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Shifting Sands for the Stateless Under the Foreign Sovereign Immunities Act

by

Vivian Grosswald Curran*

Abstract

The Foreign Sovereign Immunities Act (FSIA) grants foreign sovereigns immunity from suit in U.S. courts, but also sets forth some exceptions. One exception to a foreign sovereign's immunity occurs if its expropriation of property violates international law. Where the sovereign has expropriated property from its own nationals, however, the sovereign still remains immune from suit. This "domestic takings" rule is consistent with general principles of international law, although international law increasingly has been challenging a State's right to mistreat its own nationals. In 2023, in *Simon v. Republic of Hungary*,¹ the D.C. Circuit considered the issue of stateless plaintiffs, and held that they have no standing to sue foreign sovereigns under the FSIA. The court relied heavily on the Restatement (Second) of Foreign Relations in its reasoning. The Supreme Court subsequently granted certiorari, but only agreed to review other issues in this case, thus leaving the D.C. appellate court's decision in place with respect to stateless individuals. *Simon* was decided after it arose on remand from the U.S. Supreme Court's decision two years earlier (2021), heard in conjunction with *Federal Republic of Germany v. Philipp*,² and remanded *per curiam* to be consistent with the *Philipp* opinion. The Supreme Court had directed the lower courts to consider plaintiffs' nationality at the time of the alleged property expropriations for purposes of determining FSIA jurisdiction. In *Philipp*, the context was Nazi German expropriation of Jewish-owned property, and in *Simon*, Hungary's expropriation of Jewish-owned property under antisemitic laws. This article considers the 2023 D.C. circuit court's holding in *Simon* in light of indications and implications concerning the standing of stateless FSIA plaintiffs to be garnered from the Supreme Court's *Philipp* decision; the evolution of FSIA case law on the issue of standing; the U.S. Restatements of Foreign Relations; and international law. It concludes that a better interpretation of the FSIA does allow standing for stateless individuals.

Key words: Foreign Sovereign Immunities Act; statelessness; standing; domestic takings rule; property expropriation; Section 1605 (a) (3); *Germany v. Philipp*; *Hungary v. Simon*.

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¹ 77 F.4th 177 (D.C. Cir. 2023).

² 592 U.S. 169 (2021).

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I. Introduction	

The United States’ law on foreign sovereign immunity comes under the purview of a statute enacted in 1976, the Foreign Sovereign Immunities Act (FSIA).³ The FSIA was intended to be an all-encompassing statute and has been interpreted as such by the Supreme Court: “[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall”,⁴ and the FSIA’s “key word is *comprehensive*.”⁵ U.S. foreign sovereign immunity law has been called unique in the world in denying immunity to sovereigns which violate international customary law.⁶

FSIA § 1605 (a) (3) provides in pertinent part as follows:

³ 28 U.S.C. §§1602-1611 (1976).

⁴ Republic of Argentina v. NML Capital, Ltd, 573 U.S. 134, 141 (2014).

⁵ *Id.* (Emphasis in original) (*referring to* Republic of Austria v. Altmann, 541 U.S. 677, 699 (2004) and Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983)).

⁶ See, e.g., Federal Republic of Germany v. Philipp, 592 U.S. 169, 183 (2021) (“the [FSIA’s] expropriation exception, because it permits the exercise of jurisdiction over some public acts of expropriation ... is unique; no other country has adopted a comparable limitation on sovereign immunity.”) (citing Restatement (Fourth) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 455, REPORTERS’ NOTE 15 (2017)); HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 267 (Oxford, 3d ed., 2013). Under the influence of international public policy declarations to foster the return of Nazi stolen property, other countries today do refer to international law, but often nevertheless make recovery difficult or impossible due to statutes of limitation or other restrictions. See Mathew Franks, *American Handling of Holocaust Property Takings: What We Can Learn from International Policies*, 49 BROOKLYN J. INT’L. L. 556, 572-584 (2024). But see SEAN D. MURPHY & EDWARD T. SWAINE, THE LAW OF FOREIGN RELATIONS 273 (2023) (“the idea that state immunity from foreign national jurisdiction yields to claims of expropriations violating international law has not been broadly accepted by other states.”)

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

(3) 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 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.⁷

At one time, judicial interpretation of Section 1605 (3) in some circuits had taken the position that property expropriations during a genocide defeated sovereign immunity, without the necessity of engaging in any further jurisdictional analysis under that Section.⁸ FSIA §1605 (a) (3) provides no textual support for this short-circuit “genocide exception” jurisdiction.⁹ Before the “genocide exception”¹⁰ had been created, the judicial analysis had been to engage in a two-step inquiry. The first step was to determine if there had been a property expropriation “in violation of international law.”¹¹ The second was to determine if the foreign sovereign nevertheless retained immunity because the victim fell under a special rule concerning takings, pursuant to which the FSIA grants immunity where a sovereign deprives its own nationals of their property, no matter how egregious the expropriation was.¹² This provision, known as the

⁷ 28 U.S.C. §1605 (2016).

⁸ The D.C. Circuit in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016); *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018); the Seventh Circuit in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), *rehearing sub nom Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015).

⁹ See *supra* note 7 and surrounding text. [text of §1605]; Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception*, 23 U.C.L.A. J. INT'L L. & FOR. AFF. 46 (2019).

¹⁰ See *id.*

¹¹ FSIA §1605 (a) (3).

¹² This step, not expressly mandated in the text, was motivated by the principle of comity that States do not interfere with each other's internal affairs. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §405 (AM. LAW. INST. 2018) (as a matter of prescriptive

domestic takings rule, is in keeping with the principle of international law that a sovereign is free to do as it wishes within its own territory to its own people.¹³

In 2021, the United States Supreme Court considered and rejected the “genocide exception” in *Federal Republic of Germany v. Philipp*,¹⁴ a case which was heard in conjunction with *Republic of Hungary v. Simon*¹⁵ because of the two cases’ factual and legal similarities. *Philipp* involved extremely valuable art work which Göring, one of the highest-ranked Nazis, coveted, and obtained from plaintiffs’ Jewish antecedents in 1935 under conditions of duress.¹⁶ *Simon* involved property expropriated from Jewish Holocaust victims in 1944 pursuant to Hungarian antisemitic laws.¹⁷ In rejecting the “genocide exception,” the Supreme Court said that FSIA § 1605 (a) (3)’s reference to international law meant the international law of property, not general international human rights law: “We need not decide whether the sale of the consortium's property was an act of genocide, because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights. We do not look to the law of genocide to determine if we have jurisdiction ...”¹⁸

comity, "courts seek to avoid unreasonable interference with the legitimate sovereign authority of other states".)

¹³ See *id.*; see also *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982). (“[T]he ‘law of nations’ does not prohibit a government's expropriation of the property of its own nationals” [because] “governmental expropriation is not so universally abhorred that its prohibition commands the general assent of civilized nations - a prerequisite to incorporation in the ‘law of nations’.”).

¹⁴ 592 U.S. 169 (2021).

¹⁵ 592 U.S. 207 (2021).

¹⁶ See *id.*, at 173-174.

¹⁷ See *Simon v. Republic of Hungary*, 77 F.4th 1077, 1087-1088 (D.C. Cir. 2023).

¹⁸ 592. U.S. at 180. It has been suggested that Congress should amend the FSIA to legislate the genocide exception into it. See Joshua Newman, *Amending the Foreign Sovereign Immunity Act to Promote Accountability for Violations of Peremptory Norms of International Law*, 49 BROOKLYN J. INT’L. L. 585, 587 (2024).

While the Supreme Court reversed the lower courts' holding that a context of genocide sufficed in and of itself for FSIA jurisdiction, it did not dismiss the cases. Rather, it remanded both of them for further inquiry as to whether, among others, the victims had been nationals of the defendant sovereigns at the time of the property expropriations.¹⁹ In both *Simon* and *Phillip*, many of the plaintiffs would have become stateless or, in the Supreme Court's word, "denationalized."²⁰ The Supreme Court was thus embracing the view that the domestic takings interpretation would not immunize a defendant foreign State if it were determined that it had expropriated from plaintiffs whom the State had not deemed to be nationals at the time of the property takings by rendering them stateless.²¹

The two remanded cases wended their ways through the lower courts and back upwards to appellate courts, and the Supreme Court granted certiorari in *Simon* as to three issues which are not the focus of this article.²² In so doing, the Supreme Court leaves in place for the moment a lower court holding concerning international law that seems inconsistent with its remand in

¹⁹Phillipp, 592 U.S. at 187; Simon, 592 U.S. at 208. The tenet that a State can expropriate property at will from its own nationals and otherwise not be held accountable to them has come under increasing criticism in recent years but it is embodied in FSIA's domestic takings exception and was endorsed by the Supreme Court in *Phillipp*. In the context of grave human rights violations, the controversial area of humanitarian intervention goes so far as to recommend military intervention to protect besieged minority populations. For a summary, see Vivian Grosswald Curran, "Humanitarian Intervention", in *The International Legal Order and the Rule of Law*, 33 S. CAL. REV. L. & SOC. JUSTICE 227 (2024).

²⁰ See *infra* note [47], and surrounding text.

²¹ The D.C. District court's interpretation of *Phillip* on remand seems inconsistent with *Phillip* in this regard. See *infra* notes – to-, and surrounding text.

²² The three issues for which the Supreme Court granted certiorari on June 24, 2024 were: "(1) Whether historical commingling of assets suffices to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act. (2) Whether a plaintiff must make out a valid claim that an exception to the Foreign Sovereign Immunities Act applies at the pleading stage, rather than merely raising a plausible inference. (3) Whether a sovereign defendant bears the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act."

Philipp.²³ The Supreme Court also leaves in place the D.C. Circuit’s construction of the Restatement (Second) of United States Foreign Relations (Restatement) § 175 in which the appellate court arguably conflated an explanation of the standing of stateless individuals in *international* law tribunals to mean that they have no standing in *domestic* tribunals such as the FSIA.²⁴ This article suggests that the reasons stateless people lack standing in international tribunals are not applicable to FSIA courts, which are domestic courts.²⁵

The next Part considers the status of the stateless under the domestic takings rule as the Supreme Court suggested it should be considered in *Philipp*; as it had evolved before *Philipp*; how the Supreme Court implied a resumption of that analysis; and, finally, how some, but not all, courts on remand have interpreted *Philipp* to narrow the domestic takings exception so as to exclude stateless individuals from suing under the FSIA.

II. Statelessness Under the Domestic Takings Rule

A. The Supreme Court’s 2021 Indications as to the Stateless

In *Philipp*, the Supreme Court rejected the D.C. Circuit’s holdings that genocide provided an independent basis of jurisdiction under FSIA § 1605 (a) (3), insisting that the domestic takings rule must continue to be analyzed, regardless of the genocidal context of the taking: “[T]he phrase ‘rights in property taken in violation of international law,’ as used in the FSIA’s expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule.”²⁶ The Court then proceeded to the issue of domestic takings, explaining that the lower courts should address whether the plaintiffs were

²³ See *infra*, notes – to –, and surrounding text.

