of the increasing number of state-owned enterprises.

Practically speaking, United States business entities ought to consider, keeping in mind potential FSIA claims, the (sometimes undetected) power of state-owned entities being represented on the other side of the negotiation table considering that “state-owned enterprises are among the largest and fastest expanding multinational companies.”<sup>61</sup> One recent study found “that more than 10% of the world's largest firms are state-owned (204 firms),” coming from thirty-seven countries whose joint sales grew to \$3.6 trillion in 2011 alone.<sup>62</sup> These sales are “equivalent to 6% of world GDP [(Gross Domestic Product)], exceeding the GDPs of countries such as Germany, France or the UK.”<sup>63</sup> The top five countries with the highest state-owned enterprises among their top firms include “China (96%), the United Arab Emirates (88%), Russia (81%), Indonesia (69%), and Malaysia (68%).”<sup>64</sup> Furthermore, “[i]n light of globalization and progressive government structure, today's marketplaces are increasingly populated by state-owned corporations engaged in commercial conduct with private parties in a way Congress could have never anticipated [when the FSIA was enacted].”<sup>65</sup>

Yet, under the Act, these state-owned enterprises, which are fundamentally commercial in nature, enjoy a presumption of immunity under the FSIA unless a plaintiff can establish an exception to immunity applies.<sup>66</sup> These exceptions can, at times, be burdensome to establish.<sup>67</sup>

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60. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477–78, 481 (2003).

61. Max Büge et al., *State-Owned Enterprises in the Global Economy: Reasons for Concern?*, VOXEU.ORG (May 2, 2013), [www.voxeu.org/article/state-owned-enterprises-global-economy-reason-concern](http://www.voxeu.org/article/state-owned-enterprises-global-economy-reason-concern).

62. *Id.*

63. *Id.*

64. *Id.*

65. Engellenner, *supra* note 32, at 405.

66. *Id.* at 397–98, 405–06.

Another factor to consider regarding litigation between United States business entities and state-owned enterprises, is the latter's lack in legitimacy when denying that an exception applies. For instance, the state-owned enterprise may argue foreign sovereign immunity even though its activities are inherently commercial.<sup>68</sup> In fact, any mandated sanctions for a false or inflated claim of foreign sovereign immunity are seemingly void, regardless of the hardship that is placed on the plaintiff in proving an exception.<sup>69</sup> This may be because the court must first determine the issue of subject matter jurisdiction before the case can proceed on its merits.<sup>70</sup> Although, the case law is not fully developed with respect to imposing sanctions for unsupported or illegitimate arguments responding to the application of an exception under the FSIA, courts have imposed discovery sanctions in FSIA cases.<sup>71</sup> While

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67. *Id.* at 399 (“With prior knowledge that their business counterpart may qualify for immunity, a party could proactively protect themselves by securing waivers of immunity in their contracts or generally ensuring that the transaction satisfies one of the FSIA exceptions. Often, plaintiffs only come to learn of their counterpart’s sovereign identity after litigation has already commenced, constituting unfair surprise.”).

68. Advice relating to the practical impacts brought on by the cost of time and strategic, procedural maneuvering under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq., who has represented United States business entities against foreign state-owned enterprises in her practice. See also Order Re-Opening Case and Issuing Scheduling Order, *Global Technology Inc. v. Yubei Power Steering Syst. Co.*, 2 (E.D. Mich. 2015) (demonstrating that years can pass before the courts render a final adjudication on the legitimacy of a foreign sovereign or foreign state’s jurisdictional defense under the FSIA. This is due to the shield that the presumption of immunity under the currently FSIA supplies and the automatic right to appeal as discussed in this Article).

69. See *supra* text accompanying note 68 (providing that advice relating to the practical impacts brought on by the cost of time and strategic, procedural maneuvering under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq.).

70. *Gould*, 853 F.2d at 450–51.

71. See *FG Hemisphere Assocs. v. Dem. Rep. Congo*, 637 F.3d 373, 379–80 (D.C. Cir. 2011); *Servaas Inc. v. Rep. of Iraq*, No. 09 Civ. 1862(RMB), 2014 WL 279507, at 11–12 (S.D.N.Y. Jan. 24, 2014). See also Stewart, *supra* note 22, at 73 (“Whether sanctions can be imposed for failure to comply with a discovery order has been contested. Recently, in *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, the D.C. Circuit held that contempt sanctions could in fact be imposed on a foreign sovereign for failure to respond to court-ordered discovery in an action to enforce an arbitral award.”). See *id.* n.209 (“In *Autotech Technologies v. Integral Research &*

Congress never intended to limit the inherent power of the courts to enter contempt orders, there is, however, debate over whether the imposition of sanctions for discovery abuses is even authorized.<sup>72</sup> Nevertheless, because the commercial activity exception will continue to be further litigated, the future may present opportunities for courts to sanction parties or firms for unsupported legal arguments in addition to discovery violations.

Currently, the state-owned enterprises enjoy the significant advantage of the initial presumption of immunity.<sup>73</sup> Moreover, just as the Tate Letter reflected the view that international law evolved to allow adjudication of disputes relating to sovereigns' commercial activity,<sup>74</sup> this Article finds that the FSIA should be revisited because of the political and economic changes since its enactment.<sup>75</sup>

#### IV. EXCEPTIONS TO IMMUNITY UNDER THE FSIA

Of the nine distinct exceptions to the presumption of immunity,<sup>76</sup> only the waiver and commercial activity exceptions will be discussed as the presumption may apply to United States business entities engaging in business with foreign sovereigns and foreign states as state-owned enterprises.

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*Dev. Corp.*, 499 F.3d 737 (7th Cir. 2007), the court found no inherent limitation on the contempt power in the [FSIA] itself.”)

72. Compare *FG Hemisphere Assocs.*, 637 F.3d at 378–79 (pointing out that Congress never intended to limit the inherent power of the courts to enter contempt orders), with *Af-Cap, Inc. v. Rep. of Congo*, 462 F.3d 417, 428–29 (5th Cir. 2006) (rejecting the idea that a contempt order can be entered against a party with immunity).

73. See Engellenner, *supra* note 32, at 398–402 (discussing disadvantages to plaintiff as a result of the presumption of immunity).

