Challenges to Enforcing Arbitral Awards Against Foreign States in the United States

Molly Steele and Michael Heinlen*

This article provides an overview of the law regarding execution of judgments confirming arbitral awards against foreign states and state instrumentalities. It first examines the Foreign Sovereign Immunities Act of 1976 as the basis for obtaining jurisdiction. It then examines the FSIA as the sole basis for executing judgments against those states and instrumentalities, specifically addressing when immunity bars attachment to property held in the United States as well as alternative mechanisms for attachment. The article concludes with additional analysis of the FSIA and the frustration it leaves parties seeking enforcement of these awards.

Most U.S. attorneys understand that enforcing a judgment means using legal procedures to collect monetary damages, obtain specific performance, or prohibit behavior through an injunction.[1] In other words, they expect enforcement to encompass the final step in obtaining relief granted by a court. In international law, however, enforcement of a judgment against a foreign state or its agencies and instrumentalities does not mean collecting money or halting unlawful behavior. Instead, enforcement is merely a step in the process that leads, in the case of a money judgment, for example, to collection. Execution is the final step that actually attaches the state's property to satisfy the judgment.[2]

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) provides a classic example of the difference between enforcement and execution.[3] Article 54 unequivocally requires "enforcement" within the territory of each signatory, but states that "execution" of a judgment is governed by the laws of the jurisdiction where execution is sought:

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* Molly Steele is a partner specializing in international arbitration and litigation in the Dallas office of Thompson & Knight; Michael Heinlen is a senior associate in the intellectual property section of the same firm. The authors gratefully acknowledge the considerable assistance of Nathan Daley in preparing this article for publication.

1. *Cf.* Black's Law Dictionary 569 (8th ed. 2004) (defining "enforce" to mean compelling a person to pay damages).

2. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug. 27,1965, 17 U.S.T. 1270 [hereinafter ICSID].

3. *Id.*

> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state. . . .
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.[4]

Further, Article 55 pointedly preserves immunity from execution as observed by each signatory: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."[5]

In the United States, this distinction has been codified in the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), which establishes two different aspects of sovereign immunity: (1) jurisdictional immunity, a foreign state's immunity from suit, and (2) immunity from execution and attachment, a foreign state's immunity from having its property attached in satisfaction of judgments.[6] The two are independent; a state can be subject to suit but immune from execution of a judgment against it. Thus, to collect a money judgment against a foreign state or state agency, a plaintiff must prove that neither type of immunity applies.

Seeking to enforce and execute on arbitral awards against foreign states and state agencies can be especially difficult. Arbitral panels cannot enforce the awards they render, so prevailing parties must seek relief in courts when their opponents fail to comply. In the United States, an award holder must first obtain a judgment confirming the award, and then the court must enter an order levying execution against the opponent's property. Thus, when the opposing party is a foreign state or state agency, the award holder must show that the state entity is not immune from jurisdiction.[7] The award holder must further show that the state entity has lost its immunity from execution and attachment to be able to collect any money.

Under the FSIA, foreign state entities lose immunity from jurisdiction by agreeing to arbitration. But they do not automatically lose their immunity from execution and attachment. In fact, it can be quite difficult to attach the property of a state entity after obtaining a judgment recognizing an arbitral award against it. This article provides a broad overview of the law regarding execution of judgments confirming arbitral awards against foreign states and state instrumentalities.

4. *Id.* art. 54.

5. *Id.* art. 55.

6. 28 U.S.C. § 1605; 28 U.S.C. § 1610.

7. As used in this article, "state entity" includes both a foreign state and an instrumentality or agency of that foreign state.

I. The FSIA Provides the Sole Basis for Obtaining Jurisdiction over a Foreign State in the United States

Before 1952, U.S. courts deferred to the Executive Branch in granting immunity to foreign states in all actions against friendly sovereigns.[8] But in 1952, the State Department issued the Tate Letter, which stated:

> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*) . . . . [I]t will hereafter be the Department's policy to follow the restrictive theory . . . in the consideration of requests of foreign governments for a grant of sovereign immunity.[9]

The courts therefore adopted a more restrictive approach that limited immunity to cases involving the sovereign's purely public acts; thus, foreign states no longer enjoyed immunity from actions based on their commercial activity.[10]

Although this change did not affect the courts' approach to immunity determinations—courts continued to rely on the Executive Branch for guidance—it did create "considerable uncertainty" and a "troublesome inconsistency" in immunity decisions.[11] Specifically, immunity decisions had to be based on case-specific analyses that often involved diplomatic considerations.[12] Foreign states, for example, "often placed diplomatic pressure on the State Department . . . to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'"[13] "Not surprisingly, the governing standards were neither clear nor uniformly applied."[14]

Congress passed the FSIA to remedy this situation.[15] The FSIA transfers responsibility for immunity decisions from the Executive Branch to the courts and codifies the Tate Letter's restrictive approach to immunity.[16] The Act contains a "set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."[17] Thus, "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of [the United States],"[18] and a party seeking to enforce and execute on an arbitral award against a foreign sovereign must establish jurisdiction under the Act.

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8. *See* Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004).
9. *Id.* at 690 (quoting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting U.S. Att'y Gen. (May 19, 1952) (reprinted in 26 DEP'T ST. BULL. 984-985 (1952)).
10. *See id.*
11. *See id.* at 716 (Kennedy, J., dissenting).
12. *Id.* at 690-91.
13. *Id.* at 690.
14. *Id.* at 691.
15. *Id.*
16. *Id.*
17. *Id.* (internal quotations omitted).
18. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).

Such a party first needs to obtain a judgment from a U.S. court recognizing the award. And to enter judgment, the court must find an exception to the sovereign's immunity from suit. Section 1605(a)(6) of the FSIA provides that exception, stating:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards [such as the ICSID Convention, New York Convention, or Panama Convention],[19] or (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607 [28 USCS § 1607] . . . .[20]

The broad language of this statute demonstrates that immunity from suit is not typically a significant barrier to enforcing an arbitral award under the FSIA.

Further, there is typically no need to meet the due process requirement that nonresident defendants have minimum contacts with the forum. A majority of the courts that have addressed this issue have held that the Due Process Clause of the Constitution does not apply to foreign states because they are not persons within the meaning of that clause.[21] Whether an instrumentality of a foreign state is likewise exempt from due process considerations depends on whether the foreign state has exerted sufficient control over its instrumentality to make that instrumentality an agent of the state.[22]

In any event, in actions to enforce arbitration claims, the minimum-contacts analysis should not prevent U.S. courts from having personal jurisdiction over foreign states and their agencies and instrumentalities. Under Section 1605(a)(6) of the FSIA, minimum

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19. *See* Inter-American Convention on International Commercial Arbitration, 9 U.S.C. § 302 [hereinafter Panama Convention]; ICSID, *supra* note 2; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

20. 28 U.S.C. § 1605(a)(6).

21. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 99 (D.C. Cir. 2002) (holding that a foreign state is not a "person" within the meaning of the Due Process Clause, and, consequently, that no "minimum contacts" analysis is required once personal jurisdiction has been established under the FSIA); Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157, 1167-68 (C.D. Cal. 2006) ("[U]nder the FSIA, subject matter jurisdiction plus service of process equals personal jurisdiction and the Due Process Clause imposes no limitation on a court's exercise of personal jurisdiction over a foreign state." (quotations omitted)); Rux v. Republic of Sudan, 2:04CV428, 2005 U.S. Dist. LEXIS 36575, 2005 WL 2086202, at *18 (E.D. Va. Aug. 26, 2005) ("[T]o afford foreign states rights and protections against the United States Government that are not similarly extended to the States of the Union, would result in an irony not countenanced by the Constitution."); Cruz v. United States, 387 F. Supp. 2d 1057, 1067 (N.D. Cal. 2005) (holding that "the reasoning of Price, which this Court finds sound, counsels against affording the Mexican banks in this case the status of 'persons' within the scope of that term as used in the Due Process Clause."); *see also* Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1207 (C.D. Cal. 2001) (finding implicit support in Ninth Circuit precedent for its holding that foreign sovereigns are not "persons" under the Due Process Clause); *cf.* O'Bryan v. Holy See, 471 F. Supp. 2d 784, 794 (W.D. Ky. 2007) ("Defendant Holy See cannot simultaneously seek the protections of the FSIA and the United States Constitution. Therefore, the First Amendment does not bar Plaintiffs' claims."). *But see* Frontera Res. Azer. v. State Oil Co. of the Azer. Republic, 479 F. Supp. 2d 376, 384-85 (S.D.N.Y. 2007) (holding that exercise of personal jurisdiction under the FSIA must comport with the Due Process Clause).