²⁴ See *infra* notes – to –, and surrounding text.

²⁵ See *infra*, Part III.

²⁶ *Philipp*, 592 U.S. 169, at 187. In so doing, the Court was also rejecting the Seventh Circuit’s similar interpretation of the FSIA.

nationals of Germany in *Phillip* (and, in *Simon*, of Hungary), and if the plaintiffs had preserved the issue on appeal by raising it below.²⁷ At oral argument, when plaintiffs’ attorneys initially argued that there was FSIA jurisdiction because the defendants had engaged in the Nazi genocide, the Supreme Court justices, dubious about the “genocide exception,” asked if, in the alternative, plaintiffs had been considered nationals of the defendant States by defendants at the time of the expropriations.²⁸

This last query reprised the domestic takings test that had developed prior to the “genocide exception” and had denied immunity to sovereigns which expropriated property from minorities in their own territories which they *de facto* or *de jure* no longer considered to be citizens of their State.²⁹ On remand, however, the lower courts sometimes narrowed this domestic takings analysis by conflating the Supreme Court’s rejection of genocide (international human rights) as a *sole* basis for jurisdiction with the idea that the Supreme Court now requires immunity whenever the foreign sovereign’s expropriation had its basis in genocide.³⁰ These two propositions are not remotely the same. The very fact that the Supreme Court remanded for an inquiry into whether the plaintiffs were deemed nationals of the defendant States which expropriated property from them during the Holocaust is evidence that the Nazi and genocidal³¹ expropriations would be subject to suit under the FSIA, and plaintiffs would have standing, so

²⁷ *Id.* The Court refers to Germany, but the decision was equally applicable to Simon, involving Hungary. See *Republic of Hungary v. Simon*, 592 U.S. 207, 208 (2021) (“The judgment of the United States Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings consistent with the decision in *Federal Republic of Germany v. Phillip*...”)

²⁸ See, e.g., Transcript of Oral Argument at 12, *Phillip*, 141 S. Ct. 703 (No. 19-351), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_d0fi.pdf [<https://perma.cc/7UEZ-GZUT>].

²⁹ See *infra*, sub-Part B; for a more detailed discussion; Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act’s Evolving Genocide Exception*, 23 U.C.L.A. J. INT’L L. & FOR. AFF. 46, 60-63 (2019).

³⁰ See *infra*, notes – to –, and surrounding text.

³¹ In *Simon*, the expropriations were attributed to the Hungarian government.

long as plaintiffs established that they had not been subject solely to property expropriation but also to denationalization (statelessness). Thus, in both *Philipp* and *Simon*, many of the plaintiffs would have been stateless for all intents and purposes, a status understood by previous lower courts which had endorsed FSIA jurisdiction in similar cases, as discussed below in Part II, B.

B. Pre-“Genocide Exception” Domestic Takings Law and the Stateless

Domestic takings law developed over time.³² It had come to full fruition by 2010 in *Cassirer v Kingdom of Spain*.³³ The case involved the forced sale in 1939 of a German Jewish woman’s painting as the price of her exit from Nazi Germany. The Ninth Circuit rejected Germany’s argument of immunity under the domestic takings rule, holding instead that by the time of the expropriation “German Jews had been deprived of their civil rights, including their German citizenship; their property was being ‘Aryanized’ and ... [p]ermission was required both to leave and to take belongings [out of the country].”³⁴ In *Cassirer*, the Ninth Circuit had defined the reference to a takings in violation of international law as one which “offends international law when it does not serve a public purpose, when it discriminates against those who are not nationals of the country, or when it is not accomplished with a payment of just compensation.”³⁵ This definition is consistent with the Restatement (Fourth) of U.S. Foreign

³² See Curran, *The Evolving Genocide Exception*, *supra* note --, at 53-63.

³³ 616 F.3d 1019, 1023 (9th Cir. 2010).

³⁴ *Id.*, at 123.

³⁵ 616 F.3d, at 1027.

Relations § 712.³⁶ The international law of property requires the prompt payment of just compensation for expropriations.³⁷

In a case dealing with art expropriation under Hungarian antisemitic laws during the Second World War, *de Csepel v. Republic of Hungary*,³⁸ the D.C. Circuit court used the same domestic takings standard as the Ninth Circuit had in *Cassirer*. The appellate court affirmed the district court's analysis that, at the time of the property expropriation, and relevant to the domestic takings inquiry, the foreign sovereign did not consider plaintiffs to be Hungarian citizens:

As of 1944, Hungarian Jews could not acquire citizenship by means of naturalization, marriage, or legalization; vote or be elected to public office; be employed as civil servants, state employees, or schoolteachers; enter into enforceable contracts; participate in various industries and professions; participate in paramilitary youth training or serve in the armed forces; own property; or acquire title to land or other immovable property. Moreover, all Jews over the age of six were required to wear signs identifying themselves as Jewish, and were ultimately subject to complete forfeiture of all assets, forced labor inside and outside Hungary....³⁹

The court also made clear that, under the above conditions, even a plaintiff who still considered herself to be Hungarian would not be deemed such for purposes of FSIA domestic takings law because Hungary had not considered her to be part of the Hungarian nation: “[even] if plaintiff still considered herself to be a Hungarian citizen in 1944, it is clear that ... the government of

³⁶ See *infra*, Part III for a more detailed analysis.

³⁷ Restatement (Fourth) § 712; BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 605 (Oxford, 9th ed., 2019). See also *infra*, Part III.

³⁸ 714 F.3d 591, 598 (D.C. Cir. 2013) (*reh. en banc denied* June 4, 2013).

³⁹ 808 F. Supp. 2d 113, at 129, *aff'd in part* (and on this ground), *rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013).

Hungary thought otherwise and had *de facto* stripped her and all Hungarian Jews of their citizenship rights.⁴⁰

Thus, by 2013, the domestic takings test developed in *Cassirer* and *de Csepel* under the FSIA had three characteristics: (1) it was an objective measure of the civil, political, contractual and property rights the victim had within the body politic of the foreign sovereign; (2) it was a *de facto* and therefore not necessarily a *de jure* stripping of citizenship; and (3) since those stripped of citizenship without acquiring a new one are by definition stateless, it recognized the standing of stateless individuals under the FSIA to sue foreign sovereigns for property expropriations taken in violation of international law under Section 1605 (a) (3).

The D.C. Circuit “genocide exception” FSIA cases that the Supreme Court heard nine years later in *Philipp* and *Simon* had extended *Cassirer* and *de Csepel* beyond recognition by eliminating the essential FSIA jurisdictional inquiry into defendant States’ recognition of plaintiffs as members of the nation-state at the time of the expropriations. The D.C. Circuit, like the Seventh Circuit in *Abelesz* and *Fischer*, instead skirted the whole process in a no doubt well-meaning but flawed inquiry that made genocide a sole criterion for jurisdiction.⁴¹ In reversing this judicially created “genocide exception” misstep in 2021, the *Philipp* Supreme Court did not in any way suggest disagreement with the pre-genocide exception analysis of *Cassirer* and *de Csepel*.

The next Part discusses how, on the contrary, *Philipp* suggests the Supreme Court’s endorsement of the evolution of FSIA domestic takings analysis which *Cassirer* and *de Csepel*

⁴⁰ See *id.*

⁴¹ See *Philipp v Federal Republic of Germany*, 894 F.3d 406,410-414 (D.C. Cir. 2018).

had applied, as evidenced both by the Supreme Court at oral argument,⁴² and by its decision to remand for an inquiry into the nationality status of plaintiffs, many of whom had been born German (*Philipp*) and Hungarian (*Simon*) in pre-Nazi days but would have been made stateless if deprived of those nationalities by Nazi and antisemitic regimes at the time of the alleged property expropriations.

C. The Supreme Court's Implicit Endorsement of Standing for the Stateless

Oral argument need not be an indication of the way Supreme Court justices believe an issue should be resolved. In this case, however, when the following questions and comments are coupled with the Court's remand, the context of remand on the nationality issue suggests that the Court at oral argument was expressing genuine views on the criteria for FSIA domestic takings.

Several Supreme Court justices indicated their agreement with the way that the FISA domestic takings exception had developed into a substantive, not nominal, nationality inquiry in accordance with the *Cassirer* and *de Csepel* cases discussed in the last Part. Justice Gorsuch, for one, indicated the *de facto* rather than *de jure* nature of the test by asking defendant's lawyer why defendant Germany argued it was crucial that Germany's Nuremberg laws of 1935 which stripped Jews of citizenship rights were still a few months in the future at the time plaintiffs alleged that their Jewish forbears could not be considered German.⁴³

⁴² See *infra*, Part II, C.

⁴³ June of 1935, the time of the property expropriation, was nevertheless over two years after Hitler had acceded to power and at a time when progressively antisemitic measures in Germany had effectively already ousted Jews from the body politic.

Justice Gorsuch:

You indicated that Jewish victims of the Holocaust were stripped of their citizenship. But not nationality and are, therefore, still barred by the domestic takings rule. But, if they can't access the domestic takings rule because they are no longer citizens, in – in what respect could that – could that rule bar them? ... Your third answer to Justice Alito supposed that they [plaintiffs] were, in fact, stripped of their citizenship before the taking, but that – you said that doesn't matter because they're still nationals ... And *I'm asking you, well in what relevant sense does that make a difference?*⁴⁴

Justice Thomas insisted on the issue of statelessness,⁴⁵ which some minutes later was brought up by Justice Alito in the *Simon* oral argument which followed *Philipp*: “If we were to rule ... in favor of Germany on the jurisdictional issue [in *Philipp*], wouldn't the plaintiffs in this case [*Simon*] still have an argument based on their claim of denaturalization?”⁴⁶ Or, in other words, of statelessness, since denaturalization signifies statelessness.

The one other issue which would prove to be thorny for the plaintiffs in both of these related Supreme Court cases, heard together but with separate oral arguments in immediate succession of each other, was whether the issue of statelessness had been preserved for appeal. The preservation issue arose because both parties had relied heavily on the post- *Cassirer* and *de Csepel* “genocide exception,” arguing that the sole fact that the expropriations had taken place as part of the Holocaust sufficed for FSIA jurisdiction, implicitly without further inquiry into the domestic takings rule.⁴⁷ Justice Coney Barrett's query to the plaintiffs' attorney in *Simon*, for

⁴⁴ Justice Gorsuch to Defendant Germany's attorney, *Philipp*, Oral Tr, pp. 13 -14, *available at* https://www.supremecourt.gov/oral_oral_argument_transcripts/2020/19-351_d0fi.pdf, at 19-20. (Emphasis added).

⁴⁵ *Id.*, at 30.