74. See *supra* notes 47–48.

75. See Engellenner, *supra* note 32, at 405–06.

76. 28 U.S.C. § 1605(a) involves the following six exceptions: (1) waiver, (2) commercial activity, (3) expropriations, (4) rights in certain kinds of property in the U.S., (5) non-commercial torts, and (6) enforcement of arbitral agreements and awards. 28 U.S.C. § 1605(a)(1)–(6). This is not to be confused with section 1605A, which involves actions arising from certain state-sponsored terrorism. 28 U.S.C. § 1605A (2008). Sections 1605(b) through (d) involve maritime liens and preferred mortgages, and section 1607 involves counterclaims. 28 U.S.C. §§ 1605(b)–(d), 1607. Collectively, the above constitute the nine categories of exception.

## A. Waiver

Under section 1605(a)(1),

A foreign state shall not be immune from the jurisdiction of the court of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.<sup>77</sup>

Explicit waivers are generally construed narrowly by the courts in a foreign sovereign's favor<sup>78</sup> where "[a] foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so."<sup>79</sup> Nevertheless, a contract clause irrevocably designating a United States forum for resolution of disputes has been held to be an explicit waiver of jurisdictional immunity.<sup>80</sup> In *Themis Capital, LLC v. Democratic Republic of Congo*, the United States District Court for the Southern District of New York found an explicit waiver where the agreement provided that the Republic of Zaire,

*[I]rrevocably submits to the non-exclusive jurisdiction of the High Court of Justice in London and any New York State or United States Federal Court . . . [And the Parties] agree that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.<sup>81</sup>*

While an explicit waiver must be a "clear, complete, unambiguous, and unmistakable manifestation of the [foreign] sovereign's [or foreign state's] intent to waive . . . immunity,"<sup>82</sup> it need not contain a reference to

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77. 28 U.S.C. § 1605(a)(1).

78. *World Wide Minerals, Ltd. v. Rep. of Kaz.*, 296 F.3d 1154, 1162 (D.C. Cir. 2002).

79. *Id.*

80. *Themis Capital, LLC v. Dem. Rep. Congo*, 881 F. Supp. 2d 508, 516–17 (S.D.N.Y. 2012).

81. *Id.*

82. *World Wide Minerals, Ltd.*, 296 F.3d at 1162 (quoting *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999)).

the United States or a specific jurisdiction within the United States as long as the waiver is explicit.<sup>83</sup>

An implicit waiver, which is also narrowly construed by the courts, may occur only in one of the following three circumstances: “(1) a foreign state agrees to arbitration in another country; (2) the foreign state agrees that the contract is governed by the laws of a particular country; [and] (3) the state files a responsive pleading without raising the immunity defense.”<sup>84</sup> Implicit waivers have been found where a contract specifies the laws of the jurisdiction within the United States that governs. An example of this language is, it “shall be governed by and construed in accordance with the laws of the District of Columbia.”<sup>85</sup> Additionally, as long as the contract contemplates the adjudication of the issues by a United States court, an implicit waiver exists even if the governing law is not explicitly identified.<sup>86</sup>

An implicit waiver has been found where a lease between a San Francisco landlord and the Federal Republic of Nigeria and Consulate General of Nigeria contained a provision stating, “[i]n the event that any action shall be commenced by either party hereto arising out of, or concerning this lease . . . the prevailing party shall be entitled to recover attorney’s fees fixed by the court.”<sup>87</sup> Even though the lease did not specifically state that the laws of a jurisdiction within the United States were to govern, the reviewing court found that there may have been a “[w]aiver by contract.”<sup>88</sup> Therefore, “[w]aiver by contract is premised on

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83. *Capital Ventures Int’l v. Rep. of Arg.*, 552 F.3d 289, 293–94 (2d Cir. 2009) (“[T]o the extent that the Republic [of Argentina] has or hereafter may acquire any immunity (sovereign or otherwise) from jurisdiction of any court or from any legal process . . . the Republic hereby irrevocably waives such immunity . . .”).

84. *Af-Cap, Inc.*, 462 F.3d at 426 (quoting *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993)); see also *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Presidential Comm’n on Good Gov’t v. U.S. Dist. Court for the Dist. of Haw. (In re Rep. of the Phil.)*, 309 F.3d 1143, 1151 (9th Cir. 2002); H.R. REP. NO. 94-1487, at 18.

85. *Joseph*, 830 F.2d at 1022 (quoting *Marlow v. Argentine Naval Comm’ns*, 604 F. Supp. 703, 708 (D.D.C. 1985)).

86. 830 F.2d at 1022–23.

87. *Id.* at 1022.

88. *Id.*

an agreement by the parties that the United States courts may become involved in disputes arising pursuant to the contract.”<sup>89</sup>

However, implicit waivers have not been found where the “contract specifies that the laws of a jurisdiction outside of the United States are to govern.”<sup>90</sup> For example, a forum selection clause providing that “[t]he Courts in India and the [United States] . . . only shall have jurisdiction” has been insufficient to waive immunity.<sup>91</sup> Certainly, “by securing waivers of immunity” in their agreements, which should be carefully drafted, plaintiffs may protect themselves from the defense of sovereign immunity.<sup>92</sup>

Therefore, to prevent jurisdictional disputes, representatives of United States business entities are advised to include specific contract language, in addition to an explicit waiver, in agreements with foreign sovereigns and state-owned entities. Suggested specific contract language includes a clause by which the foreign sovereign or foreign state, as a party to the contract, recognizes and acknowledges that it is engaging in a commercial activity and is thus subject to suit in the United States. A choice of law clause is another recommended clause. Such a clause is important because foreign sovereigns or foreign states may insist that their own law, rather than forum law, governs the contract.<sup>93</sup> Although the forum court can make its own determination as to the applicable law, the choice of law by the parties negates the need for such analysis.<sup>94</sup>

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89. *Id.*

90. *Id.* at 1022.

91. *Poddar v. State Bank of India*, 235 F.R.D. 592, 597 (S.D.N.Y. 2006). This 2006 case appears to conflict with *Themis Capital, LLC v. Democratic Republic of Congo*, which found an explicit waiver even though the agreement provided that both courts of London and New York had jurisdiction. 881 F. Supp. at 516, 532.

92. *See Engellenner, supra* note 32, at 399; *Riblett, supra* note 49, at 31.

93. *See supra* text accompanying notes 13, 68 (providing that patterns among individual countries’ approaches to accepting service of process have been determined from the knowledge and experience of Aaron Lukken, Esq., and advice relating to the practical impacts brought on by the cost of time and strategic, procedural maneuvering under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq.).

94. *See supra* text accompanying notes 13, 68 (providing that patterns among individual countries’ approaches to accepting service of process have been determined from the knowledge and experience of Aaron Lukken, Esq., and advice relating to the practical impacts brought on by the cost of time and strategic, procedural maneuvering

Moreover, the inclusion of a forum selection clause, referred to internationally as a *choice of court* clause,<sup>95</sup> as well as a choice of language clause in the event that a contract is drafted in more than one language, may also negate a host of objections on the part of the foreign sovereign or foreign state—most notably, jurisdiction.