22. *See* TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 301 (D.C. Cir. 2005).

standards would be met because: (a) the foreign entity agreed to arbitrate in the United States; (b) the foreign entity waived jurisdiction by treaty; or (c) the underlying claim involved commercial activity in or affecting the United States.[23]

But establishing jurisdiction over the state does not end the process. The court must also enter an order executing against the foreign sovereign's property.[24] To do that, the court must find that the property at issue falls within an exception to immunity from execution under Section 1610 of the FSIA.[25] Put plainly, proving that a foreign state is subject to jurisdiction in the United States is not enough. Even though a state may be found liable, its assets may be protected by immunity from execution. In fact, despite the FSIA's goal of limiting sovereign immunity to suits involving public functions, immunity from execution has made the "[a]ctual seizure of State assets without consent . . . a rarity."[26] State immunity from execution has therefore been described as "'the last fortress[,] the last bastion of State immunity.'"[27]

II. The FSIA Provides the Sole Basis for Executing on Judgments Against Foreign States in the United States.

Section 1609 of the FSIA broadly immunizes state property against execution and attachment: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution . . . ."[28] Section 1610, however, provides exceptions to that broad immunity. Under Section 1610(a)(6), for example, foreign state property "used for a commercial activity in the United States" is not immune from execution of a judgment confirming an arbitral award.[29] Section 1610(b) provides exceptions for any property —whether commercial or noncommercial—of State agencies and instrumentalities that are "engaged in commercial activity in the United States" if specific conditions are met.[30] Further, in certain situations, Section 1610(d) allows prejudgment attachment of property "used for a commercial activity in the United States."[31]

The exceptions to immunity granted by Section 1610 of the FSIA are then limited by exclusions in Section 1611.[32] For example, property "of a foreign central bank or monetary authority held for its own account" and military property remain immune from attachment and execution.[33] In addition, funds used to maintain diplomatic missions are

23. *See Price*, 294 F.3d at 88-90 ("When Congress passed the original FSIA, it was assumed that the exercise of personal jurisdiction over foreign states under the statute always would satisfy the demands of the Constitution. This assumption proved accurate."). Only after the Congress added a new exception for state-sponsored terrorism in 28 U.S.C. § 1605(a)(7) did the minimum- contacts question become an issue. *See id*.

24. *See* 28 U.S.C. § 1610(c).

25. *See* 28 U.S.C. § 1610.

26. Hazel Fox, The Law of State Immunity 6 (2002).

27. *Id*. at 368 (quoting Professor Sucharitkul, Commentary to ILC Draft Articles, art. 18 ¶ 1, C/AN.4/L/452/Add 3).

28. 28 U.S.C. § 1609.

29. 28 U.S.C. § 1610(a)(6).

30. 28 U.S.C. § 1610(b).

31. 28 U.S.C. § 1610(d).

32. 28 U.S.C. § 1611.

33. *Id*.

immune from attachment under the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes (the "Vienna Convention").[34] Accordingly, diplomatic, military, and central-bank property enjoy absolute immunity from attachment and execution.

A. Under Section 1610(a) of the FSIA, Arbitral Award Holders Can Attach the Property of a Foreign State if It Is in the United States and Used for a Commercial Purpose in the United States.

Section 1610(a) of the FSIA provides exceptions to immunity from attachment or execution that apply to both foreign states and their agencies and instrumentalities.[35] Under this section, there is no immunity if:

(1) the state property at issue is in the United States;
(2) the state property at issue is used for a commercial activity in the United States; and
(3) one of seven listed exceptions must apply, one of which is that the judgment at issue "is based on an order confirming an arbitral award rendered against the foreign state . . . ."[36]

1. *The Foreign State's Property Must Be in the United States*

To execute against property under Section 1610(a) of the FSIA, the property must be in the United States when the court authorizes execution.[37] When tangible property is at issue, determining its location should be relatively straightforward (assuming it can be located). But intangible property can pose problems. Such problems have been at the center of a series of recent Fifth Circuit cases dealing with the right to receive royalties on oil produced in facilities off the coast of the Republic of Congo.[38]

Following entry of a default judgment against the Republic of Congo in London, England, the Connecticut Bank of Commerce (the "Bank") filed suit in New York state court to turn the foreign judgment into a U.S. judgment.[39] The New York court entered judgment in the Bank's favor and entered an order of attachment authorizing the Bank to

34. Vienna Convention on Diplomatic Relations art. 25, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (obligating signatories to provide diplomatic immunity for embassies and to provide "full facilities" for the function of diplomatic missions) [hereinafter Vienna Convention]; *see also* Liberian E. Timber Corp. v. Gov't of Republic of Liber., 659 F. Supp. 606, 608 (D.D.C. 1987) (holding that "[t]he United States was a party to the Vienna Convention at the time Congress enacted the FSIA, so the provisions of the Vienna Convention are controlling over the FSIA").

35. 28 U.S.C. § 1610(a); *see* 28 U.S.C. § 1603(a) (defining "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state").

36. 28 U.S.C. § 1610(a).

37. *Id.*; *see also* FG Hemisphere Assocs., LLC v. Republic of Congo, 455 F.3d 575, 588-89 (5th Cir. 2006) (holding that the "situs snapshot" is taken when the court makes the Section 1610(a) decision).

38. *See* Af-Cap, Inc. v. Republic of Congo (*Af-Cap IV*), 462 F.3d 417 (5th Cir. 2006); Af-Cap, Inc. v. Republic of Congo (*Af-Cap III*), 389 F.3d 503 (5th Cir. 2004); Af-Cap, Inc. v. Republic of Congo (*Af-Cap II*), 383 F.3d 361 (5th Cir. 2004); Conn. Bank of Commerce v. Republic of Congo (*Af-Cap I*), 309 F.3d 240 (5th Cir. 2002).

39. *Af-Cap IV*, 462 F.3d at 422; *Af-Cap II*, 383 F.3d at 364.

execute against the Congo's property.[40] The Bank then registered the New York judgment in a Texas state court and filed actions against various entities to garnish their obligations to pay taxes and royalties to the Congo.[41]

The issue before the Fifth Circuit was whether the property the Bank sought to garnish was in the United States: "Determining the situs of the property at issue here poses a special problem because this property is intangible in nature."[42] The court first held that the relevant property was the garnishee's obligation to pay taxes and royalties to the Congo.[43] Then, applying Texas garnishment law, it held "the situs of a debt obligation is the situs of the debtor."[44] A garnishment action operates "*in personam* against the garnishee to prevent him from paying the debt to the garnishment debtor and is operative *in rem* upon the *property of the defendant debtor in the hands of the garnishee*."[45] Thus, since the garnishees were "business entities formed and headquartered in the United States," the property was in the United States for purposes of the FSIA.[46]

The Ninth Circuit applied similar logic in a case that involved many of the same parties and issues.[47] As in the Texas cases, a judgment creditor had filed actions against various entities to garnish their obligations to the Congo.[48] Like the Fifth Circuit, the court implicitly found that the relevant property was the royalty obligation.[49] There was a difference, however, because the Congo had agreed that the money that would have otherwise been used to pay the obligation would be credited to a preexisting debt to the garnishees, as a set-off.[50] The court therefore found that the obligation was the garnishee's property, not the Congo's. Accordingly, although it was in the United States, the royalty was immune from execution under the FSIA: "Because only 'the property in the United States *of a foreign state*' is subject to garnishment, Af-Cap cannot garnish the obligation . . . ."[51] Thus, in at least the Fifth Circuit, when a judgment creditor seeks to garnish payment obligations owed to a foreign state, the situs of the garnishee is the Section 1610(a) situs of the foreign state's intangible property.