⁴⁶ Oral Tr, at 13, *available at* https://www.supremecourt.gov/oral_oral_argument_transcripts/2020/18-1447_ap11.pdf.

⁴⁷ They were relying on their circuit courts' adoption of this position.

instance, as to whether plaintiffs had preserved the domestic takings issue, would have made no sense in the context of the Court’s subsequent unanimous decision to remand as to whether they had preserved it, and what plaintiffs’ nationality was,⁴⁸ unless she and her brethren believed that the stateless (“denaturalized” as the justices put it) have standing under the FSIA.⁴⁹

The next Part discusses how some, but not all, lower courts after remand from the Supreme Court in both *Philipp* and *Simon* interpreted its reasoning. Those lower courts have concluded that the Supreme Court’s rejection of genocide as a sole basis for FSIA jurisdiction was, instead, a bar to jurisdiction whenever and indeed solely *because* a case arose in the context of a foreign sovereign’s genocide or complicity with genocide. It is suggested below that this is not a justified interpretation either of the FSIA or of the Supreme Court’s reasoning in *Philipp*.

D. Remand Applications of *Philipp*

On remand, the district court in *Philipp* held that plaintiffs had not preserved the argument that their forbears were stateless at the time of the takings, but that, for argument’s sake, the court still would examine the issue of their nationality under the FSIA’s domestic takings rule.⁵⁰ It opined that the issue of statelessness under the domestic takings rule was one of first impression for the D.C. Circuit.⁵¹ This ignored *de Csepel* in which the D.C. Circuit had considered the issue and accepted that the FSIA provides standing for the stateless.⁵²

⁴⁸ *Philipp*, 596 U.S. at 187.

⁴⁹ See *supra* note [46], at 81 (“And let me ask you a question about the citizenship point. You know, you point out that some plaintiffs in the suit below were not Hungarian nationals and others have a claim to their citizenship having been severed ... Is that a claim you raised below? As Justice Gorsuch pointed out, it’s not one that’s developed here ...”). For a perspective on the *Philipp* Supreme Court’s view of statelessness and the domestic takings rule which agrees with mine, see Leila A. Amineddoleh, *Kings, Treasure and Looting: The Evolution of Sovereign Immunity and the Foreign Sovereign Immunities Act*, 46 COLUM. J. L. & ARTS 419,437 (2023).

⁵⁰ 628 F. Supp.3d 10, at 22 (D.D.C. 2022), *aff’d* 77 F.4th 707 (2023).

⁵¹ *Id.*, at 25.

⁵² See *supra* notes – to --, and surrounding text.

The district court then proceeded to interpret the Supreme Court's rejection of genocide as a *sole* basis for FSIA jurisdiction as constituting, rather, a *complete bar* to FSIA jurisdiction even where the plaintiff was not a national of the foreign State:

Put another way, if a loss of nationality is part and parcel of a set of genocidal acts that happen to include expropriation, then the expropriation exception becomes the very type of "all-purpose jurisdictional hook for adjudicating human rights violations" rejected in *Philipp*, 141 S.Ct. at 713 ... The logical result of plaintiffs' argument, then, is that any program of genocidal conduct of which expropriations are a part – because it inherently entails a loss of nationality – falls outside the domestic takings rule and can be prosecuted using the expropriation exception. That is precisely what *Philipp* forecloses, only without articulating the intermediate "loss of nationality" step."⁵³

In summary, the district court's reasoning was that genocidal States denaturalize their victims, but such denaturalizations should not be considered when applying the domestic takings rule in the context of genocide because the Supreme Court had said that genocide does not justify FSIA jurisdiction. The Supreme Court in *Philipp* actually had said virtually the opposite: namely, that genocidal undertakings do not suffice *without also analyzing the domestic takings rule* for FSIA jurisdiction; namely, where there was *only* a genocidal undertaking, but the foreign State was expropriating from its own nationals, the FSIA grants immunity under the domestic takings rule, but where the net effect of the foreign State's genocidal actions had been not *just* to expropriate property but *also* to strip the victim of nationality, then the domestic takings rule does not apply, the defendant lacks immunity and plaintiffs have jurisdiction under FSIA §1605 (a) (3).⁵⁴

In analyzing plaintiffs' nationality on remand, the *Philipp* district court accepted that until the September 1935 enactment of Hitler's Nuremberg laws, German statutory law did not distinguish between "citizens" and "nationals."⁵⁵ It also concluded that, because the relevant

⁵³ 628 F. Supp.3d 10, at 25.

⁵⁴ See *Philipp*.

⁵⁵ 628 F. Supp.3d, at 28.

expropriation had taken place in June of 1935, three months prior to the enactment of the Nuremberg Laws, defendant Germany was immune under the domestic takings rule because plaintiffs were full-fledged Germans at that time.⁵⁶

The D.C. Circuit had applied a very different domestic takings analysis in *de Csepel*, however, looking to the plaintiff's substantive, *de facto*, situation as a member of the defendant nation rather than her *de jure* citizenship,⁵⁷ as had the Ninth Circuit in *Cassirer*.⁵⁸ Such an inquiry might have yielded the conclusion that by the time of the *Philipp* expropriation, just three months before the formal enactment of the 1935 Nuremberg laws, Germany already had stripped its Jewish population of its membership in the German nation:

The first wave of [Nazi German] legislation, from 1933 to 1934, focused largely on limiting the participation of Jews in German public life. The first major law to curtail the rights of Jewish citizens was the "Law for the Restoration of the Professional Civil Service" of April 7, 1933, according to which Jewish ... civil servants and employees were to be excluded from state service. The new Civil Service Law was the German authorities' first formulation of the so-called Aryan Paragraph, a kind of regulation used to exclude Jews ... from organizations, professions, and other aspects of public life.

In April 1933, German law restricted the number of Jewish students at German schools and universities. In the same month, further legislation sharply curtailed "Jewish activity" [i.e., presence] in the medical and legal professions. Subsequent laws and decrees restricted reimbursement of Jewish doctors from public (state) health insurance funds. The city of Berlin forbade Jewish lawyers and notaries to work on legal matters, the mayor of Munich disallowed Jewish doctors from treating non-Jewish patients, and the Bavarian Interior Ministry denied admission of Jewish students to medical school.

At the national level, the Nazi government revoked the licenses of Jewish tax consultants; imposed a 1.5 percent quota on admission of "non-Aryans" to public schools and universities; fired Jewish civilian workers from the army; and, in early 1934, forbade Jewish actors to perform on the stage or screen.

⁵⁶ *Id.*, at 29-30.

⁵⁷ See *supra*, notes – to—and surrounding text.

⁵⁸ See *supra*, notes – to—and surrounding text.

Local governments also issued regulations that affected other spheres of Jewish life: in Saxony, Jews could no longer slaughter animals according to ritual purity requirements, effectively preventing them from obeying Jewish dietary laws.⁵⁹

In *Lehman v. Israelitische Kultusgemeinde*, a non-FSIA case decided as this article was being written, a N.Y. state court judge wrote an 87-page decision analyzing the claims concerning Nazi-stolen art work, a Schiele painting, holding that even a transfer on its face voluntarily made to an acquaintance of the art owner had to be considered coerced if made after the Nazi discrimination of Jews was underway:

Karl's transfer of his art collection to his non-Jewish acquaintance, Etelka, at a time when he was completely dehumanized and devalued by Nazi ideology in practice and in reality is not a realistic setting for a voluntary transfer of a sentimentally valuable art collection. The atmosphere of fear and brutality mounted by the Third Reich is undeniably not a fertile ground for valid donative intent. Whatever transfer occurred between Karl and Etelka was not voluntary due to the conditions of extreme duress and antisemitism suffered by Karl that existed at the moment in time when the transfer occurred. The evidence adduced at trial established that Karl Mayländer was under duress during the time period that his art collection came into the possession of Etelka Hoffman.⁶⁰

In *Lehman*, the painting's owner was well acquainted with the transferee whereas in *Philipp*, the transfer was to Nazi authorities.⁶¹

Equally importantly, Jews in Germany effectively had lost the ability to enforce contracts by the time of the *Philipp* expropriation.⁶² The *de facto* "aryanization" of property had begun

⁵⁹ THE HOLOCAUST ENCYCLOPEDIA, available at <https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany>.

⁶⁰ Robert Owen Lehman Foundation, Inc. v. Israelitische Kultusgemeinde Wien et al, NYSCEF DOC. NO. 1313 (Aug. 1, 2024).

⁶¹ See *Philipp*, 592 U.S., at 173-174

⁶² Viktor Klemperer's diary recounts the helplessness of Jews as their contracts became unenforceable against "Aryans" when courts were called upon to adjudicate contract disputes where one party was Jewish, and his fears of losing his house in such a process. On this subject, see also INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (trans. Deborah Lucas Schneider, 1992) (an excellent account of the judicial system under Hitler, including a description of the German judiciary's enthusiastic

from the time that Jews became unable to resist Nazi demands, well before the passage of the 1935 Nuremberg Laws, when the courts had stopped protecting Jewish parties.⁶³ By that time, German Jews effectively already had become *Staatsangehörige*, as the Nuremberg laws were to put it, or those who “belonged” to Germany as possessions to be made of as the State decided. They were not “nationals” as defendant Germany argued and the *Phillip* district court uncritically accepted on remand since, as plaintiffs argued, the Nazi party platform was from before 1935 that “no Jew may be a member of the [German] nation.”⁶⁴ The German word for “German nationality”, “*deutsche Nationalität*,”⁶⁵ was not used in connection to Jews by the Nazis, either in the Nuremberg laws or elsewhere, and is a distinct word from “*Staatsangehörigkeit*,” casting further doubt on the propriety of using “nationals” as a translation. The district court, however, did adopt defendant Germany’s English translation of *Staatsangehörige* as “nationals” for the Nazi legal term used for Jews to distinguish them from citizens. Since “national” in English implies being a full part of the nation-state, and was the very word used by the Supreme Court in *Philipp* to denote the characteristic that would make the plaintiffs come within the purview of the domestic takings rule and lose standing, this translation served to exclude plaintiffs from the FSIA’s jurisdiction in the eyes of the district court.

Germany today continues to argue solemnly in courts of law that the *Philipp* transfer was at arm’s length, a position one might consider remarkable for its refusal to acknowledge the status of Jews in 1935 and specifically their inability to refuse Nazi demands, let alone transact

reception of Hitler’s accession to the Chancellorship in 1933, ultimately changing Hitler’s original ideas about suppressing Germany’s regular judiciary); MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY (trans. Thomas Dunlap, 1998).

⁶³ See *id.*

⁶⁴ 628 F. Supp.3d 10, 28 (D.D.C. 2022); see Vivian Grosswald Curran, *Nazi Stolen Art*, *supra*, at 18–19 (footnotes omitted).