In addition to these suggested contractual provisions, the operative language of a contract is critical and should be determined in advance.<sup>96</sup> Overall, in the business sector, it is suggested that by procuring specific contractual clauses, including an explicit waiver, the parties may be able to bypass the pitfalls, expense, and uncertainty related to jurisdictional issues pursuant to the FSIA.

## B. Commercial Acts

The commercial activity exception is another significant exception often used by foreign sovereigns, and particularly, state-owned enterprises. Although the intricacies of state-owned enterprises claiming immunity from litigation under the FSIA stem from a relationship that is typically commercial in nature,<sup>97</sup> the “commercial activity” actualized and that warrants the exception to immunity requires specific criteria to be met.

First, “[c]ommercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act.”<sup>98</sup> Second, while most state-owned enterprises are engaged in inherently commercial activity, a “plaintiff must [nevertheless] demonstrate a nexus between the foreign state’s commercial acts, the plaintiff’s claim, and the

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under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq.).

95. See Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, U. PA. J. INT’L L. 1013, 1014 (2010).

96. See *supra* text accompanying notes 13, 68 (providing that patterns among individual countries’ approaches to accepting service of process have been determined from the knowledge and experience of Aaron Lukken, Esq., and advice relating to the practical impacts brought on by the cost of time and strategic, procedural maneuvering under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq.).

97. See discussion *supra* pp. 636-38.

98. 28 U.S.C. § 1603(d).

United States.”<sup>99</sup> Section 1605(a)(2) provides three prongs upon which a plaintiff’s claim must be based:

- “[A] commercial activity carried on in the United States by . . . [a] foreign state;”
- “[A]n act[ion] performed in the United States in connection with a commercial activity of the foreign state elsewhere; or”
- “[A]n act[ion] outside . . . of the United States in connection with commercial activity of a foreign state elsewhere and that act causes a direct effect in the United States.”<sup>100</sup>

If a plaintiff demonstrates any of these prongs—which functionally define “commercial activity” under the Act—“a foreign state is not immune from suit in any case.”<sup>101</sup> However, these prongs as well as the developed definition of “commercial activity” have posed challenges given their ambiguities.<sup>102</sup> For instance, in *Republic of Argentina v. Weltover, Inc.*, the United States Supreme Court found “commercial” in section 1603(d) to be undefined, but limited in scope under the restrictive theory encompassing the Act.<sup>103</sup>

In *Weltover*, the Court held an activity is “commercial” when the foreign sovereign or foreign state<sup>104</sup> acts as “a private player” within the market: when the activity’s nature is the “type . . . by which a private party engages in ‘trade and traffic or commerce.’”<sup>105</sup> An example is a sales contract to acquire goods to which an ordinary individual and a foreign state-owned enterprise can each be party.<sup>106</sup> Additionally, the Court held that Argentina’s activity as a party, issuing bonds that defaulted, was a commercial activity.<sup>107</sup>

99. Riblett, *supra* note 49, at 32.

100. 28 U.S.C. § 1605(a)(2).

101. *Rep. of Arg. v. Weltover, Inc.*, 504 U.S. 607, 611 (1992).

102. ANDREW M. VOLLMER ET AL., A.B.A. SEC. INT’L L. & PRAC., REPORT ON THE U.S. FOREIGN SOVEREIGN IMMUNITIES ACT 79–80 (2001), available at <http://famguardian.org/subjects/freedom/Sovereignty/RptForeignSovImmAct-ABA.pdf>.

103. *Weltover*, 504 U.S. at 612–13; see *supra* text accompanying note 47 (regarding the restrictive theory).

104. DAMROSCH & MURPHY, *supra* note 48, at 845.

105. *Weltover*, 504 U.S. at 614 (citing BLACK’S LAW DICTIONARY 270 (6th ed. 1990)).

106. *Id.* at 614–15.

107. *Id.* at 617.

Recently, in *Global Technology, Inc. v. Yubei (XinXiang) Power Steering System. Co.*, the United States Court of Appeals for the Sixth Circuit affirmatively held that, after a plaintiff sustains its burden of production establishing that an exception under the Act applies (e.g., the foreign state engaged in commercial activity), the burden of persuasion shifts to the foreign state to demonstrate that its actions do not satisfy an exception.<sup>108</sup> Therefore, “[t]he party claiming immunity under FSIA retains the burden of persuasion throughout this process.”<sup>109</sup> The Sixth Circuit found the ultimate burden of persuasion remains with the defendant to show why “its actions are not the sort of private commercial activities that a private corporation would perform in the competitive marketplace.”<sup>110</sup> In its holding, the Sixth Circuit further emphasized the grounds warranting the commercial activity exception’s application pronounced in *Weltover*: where the defendant’s foreign business entity is acting as a “corporate competitor” rather than a “governmental regulator.”<sup>111</sup>

*Global Technology* demonstrates the time-consuming back and forth of burden shifting required under the FSIA to determine whether an action constitutes “commercial activity.”<sup>112</sup> This strenuous mandatory determination of litigating whether a foreign sovereign’s or foreign state’s activity was legally “commercial,” even when the actions are undeniably commercial, is often accompanied by the halting of discovery during the appeal process.<sup>113</sup> Delay, together with the prolonged and increased cost of litigation, has a chilling effect on pursuing a plaintiff’s legal rights.

Furthermore, the legislative history of the FSIA concerning the commercial activity exception demonstrates that Congress did not have an interest in proclaiming which activities would be commercial in nature in the text of the Act.<sup>114</sup> Specifically, House Report No. 94-1487 (regarding enacted House Bill 11315 as the FSIA) provided that courts would have great “latitude” in establishing the contours of commercial

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108. 807 F.3d 806, 811 (6th Cir. 2015).

109. *Id.* (quoting *O’Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009)).

110. *Id.* at 814–15.

111. *Id.* at 815.

112. *Id.*

113. *See* discussion *infra* pp. 24–26.