2. *The Foreign State's Property Must Be Used for a Commercial Purpose in the United States*

The second element required to find an exception to immunity under Section 1610(a) is that the state property at issue must be used for a commercial activity in the United States.[52] Thus, the state (or state agency or instrumentality) must be involved in "commercial activity" in the United States, and the property must be "used for" that activity.[53]

40. *Af-Cap IV*, 462 F.3d at 422; *Af-Cap II*, 383 F.3d at 364.
41. *Af-Cap IV*, 462 F.3d at 422; *Af-Cap II*, 383 F.3d at 364.
42. *Af-Cap II*, 383 F.3d at 371. *But see* discussion, *infra* notes 100-102 and accompanying text.
43. *Af-Cap II*, 383 F.3d at 371-72.
44. *Id.* at 372.
45. *FG Hemisphere Assocs.*, 455 F.3d at 585 (explaining the earlier *Af-Cap* holdings).
46. *Af-Cap II*, 383 F.3d at 373.
47. Af-Cap Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007) [hereinafter *COCL*].
48. *Id.* at 1084-85.
49. *Id.* at 1092-93.
50. *Id.* at 1093.
51. *Id.*
52. 28 U.S.C. § 1610(a); *Af-Cap II*, 383 F.3d at 367.
53. *See Af-Cap II*, 383 F.3d at 365.

a. Commercial Activities Are Activities that Involve Trade and Traffic or Commerce

The first question is whether the state is engaged in commercial activity in the United States. The FSIA defines "commercial activity" as follows: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The 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."[54] The issue, therefore, is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'"[55]

The FSIA further defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States."[56] The legislative history of the FSIA provides examples of commercial activity in the United States, including: (1) "a commercial transaction performed and executed . . . in the United States;" (2) "a commercial transaction or act having a 'substantial contact' with the United States;" (3) "commercial transactions performed . . . in part in the United States;" (4) "import-export transactions [partly performed] . . . in the United States"' (5) "business torts occurring in the United States;" and (6) "indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States."[57] Congress considered the following to be "commercial activities" under Section 1610(a):

- operating a mineral extraction company;[58]
- operating an airline;[59]
- operating a state trading corporation;[60]
- "a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building;"[61]
- "a contract to make repairs on an embassy building;"[62]
- selling a service;[63]

54. 28 U.S.C. § 1603(d). *See* Republic of Argentina v. Weltover, Inc. 504 U.S. 607, 611 (1992).

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

56. 28 U.S.C. § 1603(e).

57. H.R. REP. NO. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615-616.

58. *Id*. at 16. Whether oil and gas production is a commercial activity, however, is a complicated question of international law because "[o]utside the United States and Canada, sovereign ownership of mineral reserves is the almost universal rule." ERNEST E. SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS 201 (2d ed. 2000). Since mineral reserves can be owned by private parties in the United States, the United States views mineral extraction as a commercial activity; but, in most of the world, minerals are owned by states as part of their patrimony.

59. H.R. REP. NO. 94-1487, at 16.

60. *Id*.

61. *Id*. Although the legislative history of the FSIA indicates that this may be a commercial activity, many types of property owned by the military are absolutely immune under 28 U.S.C. § 1610(d).

62. *Id*. Considering this a commercial activity, however, may violate the United States obligation under Article 25 of the Vienna Convention to provide "full facilities" for the functioning of a diplomatic mission. *See* Vienna Convention art. 25; *see also Liberian E. Timber Corp*., 659 F. Supp. at 608 (holding that accounts used for purposes of a diplomatic mission are immune under the Vienna Convention).

63. H.R. REP. NO. 94-1487, at 16.

- selling a product;[64]
- leasing property;[65]
- borrowing money;[66]
- "employment or engagement of laborers, clerical staff or public relations or marketing agents;"[67] and
- "investment in a security of an American corporation."[68]

The following examples are not "commercial activities" under Section 1610(a):

- "participation in a foreign assistance program administered by the Agency for International Development;"[69]
- funds used to maintain embassy facilities, pay salaries and wages of diplomatic personnel, and fund other diplomatic and consular activities;[70]
- acts of political terrorism; [71] and
- holding a nonprofit art exhibition.[72]

Several recent cases have clarified the distinction between commercial and governmental. The Second Circuit found that repayment of debt to the International Monetary Fund (IMF) is not a commercial activity that would subject Argentina to execution.[73] But, the Eleventh Circuit held that Peru was engaged in commercial activity when it offered a five-million dollar reward for information enabling it to capture a fugitive because offering a reward for information is an activity in which private commercial entities engage.[74] When an Australian scientific agency conducted negotiations to license a patent, it was engaged in commercial activity.[75] Similarly, when Liberia hired an American lawyer to represent its interests in a U.S. dispute, it was engaged in commercial activity.[76]

b. The Property Must Be Used for a Commercial Activity, Not Simply Related to a Commercial Activity

The immunity analysis under Section 1610(a) does not end with a determination that the foreign state is engaged in commercial activity in the United States. The property at issue must also be "used for" that activity.[77] Courts have applied this requirement narrowly, holding that the "phrase 'used for' in Section 1610(a) is not a mere syntactical infelicity that permits courts to look beyond the 'use' of property, and instead try to find

64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Liberian E. Timber Corp.*, 659 F. Supp. at 610.
71. De Letelier v. Republic of Chile, 748 F.2d 790, 798 (2d Cir. 1984).
72. Aschenbrenner v. Conseil Regional de Haute-Normandie, 851 F. Supp. 580, 585 (S.D.N.Y. 1994).
73. EM Ltd. v. Republic of Argentina, 473 F.3d 463 (2d Cir. 2007), *petition for cert. filed*, 2007 WL 155223 (U.S. May 29, 2007) (No. 06-1576).
74. Guevara v. Republic of Peru, 468 F.3d 1289 (11th Cir. 2006).
75. Intel Corp. v. Commonwealth Scientific & Indus. Research Org., 455 F.3d 1364 (Fed. Cir. 2006).
76. Reichler, Milton & Medel v. Republic of Liberia, 484 F. Supp. 2d 1 (D.D.C. 2007).
77. *COCL*, 475 F.3d at 1088.

any kind of nexus or connection to a commercial activity in the United States."[78] The Fifth Circuit set forth the issue as follows:

> What matters under the statute is what the property is "used for," not how it was generated or produced. If property in the United States is used for a commercial purpose here, that property is subject to attachment and execution even if it was purchased with tax revenues or some other noncommercial source of government income. Conversely, even if a foreign state's property has been generated by commercial activity in the United States, that property is not thereby subject to execution or attachment if it is not "used for" a commercial activity within our borders.[79]

The Ninth Circuit agrees: "[P]roperty is 'used for a commercial activity in the United States' when the property in question is put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a commercial activity or *in relation* to a commercial activity."[80]

In *COCL*, a judgment creditor, Af-Cap, sought to garnish sums from various Chevron entities in the United States that had payment obligations to the Congo.[81] Af-Cap argued the obligations were used for a commercial activity in the United States because the Congo had pledged them as security for a loan agreement.[82] The court disagreed, finding that the loan agreement was between the Congo and a bank located in the Bahamas and that the loan was used to finance the construction of a highway in the Congo managed by an English contractor.[83] That the money used to secure the loan was in a U.S. bank did not mean that it was used for a commercial activity in the United States. The court explained "[w]hat matters under the statute is what the property is 'used for,' not how it was generated or produced."[84]

Af-Cap next argued that the obligations were used for a commercial activity in the United States because they were paid to the Congo by wire transfer from a bank in New York.[85] The court again disagreed. Although the obligations might have been related to, or had some connection with, a commercial activity in the United States, that was not enough: "[I]n order to satisfy Section 1610(a), the property must have been 'used'; the mere fact that the property has a 'nexus or connection to a commercial activity in the United States' is insufficient."[86]

By contrast, in *Af-Cap II*, the Fifth Circuit found that certain oil-related obligations were used for commercial activities in the United States. As described above, Af-Cap wanted to garnish royalty and tax obligations owed to the Congo by working-interest owners located (at least initially) in the United States.[87] Unlike *COCL*, however, in *Af-Cap II*, the Congo had, for eleven of the preceding twenty-four years, used half of the

78. *Id*. at 1087 (quoting *Af-Cap-I*, 309 F.3d at 254).
79. *Af-Cap I*, 309 F.3d at 251.
80. *COCL*, 475 F.3d at 1091.
81. *See supra* notes 45-49 and accompanying text.
82. *COCL*, 475 F.3d at 1091.
83. *Id*. at 1091-92.
84. *Id*. at 1087 (quoting *Af-Cap I*, 309 F.3d at 251).
85. *Id*. at 1094.
86. *Id* (quoting *Af-Cap I*, 309 F.3d at 254).
87. *See supra* notes 37-44 and accompanying text.

royalties to repay a commercial debt incurred in the United States.[88] In accordance with a settlement agreement between the Congo and the U.S. bank, cash payments were made by the operator of the oil concession to the creditor in the United States.[89] The remainder of the royalties were paid in-kind to the Congo, and after the debt was repaid in 2002, all royalties were taken by the Congo in-kind, without any evidence of use in the United States.[90] Under these facts, the Fifth Circuit found that the Congo's property was used for commercial purposes in the United States.[91]

The court had "reservations about defining property use as commercial in nature solely by reference to past single and/or exceptional commercial uses."[92] Specifically, the court was troubled because, although the royalty and tax obligations were ongoing—they had existed for twenty-four years when the Fifth Circuit entered its opinion—the Congo's debt payments ended a few years earlier when its debt to the New York bank was paid off.[93] Further, while the debt was being paid, not all of the royalty and tax obligations were diverted to the U.S. creditor.[94] The court, therefore, had to decide whether such past, partial commercial use was sufficient to render the royalties "property used for commercial purposes" in the United States under the FSIA.[95]