⁶⁵ See Ralf Michaels, Director of Max Planck Institute for Private International Law, Hamburg (explanation of German legal terms, email on file with author, August 15, 2024).

with Nazis at arm's length. In *The Rape of Europa*, Lynn Nicholas has described the issues claimants faced after the war when they tried to recover their property, only to be told that they had sold it to the Nazis, regardless of the coercion to which they had been subjected or the derisory prices they had received.⁶⁶ For its part, in *Simon*, Hungary has continued to argue that Jews were citizens even in 1944, despite the antisemitic laws and practices which led the court in *de Csepel* to rule otherwise.⁶⁷

On remand in *Simon*, the D.C. District Court acknowledged that the Supreme Court had left the door open to arguing that the defendant State's denaturalizing its own minority population took such plaintiffs out of the domestic takings rule,⁶⁸ yet at the same time nevertheless concluded that the domestic takings rule applied:

Indeed, it is difficult to conceive of a hypothetical program of genocide that does *not* deprive "member[s] of a minority group" of "full civic and political rights," or treat its victims as something less than "full citizen[s]." The logical result of plaintiffs' argument, then, is that any program of genocidal conduct of which expropriations are a part—because it inherently entails a loss of nationality—falls outside the domestic takings rule and can be prosecuted using the expropriation exception. That is precisely what *Philipp* forecloses, only without articulating the intermediate "loss of nationality" step. As the defendant in *Philipp* articulates in a renewed motion to dismiss on remand, "claim[ing] some de facto statelessness exception to the domestic-takings rule ... do[es] little more than ask[] this Court to reinstate the unanimously overruled *Simon* [I] decision in new words."⁶⁹

⁶⁶ LYNN NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR* 407-444 (2009).

⁶⁷ See *supra* note -, and surrounding text.

⁶⁸ See *Simon v Republic of Hungary*, 579 F.Supp. 3d 91,118 ("To be sure, the Supreme Court in *Philipp* did not categorically close the door on the argument: "Nor do we consider an alternative argument noted by the heirs: that the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction.") (quoting *Philipp*, 141 S.Ct. at 715).

⁶⁹ *Id.*, at 119 (quoting in part Defendant's Supp. Mot. Dismiss Second Am. Compl. at 41, *Philipp v. Stiftung Preussischer Kulturbesitz*). (Internal citations omitted).

The district court was not disagreeing that Hungary may have rendered the plaintiffs *de facto* stateless:

To be clear, none of this discussion is meant to suggest that Hungary granted plaintiffs the rights and dignity afforded to persons Hungary unambiguously considered to be that country's nationals. It plainly did not. *Nor does the Court necessarily reject the proposition that plaintiffs were rendered de facto stateless.* Nor is there any real question whether Hungary committed “serious violations of international human rights law.” *Philipp*, 141 S. Ct. at 713. The holding here is more technical in nature: genocidal expropriations, including those directly associated with the result of denaturalization, cannot under *Philipp* trigger the expropriation exception with respect to plaintiffs that would have been nationals of the offending state but for the genocidal conduct.⁷⁰

Rather, the court was holding that the very fact that the expropriation occurred during a genocide precluded the domestic takings analysis. The Supreme Court had quite clearly indicated otherwise, as even the district acknowledged.⁷¹ In the words of the Supreme Court, the expropriation of “property belonging to a country’s *own nationals*”⁷² does not violate the international law of expropriation. The stateless are not nationals: they are nationless.

On appeal from the district court in *Simon*, the D.C. Circuit Court of Appeals,⁷³ “assumed without deciding” that Hungarian-Jewish plaintiffs in Hungary by the time of the expropriations had become *de facto* stateless.⁷⁴ The court rejected the defendant (and lower court’s) reading of *Philipp* as finding that non-nationals who had been denationalized by the defendant State could not have jurisdiction under the FSIA: “*Phillip* did not opine on, let alone foreclose, the possibility that conduct that could give rise to a claim of genocide might also bear on the nationality inquiry for purposes of the expropriation exception or the domestic takings rule.

⁷⁰ *Id.* (Emphasis added).

⁷¹ See [dist ct above]; and see *supra* notes – and surrounding text.

⁷² *Philipp*, 592 U.S. 169, at 170 (emphasis added) (*quoting* Republic of Austria v. Altmann, 541 U.S. 677, 713 (2004) (Breyer, J., concurring)).

⁷³ *Simon v Republic of Hungary*, 77 F.4th 1077 (2023).

⁷⁴ *Id.*, at 1088.

Rather, *Phillip* left open for lower courts to resolve what conduct is relevant to the nationality inquiry. We thus reject the view that *Phillip* preempts the Trianon [i.e., stateless] Survivors' takings theory."⁷⁵

The court nevertheless dismissed the case against the presumptively stateless plaintiffs based on finding that they had not persuaded the court that the international law of property expropriation supported their claim.⁷⁶ In particular, the court relied heavily on the Restatement (Second) of U.S. Foreign Relations § 175 which says that stateless individuals have no standing to make property expropriation claims against the expropriating State because they lack a State to espouse their claims.⁷⁷

The Restatement puts it as follows:

The responsibility of [a] state under international law for an injury to an alien cannot be invoked directly by the alien against the state except as provided by

- (a) the law of the state,
- (b) international agreement, or
- (c) agreement between the state and the alien.⁷⁸

The court also quoted Section 175, comment d:

Under traditional principles of international law, a state, being responsible only to other states, could not be responsible to anyone for an injury to a stateless alien. Under the rule stated in this Section, a stateless alien may himself assert the responsibility of a state in those situations where an alien who is a national of another state may do so. However, in those situations not covered by the rule stated in this Section or by an international agreement providing some other remedy, a stateless alien is without remedy, since there is no state with standing to espouse his claim.⁷⁹

⁷⁵ *Id.* at 1096.

⁷⁶ *Id.* at 1097.

⁷⁷ *Id.*, at 1097-1098.

⁷⁸ Restatement §175.

⁷⁹ 77 F.4th 1077, at 1097-1098.

Both of these principles are correct statements of international law but they do not apply to FSIA cases; rather, they are accurate because they refer to international tribunals in which only States have standing to argue.⁸⁰ Such a court would include, for instance, the International Court of Justice. FSIA courts, by contrast, are domestic courts in which individuals do have standing to assert claims against States. The issue of courts' reliance on Restatements "without any recourse to its drafting history and intellectual lineage"⁸¹ has been noted critically and was a problem in this case. The Restatement drafters had not been referring to domestic, national courts, although the Restatement language did not make that clear.⁸²

The Supreme Court's remand on the issue of plaintiffs' nationality would have made no sense had statelessness barred plaintiffs from standing under principles of international law. Perhaps sensing it was on uncertain ground, the D.C. Circuit left the door open: "The Survivors have thus failed to persuade us that a state's taking of a *de facto* stateless person's property violates the customary international law of expropriation. To be clear, we do not foreclose the possibility that such support exists in sources of international law not before us in this case or based on arguments not advanced here."⁸³

As seen in *Simon*, U.S. Restatements of Law play an important role in influencing U.S. judges.⁸⁴ The next Part considers the Restatements of Foreign Relations at greater length and analyzes applicable international law.

⁸⁰ A similar confusion relating to the Restatement drafters' intention was made concerning the exhaustion of local remedies. The drafters of the Restatement (Fourth) explained the confusion, indicating that FSIA and other domestic courts were not included. See Restatement (Fourth) § 455 cmt. 9.

⁸¹ See Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2126 (2022).

⁸² See *id.* The author blames some of the problem on the ALI's procedural opacity. *Id.* at 2146-2147.

⁸³ 77 F.4th 1077, at 1098.

⁸⁴ Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2123 (2022) ("innumerable courts ... treat Restatements as statutory directives, that is, as primary sources of law.")

III. The Restatement and International Law

Although the FSIA is a self-contained, comprehensive statute, Section 1605 (a) (3) requires inquiry outside of the text by referencing exceptions to foreign sovereign immunity for acts “in violation of international law.” In *Philipp*, the Supreme Court said that international law refers to the international law of property, not of international human rights.⁸⁵ The international law of property is not neatly divorced from basic human rights principles, however. The Restatement (Third) of U.S. Foreign Relations §712, discussing property expropriations of “nationals of other states,” specifies that

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that

- (a) is not for public purpose, or
- (b) is discriminatory, or
- (c) is not accompanied by provision for just compensation;

For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter....

These principles of international law, expressed in terms of States and nationals of other countries, are, like those in Restatement (Second) §175, situated in the context of international tribunals in which only States have standing. In FSIA courts, Restatement (Third) §712 is equally applicable to the property of stateless individuals.⁸⁶

As *Brownlie's Principles of Public International Law* sets forth, “[t]he rule long supported by Western governments and jurists is that expropriation of alien property is only

⁸⁵ 592 U.S. at 180.

⁸⁶ See *supra* notes – to – , and surrounding text.

lawful if prompt, adequate and effective compensation is provided for. The full compensation rule has received considerable support from state practice and international tribunals.”⁸⁷

In *Fireman's Fund Insurance Co. v. Mexico*,⁸⁸ the tribunal set forth similar criteria in a case decided under the North American Free Trade Agreement (NAFTA):

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis....

3. Compensation shall be paid without delay and be fully realizable.⁸⁹

It further elaborated the following criteria:

(a) Expropriation requires a taking (which may include destruction) by a government-type authority

(b) The covered investment may include intangible as well as tangible property.

(c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).

(d) The taking must be permanent, and not ephemeral or temporary.

(e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).

(f) The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation.

(g) The taking may be *de jure* or *de facto*....

(i) The taking may have the form of a single measure or a series of related or unrelated measures over a period of time

⁸⁷BROWNIE, *supra* note --, at 605 (internal quotation marks and citations omitted).

⁸⁸ ICSID Case No. ARB (AF)/02/1, Award July 17, 2006.

⁸⁹ *Id.*, Para. 170, *quoting* NAFTA Art. 1110.

(j) To distinguish between a compensable expropriation and a noncompensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.....⁹⁰

These sources are also consistent with the International Law Commission's position that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution ... [or] compensation."⁹¹

The international law of property has dealt with State nationalizations of private property, a topic outside the scope of this Article. The basic principles of private property expropriation are, however, fairly consistent with each other, as exemplified by the NAFTA and Restatement principles. One recent FSIA case also considered additional international instruments when deciding a case of Nazi expropriation.⁹² In *Ambar*, the D.C. District Court dealt with conflicting arguments about the nationality of plaintiff's ancestor at the time of a 1941 expropriation.⁹³ The court in this case adopted a substantive test consistent with the analysis of the 2010 and 2013 *Cassirer* and *de Csepel* courts and the 2023 D.C. Circuit Court in *Simon* by determining nationality based on how the defendant State considered the plaintiff at the time of the taking,⁹⁴ but in doing so,

⁹⁰ *Id.*, para 176.