114. *See* H.R. REP. NO. 94-1487, at 16.

activity because it “seemed unwise to attempt an excessively precise definition of this term.”<sup>115</sup>

However, the legislative history to the FSIA does reveal that Congress contemplated “examples of conduct that would qualify as commercial for purposes of the FSIA, and of claims that would be sufficiently ‘based upon’ or ‘in connection with’ commercial activity to fall within Section 1605(a)(2).”<sup>116</sup> With regard to the former, the legislative history lends the following as examples to be included as commercial activity:

- “[T]he carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation[]’;”
- “[A] contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building. . . .’;”
- “A contract to make repairs on an embassy building; . . .”
- “[S]ale of a service or a product. . . .’;”
- “[L]easing of property. . . .’;”
- “[B]orrowing of money. . . .’;”
- “[E]mployment or engagement of laborers, clerical staff or public relations or marketing agents. . . .’;” [and]
- “[I]nvestment in a security [of a United States corporation]. . . .”<sup>117</sup>

115. *Id.*

116. George K. Foster, *When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 HOUS. L. REV. 361, 375 (2014).

117. *Id.* at 375 (2014) (citing H.R. REP. NO. 94-1487, at 16). The House of Representatives pointed out and passed a recent distinction concerning what is not actually commercial activity, and the House also “clarif[ied] the exception to foreign sovereign immunity set forth in section 1605(a)(3),” which also regards commercial activity. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, H.R. 4292, 113th Cong. (2014); Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, H.R. 889, 114th Cong. (2015). Bill 113 H.R. 4292—and later version 114 H.R. 889—discussed the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act. H.R. 4292; H.R. 889. These Bills provide that foreign states importing artworks for temporary exhibition in the United States are not conducting commercial activity under the FSIA. H.R. 4292 § 2(a); H.R. 889 § 2(a). However, when international law violations of property rights over such artworks are claimed against the Government of Germany or a European government affiliated with the Government of Germany during the “covered period” of “January 30, 1933 [to] . . . May 8, 1945,” a United States

With regard to the latter, cases showing a nexus connection based upon “commercial transactions performed in whole or in part in the United States[,]” as determined by a court,<sup>118</sup> listed were the following:

- “[I]mport-export transactions involving sales to, or purchases from, concerns in the United States”;<sup>119</sup>
- “[B]usiness torts occurring in the United States”;<sup>120</sup> and
- “[A]n indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States.”<sup>121</sup>

Considering the above nuances for an activity to be “commercial” under the Act and those that establish the mandatory nexus demonstrated by the three prongs in section 1605(a)(2) between the plaintiff’s claim and the United States and the foreign state’s acts, there is a “‘considerably greater’ [burden upon the plaintiff] than what would apply in the context of a typical company.”<sup>122</sup> Although, the purpose of such provisions in the commercial activity exception is to provide a foundation to justify the applicability of United States law and the FSIA in an action,<sup>123</sup> “[s]ection 1605(a)(2) is another example of how, due to the difficulty of establishing an applicable exception, the presumption of immunity is a significant advantage for [foreign state-owned enterprises].”<sup>124</sup> This is emphasized by the unclear lines that dictate a court’s case-by-case determination of whether an activity is

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court is free to determine whether the activity was “commercial activity” under section 1603(d) and to exercise jurisdiction over such foreign state under section 1605(a)(3). H.R. 4292 § 2(a); H.R. 889 § 2(a). These 2014 and 2015 Bills demonstrate the inconsistency and complication effecting the determination of what is “commercial” under the Act when such activity, done by a foreign state conducting an artwork expedition, can considerably satisfy the “private player” in the market place qualification for “commercial activity” that the Supreme Court set out in *Weltover* because a private individual can engage in the same activity.

118. H.R. REP. NO. 94-1487, at 17; VOLLMER ET AL., *supra* note 102, at 79.

119. H.R. REP. NO. 94-1487, at 17.

120. *Id.*

121. *Id.*

122. Riblett, *supra* note 49, at 33.

123. VOLLMER ET AL., *supra* note 102, at 81.

124. Riblett, *supra* note 49, at 33.

“commercial” to satisfy the exception to the presumption of immunity under the FSIA<sup>125</sup> despite examples in the legislative history of the Act.

Consequently, “[t]he requirement under the FSIA of a connection between the plaintiff’s cause of action and the commercial acts of the foreign sovereign [or foreign state, accompanied by distinctions complicating what constitutes commercial activity,] is a significant barrier to the exercise of subject matter jurisdiction in the United States Courts.”<sup>126</sup> While the commercial activity exception is laborious to prove, there is no confusion that there is a bright-line difference between nature and purpose of an activity. The Act clearly provides that “[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”<sup>127</sup>

This seemingly mundane nuance between nature and purpose, however, can be a significant crutch to a foreign sovereign’s or state’s ability to garner the protection of the FSIA.<sup>128</sup> And rightfully so as different governments may have different purposes for their actions, rendering the purpose an inappropriate measure. The Supreme Court of the United States unequivocally held the “question is not whether the foreign government is acting with a profit motive.”<sup>129</sup> Therefore, despite the attempt to introduce and argue a sovereign’s motive with arguments based upon a sovereign’s subjective profit motive, or the lack thereof, the courts have swiftly rejected such measures.<sup>130</sup>

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125. H.R. REP. NO. 94-1487, at 16; *see also supra* text accompanying note 117.

126. Riblett, *supra* at note 49, at 35 (quoting *Stena Rederi, AB v. Comision de Contratos del Comite Ejecutivo General*, 923 F.2d 380, 387 (5th Cir. 1991)).

127. 28 U.S.C. § 1603(d) (2005).

128. *See supra* text accompanying note 68 (providing that advice relating to the practical impacts brought on by the cost of time and strategic, procedural maneuvering under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq.).

129. *Weltover*, 504 U.S. at 614.

130. *See Beg v. Islamic Rep. of Pak.*, 353 F.3d 1323, 1327 n.1 (11th Cir. 2003) (“We decline to examine the government’s motives in determining what is commercial activity.”); *see also, e.g., NML Capital, Ltd. v. Rep. of Arg.*, 680 F.3d 254, 260 (2d Cir. 2012) (“The [sovereign’s] lack of a profit motive is simply irrelevant.”); *Rush-Presbyterian-St. Luke’s Med. Ctr. v. Hellenic Rep.*, 877 F.2d 574, 581 (7th Cir. 1989) (“Whether the obligation to provide . . . services arises from the relation of government to citizen, or employer to employee, or insurer to insured is simply irrelevant—the ‘basic exchange’ of money for health care services is the same in each context. We decline to

One could argue that with the globalization of commerce and the intentional infiltration of products that advance the commercial presence of a foreign state's or, specifically, a state-owned enterprise's position in the market place, the time has come to even the playing field and curb the protections of the FSIA. At the very least there are certainly instances of "commercial activity"—such as a state-owned enterprise becoming a private player in an American market—that should not enjoy the protections of the FSIA. Nor should these instances invoke the right to claim an illegitimate defense cloaked under the protections of the FSIA without compensating the plaintiff for the costs and expense of litigating a meritless FSIA defense.