In doing so, the court defined and then applied an "essential use" test to determine whether the tax and royalty obligations were commercial in nature.[96] Thus, it held:

> [The] analysis should include an examination of the uses of the property in the past as well as all facts related to its present use, with an eye toward determining whether the commercial use of the property, if any, is so exceptional that it is 'an out of character' use for that particular property.[97]

Stated differently, "foreign property retains its immunity protection where its commercial uses, considered holistically and in context, are bona fide exceptions to its otherwise non-commercial use."[98]

Applying this standard, the court held that the Congo used the royalty obligations commercially. First, "[t]he amount of the debt repaid was not insignificant . . . over $26,000,000 was diverted from these obligations to the Congo's commercial creditor."[99] Second, the Congo's use of the obligations to repay its debt was "frequent, ongoing, and longstanding."[100] And third, "the proceeds of these tax and royalty obligations were not cordoned off for use of the Congo in its sovereign capacity . . . indicat[ing] the availability

88. *Af-Cap II*, 383 F.3d at 368.
89. *Id.*
90. *Id.* at 371 n.13.
91. *Id.* at 368-70; *accord* Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A., 875 F.2d 1174, 1175-76 (5th Cir. 1989) (holding that a letter of credit was used for commercial activities in the United States because it was used to secure the services of an American corporation to do drilling work); *see AF-Cap I*, 309 F.3d at 258 (explaining the holding in *Atwood*).
92. *Af-Cap II*, 383 F.3d at 369.
93. *Id.* at 368-70.
94. *Id.* at 370.
95. *Id.* at 368.
96. *Id.* at 368-69.
97. *Id.* at 369.
98. *Id.* at 370.
99. *Id.*
100. *Id.*

of this property for whatever purpose — commercial or otherwise—the Congo deem[ed] appropriate."[101] Accordingly, the royalty and tax obligations were used for commercial purposes under Section 1610(a) of the FSIA.[102]

In an amendment after rehearing, the court further held:

> [T]o the extent that tax obligations were not used to satisfy the . . . debt, such obligations cannot be reached by the garnishment proceedings in this case. Instead, the Garnishees' obligations to the Congo are subject to garnishment by Af-Cap only to the extent that those obligations were used in the past to settle the . . . debt, irrespective of whether the Garnishees and the Congo label those obligations "taxes" or "royalties."[103]

This amendment clarified the court's position. It did not overrule the opinion's principal holding that royalty obligations earmarked to pay off the Congo's loan were used for a commercial purpose in the United States.

Within two years, however, the Fifth Circuit effectively reversed the result it had reached in *Af-Cap II*. In 2006, the court decided that nonmonetary obligations cannot be garnished under Texas law, thereby extinguishing Af-Cap's hopes of obtaining the royalties owed by the operators to the Congo.[104] In the meantime, another panel of the Fifth Circuit had questioned whether the royalty obligations the Congo owned were truly "intangibles" as assumed in *Af-Cap II* and *III*.[105] The Fifth Circuit's reasoning in *Af-Cap II* is questionable for at least two reasons: 1) it failed to examine the in-kind nature of the royalties; and 2) it looked too far back in time for commercial use in the United States.

Since 2002, the Congo had received all of its oil royalties as oil in Congolese waters, rather than as cash. Thus, both when the petition for garnishment was filed and when the court ruled on the Congo's immunity from execution, the Congo had no property in the United States that was being used for commercial purposes. The court, however, paid little attention to the distinction between cash and in-kind royalties, relegating its discussion of that issue to a footnote.[106] Instead, the court focused on the garnishee's obligation to pay royalties and taxes.[107] Under the FSIA, however, the relevant question is whether the foreign state's property is used for commercial purposes in the United States.[108] Obviously, the foreign state's property is the royalties themselves, not the obligation to pay royalties. The royalties were barrels of oil tendered to the Congo in the Congo. Royalties are considered part of the mineral estate before the minerals are removed from the

101. *Id.* at 370-71.

102. *Id.* at 371; *cf. Liberian E. Timber Corp.*, 659 F. Supp. at 610 (holding that money in an account primarily used to fund diplomatic and consular activities was immune from attachment even though a portion of the account had been used for commercial activities) (cited with approval by *AF-Cap I*, 309 F.3d at 258 n.9, and *Af-Cap II*, 383 F.3d at 370 n.9). On subsequent appeal after remand, the Fifth Circuit held that the obligations could not be garnished because the Congo chose to receive its payments in kind as oil (as opposed to cash), and Texas does not allow garnishment of nonmonetary obligations. *Af-Cap IV*, 462 F.3d at 424-25.

103. *Af-Cap III*, 389 F.3d at 503.

104. *Af-Cap IV*, 462 F.3d at 424-25.

105. *FG Hemisphere Assocs.*, 455 F.3d at 585-87.

106. *See Af-Cap II*, 383 F.3d at 372 n.13.

107. *Id.*

108. 28 U.S.C. § 1610(a).

ground, and they become personalty once removed from the ground.[109] Thus, the right to future royalties would be real estate—located, in this instance, in the Congo. Real estate is, of course, tangible. And accrued royalties, though personalty, would nonetheless be tangible barrels of oil if paid in kind, as they were being paid when the garnishment action was filed. The Congo was receiving the oil in Africa, and there was no evidence that the Congo was using it in the United States. If the court had focused on the in-kind nature of the royalties the Congo was receiving, it would likely have determined that the sovereign's property was located in the Congo, rather than in the United States.

Further, the Fifth Circuit's "holistic approach"[110] of examining the use of the royalties for the preceding twenty-four years is inherently vague. The district court had looked at the same set of facts and determined that the prior payments of half the royalties for eleven years were not enough to make the current royalty payments "used for commercial purposes in the United States."[111]

The Ninth Circuit has also questioned the Fifth Circuit's decision to consider the entire twenty-four-year period in determining how the royalties and taxes were used. Although the Ninth Circuit agrees that "[w]hat matters under the statute is what the property is 'used for,' not how it was generated or produced, and not whether the property merely has a 'nexus or connection to a commercial activity in the United States,'"[112] it does not share the Fifth Circuit's willingness to analyze each use of the property over a quarter century.[113] On the contrary, the Ninth Circuit stated in *COCL* that "attempting to quantify the number of commercial uses associated with the property, or to embark upon characterizing property use as exceptional or unexceptional, would unnecessarily complicate the determination to be made under §1610(a)."[114] Accordingly, that court requires simply that the used-for determination be made in a "straight-forward manner, with a proper appreciation of the fact that the further removed the property is from the referenced commercial transaction, the less likely it is that the property was used *for* that transaction."[115]

In reality, however, the Ninth Circuit had an easier set of facts. The court concluded that certain royalty and bonus payments were property of COCL, rather than the Congo. The fact that other bonuses were sent from a bank in the United States had no bearing on how the Congo had used them.[116] Similarly, payments to purchase an interest in a Congolese joint venture that operated in the Congo were never used for commercial activities in the United States.[117] And payments to third-party contractors for social programs in the Congo never even went into the state's coffers, so they clearly were not property of the state used for commercial activity in the United States.[118]

The question of how far back a court should look to determine whether regular, continuing payments made to a sovereign qualify as property used for commercial purposes in

109. *See, e.g.*, *FG Hemisphere Assocs.*, 455 F.3d at 595 n.4; WALTER LEE SUMMERS, THE LAW OF OIL & GAS §§ 572-85 (1958).
110. *Af-Cap II*, 383 F.3d at 369.
111. *See id.* at 368-69 (discussing the unpublished district court opinion).
112. *COCL*, 475 F.3d at 1087 (quoting *Af-Cap I*, 309 F.3d at 251).
113. *Id.* at 1091.
114. *Id.*
115. *Id.*
116. *Id.* at 1093-94.
117. *Id.* at 1094.
118. *Id.* at 1094-95.

the United States is not an easy one. The Third Restatement of the Foreign Relations Law of the United States takes the position that courts can and should look at past as well as current use.[119] But cases construing the statute indicate that the commercial use should be current.[120] Investors would benefit from the Fifth Circuit's approach, because the longer the period of examination, the greater the chance that the foreign sovereign has used the property at some point for commercial purposes in the United States. But a sovereign that completed its commercial venture several years before the court's examination would reasonably expect that, because its property is not being used in the United States, there would be little chance a U.S. court would conclude that such property could be attached. Yet, that is the situation in which the Congo found itself, at least until the Fifth Circuit eventually held that nonmonetary obligations could not be garnished.[121]

The Fifth Circuit's opinions also raise questions about how royalties in international oil and gas ventures should be viewed. Although in *Af-Cap II* and *Af-Cap IV* the Fifth Circuit panels assumed that royalty obligations are intangible, another panel of the Fifth Circuit questioned that assumption and specifically refused to decide the issue.[122] It was only because the royalty obligations were classified as "intangible debts" that the situs of the royalty obligations became the location of the debtor/garnishee.[123] If mineral royalties were viewed *sui generis*, a court could reasonably conclude that the situs of the right to royalties is where the extracted minerals are located, particularly since royalties are interests in land.[124] If the royalties were located where the minerals are located, of course, the FSIA would not even come into play, because there would be no property of a sovereign in the United States.