⁹¹ Int'l L. Comm'n Rep. on the Work of Its Fifty-Third Session, *State Responsibility*, Y.B. Int'l L. Comm'n, art. 34, U.N. Doc. A/CN.4SER.A/2001/Add.1 (Part 2) (2001).

⁹² *Ambar v. Federal Republic of Germany*, 596 F. Supp.3d 76 (2022)

⁹³ *See id.*

⁹⁴ *Id.*, at 83 ("It is for each State to determine under its own law who are its nationals[,] and "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.") (*quoting* Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, 2, Apr. 12, 1930, 179 U.N.T.S. 89).

it relied on the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*,⁹⁵ and the *European Convention on Nationality*.⁹⁶

The plaintiff in *Ambar* fell under a November 1941 amendment to the 1935 Nuremberg Laws. The 1941 amendment explicitly severed any and all legal ties between Germany and “non-Aryans” located outside of Germany who in 1935 were mere *Staatsangehörige*, the already downgraded status of Jews.⁹⁷ Thus, in *Ambar*’s case, the plaintiff was *de jure* stateless.⁹⁸ Germany nevertheless still argued immunity in this case under the FSIA’s domestic takings rule because, it said, current German law should be applied, and today German law would have recognized plaintiff as a full-fledged citizen despite being Jewish.⁹⁹ The court rejected this argument, applying Germany’s law at the time of expropriation and denying defendant’s motion to dismiss. The standard of looking to the sovereign’s own perception of the plaintiff at the time of the taking is in keeping with the substantive citizenship test that the D.C. Circuit had developed earlier in *de Csepel* and the Ninth Circuit in *Cassirer*. It also subsequently has been applied on remand by the D.C. Circuit in *Simon*, consistently with the Supreme Court’s instructions in *Philipp*.

One of the most famous international law cases to deal with nationality is *Nottebohm*,¹⁰⁰ in which the International Court of Justice emphasized the importance of substance over form in

⁹⁵ *Id.*

⁹⁶ *Id.* (“Each State shall determine under its own laws who are its nationals.”)(quoting European Convention on Nationality, art. 3, Nov. 6, 1997, E.T.S. No. 166).
art. 3, Nov. 6, 1997, E.T.S. No. 166.

⁹⁷ See *id.*, at 80.

⁹⁸ For a similar case of *de jure* statelessness, in this case Iraqi Jews stripped of their citizenship under the Denaturalization Act of 1950 and property once owned by the Jewish community but now claimed by the Iraqi government, see Leila Selchaif, *The Iraqi Jewish Archive in Exile: A Legal Argument for Equitable Return Practice*, 14 NORTHEASTERN U. L. REV. 275 (2022).

⁹⁹ *Ambar*, 596 F. Supp.3d 76, at 84 (“Plaintiffs argue that if German law is to be considered, then German law at the time of the taking of the Building should be the relevant analysis, whereas Defendant contends that only German law retroactively should apply.”).

¹⁰⁰ *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4 (Apr. 6).

evaluating nationality. There, Liechtenstein had naturalized a formerly German citizen, whom it sought to represent at the ICJ in his claim against Guatemala, but the ICJ determined that the naturalization was not valid for purposes of allowing Liechtenstein to represent him as its citizen, because it concluded that the ICJ's substantive citizenship standards had not been met.¹⁰¹ It has been suggested that *Nottebohm* should be interpreted as the ICJ's rejection of bad faith decisions in nationality, and that the ICJ rejected Liechtenstein's ability to represent an individual it had naturalized and recognized as its citizen because Nottebohm was a former German Nazi attempting to evade alien enemy status in Guatemala, his real country of residence.¹⁰² That substance should prevail over form in the international law of property expropriation has also been confirmed by a major international law treatise, *Brownlie's Principles of International Law* in its discussion of property expropriation and sovereign immunity.¹⁰³

Thus, the D.C. Circuit correctly concluded that the stateless can have standing under the domestic takings criteria the Supreme Court set forth in *Philipp*, but it misconstrued the *Restatement (Second)* to conclude that they cannot have standing after all. Had international law prevented the stateless from having standing under the FSIA, however, the Supreme Court's instructions to remand for a domestic takings inquiry would have been pointless, and the Court would have reversed without remand. The next Part, the Conclusion, considers FSIA statelessness jurisdiction today in a larger context.

IV. Conclusion

¹⁰¹ See *id.*

¹⁰² See Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L. L. J. 2,4, 11-24 (2009).

¹⁰³ James Crawford, *Expropriation of Foreign Property*, in *Brownlie's Principles of International Law* 603 (Oxford University Press, 9th ed., 2019) ("The terminology of the subject is by no means settled and, in any event, *form should not prevail over substance.*")(emphasis added).

Inasmuch as modern international law has been moving towards holding States responsible for how they treat their own nationals on their own territory, it has been suggested that the *Phillip* Court's "focus on the citizenship of the property owner ... represents a lost opportunity."¹⁰⁴ The Supreme Court distinguished this international law trend towards holding States accountable for their own nationals from FSIA § 1605 (a) (3) cases when it held that the section does not concern international human rights, but only international property expropriations:

The domestic takings rule endured even as international law increasingly came to be seen as constraining how states interacted not just with other states but also with individuals, including their own citizens. The United Nations Universal Declaration of Human Rights and Convention on the Prevention of Genocide became part of a growing body of human rights law that made how a state treats individual human beings ... a matter of international concern. These human rights documents were silent, however, on the subject of property rights. International tribunals therefore continued to maintain that international law governed confiscation of the property of foreigners, but measures taken by a State with respect to the property of its own nationals are not subject to these principles.¹⁰⁵

Within the domestic arena, the *Phillip* Supreme Court decision has brought the FSIA within the Court's increasing reluctance to recognize the extraterritoriality of U.S. laws, while simultaneously balancing it with U.S. public policy favoring the return of expropriated Holocaust property and the FSIA's own similar policy indications concerning Nazi-looted property.¹⁰⁶ A series of public declarations, one of which the United States spearheaded and

¹⁰⁴ Gregory H. Fox & Noah B. Novogrodsky, *Of Looting, Land, and Loss: The New International Law of Takings*, 65 HARV. INT'L. L. J. 186, 190 (2023).

¹⁰⁵ *Phillip*, 592 U.S. at 710 (internal quotation marks and citations omitted)(citing to both the Restatement (Third) and a European Commission on Human Rights decision)..

¹⁰⁶ See *infra*, note 106.

all of which it signed, aim to ensure that U.S. courts and courts around the world will oversee the return of Nazi-looted property.¹⁰⁷

A prior statute, the Alien Tort Statute (ATS), was excluded from having extraterritorial effect in *Kiobel v. Royal Dutch Petroleum Co.*¹⁰⁸ The Court limited extraterritoriality in *Kiobel* by displacing the Alien Tort Statute (ATS) from the context of international human rights law which it had occupied for decades¹⁰⁹ to commercial law, analyzing an international human rights claim as part of a line of cases in which the Court already had rejected extraterritoriality in commerce.¹¹⁰ When the ATS stopped being a fruitful avenue for international human rights recovery, the FSIA remained a viable option, albeit limited to where the defendant was a foreign sovereign or its agency or instrumentality, and to where the plaintiff was able to meet the statute's other stringent requirements. One notable limitation is that the ATS is a torts statute, while the FSIA forecloses tort claims unless they are committed in the United States.¹¹¹ In some FSIA cases where the wrongdoing occurred outside of the United States, such as *de Csepel*, *Cassirer* and *Philipp*, extremely valuable property is at issue in bona fide property

¹⁰⁷ U.S. public policy is reflected in the Washington Principles and The Terezin Declaration, see <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>; and Ministry of Foreign Affairs of the Czech Republic, *Terezin Declaration*, https://www.mzv.cz/jnp/en/foreign_relations/terezin_declaration/index.html. In addition, Congress passed the HEAR Act, Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016), to facilitate legal actions by relaxing statutes of limitation. The FSIA devotes a special section to Nazi-looted art, albeit not §1605 (a)(3), allowing for the conclusion either that the FSIA reflects the policy of returning Nazi looted property or, on the contrary, that §1605 (a) (3)'s silence on such property should be taken as distinguishing it from § 1605 (h) (2) under the interpretive canon of *expressio unius esalterius*. See generally Vivian Grosswald Curran, *Nazi Stolen Art: Uses and Misuses of the Foreign Sovereign Immunities Act*, 32 TRANS'L L. & CONTEMP. PROBLEMS 197 (2023).

¹⁰⁸ 569 U.S. 108 (2013).

¹⁰⁹ It had been an avenue for international human rights claims since 1980. See *Filartiga v. Pena- Irala*, 630 F.2d 876 (1980).

¹¹⁰ See *Kiobel*, 569 U.S., at 664.

¹¹¹ FSIA § 1605 (2016).

expropriation claims.¹¹² In other claims, one can have the sense that an underlying tort claim has been transfigured into a property claim in order to state a cause of action within the purview of Section 1605 (a) (3).¹¹³

Just as in *Kiobel* the Supreme Court said it did not want the United States to become the only forum for the whole world's human rights claims,¹¹⁴ we have seen that in *Phillip* it said that FSIA §1605 (a) (3)'s reference to international law is to the international law of property, not of human rights. That limitation was within the framework of an appeal from the D.C. Circuit's holding that a genocidal context to a taking suffices without further analysis for FSIA jurisdiction. Interestingly, it was the Court rather than the plaintiffs which raised the issue of potential Section 1605 (a) (3) jurisdiction if plaintiffs were found not to have been nationals of defendants at the times of expropriation. It was thus the Court that held the door ajar for their FSIA claims. In so doing, the Court was furthering declared U.S. foreign policy of seeking to assist restitution and compensation for Holocaust-era property expropriation and theft.¹¹⁵

¹¹² See *supra*, notes – and –, and surrounding text.

¹¹³ In *Simon and Abelesz/Fischer*, for example, claims included the last vestiges of property remaining in the backpacks of possibly destitute victims as they were put on trains to concentration camps.

¹¹⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 123 (2013) (“there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”)

¹¹⁵ See *supra* notes – to –, and surrounding text.

28 U.S.C.

United States Code, 2011 Edition

Title 28 - JUDICIARY AND JUDICIAL PROCEDURE

PART IV - JURISDICTION AND VENUE

CHAPTER 97 - JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

From the U.S. Government Publishing Office, www.gpo.gov**CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES**

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AMENDMENTS

2008—Pub. L. 110–181, div. A, title X, §1083(a)(2), Jan. 28, 2008, 122 Stat. 341, added item 1605A.

^{[1](#)} *So in original. Does not conform to section catchline.*

§1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2892.)

EFFECTIVE DATE

Section 8 of Pub. L. 94–583 provided that: “This Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section and section 1 of this title] shall take effect ninety days after the date of its enactment [Oct. 21, 1976].”