However, until Congress takes the necessary steps to protect its citizens from unscrupulous defenses or the ill-begotten, unintended advantages that the FSIA offers to foreign states and state-owned enterprises, the best protection is to seek specific contract provisions, including but not limited to an explicit waiver of any FSIA claim. It is further noted here that, under the Act, there is no express mention of sanction awards for claiming a defense of immunity regardless if such defense is legitimately used.<sup>131</sup>

## V. APPEALS UNDER THE FSIA

Fast-forwarding through litigation, even if a plaintiff survives a foreign state or state-owned enterprise's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a defendant will likely appeal this interlocutory type order.<sup>132</sup> Further, absent an implicit waiver including the filing of a responsive pleading without raising immunity as a defense,<sup>133</sup> a

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focus exclusively, for purposes of determining immunity, on the *purpose* for which Greece happened to enter this particular transaction.”); *Joseph*, 830 F.2d at 1024 (“[T]here is no indication that Congress intended the presence of a profit motive on the part of the sovereign to be a *threshold requirement* for applying the commercial activity exception.”).

131. See *Af-Cap, Inc.* 462 F.3d at 428–29.

132. See, e.g., Order Re-Opening Case and Issuing Scheduling Order, *Global Tech., Inc. v. Yubei Power Steering Syst. Co.*, 2 (E.D. Mich. 2015); *Global Tech. Inc.*, 807 F.3d at 809–10.

133. See discussion *supra* pp. 640–41; see also *supra* text accompanying note 68 (providing that advice relating to the practical impacts brought on by the cost of time and

defendant can conceivably hold its cards and wait to raise the issue because litigants can bring a motion challenging subject matter jurisdiction at any time during litigation.<sup>134</sup>

Generally, a motion to dismiss, even one based on jurisdictional grounds, is not immediately reviewable.<sup>135</sup> Under the FSIA, however, foreign states have an *immediate right to appeal* rulings denying claims of foreign sovereign immunity under the collateral order doctrine.<sup>136</sup> This is “because ‘sovereign immunity’ is an immunity from trial, not just a defense to liability on the merits [and, therefore,] the denial of a claim of sovereign immunity is immediately appealable under the collateral order doctrine as a final decision, pursuant to 28 U.S.C. § 1291.”<sup>137</sup>

The majority of the Federal Circuits agree that, under the FSIA, there is an immediate right of appeal under the collateral order doctrine to prevent the need for parties to litigate claims over which the court lacks jurisdiction.<sup>138</sup> Nonetheless, the appeals process, which stays the case, is another costly delay tactic, which may be utilized by the state-owned enterprises seeking immunity for their actions under the Act.<sup>139</sup> In fact, a

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strategic, procedural maneuvering under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq.).

134. Fed. R. Civ. P. 12(h)(3).

135. *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002).

136. *Gould*, 853 F.2d at 451.

137. *O'Bryan*, 556 F.3d at 372 (quoting *Keller*, 277 F.3d at 815). For an explanation of the collateral order doctrine's application to FSIA claims, see *Gould*, 853 F.2d at 450–51 (internal citations omitted) (“A motion under Fed.R.Civ.P. 12(b)(1) questioning subject matter jurisdiction must be considered before other challenges since the court must find jurisdiction before determining the validity of a claim. Ordinarily, the ‘denial of a motion to dismiss, even when the motion is based on jurisdictional grounds, is not immediately reviewable.’ However, a denial of foreign sovereign immunity is immediately appealable under the collateral order doctrine as a final decision, pursuant to 28 U.S.C. § 1291.”).

138. See generally, e.g., *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010); *Abi Jaoudi & Ajar Trading Corp. v. Cigna Worldwide Ins. Co.*, 391 F. App'x 173 (3d Cir. 2010); *Hansen v. PT Bank Negara Indon. (Persero)*, TBK, 601 F.3d 1059 (10th Cir. 2010); *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahirya*, 533 F.3d 837 (D.C. Cir. 2008); *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004).

139. See *supra* text accompanying note 68 (providing that advice relating to the practical impacts brought on by the cost of time and strategic, procedural maneuvering under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq.).

foreign sovereign or foreign state may take advantage of the appeals process on the immunity issue on more than one occasion.<sup>140</sup> For example, if a district court finds that a foreign sovereign or foreign state does not have FSIA protection, that foreign sovereign or foreign state can immediately appeal the decision.<sup>141</sup> In the event that a higher court remands the issue, it is conceivable that a state-owned enterprise could appeal the district court's decision on remand again. Until a court of appeal affirms that there is no immunity, this situation is subject to uncertainty.

The time involved in these appeals, which delays the litigation and discovery, is considerable. From June 2014 to June 2015, the median time from the filing of a Notice of Appeal to disposition averaged 8.4 months in federal courts, which is delineated by federal circuit below.<sup>142</sup>

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140. See *supra* text accompanying note 68 (providing that advice relating to the practical impacts brought on by the cost of time and strategic, procedural maneuvering under FSIA litigation has been determined by the knowledge and experience of Victoria Valentine, Esq.).

141. See, e.g., Order Re-Opening Case and Issuing Scheduling Order, *Global Tech., Inc. v. Yubei Power Steering Syst. Co.*, 1–2 (E.D. Mich. 2015); *Global Tech. Inc.*, 807 F.3d at 809. See also *O'Bryan*, 556 F.3d at 372 (explaining that a “denial of a claim of sovereign immunity is immediately appealable under the collateral order doctrine”) (quoting *Keller*, 277 F.3d at 815).

142. To access the information included in the time lapse table designated by federal circuit court as well as the average median time nationally, see *U.S. Courts of Appeals Federal Court Management Statistics (June 30, 2015)*, OFFICE OF THE U.S. COURTS tbl., <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30> (last visited March 22, 2016), then click “Download Data Table” and review the “Median Time from Filing Notice of Appeal to Disposition” row for the national total and for each Circuit.

<b>Time Lapse</b>	<b>Federal Circuit Court</b>
14 months	D.C. Circuit
12.7 months	1 <sup>st</sup> Circuit
10 months	2 <sup>nd</sup> Circuit
8.3 months	3 <sup>rd</sup> Circuit
5.3 months	4 <sup>th</sup> Circuit
9.2 months	5 <sup>th</sup> Circuit
8.8 months	6 <sup>th</sup> Circuit
7.2 months	7 <sup>th</sup> Circuit
6 months	8 <sup>th</sup> Circuit
12.8 months	9 <sup>th</sup> Circuit
7.8 months	10 <sup>th</sup> Circuit
7.3 months	11 <sup>th</sup> Circuit

Certainly, plaintiffs should be mindful of the time, which delays discovery and the litigation process itself, and the costs involved in an appeal when entering into business dealings with foreign business entities that could be subject to the FSIA. Again, when entering into a business relationship with foreign sovereigns or an entity classified as a foreign state under the Act, it is likely best to insist on an explicit waiver because it may potentially narrow the scope of the litigation and appeals to the actual, primary legal issues and not the FSIA issues. Consequently, litigation can be more streamlined and less costly for all parties involved.