The Ninth Circuit recently decided a case involving an arbitral award that Iran's Ministry of Defense had won against an American military supplier.[125] The court found that the Ministry bore none of the earmarks of a separate juridical entity and was therefore the State itself. In a separate case, a private citizen in California had obtained a judgment against Iran for the assassination of his brother.[126] In order to collect that judgment, the private citizen intervened to obtain a lien against the arbitral award held by Iran. The court ruled, however, that the arbitral award was not property used for a commercial purpose in the United States, and therefore could not be attached.[127]

As these cases demonstrate, it is extremely difficult to prove that property of a sovereign state is used for commercial activity in the United States. Sovereigns are likely to have bank accounts, for example, whose funds pass through the Federal Reserve Bank of New

119. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 460 cmt. b (1987) ("The property of states may be attached only if it is or was used in commercial activity . . . .").

120. *E.g.*, City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31, 36 (3d Cir. 1985) ("Section 1610(a) . . . permits execution on property of a foreign state only if it is used for commercial activity in the United States . . . .").

121. *Af-Cap IV*, 462 F.3d at 424-25. The question will likely reappear, however, if other sovereigns have waived sovereign immunity from execution, have previously used the royalties to pay off a U.S. debt, and choose to accept their mineral royalties in cash.

122. *FG Hemisphere Assocs.*, 455 F.3d at 585-87.

123. *Af-Cap II*, 383 F.3d at 371-72.

124. *See* SUMMERS, *supra* note 109, at §§ 572-85.

125. Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., 2007 WL 1544584 (9th Cir. May 30, 2007).

126. *Id.*

127. *Id.*

York. But, unless a claimant can prove those funds were or are used for a commercial purpose in the United States, the funds cannot be reached.

Real property owned by a foreign sovereign may prove easier to attach. The Supreme Court recently decided a case brought by the City of New York in an attempt to enforce a tax lien against property held by the permanent mission of India to the United Nations to house lower-level employees of the mission.[128] The Court held that India's permanent mission was subject to federal court jurisdiction under the exception contained in Section 1605(4) concerning "rights in immovable property situated in the United States."[129] The Court considered jurisdictional immunity alone, however, and was not called upon to determine execution immunity under Section 1610. In order to foreclose on immovable property owned by a foreign sovereign, the petitioner would still have to show that the particular piece of real estate is used for a commercial activity in the United States and is not used to maintain a diplomatic or consular mission or the residence of the chief of such mission.[130] For example, if a sovereign owned the building in which it conducted its national airline business in the United States, that property would be subject to execution. But if the property were used to house lower-level employees of a sovereign's diplomatic mission, its commercial purpose is much more doubtful.[131]

3. *Arbitral Award Holders Easily Meet the Final Element for Establishing an Exception to Immunity Under Section 1610(a)*

To meet the final element for establishing an exception to immunity under Section 1610(a), a party seeking to attach the property of a state or state agency or instrumentality must show that one of seven enumerated exceptions applies.[132] One of those exceptions provides that, if the other elements have been met, there is no immunity from execution on a judgment "confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement."[133] Accordingly, this element is easily met by parties attempting to enforce arbitral awards.[134]

The fact remains that even for holders of arbitral awards, the FSIA severely restricts the ability to execute against foreign states. The threshold requirement in Section 1610(a) that the property against which execution is sought must be "used for a commercial activity in the United States"[135] is a formidable barrier to overcome. "At the outset, this [requirement] eliminates large classes of property that might be candidates for execution in

128. Permanent Mission of India to U.N. v. City of New York, 127 S.Ct. 2352 (2007).

129. *Id.*

130. 28 U.S.C. § 1610(1)(4)(B).

131. While ownership of real estate can unquestionably be a commercial enterprise, it can also be quite personal. Courts will therefore have to look at the purpose for which the real estate is held to determine whether it is used for commercial activity.

132. 28 U.S.C. § 1610(a)(1)-(6).

133. 28 U.S.C. § 1610(a)(6).

134. Section 1610(c) of the FSIA provides two additional requirements to attaching the property of a foreign sovereign: (1) "that a reasonable period of time has elapsed following entry of the judgment" and (2) that notice has been given to the party against whom execution is being sought. 28 U.S.C. § 1610(c).

135. 28 U.S.C. § 1610(a).

satisfaction of a judgment against a foreign sovereign."[136] Congress was less cautious, however, about preserving immunity from execution or attachment against state agencies and instrumentalities. As explained below, Section 1610(a)'s used-for requirement does not apply to such entities.

B. Section 1610(b) Provides an Alternative Mechanism for Attaching the Property of Foreign State Agencies and Instrumentalities

If the holder of an arbitral award against a State agency or instrumentality cannot prove that the property it seeks to attach is "used for a commercial activity in the United States," Section 1610(b) of the FSIA provides an alternative basis for attachment or execution. Under that section, the property of a state agency or instrumentality is not immune if the following requirements are met: 1) the property at issue is in the United States; 2) the State instrumentality is engaged in a commercial activity in the United States; and 3) one of six listed exceptions applies.[137]

Thus, under both Section 1610(a) and Section 1610(b), the party seeking attachment must show that the property is in the United States. But under Section 1610(b) the agency or instrumentality must be engaged in commercial activity. Apart from that, however, there are other important differences between the two sections. First, Section 1610(b) does not require that the property be used for a commercial purpose in the United States. Rather, the agency or instrumentality must be engaged in commercial activity in the United States. Consequently, a greater range of property can be attached under Section 1610(b). As long as the requirements are met, any property is subject to attachment, not just commercial property. Further, since many state agencies and instrumentalities, such as state airlines and state oil companies, perform the "type of actions by which a private party engages in 'trade and traffic or commerce,'"[138] it should be easier to prove that they are engaged in commercial activity under Section 1610(b) than to show that a state's property is used for a commercial activity under Section 1610(a).[139]

The second difference between Sections 1610(a) and (b), however, can make it difficult for an arbitral award holder to execute on a judgment recognizing its award against a state agency or instrumentality. The exceptions listed for the third requirement under Section 1610(b) are different than the exceptions listed in Section1610(a). Most notably, unlike Section 1610(a), Section 1610(b) does not have an arbitration exception; holding an arbitral award does not meet the third requirement under Section 1610(b). Something else is needed. Specifically, an award holder must show that either: (1) the state agency waived its immunity from attachment; or (2) the subject matter of the underlying arbitration was related to (a) the state agency's commercial activity in or affecting the United States, or (b) the expropriation of physical or tangible property.[140]

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136. *COCL*, 475 F.3d at 1089 (quoting Working Group of the A.B.A., *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 584 (2002)).

137. 28 U.S.C. § 1610(b).

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

139. *See supra* notes 54-70 and accompanying text (discussing the meaning of "commercial activity" under the FSIA).

140. 28 U.S.C. § 1610(b)(1)-(2). There are three other exceptions under § 1610(b), but they are not likely to be relevant in commercial arbitration claims because they involve claims for personal injury or property damage, claims regarding state-sponsored terrorism, and claims in admiralty. 28 U.S.C. § 1610(b)(2).

1. *State Agencies and Instrumentalities Can Waive Immunity from Attachment or Execution*

A foreign state may waive immunity from execution under Section 1610 of the FSIA, either explicitly or implicitly, by "the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution."[141] In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, for example, Pertamina, an oil and gas company owned and controlled by the Republic of Indonesia, entered into contracts with a private company under which Pertamina "waive[d] any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may have in the future."[142] The court held that this language waived Pertamina's immunity from execution in U.S. courts.[143]

Similarly, in *Ferrostaal Metals Corp. v. S.S. Lash Pacifico*, a state agency explicitly waived its immunity from execution under the terms of a trade agreement between Romania and the United States.[144] The court held that the agency's property could be attached for execution of a judgment because Romania waived its immunity in the Agreement on Trade Relations Between the United States and the Romanian Government.[145] That agreement stated:

> Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts, and, when applicable, to administrative bodies as plaintiffs and defendants, or otherwise, in accordance with the laws in force in the territory of such other Party. *They shall not claim or enjoy immunities from suit or execution of judgment* or other liability in the territory of the other Party with respect to commercial or financial transactions, except as may be provided in other bilateral agreements.[146]

Cases involving such explicit waivers are not difficult. It is much harder, however, to prove that a state agency implicitly waived its immunity from execution. Indeed, courts are unwilling to find implicit waiver without strong evidence of intent even under Section 1605(a)(1) of the FSIA, which provides an exception to jurisdictional immunity.[147] Although some cases have held that agreements to arbitrate implicitly waive jurisdictional

141. H.R. Rep. No. 94-1487, at 28.

142. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 82 (2d Cir. 2002).