SHORT TITLE

For short title of Pub. L. 94–583 as the “Foreign Sovereign Immunities Act of 1976”, see section 1 of Pub. L. 94–583, set out as a Short Title of 1976 Amendments note under section 1 of this title.

SEPARABILITY

Section 7 of Pub. L. 94–583 provided that: “If any provision of this Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section and section 1 of this title] or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.”

§1603. Definitions

For purposes of this chapter—

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

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

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

(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, nor created under the laws of any third country.

(c) The “United States” includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) 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.

(e) A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub. L. 109–2, §4(b)(2), Feb. 18, 2005, 119 Stat. 12.)

AMENDMENTS

2005—Subsec. (b)(3). Pub. L. 109–2 substituted “(e)” for “(d)”.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–2 applicable to any civil action commenced on or after Feb. 18, 2005, see section 9 of Pub. L. 109–2, set out as a note under section 1332 of this title.

§1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2892.)

REFERENCES IN TEXT

The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub. L. 94–583, which was approved Oct. 21, 1976.

§1605. General exceptions to the jurisdictional immunity of a foreign state

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

(1) in which the foreign state has waived its immunity either explicitly 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;

(2) 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;

(3) 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 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;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

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

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

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such 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, (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, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state:

Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110–181, div. A, title X, §1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of

action.

(2) **SUNSET.**—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

- (i) create a serious threat of death or serious bodily injury to any person;
- (ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or
- (iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) **EVALUATION OF EVIDENCE.**—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted *ex parte* and *in camera*.

(4) **BAR ON MOTIONS TO DISMISS.**—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) **CONSTRUCTION.**—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub. L. 100–640, §1, Nov. 9, 1988, 102 Stat. 3333; Pub. L. 100–669, §2, Nov. 16, 1988, 102 Stat. 3969; Pub. L. 101–650, title III, §325(b)(8), Dec. 1, 1990, 104 Stat. 5121; Pub. L. 104–132, title II, §221(a), Apr. 24, 1996, 110 Stat. 1241; Pub. L. 105–11, Apr. 25, 1997, 111 Stat. 22; Pub. L. 107–77, title VI, §626(c), Nov. 28, 2001, 115 Stat. 803; Pub. L. 107–117, div. B, §208, Jan. 10, 2002, 115 Stat. 2299; Pub. L. 109–304, §17(f)(2), Oct. 6, 2006, 120 Stat. 1708; Pub. L. 110–181, div. A, title X, §1083(b)(1), Jan. 28, 2008, 122 Stat. 341.)

REFERENCES IN TEXT

Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, referred to in subsec. (g)(4), are set out in the Appendix to this title.

AMENDMENTS

2008—Subsec. (a)(7). Pub. L. 110–181, §1083(b)(1)(A), struck out par. (7) which provided for lack of jurisdictional immunity in certain cases in which money damages were sought against a foreign state for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.

Subsecs. (e), (f). Pub. L. 110–181, §1083(b)(1)(B), struck out subsecs. (e) and (f) which defined “torture”, “extrajudicial killing”, “hostage taking”, and “aircraft sabotage” and provided for a 10-year statute of limitations for actions brought under former subsec. (a)(7) of this section.

Subsec. (g)(1)(A). Pub. L. 110–181, §1083(b)(1)(C), substituted “but for section 1605A” for “but for subsection (a)(7)”.

2006—Subsec. (d). Pub. L. 109–304 substituted “section 31301 of title 46” and “chapter 313 of title 46” for “the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following)” and “that Act”, respectively.

2002—Subsec. (a)(7)(A). Pub. L. 107–117 amended Pub. L. 107–77. See 2001 Amendment note below.

2001—Subsec. (a)(7)(A). Pub. L. 107–77, as amended by Pub. L. 107–117, inserted before semicolon “or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia”.

1997—Subsec. (a)(7)(B)(ii). Pub. L. 105–11 substituted “neither the claimant nor the victim was” for “the

claimant or victim was not”.

1996—Subsec. (a)(7). Pub. L. 104–132, §221(a)(1), added par. (7).

Subsecs. (e) to (g). Pub. L. 104–132, §221(a)(2), added subsecs. (e) to (g).

1990—Subsec. (a)(6). Pub. L. 101–650 substituted “state” for “State” after “foreign”.

1988—Subsec. (a)(6). Pub. L. 100–669 added par. (6).

Subsec. (b). Pub. L. 100–702, §1(3), struck out at end “Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.”

Subsec. (b)(1). Pub. L. 100–640, §1(1), substituted “and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved” for “but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice”.

Subsec. (b)(2). Pub. L. 100–640, §1(2), substituted “paragraph (1) of this subsection” for “subsection (b)(1) of this section”.

Subsecs. (c), (d). Pub. L. 100–702, §1(3), added subsecs. (c) and (d).

EFFECTIVE DATE OF 2008 AMENDMENT

For applicability of amendments by Pub. L. 110–181 to pending cases, see section 1083(c) of Pub. L. 110–181, set out as an Effective Date note under section 1605A of this title.

EFFECTIVE DATE OF 1997 AMENDMENT

Pub. L. 105–11 provided that the amendment made by that Act was effective with respect to any cause of action arising before, on, or after Apr. 25, 1997.

EFFECTIVE DATE OF 1996 AMENDMENT

Section 221(c) of title II of Pub. L. 104–132 provided that: “The amendments made by this subtitle [subtitle B (§221) of title II of Pub. L. 104–132, amending this section and section 1610 of this title] shall apply to any cause of action arising before, on, or after the date of the enactment of this Act [Apr. 24, 1996].”

EFFECTIVE DATE OF 1988 AMENDMENT

Section 3 of Pub. L. 100–640 provided that: “The amendments made by this Act [amending this section and section 1610 of this title] shall apply to actions commenced on or after the date of the enactment of this Act [Nov. 9, 1988].”

CIVIL LIABILITY FOR ACTS OF STATE SPONSORED TERRORISM

Pub. L. 104–208, div. A, title I, §101(c) [title V, §589], Sept. 30, 1996, 110 Stat. 3009–121, 3009–172, provided that:

“(a) an [sic] official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated [sic] under section 6(j) of the Export Administration Act of 1979 [50 U.S.C. App. 2405(j)] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national’s legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [former] section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in [former] section 1605(a)(7).

“(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this action [sic] if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.”

§1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) **NO IMMUNITY.**—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) **CLAIM HEARD.**—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) **LIMITATIONS.**—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) **PRIVATE RIGHT OF ACTION.**—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

- (1) a national of the United States,
- (2) a member of the armed forces,
- (3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or
- (4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) **ADDITIONAL DAMAGES.**—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) **SPECIAL MASTERS.**—

(1) **IN GENERAL.**—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) **TRANSFER OF FUNDS.**—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) **APPEAL.**—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) **PROPERTY DISPOSITION.**—

(1) **IN GENERAL.**—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of *lis pendens* upon any real property or tangible personal property that is—

- (A) subject to attachment in aid of execution, or execution, under section 1610;
- (B) located within that judicial district; and
- (C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) **NOTICE.**—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) **ENFORCEABILITY.**—Liens established by reason of this subsection shall be enforceable as

provided in chapter 111 of this title.

(h) **DEFINITIONS.**—For purposes of this section—

(1) the term “aircraft sabotage” has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term “hostage taking” has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term “material support or resources” has the meaning given that term in section 2339A of title 18;

(4) the term “armed forces” has the meaning given that term in section 101 of title 10;

(5) the term “national of the United States” has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term “state sponsor of terrorism” means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms “torture” and “extrajudicial killing” have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

(Added Pub. L. 110–181, div. A, title X, §1083(a)(1), Jan. 28, 2008, 122 Stat. 338.)

REFERENCES IN TEXT

Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008, referred to in subsec. (a)(2)(A)(i)(II), is section 1083(c) of Pub. L. 110–181, which is set out as a note below.

The enactment of this section and the date of the enactment of this section, referred to in subsecs. (a)(2)(A)(i)(II) and (b), refers to the date of enactment of Pub. L. 110–181, which was approved Jan. 28, 2008.

Section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, referred to in subsecs. (a)(2)(A)(i)(II) and (b), is Pub. L. 104–208, div. A, title I, §101(c) [title V, §589], which is set out as a note under section 1605 of this title.

Section 3 of the Torture Victim Protection Act of 1991, referred to in subsec. (h)(7), is section 3 of Pub. L. 102–256, which is set out as a note under section 1350 of this title.

EFFECTIVE DATE

Pub. L. 110–181, div. A, title X, §1083(c), Jan. 28, 2008, 122 Stat. 342, provided that:

“(1) **IN GENERAL.**—The amendments made by this section [enacting this section and amending sections 1605, 1607 and 1610 of this title and section 10603a of Title 42, The Public Health and Welfare] shall apply to any claim arising under section 1605A of title 28, United States Code.

“(2) **PRIOR ACTIONS.**—

“(A) **IN GENERAL.**—With respect to any action that—

“(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) [28 U.S.C. 1605 note], before the date of the enactment of this Act [Jan. 28, 2008],

“(ii) relied upon either such provision as creating a cause of action,

“(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

“(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure [28 U.S.C. App.],

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States

district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

“(B) DEFENSES WAIVED.—The defenses of res judicata, collateral estoppel, and limitation period are waived—

“(i) in any action with respect to which a motion is made under subparagraph (A), or

“(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208), and is refiled under section 1605A(c) of title 28, United States Code, to the extent such defenses are based on the claim in the action.

“(C) TIME LIMITATIONS.—A motion may be made or an action may be refiled under subparagraph (A) only—

“(i) if the original action was commenced not later than the latter of—

“(I) 10 years after April 24, 1996; or

“(II) 10 years after the cause of action arose; and

“(ii) within the 60-day period beginning on the date of the enactment of this Act.

“(3) RELATED ACTIONS.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) [28 U.S.C. 1605 note], any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

“(A) the date of the entry of judgment in the original action; or

“(B) the date of the enactment of this Act [Jan. 28, 2008].

“(4) PRESERVING THE JURISDICTION OF THE COURTS.—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108–11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.”

SEVERABILITY

Pub. L. 110–181, div. A, title X, §1083(e), Jan. 28, 2008, 122 Stat. 344, provided that: “If any provision of this section [enacting this section and amending sections 1605, 1607 and 1610 of this title and section 10603a of Title 42, The Public Health and Welfare] or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.”

LIBYA CLAIMS RESOLUTION

Pub. L. 110–301, Aug. 4, 2008, 122 Stat. 2999, provided that:

“SECTION 1. SHORT TITLE.

“This Act may be cited as the ‘Libyan Claims Resolution Act’.

“SEC. 2. DEFINITIONS.