## CONCLUSION

This Article encourages United States business entities to educate themselves about the effects of the FSIA. According to the trends, the United States will continue to do business with state-owned enterprises. This Article recommends that individual business entities should include specific contract provisions, including an explicit waiver provision, in their agreements with state-owned enterprises. Being conscientious of the FSIA, effects of explicit waiver provisions, and factors that perpetuate litigation and its cost, such as jurisdictional issues dependent on the determination of “commercial activity” and a defendant’s right to an automatic appeal, strategically allows United States business entities to avoid costly, time-consuming legal hurdles and to resolve any disputes that may arise between the parties in litigation.

Therefore, as we open our borders and allow an increase in foreign commercial activity in the United States, the mechanism for disposing of disputes needs to be reconsidered. Because United States citizens may suffer the unintended consequences resulting from foreign governments’ and state-owned enterprises’ misuse of the statute, it is time Congress revisit the FSIA.

## APPENDIX

Aaron Lukken, Esq. \*

Historically, service of process through official channels could only be undertaken by Letter Rogatory (Letter of Request), a communication from a judge hearing a case, transmitted through diplomatic channels, to a judge in the involved foreign country.<sup>143</sup> Avenues to service were streamlined dramatically with the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention).

Now available to United States litigants, to varying degrees dependent on destination country, are three means of serving with full respect to the law: (1) a request to the destination state's Central Authority, pursuant to Article 5; (2) direct service by postal channels, pursuant to Article 10(a); and (3) service effected by judicial officer or other person pursuant to Article 10(b) and (c).<sup>144</sup> While all member countries must provide Article 5 access, Article 10 methods are available only where neither the originating jurisdiction nor the destination state object.<sup>145</sup>

A small handful of countries not party to the Hague Service Convention still see a good deal of litigation. These are addressed below the Hague member countries in the following grid, which details the individual steps involved in serving particular foreign defendants.<sup>146</sup>

Unless otherwise noted, methods of service available refer to those under articles of the Hague Service Convention and traditional requests for international judicial assistance (i.e., Letters Rogatory). The timeframes for receipt of proof of service as well as individual countries'

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\* See note on page 625.

143. See BLACK'S LAW DICTIONARY, 988 (9th ed. 2009) ("A document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case.").

144. Hague Service Convention, *supra* note 5, arts. 5, 10(a)–(c).

145. *Id.* arts. 5, 10.

146. For the Hague Service Convention state membership table, which includes all signatories, dates of ratification, and entry into force, see *Status Table 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HCCH (Mar. 31, 2016), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17> [hereinafter *Status Table*].

unique and analytical characteristics have been determined from the knowledge and experience of Aaron Lukken, Esq., a consulting attorney who provides litigation support to United States and Canadian lawyers seeking to serve process abroad, compel evidence in foreign countries, and enforce judgments overseas. His experience is informed by his tenure as a staff attorney with Legal Language Services and his management of requests for service abroad. The timeframes and analytical characteristics included in the following grid are based on historical performance of Central Authorities<sup>147</sup> and agents in the field, but are not statutorily required or in any way binding.

Hague-Member Country	Methods Available	Timeframe Expected (for receipt of proof)	Unique Characteristics
Canada	Central Authority (Article 5)	2–4 months, depending on province	<p>Canada is, by far, the easiest Hague country in which to serve, by virtue of its close similarity to the U.S. system.</p> <ul style="list-style-type: none"> <li>▪ Canada's Central Authority function is <i>decentralized</i>—each province and territory has its own authority, as does the federal government in Ottawa.<sup>148</sup></li> <li>▪ Canadian authorities are not likely to reject service requests on sovereignty</li> </ul>

147. Foreign Central Authorities under the Hague Service Convention are designated agencies tasked with executing service requests under Article 5 of the Convention. Hague Service Convention, *supra* note 5, arts. 2, 5.

148. For an overview of Canada's central and forwarding authorities as well as the methods and costs relating to requests for service, etc., see *Canada – Central Authority & Practical Information*, HCCH (Dec. 11, 2015), <https://www.hcch.net/en/states/authorities/details3/?aid=248>. For a comprehensive list for Canada's designated Central Authorities and their contact information, see *Central Authorities (Articles 2 and Art. 18(3))*, HCCH, <https://assets.hcch.net/upload/auth14ca2015en.pdf> (last visited Mar. 29, 2016).

			<p>grounds.</p> <ul style="list-style-type: none"> <li>▪ In <i>Quebec</i>, translation into French is required for service of initiating documents, such as a summons and complaint.<sup>149</sup></li> </ul>
	Mail (Article 10(a))	1 week	Notwithstanding § 1608(a)(3) and (b)(3), mail service is not advisable, and very frequently unavailable in any event (Hague mail service is invalid in the 5th and 8th Circuits, as well as many individual federal districts). <sup>150</sup>
	Other competent persons (Article 10(b))	2–3 weeks	Canada's declarations to the Convention authorize the use of private process servers in Anglophone provinces and direct access to local <i>hussiers de justice</i> (bailiffs) in Quebec. <sup>151</sup>

149. *Canada – Central Authority & Practical Information*, *supra* note 148.

150. *Bankston*, 889 F.2d at 173–74 (holding that mail is an invalid method of service under the Hague Service Convention in the Eighth Circuit); *Nuovo Pignone*, 310 F.3d at 384–85 (holding that mail is an invalid method of service under the Hague Convention in the Fifth Circuit).

151. *See generally Canada – Central Authority & Practical Information*, *supra* note 148; *Declaration/Reservation/Notification*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=392&disp=resdn> (last visited Apr. 6, 2016) (describing Canada's declarations to the Hague Service Convention).