143. *Id.* at 83; *see also COCL*, 475 F.3d at 1086-87 (finding an explicit waiver of immunity from attachment in the following contract language:

> To the extent that the Borrower may in any jurisdiction claim for itself or it assets immunity from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets such immunity (whether or not claimed) the Borrower agrees not to claim and waives such immunity to the fullest extent permitted by the laws of that jurisdiction).

144. Ferrostaal Metals Corp. v. S.S. Lash Pacifico, 652 F. Supp. 420, 422-23 (S.D.N.Y. 1987).

145. *Id.*

146. *See id.* (quoting Agreement on Trade Between the United States and the Romanian Government, April 2, 1975, Art. IV, ¶ 2, 26 U.S.T. 2305, 2308-09, T.I.A.S. No. 8159 (emphasis added)).

147. *See*, *e.g.*, Cabiri v. Republic of Ghana, 165 F.3d 193, 201 (2d Cir. 1999) ("We and other courts have observed that the implied waiver provision of Section 1605(a)(1) must be construed narrowly. We have previously suggested that § 1605(a)(1) requires that the plaintiff demonstrate proof of a subjective intent to waive immunity."); Corzo v. Banco Central de Reserva del Peru, 243 F.3d 519, 523 (9th Cir. 2001) ("[T]he waiver exception to sovereign immunity must be narrowly construed.").

immunity,[148] such holdings do not carry over to cases involving immunity from attachment.

The Ninth Circuit squarely addressed this issue in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*[149] In that case, an individual sought to attach property owned by Iran's Ministry of Defense ("MOD"), arguing that MOD had waived immunity from attachment by arbitrating a claim at the International Chamber of Commerce.[150] The trial court agreed, but in doing so, it erred "by confounding two different aspects of foreign sovereign immunity."[151] As the Ninth Circuit explained, "the FSIA preserved a distinction between two different aspects of foreign sovereign immunity: jurisdictional immunity—that is, a foreign sovereign's immunity from actions brought in United States courts—and immunity from attachment—a foreign sovereign's immunity from having its property attached or executed upon."[152] The court emphasized that the FSIA *preserved* the distinction between the two types of immunity: "Prior to the passage of the FSIA, the courts that had addressed this question had held that a foreign state's waiver of jurisdictional immunity did not constitute a waiver of its immunity from attachment of its property."[153] Accordingly, MOD's waiver of jurisdictional immunity was not a waiver of its immunity from execution.[154]

The Second Circuit similarly overturned a district court ruling that allowed execution against assets of Chile's national airline.[155] Having determined that the airline was subject to jurisdiction, the trial court was reluctant to find that it was immune from execution.[156] "Hence, it concluded that Congress would not create a right without a remedy."[157] But the Second Circuit disagreed, holding that "Congress did in fact create a right without a remedy."[158] Since jurisdiction alone does not provide an exception to immunity from execution, the airline retained its immunity from execution.[159]

At least two federal district courts and one state court have taken contrary positions. In *Hercaire Int'l, Inc. v. Argentina*, for example, the federal district court for the Southern District of Florida held: "In order to waive its sovereign immunity to jurisdiction while retaining immunity as to execution, a foreign state and its agencies must expressly retain

148. *See*, *e.g.*, Ipitrade Int'l v. Fed. Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978); Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fid., Ltd., 689 F. Supp. 1340, 1351 (S.D.N.Y. 1988); Birch Shipping Corp. v. Embassy of United Republic of Tanz., 507 F. Supp. 311, 312 (D.D.C. 1980).

149. Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., 385 F.3d 1206 (2004), *vacated on other grounds*, 546 U.S. 450 (2006).

150. *Id.* at 1217-18.

151. *Id.* at 1217.

152. *Id.* at 1218.

153. *Id.* (citing Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana, 335 F.2d 619, 626 (4th Cir. 1964) ("A distinction has been drawn between jurisdictional immunity and immunity from execution of the property of a sovereign, and waiver the former is not necessarily a waiver of the latter."); Rich v. Naviera Vacuba S.A., 197 F. Supp. 710, 722-23 (E.D. Va. 1961) (holding that waiver of jurisdictional immunity does not waive immunity from attachment); Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705, 708 (2d Cir. 1930)).

154. *Cubic Def. Sys., 385 F.3d at 1218*; *see also Liberian E. Timber Corp.*, 650 F. Supp. at 75-77 (treating jurisdictional immunity, which was waived by treaty, and immunity from attachment as separate issues).

155. *De Letelier*, 748 F.2d at 798.

156. *Id.*

157. *Id.*

158. *Id.* at *798*.

159. *Id.* at 798-99.

that immunity, either in its Answer or in some other form. Otherwise, the Court will deem that immunity implicitly waived."[160]

"To rule any other way would be to subject the Court, the parties, and counsel to needless expense and effort in litigating a cause that may eventually prove useless. Though the statute does allow for this situation, a plaintiff should at least be given fair warning at the inception of the action that, although the country in question is technically waiving its sovereign immunity, it does so only if it eventually wins."[161] [This should be single-spaced, I believe. It is a quote from the case.]

Similarly, in *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, the court held that "an agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity" from execution.[162] And a New York state court followed *Hercaire* in holding that an Iranian state agency implicitly waived its immunity from execution by consenting to suit in the United States without expressly reserving execution immunity.[163]

While these cases may appeal to a sense of equity and fairness, they do not address or account for the FSIA's distinction between jurisdictional immunity and immunity from execution. In fact, the *Hercaire* court acknowledged that the statute does allow for a plaintiff to obtain a judgment against a state yet be unable to execute on that judgment; it simply rejects this result as unfair and inefficient.[164] Better-reasoned cases show that this distinction cannot be ignored and that waiver of one does not constitute waiver of the other.[165]

Further, while Sections 1610(a) and (b) provide identical waiver exceptions, only Section 1610(a) provides an arbitration exception. This indicates two things. First, it shows that foreign states do not implicitly waive immunity from attachment under Section 1610(a) by agreeing to arbitrate claims. If they did, the separate arbitration exclusion would be redundant. Because statutes must be interpreted to avoid making any provisions superfluous, agreements to arbitrate do not implicitly waive immunity from attachment under Section 1610(a)'s waiver exception.[166] And second, it follows that since Section 1610(b) does not have a separate arbitration exception, foreign agencies and instrumentalities do not waive immunity from attachment by agreeing to arbitrate claims.

2. *Under Section 1610(b)(2) of the FSIA, State Agencies and Instrumentalities Engaged in Commerce in the United States Are Not Immune from Execution of Judgments Based on Certain Commercial and Expropriation Claims*

Section 1610(b)(2) of the FSIA lists other exceptions to a state agency's or instrumentality's immunity from attachment besides waiver. Under that section, any property in the

160. Hercaire Int'l., Inc. v. Argentina, 642 F. Supp. 126, 129 (S.D. Fla. 1986), *rev'd in part on other grounds*, 821 F.2d 559 (11th Cir. 1987).
161. *Id.*
162. *Birch Shipping*, 507 F. Supp. at 312.
163. Raji v. Bank Sepah-Iran, 529 N.Y.S.2d 420, 422 (N.Y. Sup. Ct. 1988).
164. *Hercaire*, 642 F. Supp. at 129.
165. *See Cubic Def. Sys.*, 385 F.3d at 1217-18; *Flota Maritima Browning de Cuba, S.A.*, 335 F.2d at 626; *Dexter & Carpenter*, 43 F.2d at 708; *Rich*, 197 F. Supp. at 722-23; *Liberian E. Timber Corp.*, 650 F. Supp. at 75-77.
166. *See, e.g.*, TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("[I]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

United States of a state agency or instrumentality engaged in commercial activity in the United States:

> [S]hall not be immune from attachment in aid of execution, or from execution, upon a judgment . . . if . . . the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2) [or] (3) . . . of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.[167]

In other words, if a court has jurisdiction over the state instrumentality under either Section 1605(a)(2) or (a)(3), the instrumentality's property in the United States is not immune from attachment as long as the agency is engaged in commercial activity in the United States. Section 1605(a)(2) concerns claims involving commercial activities in or affecting the United States, and Section 1605(a)(3) concerns expropriation claims.

a. If the State Agency Is Engaged in Commerce in the United States, It Is Not Immune from Execution on Judgments Based on Its Commercial Activity in or Affecting the United States

Section 1605(a)(2) of the FSIA states:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[168]

Applying this section to the exception-to-immunity provision in Section 1610(b)(2), a state agency or instrumentality is not immune from attachment if the claim at issue is based on:

(1) the agency's commercial activity in the United States;
(2) an act in the United States connected to the agency's commercial activity outside of the United States; or
(3) an act outside of the United States connected to commercial activity outside of the United States that caused a direct effect in the United States.