“In this Act—

“(1) the term ‘appropriate congressional committees’ means the Committee on Foreign Relations and the Committee on the Judiciary of the Senate and the Committee on Foreign Affairs and the Committee on the Judiciary of the House of Representatives;

“(2) the term ‘claims agreement’ means an international agreement between the United States and Libya, binding under international law, that provides for the settlement of terrorism-related claims of

nationals of the United States against Libya through fair compensation;

“(3) the term ‘national of the United States’ has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

“(4) the term ‘Secretary’ means the Secretary of State; and

“(5) the term ‘state sponsor of terrorism’ means a country the government of which the Secretary has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism.

“SEC. 3. SENSE OF CONGRESS.

“Congress supports the President in his efforts to provide fair compensation to all nationals of the United States who have terrorism-related claims against Libya through a comprehensive settlement of claims by such nationals against Libya pursuant to an international agreement between the United States and Libya as a part of the process of restoring normal relations between Libya and the United States.

“SEC. 4. ENTITY TO ASSIST IN IMPLEMENTATION OF CLAIMS AGREEMENT.

“(a) DESIGNATION OF ENTITY.—

“(1) DESIGNATION.—The Secretary, by publication in the Federal Register, may, after consultation with the appropriate congressional committees, designate 1 or more entities to assist in providing compensation to nationals of the United States, pursuant to a claims agreement.

“(2) AUTHORITY OF THE SECRETARY.—The designation of an entity under paragraph (1) is within the sole discretion of the Secretary, and may not be delegated. The designation shall not be subject to judicial review.

“(b) IMMUNITY.—

“(1) PROPERTY.—

“(A) IN GENERAL.—Notwithstanding any other provision of law, if the Secretary designates any entity under subsection (a)(1), any property described in subparagraph (B) of this paragraph shall be immune from attachment or any other judicial process. Such immunity shall be in addition to any other applicable immunity.

“(B) PROPERTY DESCRIBED.—The property described in this subparagraph is any property that—

“(i) relates to the claims agreement; and

“(ii) for the purpose of implementing the claims agreement, is—

“(I) held by an entity designated by the Secretary under subsection (a)(1);

“(II) transferred to the entity; or

“(III) transferred from the entity.

“(2) OTHER ACTS.—An entity designated by the Secretary under subsection (a)(1), and any person acting through or on behalf of such entity, shall not be liable in any Federal or State court for any action taken to implement a claims agreement.

“(c) NONAPPLICABILITY OF THE GOVERNMENT CORPORATION CONTROL ACT.—An entity designated by the Secretary under subsection (a)(1) shall not be subject to chapter 91 of title 31, United States Code (commonly known as the ‘Government Corporation Control Act’).

“SEC. 5. RECEIPT OF ADEQUATE FUNDS; IMMUNITIES OF LIBYA.

“(a) IMMUNITY.—

“(1) IN GENERAL.—Notwithstanding any other provision of law, upon submission of a certification described in paragraph (2)—

“(A) Libya, an agency or instrumentality of Libya, and the property of Libya or an agency or instrumentality of Libya, shall not be subject to the exceptions to immunity from jurisdiction, liens, attachment, and execution contained in section 1605A, [former] 1605(a)(7), or 1610 (insofar as section 1610 relates to a judgment under such section 1605A or [former] 1605(a)(7)) of title 28, United States

Code;

“(B) section 1605A(c) of title 28, United States Code, section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 342; 28 U.S.C. 1605A note), section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 [Pub. L. 104–208, div. A, title I, §101(c)] (28 U.S.C. 1605 note), and any other private right of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall not apply with respect to claims against Libya, or any of its agencies, instrumentalities, officials, employees, or agents in any action in a Federal or State court; and

“(C) any attachment, decree, lien, execution, garnishment, or other judicial process brought against property of Libya, or property of any agency, instrumentality, official, employee, or agent of Libya, in connection with an action that would be precluded by subparagraph (A) or (B) shall be void.

“(2) CERTIFICATION.—A certification described in this paragraph is a certification—

“(A) by the Secretary to the appropriate congressional committees; and

“(B) stating that the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure—

“(i) payment of the settlements referred to in section 654(b) of division J of the Consolidated Appropriations Act, 2008 (Public Law 110–161; 121 Stat. 2342); and

“(ii) fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act [Aug. 4, 2008] against Libya arising under section 1605A of title 28, United States Code (including any action brought under [former] section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (28 U.S.C. 1605 note), that has been given effect as if the action had originally been filed under [section] 1605A(c) of title 28, United States Code, pursuant to section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 342; 28 U.S.C. 1605A note)).

“(b) TEMPORAL SCOPE.—Subsection (a) shall apply only with respect to any conduct or event occurring before June 30, 2006, regardless of whether, or the extent to which, application of that subsection affects any action filed before, on, or after that date.

“(c) AUTHORITY OF THE SECRETARY.—The certification by the Secretary referred to in subsection (a)(2) may not be delegated, and shall not be subject to judicial review.”

APPLICABILITY TO IRAQ

Pub. L. 110–181, div. A, title X, §1083(d), Jan. 28, 2008, 122 Stat. 343, provided that:

“(1) APPLICABILITY.—The President may waive any provision of this section [enacting this section and amending sections 1605, 1607 and 1610 of this title and section 10603a of Title 42, The Public Health and Welfare] with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

“(A) the waiver is in the national security interest of the United States;

“(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

“(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

“(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply—

“(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act [Jan. 28, 2008];

“(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

“(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

“(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective

30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

“(4) SENSE OF CONGRESS.—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).”

EX. ORD. NO. 13477. SETTLEMENT OF CLAIMS AGAINST LIBYA

Ex. Ord. No. 13477, Oct. 31, 2008, 73 F.R. 65965, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and pursuant to the August 14, 2008, claims settlement agreement between the United States of America and Libya (Claims Settlement Agreement), and in recognition of the October 31, 2008, certification of the Secretary of State, pursuant to section 5(a)(2) of the Libyan Claims Resolution Act (Public Law 110–301), and in order to continue the process of normalizing relations between the United States and Libya, it is hereby ordered as follows:

SECTION 1. All claims within the terms of Article I of the Claims Settlement Agreement (Article I) are settled.

(a) Claims of United States nationals within the terms of Article I are espoused by the United States and are settled according to the terms of the Claims Settlement Agreement.

(i) No United States national may assert or maintain any claim within the terms of Article I in any forum, domestic or foreign, except under the procedures provided for by the Secretary of State.

(ii) Any pending suit in any court, domestic or foreign, by United States nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.

(iii) The Secretary of State shall provide for procedures governing applications by United States nationals with claims within the terms of Article I for compensation for those claims.

(iv) The Attorney General shall enforce this subsection through all appropriate means, which may include seeking the dismissal, with prejudice, of any claim of a United States national within the terms of Article I pending or filed in any forum, domestic or foreign.

(b) Claims of foreign nationals within the terms of Article I are settled according to the terms of the Claims Settlement Agreement.

(i) No foreign national may assert or maintain any claim coming within the terms of Article I in any court in the United States.

(ii) Any pending suit in any court in the United States by foreign nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.

(iii) Neither the dismissal of the lawsuit, nor anything in this order, shall affect the ability of any foreign national to pursue other available remedies for claims coming within the terms of Article I in foreign courts or through the efforts of foreign governments.

(iv) The Attorney General shall enforce this subsection through all appropriate means, which may include seeking the dismissal, with prejudice, of any claim of a foreign national within the terms of Article I pending or filed in any court in the United States.

SEC. 2. For purposes of this order:

(a) The term “United States national” has the same meaning as “national of the United States” in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)), but also includes any entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches).

(b) The term “foreign national” means any person other than a United States national.

(c) The term “person” means any individual or entity, including both natural and juridical persons.

(d) The term “entity” means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

SEC. 3. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

GEORGE W. BUSH.

WAIVER OF SECTION 1083 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

Determination of President of the United States, No. 2008–9, Jan. 28, 2008, 73 F.R. 6571, provided:

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, and section 1083(d) of the National Defense Authorization Act for Fiscal Year 2008 (the “Act”), I hereby determine that:

- All provisions of section 1083 of the Act, if applied to Iraq or any agency or instrumentality thereof, may affect Iraq or its agencies or instrumentalities, by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation.
- The economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States. Section 1083 of the Act threatens those key priorities. If permitted to apply to Iraq, section 1083 would risk the entanglement of substantial Iraqi assets in litigation in the United States—including those of the Development Fund for Iraq, the Central Bank of Iraq, and commercial entities in the United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed. If permitted to apply to Iraq, section 1083 would have a significant financial impact on Iraq and would result in the redirection of financial resources from the continued reconstruction of Iraq and the harming of Iraq's stability, contrary to the interests of the United States.
- A waiver of all provisions of section 1083 with respect to Iraq and any agency or instrumentality of Iraq is therefore in the national security interest of the United States and will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq.
- Iraq continues to be a reliable ally of the United States and a partner in combating acts of international terrorism. The November 26, 2007, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America confirmed the commitment of the United States and Iraq to build an enduring relationship in the political, diplomatic, economic, and security arenas and to work together to combat all terrorist groups, including al-Qaida.

Accordingly, I hereby waive all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof.

You are authorized and directed to notify the Congress of this determination and waiver and the accompanying memorandum of justification [not set out in the Code], incorporated by reference herein, and to arrange for their publication in the Federal Register.

GEORGE W. BUSH.

§1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency

or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2894; amended Pub. L. 105–277, div. A, §101(h) [title I, §117(b)], Oct. 21, 1998, 112 Stat. 2681–480, 2681–491; Pub. L. 106–386, div. C, §2002(g)(2), formerly §2002(f)(2), Oct. 28, 2000, 114 Stat. 1543, renumbered §2002(g)(2), Pub. L. 107–297, title II, §201(c)(3), Nov. 26, 2002, 116 Stat. 2337.)

AMENDMENTS

2000—Pub. L. 106–386, §2002(g)(2), formerly §2002(f)(2), as renumbered by Pub. L. 107–297, which directed repeal of section 101(h) [title I, §117(b)] of div. A of Pub. L. 105–277, was executed by striking out “, except any action under section 1605(a)(7) or 1610(f)” after “punitive damages”, to reflect the probable intent of Congress. See 1998 Amendment note below.

1998—Pub. L. 105–277 inserted “, except any action under section 1605(a)(7) or 1610(f)” after “punitive damages”.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–277 applicable to any claim for which a foreign state is not immune under section 1605(a)(7) of this title arising before, on, or after Oct. 21, 1998, see section 101(h) [title I, §117(c)] of Pub. L. 105–277, set out as a note under section 1610 of this title.

§1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

- (a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or
- (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or
- (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2894; amended Pub. L. 110–181, div. A, title X, §1083(b)(2), Jan. 28, 2008, 122 Stat. 341.)

AMENDMENTS

2008—Subsec. (a). Pub. L. 110–181 inserted “or 1605A” after “section 1605”.