<b>China</b>	Central Authority (Article 5)	6–9 months	China objects to all alternative means of Hague service, allowing only Article 5 requests. Although quite slow in comparison to other Hague authorities, the Chinese usually execute service requests with little fanfare. However, where the People’s Republic is itself a defendant, plaintiffs should not be surprised by a rejected request. In such a case, plaintiffs should proceed directly to § 1608(a)(4) and (b)(4), requesting that service be effected via the U.S. Department of State.  Hong Kong is addressed <i>infra</i> .
<b>England &amp; Wales</b>	Central Authority (Article 5)	2–3 months	The English Central Authority is relatively efficient, and less likely to reject a service request on sovereignty grounds.
	Mail (Article 10(a))	1 week	Notwithstanding § 1608(a)(3) and (b)(3), mail service is not advisable, and very frequently unavailable (Hague mail service is invalid in the 5th and 8th Circuits, as well as many individual federal districts). <sup>152</sup>
	Other competent persons (Article 10(b))	1–4 weeks	Foreign litigants may avail themselves of private process servers, <i>provided the server is instructed by a solicitor</i> . <sup>153</sup>

152. *Bankston*, 889 F.2d at 173–74; *Nuovo Pignone*, 310 F.3d at 384–85.

153. See *Declaration/Reservation/Notification*, HCCH, <https://www.hcch.net/en/states/authorities/status-table/notifications/?csid=427&disp=resdn> (last visited Mar. 29, 2016) (regarding the United Kingdom’s declarations and subsequent diplomatic clarification).

<b>France</b>	Central Authority (Article 5)	3–5 months	The French Central Authority is less likely to reject a service request on sovereignty grounds.
	Mail (Article 10(a))	1 week	Notwithstanding § 1608(a)(3) and (b)(3), mail service is not advisable, and very frequently unavailable (Hague mail service is invalid in the 5th and 8th Circuits, as well as many individual federal districts). <sup>154</sup>
	Other competent persons (Article 10(b))	2–4 weeks	<p>“Other competent persons” in France refers to <i>huissiers de justice</i>, which are quasi-public officials, roughly akin to bailiffs or sheriffs in common law countries.<sup>155</sup></p> <p>When serving private defendants, the <i>hussier</i> method is the most logical and timely, because the Central Authority utilizes <i>huissiers</i>. However, it is unclear whether the <i>hussier</i> may serve the French Republic or its subdivisions.</p>

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154. *Bankston*, 889 F.2d at 173–74; *Nuovo Pignone*, 310 F.3d at 384–85.

155. *See Its Role*, CHAMBRE NATIONALE DES HUISSIERS DE JUSTICE, <http://www.huissier-justice.fr/en/its-role-324.aspx> (last visited Mar. 29, 2016) (explaining the function of France’s National Chamber of Bailiffs).

<b>Germany</b>	Central Authority (Article 5)	2–4 months, depending on “Land”	<p>Germany’s Central Authority function is <i>decentralized</i>—each “Land” (federal state) has its own authority, but the federal government does not.<sup>156</sup> Moreover, although quite efficient, German authorities are quite sensitive to matters involving German sovereignty. Although it is not certain that the Berlin authority would refuse to serve the federal government, a rejection could not be surprising.</p> <p>In such a case, plaintiffs should proceed directly to § 1608(a)(4) or (b)(4), requesting that service be effected via the U.S. Department of State.</p>
<b>Hong Kong</b>	Central Authority (Article 5)	4–6 months	<p>Although officially a part of the People’s Republic of China (PRC) since 1997, Hague methods in Hong Kong are more in line with English practice than with Chinese practice. Translation is not required, and China allows Article 10 service in Hong Kong.<sup>157</sup></p> <p>The Central Authority is a bit more efficient than its counterpart in Beijing, but is extremely sensitive to any act which might offend the PRC. Article 13 (sovereignty) rejection would be unsurprising.</p>

156. See Central Authority of the Lands, HCCH, [https://assets.hcch.net/upload/auth14\\_de.pdf](https://assets.hcch.net/upload/auth14_de.pdf) (last visited Mar. 29, 2016) (demonstrating Germany’s Central Authority is divided into “Lands” and providing contact information of such agencies for requests for service).

157. *China (Hong Kong) – Other Authority (Art. 18) & Practical Information*, HCCH (July 9, 2015), <https://www.hcch.net/en/states/authorities/details3/?aid=393> (“Documents have to be in English or Chinese.”).

	Mail (Article 10(a))	1 week	Notwithstanding § 1608(a)(3) and (b)(3), mail service is not advisable, and very frequently unavailable in any event (Hague mail service is invalid in the 5th and 8th Circuits, as well as many individual federal districts). <sup>158</sup>
	Other competent persons (Article 10(b))	2–4 weeks	Foreign litigants may avail themselves of service via private agents (usually solicitors). However, this raises the question of whether private agents may serve process on a government entity in a foreign action.
<b>India</b>	Central Authority (Article 5)	9–12 months	<p>Of India's more than one billion people, only a single staff member works in the Hague Central Authority. As such, the time needed to effect service is extraordinarily long. That translation is unnecessary does little to expedite the process. Moreover, litigants should be unsurprised if the Authority rejects requests to serve the government on sovereignty grounds. (Art. 13.).</p> <p>In such a case, plaintiffs should disregard § 1608(a)(3) and (b)(3), as India objects to service by mail. Proceed directly to § 1608(a)(4) and (b)(4), requesting that service be effected via the U.S. Department of State.</p>

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158. *Bankston*, 889 F.2d at 173–74; *Nuovo Pignone*, 310 F.3d at 384–85.

<b>Japan</b>	Central Authority (Article 5)	4–5 months	The Japanese Central Authority is highly competent, but culturally speaking, quite concerned about the sovereign's reputation. Although not a certainty, rejection of FSIA service on grounds that it violates Japan's sovereignty would not be surprising.
	Mail (Article 10(a))	1 week	<p>Japan filed a decidedly vague declaration to Article 10(a),<sup>159</sup> indicating that it was not objectionable, but also unlikely to be viewed as appropriate. Service on the Japanese government by mail would most likely be challenged, if not ignored altogether.</p> <p>In any event, notwithstanding § 1608(a)(3), (b)(3), mail service is not advisable, and very frequently unavailable (Hague mail service is invalid in the 5th and 8th Circuits, as well as many individual federal districts).<sup>160</sup></p>

159. See *Japan – Central Authority & Practical Information*, HCCH (May 15, 2009), <https://www.hcch.net/en/states/authorities/details3/?aid=261> (providing a summary of the representative of Japan's commentary at the Special Commission of April 1989 on the practical operation of the Service and Evidence Conventions that describes Japan's declaration to Article 10(a) of the Hague Service Convention); *Declaration/Reservation/Notification*, HCCH, <https://www.hcch.net/en/states/authorities/notifications/?csid=407&disp=resdn> (last visited Apr. 6, 2016) (demonstrating Japan's declaration to Article 10).