If one of those three grounds can be established, any property of the state entity can be attached, not just property related to the claim.

The first issue for all three grounds is whether the state entity was engaged in commercial activity.[169] In addition, the statute requires that the claim be "based upon"the entity's commercial activity. This means there must be "something more than a mere connection

167. 28 U.S.C. § 1610(b)(2).
168. 28 U.S.C. § 1605(a)(2).
169. *See supra* notes 54-70 and accompanying text (discussing the meaning of "commercial activity" under the FSIA).

with, or relation to, commercial activity."[170] In *Saudi Arabia v. Nelson*, the Supreme Court held: "In denoting conduct that forms the 'basis,' or 'foundation,' for a claim, the phrase [based upon] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case."[171] Accordingly, if the holder of an arbitral award had to prove that a state agency was engaged in commercial activity in the United States to prevail in the underlying arbitration, the state agency's property will not be immune from attachment in an action to enforce the award.[172]

The third ground for establishing lack of immunity raises another issue—what kinds of commercial activities have a *direct effect* on the United States? The Supreme Court answered this question in *Republic of Argentina v. Weltover*: "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's. . . activity.'"[173] Thus, the failure to make a payment to a U.S. bank had a direct effect on the United States.[174] Likewise, actions that cause a depletion of funds in a U.S. bank or that cause a U.S. bank to withhold payments have a direct effect in the United States.[175] In sum, if one of the three bases for finding immunity under Section 1605(a)(2) is met, the state instrumentality is not immune from execution, and any of its property in the United States—not just the property at issue in the underlying arbitration—can be attached.

b. If the State Entity is Engaged in Commerce in the United States, it is not Immune from Execution on Judgments Based on Expropriation Claims

Section 1605(a)(3) of the FSIA grants jurisdiction over foreign states in any case:

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or

170. Saudi Arabia v. Nelson, 507 U.S. 349, 358 (1993).

171. *Id.* at 357 (internal citations omitted); *see id.* (citing with approval Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991) ("An action is based upon the elements that prove the claim, no more and no less")); *see* Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384, 390 (2nd Cir. 2000) (interpreting *Nelson* and concluding that a "but for" causal relationship, while required, is not sufficient: "'based upon' requires a degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is considerably greater than common law causation.")

172. In one case, a foreign state argued that actions to enforce a foreign judgment are based upon the judgments, not the acts that underlie them. *Transatlantic Shiffahrtskontor GmbH*, 204 F.3d at 389. Thus, it asserted, the elements of a claim on a foreign judgment—what, in other words, must be shown to enforce such a judgment in the United States—are simply that the foreign judgment be final, conclusive, and enforceable where rendered. None of those elements has anything to do with the commercial actions in the United States. Although the court did not ultimately rule on this issue, it stated that the foreign state's position made Section 1605(a)(2) meaningless: "SFTC's position would, in practice, preclude plaintiffs from enforcing any foreign judgments against foreign sovereigns in U.S. courts under § 1605(a)(2). For the elements of such an enforcement action would never have anything to do with the underlying commercial activity." *Id.* The same reasoning applies to actions to attach property to satisfy foreign judgments or arbitration awards under 1610(b)(2).

173. *Weltover*, 504 U.S. at 618.

174. *Id.*

175. *See* Wyle v. Bank Melli of Tehran, Iran, 577 F. Supp. 1148, 1158 (N.D. Cal. 1983); Reed Int'l Trading Corp. v. Donau Bank AG, 866 F. Supp. 750, 754-55 (S.D.N.Y. 1994).

> operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[176]

This section provides an expropriation exception to immunity. If a claim involves seized property owned by a state agency or instrumentality engaged in commercial activity in the United States, that entity is not immune from jurisdiction and its property is not immune from attachment. This provision is limited, however, to physical or tangible property.[177] It does not apply to the right to receive payment.[178]

If an expropriation claim covered by Section 1605(a)(3) was the subject of a lawsuit or arbitration, then under Section 1610(b)(2), the state agency's property is not immune from attachment in an action to enforce an award against it.[179] More importantly, the award holder can attach any of the agency's property in the United States. Again, it is not limited to attaching the property at issue in the underlying action. This highlights the key difference between Sections 1610(a) and (b). In actions to confirm and enforce arbitral awards against a foreign state under Section 1610(a), award holders must show that the property they seek to attach is both in the United States and used for commercial activity in the United States. As arbitral award holders, they have a clear right to attach property, but the range of property open to attachment is limited.

By contrast, in actions to confirm and enforce awards against state agencies and instrumentalities under Section 1610(b), the range of property that can be attached is much broader; as long as the agency is engaged in commercial activities in the United States, any of its property in the United States is open to attachment.[180] But, if the property at issue is not used for commercial activity, there is no arbitration exception to immunity from attachment. The award holder must show something else, such as the agency's waiver of immunity from attachment or evidence that the arbitration claims were based on commercial activity in the United States.

C. Section 1610(d) Provides an Exception for Immunity from Pre-judgment Attachment if Waiver Is Explicit

Section 1610(d) of the FSIA allows for pre-judgment attachment of funds used for commercial activities in the United States if the funds are to be used to secure a future judgment and immunity from such attachment has been explicitly waived.[181] Further, it provides that such funds can be attached before the end of the mandatory notice period required under Section 1610(c).[182] In the context of an arbitration proceeding, this can be an especially valuable tool.

Since arbitral awards cannot be enforced by the arbitration panels that render them, award holders must have their awards confirmed in courts. Accordingly, they cannot seek

176. 28 U.S.C. § 1605(a)(3).
177. Lord Day & Lord v. Socialist Republic of Vietnam, 134 F. Supp. 2d 549, 560 (S.D.N.Y. 2001); Peterson v. Royal Kingdom of Saudi Arabia, 332 F. Supp. 2d 189, 197 (D.D.C. 2004), *aff'd* 416 F.3d 83 (D.C. Cir. 2005).
178. Nemariam v. Fed. Democratic Republic of Ethiopia, 400 F. Supp. 2d 76, 83 (D.D.C. 2005).
179. 28 U.S.C. § 1610(b)(2).
180. *Id.*
181. 28 U.S.C. § 1610(d).
182. 28 U.S.C. § 1610(c).

post-judgment attachment or execution under Sections 1610(a) or (b) until a court enters judgment confirming their awards. And even then, they must wait until "a reasonable period of time has elapsed following the entry of judgment" before the court can enter an order of attachment or execution.[183] In the meantime, the foreign state can transfer its assets outside of the United States or into another vehicle where they cannot be reached, such as an account in the name of the state's central bank. By allowing pre-judgment attachment of the state's funds, Section 1610(d) makes it more difficult for the state to shield its assets in this manner.

But, Section 1610(d) requires that the foreign state explicitly waive its immunity from pre-judgment attachment. The Second Circuit has stated that this means "a waiver . . . must be explicit in the common sense meaning of that word: the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from pre-judgment attachment in this country."[184] The Republic of Congo satisfied this requirement under the following terms of a loan agreement:

> To the extent that [the Congo] may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment (whether in aid of execution, *before judgment* or otherwise) or other legal process . . . [the Congo] agrees not to claim and waives such immunity to the full extent permitted by the laws of that jurisdiction intending, in particular, that in any proceedings taken in New York the foregoing waiver of immunity shall have effect under and be construed in accordance with the United States Foreign Sovereign Immunities Act of 1976.[185]

Thus, explicit reference to waiver of immunity from execution before judgment is a valid explicit waiver of pre-judgment attachment.

In *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, the same court considered whether an agreement that waived "any right or immunity from legal proceedings including suit judgment and execution on grounds of sovereignty" was an explicit waiver under Section 1610(d).[186] Although the words "pre-judgment attachment" were not mentioned, the court held there was an explicit waiver because the language demonstrated a "clear and unambiguous intent to waive all claims of immunity in all legal proceedings."[187]

In *S & S Machinery Co. v. Masinexportimport*, on the other hand, a statement in a trade agreement prohibiting state entities from claiming "immunities from suit or execution of judgment or other liability" was not a waiver of immunity from pre-judgment attachment.[188] The court held that waivers from suit and post-judgment attachment are separate from waivers under Section 1610(d) and that immunity from "'other liability' is ill-suited to encompass prejudgment attachments."[189]

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183. *Id.*

184. Kensington Int'l Ltd. v. Republic of Congo, 461 F.3d 238, 243 (2d Cir. 2006) (internal quotations omitted).

185. *Id.* (emphasis added; ellipses and brackets in original).

186. Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47, 49 (2d Cir. 1982).

187. *Id.*

188. S & S Machinery Co. v. Masinexportimport, 706 F.2d 411, 416-17 (2d Cir. 1983).

189. *Id.* at 417.

Foreign states can also explicitly waive immunity from pre-judgment attachment by treaty. Courts have found waiver, for example, under Article VI of the New York Convention, which reads:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.[190]

Based on this provision, the Seventh Circuit held that Argentina explicitly waived immunity from providing pre-judgment security by signing the New York Convention.[191] Likewise, the Southern District of New York held that Uruguay waived its immunity from pre-judgment attachment by signing the New York Convention.[192] In both of these cases, the foreign state had asked the court to set aside an arbitral award, either by pleading an affirmative defense or by moving to vacate the award.[193]

This is an important point because signing the New York Convention waives immunity only "[i]f an application for the setting aside or suspension of the award has been made."[194] There is no waiver if the award holder seeks pre-judgment attachment and the foreign state fails to contest the award.[195] Because so many countries have ratified the New York Convention, however, and because sovereigns faced with unfavorable ICSID awards so frequently seek to set them aside, these cases may provide the most fruitful avenue for an investor seeking assurance that its award will be paid.[196]

Finally, under *Banco de Seguros del Estado v. Mutual Marine Offices, Inc.*, it may be possible to secure the assets of a foreign state even before an arbitral award has been rendered. In that case, the court held that an arbitration panel's order requiring a Uruguayan bank to post a letter of credit to secure a possible award was itself an arbitration award, and that the bank's motion to reconsider that order was an application for setting it aside.[197] Thus, because the bank was an instrumentality of a state that had signed the New York Convention, the court confirmed the panel's order requiring pre-judgment security.[198]

Section 1610(d) therefore provides a valuable tool for parties in arbitration against foreign states and their agencies and instrumentalities. If the foreign entity has waived immunity from pre-judgment attachment, funds can be secured and available when a court

190. New York Convention, *supra* note 19, art. VI.

191. Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro, 293 F.3d 392, 399 n.13 (7th Cir. 2002).

192. Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 230 F. Supp. 2d 362, 375 (S.D.N.Y. 2002).

193. *Int'l Ins. Co.*, 293 F.3d at 394; *Banco de Seguros del Estado*, 230 F. Supp. at 370, 374.

194. New York Convention, *supra* note 19, art. VI.

195. *See* Libancell S.A.L. v. Republic of Lebanon, No. 06 Civ. 2765, 2006 U.S. Dist. LEXIS 29442, at *12-13 (S.D.N.Y. May 16, 2006) (holding that signing the New York Convention creates waiver only if the foreign state contests the award before a "competent authority," that is, a court "of the country in which, or under the law of which an award is issued").

196. *See generally* New York Convention, *supra* note 19 (listing signatories to the New York Convention); ICSID Cases, http://www.worldbank.org/icsid/cases.htm (describing rise in ICSID cases over the years); List of Contracting States, http://www.worldbank.org/icsid/constate/constate.htm (listing contracting states and other ICSID signatories).

197. *Banco de Seguros del Estado*, 230 F. Supp. at 370, 374.

198. *Id.* at 375.

ultimately recognizes an arbitral award against it. This does not, however, guarantee that the award holder will be able to execute on the court's judgment; it must still satisfy the elements of either Section 1610(a) or (b) to establish the state entity is not immune from post-judgment execution. Thus, in the case of arbitration against a state, an award holder can execute only against property used for a commercial purpose in the United States. Establishing an exception to immunity in cases involving arbitration against state agencies and instrumentalities, however, should not be difficult, since it is unlikely that an entity that waived its immunity from pre-judgment attachment did not also waive immunity from post-judgment execution.

III. Conclusion

Executing against the assets of a foreign sovereign poses daunting challenges. First, many state assets are absolutely immune from attachment and execution. Central Bank accounts and military assets, for example, are immune under the FSIA. Similarly, property used for diplomatic activities is immune under the Vienna Convention.[199]

Second, although the FSIA adopted a restrictive approach to sovereign immunity, holders of arbitral awards must still overcome substantial obstacles to attach the property of foreign states and their agencies and instrumentalities. To execute against state property under Section 1610(a) of the FSIA, for example, an award holder must prove that the property at issue is used for commercial activity in the United States. Section 1610(b) eliminates that hurdle in cases involving the property of state agencies and instrumentalities, but it creates different ones. Thus, an award holder can attach even the noncommercial property of a state agency, but to do so it must show that the state agency is engaged in commerce in the United States and: (1) the agency waived immunity from attachment; (2) the underlying arbitration was based on the agency's commercial activities in or affecting the United States; or (3) the underlying arbitration involved expropriation claims.

Third, the "snapshot" rule, under which the property at issue must be in the United States when the court authorizes execution, allows foreign states ample time to remove their assets from the United States before the snapshot occurs. Award holders must first obtain a judgment confirming their award from a U.S. court, and then, after a reasonable period of time has elapsed following entry of judgment, a court may enter an order of attachment. During that time, the foreign state can dispose of its U.S. assets by closing accounts, moving funds to central-bank or other protected accounts, and selling real estate. This undoubtedly explains why so many FSIA execution cases involve garnishment actions. Unless state-owned property is controlled by third parties, award holders are unlikely to succeed in executing against a foreign state's assets.[200]

199. *See supra* note 34 and accompanying text.

200. On March 17, 2008, the U.S. Supreme Court will hear oral arguments in a case that may make it difficult to recover against foreign states even when the state-owned property is controlled by third parties in the U.S. In *Philippines v. Pimentel*, one of the issues is whether a foreign sovereign with an interest in assets that are the subject of an interpleader action under Federal Rule of Civil Procedure 19 can claim sovereign immunity and have the case dismissed for failure to include a necessary party. *See* relevant briefing and further analysis at Cornell University Law School, Legal Information Institute, http://www.law.cornell.edu/supct/cert/06-1204.html. Briefly, that case involves competing claims to funds held by Merrill Lynch in an account created by Ferdinand Marcos while he was president of the Philippines. In 2000, the Philippines asked Merrill Lynch to transfer the funds to its national bank. To avoid potential liability from other claim-

Section 1610(d) of the FSIA provides a mechanism for overcoming this obstacle by allowing for pre-judgment attachment of assets, but award holders must show that the state explicitly waived immunity from such attachment. Further, even if they can make that showing, a fourth hurdle stands in the way of attaching any property—locating the foreign state's assets. U.S. courts cannot compel a foreign state to answer discovery.[201] A defending state, therefore, can simply refuse to respond to discovery seeking the location and value of its assets. Although the refusal to answer discovery may permit negative inferences to be drawn about the use of property—for example, that it is used for commercial purposes in the United States—negative inferences do not disclose the location of assets.[202] Put plainly, without discovery, it may be impossible for an award holder to locate and secure a foreign state's assets.

In sum, despite the FSIA's restrictive approach to sovereign immunity, immunity from execution still frustrates efforts to obtain payments for arbitral awards against foreign states and state agencies. Indeed, sovereign immunity from execution and attachment remains "'the last fortress . . . the last bastion of State immunity.'"[203]

ants, Merrill Lynch refused and brought an interpleader action to determine rightful ownership of the assets. The Philippines asserted sovereign immunity and moved to dismiss the action on the ground that it was an indispensable party under Rule 19(b). On interlocutory appeal, the Ninth Circuit dismissed the Philippines but remanded the action to determine whether it was an indispensable party. In a judgment that was ultimately upheld by the Ninth Circuit, the district court then held that the Philippines was not an indispensable party and awarded the assets to one of the remaining parties. The U.S. Supreme Court has been asked to decide whether a court must dismiss an interpleader action involving a foreign country that has successfully claimed sovereign immunity. The court's ruling may have an impact on actions to recover arbitral awards against foreign sovereigns. If, for example, the Supreme Court overturns the Ninth Circuit and holds that the entire case should have been dismissed under Rule 19(b), foreign sovereigns will likely be able to stop a U.S. legal proceeding involving property by asserting a claim to the property and then asserting sovereign immunity. This would create yet another hurdle for arbitral award holders to overcome in their attempts to recover from foreign sovereigns.

201. *See* Rux v Republic of Sudan, 2007 WL 528735 (E.D. Va. Feb. 12, 2007); *Af-Cap IV*, 462 F.3d at 429.

202. *See generally Rux*, 2007 WL 528735.

203. Fox, *supra* note 26 at 368.