EFFECTIVE DATE OF 2008 AMENDMENT

For applicability of amendments by Pub. L. 110–181 to pending cases, see section 1083(c) of Pub. L. 110–181, set out as an Effective Date note under section 1605A of this title.

§1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

- (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
- (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
- (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
- (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a “notice of suit” shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

- (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
- (2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or
- (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—
 - (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or
 - (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or
 - (C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

- (1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and
- (2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2894.)

§1609. Immunity from attachment and execution of property of a foreign state

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 except as provided in sections 1610 and 1611 of this chapter.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2895.)

REFERENCES IN TEXT

The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub. L. 94–583, which was approved Oct. 21, 1976.

§1610. Exceptions to the immunity from attachment or execution

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

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

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is

based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any

court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

- (i) may provide such information to the court under seal; and
- (ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) **WAIVER.**—The President may waive any provision of paragraph (1) in the interest of national security.

(g) **PROPERTY IN CERTAIN ACTIONS.**—

(1) **IN GENERAL.**—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

- (A) the level of economic control over the property by the government of the foreign state;
- (B) whether the profits of the property go to that government;
- (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
- (D) whether that government is the sole beneficiary in interest of the property; or
- (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) **UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.**—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) **THIRD-PARTY JOINT PROPERTY HOLDERS.**—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

(Added Pub. L. 94–583, § 4(a), Oct. 21, 1976, 90 Stat. 2896; amended Pub. L. 100–640, §2, Nov. 9, 1988, 102 Stat. 3333; Pub. L. 100–669, §3, Nov. 16, 1988, 102 Stat. 3969; Pub. L. 101–650, title III, §325(b)(9), Dec. 1, 1990, 104 Stat. 5121; Pub. L. 104–132, title II, §221(b), Apr. 24, 1996, 110 Stat. 1242; Pub. L. 105–277, div. A, §101(h) [title I, §117(a)], Oct. 21, 1998, 112 Stat. 2681–480, 2681–491; Pub. L. 106–386, div. C, §2002(g)(1), formerly §2002(f)(1), Oct. 28, 2000, 114 Stat. 1543, renumbered §2002(g)(1), Pub. L. 107–297, title II, §201(c)(3), Nov. 26, 2002, 116 Stat. 2337; Pub. L. 110–181, div. A, title X, §1083(b)(3), Jan. 28, 2008, 122 Stat. 341.)

REFERENCES IN TEXT

The effective date of this Act, referred to in subsecs. (a) and (b), is 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94–583, set out as an Effective Date note under section 1602 of this title.

The enactment of section 1605A, referred to in subsec. (f)(1)(A), (2)(A), refers to the enactment of Pub. L. 110–181, which was approved Jan. 28, 2008.

The Trading with the Enemy Act, referred to in subsec. (g)(2), is act Oct. 6, 1917, ch. 106, 40 Stat. 411, which is classified to sections 1 to 6, 7 to 39 and 41 to 44 of Title 50, Appendix, War and National Defense. For complete classification of this Act to the Code, see Tables.

The International Emergency Economic Powers Act, referred to in subsec. (g)(2), is title II of Pub. L. 95–223, Dec. 28, 1977, 91 Stat. 1626, which is classified generally to chapter 35 (§1701 et seq.) of Title 50, War and National Defense. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 50 and Tables.

AMENDMENTS

2008—Subsec. (a)(7). Pub. L. 110–181, §1083(b)(3)(A), substituted “1605A” for “1605(a)(7)”.

Subsec. (b)(2). Pub. L. 110–181, §1083(b)(3)(B), substituted “or (5), 1605(b), or 1605A” for “(5), or (7), or 1605(b)”.

Subsec. (f)(1)(A), (2)(A). Pub. L. 110–181, §1083(b)(3)(C), inserted “(as in effect before the enactment of section 1605A) or section 1605A” after “section 1605(a)(7)”.

Subsec. (g). Pub. L. 110–181, §1083(b)(3)(D), added subsec. (g).

2000—Subsec. (f)(2)(A), (B)(ii). Pub. L. 106–386, §2002(g)(1)(A), formerly §2002(f)(1)(A), as renumbered by Pub. L. 107–297, substituted “should make every effort to” for “shall”.

Subsec. (f)(3). Pub. L. 106–386, §2002(g)(1)(B), formerly §2002(f)(1)(B), as renumbered by Pub. L. 107–297, added par. (3).

1998—Subsec. (f). Pub. L. 105–277 added subsec. (f).

1996—Subsec. (a)(7). Pub. L. 104–132, §221(b)(1), added par. (7).

Subsec. (b)(2). Pub. L. 104–132, §221(b)(2), substituted “(5), or (7),” for “or (5),” and “involved in the act” for “used for the activity”.

1990—Subsecs. (a)(6), (e). Pub. L. 101–650 substituted “state” for “State” after “foreign”.

1988—Subsec. (a)(6). Pub. L. 100–669 added par. (6).

Subsec. (e). Pub. L. 100–640 added subsec. (e).

EFFECTIVE DATE OF 2008 AMENDMENT

For applicability of amendments by Pub. L. 110–181 to pending cases, see section 1083(c) of Pub. L. 110–181, set out as an Effective Date note under section 1605A of this title.

EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105–277, div. A, §101(h) [title I, §117(c)], Oct. 21, 1998, 112 Stat. 2681–480, 2681–491, provided that: “The amendments made by subsections (a) and (b) [amending this section and section 1606 of this title] shall apply to any claim for which a foreign state is not immune under section 1605(a)(7) of title 28, United States Code, arising before, on, or after the date of enactment of this Act [Oct. 21, 1998].”

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–132 applicable to any cause of action arising before, on, or after Apr. 24, 1996, see section 221(c) of Pub. L. 104–132, set out as a note under section 1605 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–640 applicable to actions commenced on or after Nov. 9, 1988, see section 3 of Pub. L. 100–640, set out as a note under section 1605 of this title.

SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM

Pub. L. 107–297, title II, §201(a), (b), (d), Nov. 26, 2002, 116 Stat. 2337, 2339, provided that:

“(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code,

the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

“(b) PRESIDENTIAL WAIVER.—

“(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

“(2) EXCEPTION.—A waiver under this subsection shall not apply to—

“(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

“(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

“(d) DEFINITIONS.—In this section, the following definitions shall apply:

“(1) ACT OF TERRORISM.—The term ‘act of terrorism’ means—

“(A) any act or event certified under section 102(1) [Pub. L. 107–297, set out in a note under section 6701 of Title 15, Commerce and Trade]; or

“(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

“(2) BLOCKED ASSET.—The term ‘blocked asset’ means—

“(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

“(B) does not include property that—

“(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

“(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

“(3) CERTAIN PROPERTY.—The term ‘property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations’ and the term ‘asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations’ mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

“(4) TERRORIST PARTY.—The term ‘terrorist party’ means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).”

WAIVER OF EXCEPTION TO IMMUNITY FROM ATTACHMENT OR EXECUTION

Pub. L. 105–277, div. A, §101(h) [title I, §117(d)], Oct. 21, 1998, 112 Stat. 2681–480, 2681–492, which authorized the President to waive the requirements of section 101(h) [title I, §117] of Pub. L. 105–277, which amended this section and section 1606 of this title and enacted provisions set out as a note above, in the interest of national security, was repealed by Pub. L. 106–386, div. C, §2002(g)(2), formerly §2002(f)(2), Oct.

28, 2000, 114 Stat. 1543, renumbered §2002(g)(2), Pub. L. 107–297, title II, §201(c)(3), Nov. 26, 2002, 116 Stat. 2337.

Determination of President of the United States, No. 99–1, Oct. 21, 1998, 64 F.R. 59201, which provided for waiver of requirements of section 101(h) [title I, §117(b)] of div. A of Pub. L. 105–277, relating to blocked property of terrorist-list states, was superseded by Determination of President of the United States, No. 2001–3, Oct. 28, 2000, 65 F.R. 66483, set out below.

DETERMINATION TO WAIVE ATTACHMENT PROVISIONS RELATING TO BLOCKED PROPERTY OF TERRORIST-LIST STATES

Determination of President of the United States, No. 2001–3, Oct. 28, 2000, 65 F.R. 66483, provided:

Memorandum for the Secretary of State [and] the Secretary of the Treasury

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 2002(f) [now 2002(g)] of H.R. 3244, “Victims of Trafficking and Violence Protection Act of 2000,” (approved October 28, 2000) [section 2002(g) of Pub. L. 106–386, amending this section and section 1606 of this title and repealing provisions set out as a note above], I hereby determine that subsection (f)(1) of section 1610 of title 28, United States Code, which provides that any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. [C.] App. 5(b)(1)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), and proclamations, orders, regulations, and licenses issued pursuant thereto, be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state claiming such property is not immune from the jurisdiction of courts of the United States or of the States under section 1605(a)(7) of title 28, United States Code, would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions. Therefore, pursuant to section 2002(f) [now 2002(g)] of H.R. 3244, the “Victim's of Trafficking and Violence Protection Act of 2000,” I hereby waive subsection (f)(1) of section 1610 of title 28, United States Code, in the interest of national security. This waiver, together with the amendment of subsection (f)(2) of the Foreign Sovereign Immunities Act [probably means subsec. (f)(2) of this section] and the repeal of the subsection (b) of section 117 of the Treasury and General Government Appropriations Act, 1999 [section 101(h) [title I, §117(b)] of div. A of Pub. L. 105–277, amending section 1606 of this title], supersedes my prior waiver of the requirements of subsections (a) and (b) of said section 117 [amending this section and section 1606 of this title], executed on October 21, 1998 [former Determination of President of the United States, No. 99–1, Oct. 21, 1998, 64 F.R. 59201].

The Secretary of State is authorized and directed to publish this determination in the Federal Register.

WILLIAM J. CLINTON.

§1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the

waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

(Added Pub. L. 94–583, §4(a), Oct. 21, 1976, 90 Stat. 2897; amended Pub. L. 104–114, title III, §302(e), Mar. 12, 1996, 110 Stat. 818.)

REFERENCES IN TEXT

The International Organizations Immunities Act, referred to in subsec. (a), is title I of act Dec. 29, 1945, ch. 652, 59 Stat. 669, as amended, which is classified principally to subchapter XVIII (§288 et seq.) of chapter 7 of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 288 of Title 22 and Tables.

Section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, referred to in subsec. (c), is section 302 of Pub. L. 104–114, which amended this section and enacted section 6082 of Title 22, Foreign Relations and Intercourse.

AMENDMENTS

1996—Subsec. (c). Pub. L. 104–114 added subsec. (c).

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–114 effective Aug. 1, 1996, or date determined pursuant to suspension authority of President under section 6085(b) or (c) of Title 22, Foreign Relations and Intercourse, see section 6085 of Title 22.