160. *Bankston*, 889 F.2d at 173–74; *Nuovo Pignone*, 310 F.3d at 384–85.

<b>Korea</b>	Central Authority (Article 5)	4–5 months	<p>The Korean Central Authority is highly competent but, like its Chinese and Japanese neighbors, is concerned about the sovereign's reputation. Although not a certainty, rejection of FSIA service on grounds that it violates Korea's sovereignty would not be surprising.</p> <p>In such a case, plaintiffs should disregard § 1608(a)(3) and (b)(3), as Korea objects to service by mail. Proceed directly to § 1608(a)(4) and (b)(4), requesting that service be effected via the U.S. Department of State.</p>
<b>Mexico</b>	Central Authority (Article 5)	9–12 months	<p>As the expected timeframe indicates, Mexico's handling of Hague requests is not expeditious. Litigants should be unsurprised if the Authority rejects requests to serve the government on sovereignty grounds (Art. 13).</p> <p>In such a case, plaintiffs should disregard § 1608(a)(3) and (b)(3), as Mexico objects to service by mail. Proceed directly to § 1608(a)(4) and (b)(4), requesting that service be effected via the U.S. Department of State.</p>

<b>Switzerland</b>	Central Authority (Article 5)	2–4 months, depending on Canton	<p>The Swiss Central Authority function is <i>decentralized</i> with a separate designation for each canton, akin to a province or federal state.<sup>161</sup></p> <p>Although it is uncertain whether a request to serve a FSIA claim in Switzerland would be rejected under Article 13, it remains a possibility.</p> <p>In such a case, plaintiffs should disregard § 1608(a)(3) and (b)(3), as India objects to service by mail. Proceed directly to § 1608(a)(4) and (b)(4), requesting that service be effected via the U.S. Department of State.</p>
<b>Non-Hague Countries</b>	<b>Methods Available</b>	<b>Timeframe Expected</b>	<b>Unique Characteristics</b>
<b>Austria</b>	Letter Rogatory	4–5 months	<p>Austria is not a member of the Hague Service Convention and has no similar treaty relationship with the United States,<sup>162</sup> so § 1608(a)(2) and (b)(2) are inapplicable. Where an agency or instrumentality of the foreign state is to be served, Letters Rogatory fall specifically under § 1608(b)(3).</p>

161. *Switzerland – Central Authority & Practical Information*, HCCH (Apr. 5, 2016), <https://www.hcch.net/en/states/authorities/details3/?aid=276> (explaining that Switzerland has multiple Central Authorities); see also *Liste des Autorités Centrales Condonales pour L'entraide Judiciaire en Matière Civile et Commerciale*, SCHWEIZERISCHE EIDENOSSENSCHAFT (Apr. 5, 2016), <http://www.rhf.admin.ch/rhf/fr/home/zivil/behoerden/zentral.html> (listing Switzerland's Central Authorities and their contact information).

162. See *Status Table*, *supra* note 146; see also *Details*, HCCH, <https://www.hcch.net/en/states/hcch-members/details1/?sid=23> (last visited Apr. 6, 2016) (listing treaties to which Austria is bound).

	Mail	1 week	Mail service would likely be ignored, if it is even successfully delivered. U.S. litigants should follow mail service with a request to the U.S. Department of State under § 1608(a)(4) and (b)(4).
<b>Philippines</b>	Letter Rogatory	Unlikely to ever be effected	The State Department advises that Letters Rogatory are highly unlikely to ever be processed by Philippine officials. <sup>163</sup>
	Service by agent/local counsel	n/a	This is not a valid method to serve the state or political subdivision under § 1608(a). <sup>164</sup>  Local counsel <i>may</i> petition for service on an agency or instrumentality under § 1608(b)(3)(C).
	Mail	1 week	Mail service would likely be ignored, if it is even successfully delivered. U.S. litigants should follow mail service with a request to the U.S. Department of State under § 1608(a)(4) or (b)(4).

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163. *See supra* note 13 (providing that patterns among individual countries' approaches to accepting service of process, here the Philippines, have been determined from the knowledge and experience of Aaron Lukken, Esq.).

164. 28 U.S.C. § 1608(a) (providing an exhaustive list of valid service methods that does not include service by agent).

<b>Singapore</b>	Letter Rogatory	5–6 months	<p>Singapore is not a member of the Hague Service Convention and has no similar treaty relationship with the United States,<sup>165</sup> and thus, § 1608(a)(2) and (b)(2) are inapplicable. Still, if the foreign ministry is willing to convey a Letter Rogatory—and a court is willing to execute that Letter, the “special arrangement” channel in § 1608(a)(1) might be fulfilled.</p> <p>Where an agency or instrumentality of the foreign state is to be served, Letters Rogatory fall specifically under § 1608(b)(3).</p>
	Service by agent/local counsel	n/a	<p>This is not a valid method to serve the state or political subdivision under § 1608(a).<sup>166</sup></p> <p>Local counsel <i>may</i> petition for service on an agency or instrumentality under § 1608(b)(3)(C).</p>
	Mail	1 week	<p>Mail service would likely be ignored, if it is even successfully delivered. U.S. litigants should follow mail service with a request to the U.S. Department of State under § 1608(a)(4) or (b)(4).</p>

165. See *Status Table*, *supra* note 146; see also *Details*, HCCH, <https://www.hcch.net/en/states/hcch-members/details1/?sid=128> (last visited Apr. 6, 2016) (listing treaties to which Singapore is bound).

166. 28 U.S.C. § 1608(a).

<b>Taiwan</b>	Letter Rogatory	6–9 months	<p>Because it is not recognized as a sovereign, Taiwan is not a member of the Hague Service Convention or other service treaty. Accordingly, § 1608(a)(2) and (b)(2) are inapplicable. Still, if Taiwan’s foreign ministry is willing to convey a Letter Rogatory—and a court is willing to execute that Letter, the “special arrangement” channel in § 1608(a)(1) might be fulfilled.</p> <p>Where an agency or instrumentality of the foreign state is to be served, Letters Rogatory fall specifically under § 1608(b)(3).</p>
	Service via agent/local counsel	n/a	<p>Not a valid method to serve the state or political subdivision under § 1608(a).<sup>167</sup></p> <p>Local counsel <i>may</i> petition for service on an agency or instrumentality under § 1608(b)(3)(C).</p>
	Mail	1 week	<p>Mail service would likely be ignored, if it is even successful. U.S. litigants should follow mail service with a request to the U.S. Department of State under § 1608(a)(4) or (b)(4).</p>

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167. *Id.*

