Corporations, Securities & Antitrust

Looks Can Be Deceiving: Holdout Litigation Under the Foreign Sovereign Immunities Act

*By Saloni Kantaria**

Historically, sovereign lending has been dominated by a small group of large banks and financial institutions.[1] The group of investors holding sovereign debt has become more diverse and includes commercial banks of all sizes, investment banks, pension funds, mutual funds, hedge funds, nonfinance companies, and retail investors.[2] In the late 1980's and early 1990's, a secondary market developed for distressed sovereign debt because banks sought to remove rescheduled sovereign debt from their books and did so by selling this debt at significantly discounted prices to the secondary market.[3] However, the secondary market for sovereign debt began to attract investors having no intention of making equity investments in the debtor countries. These investors, known as "vulture creditors,"[4] specialize in strategic purchase of debt on the secondary market and typically purchase sovereign debt that is trading at a deep discount as a result of the sovereign's financial distress.[5] The objective of the vulture creditors is to seek short-term gains, either through the restructuring process or by holding out of the restricting process until the debtors and majority creditors negotiate an offer of additional payment. In such a situation, the vulture creditor typically "free rides" by holding out for better terms already agreed to by other creditors in a restructuring process. If this is unsuccessful, the vulture creditor will seek to collect the full face value of its claim from the sovereign by means of litigation.[6] The term "holdout litigation" typically characterizes this situation, where a majority of creditors accept debt restructuring but a minority chooses to sue for full repayment.[7]

In order for a vulture creditor to sue a sovereign state in the United States, it must do so pursuant to the provisions of the Foreign Sovereign Immunities Act of 1976 (the "FSIA").[8] The FSIA was introduced for the purposes of curbing states from invoking sovereign immunity to prevent suits against them on commercial grounds.[9] A second purpose of the FSIA was to protect injured parties in commercial dealings with states. Although the FSIA gives the initial impression that it is suitable repayment vehicle for creditors, this paper will demonstrate that the FSIA standards for parties to bring suit and enforce a judgment against a sovereign state are rigorous and burdensome due to the dualism of immunity in the FSIA.[10] For this reason, many vulture creditors have not been successful against foreign states in U.S. courts.[11] In the context of holdout litigation by vulture creditors, this paper will explore the following issues: the evolution of the FSIA, the challenges of overcoming the jurisdictional immunity hurdle, and the practical challenges of seeking an order of attachment and execution against a sovereign state.

** LL.M. University of Chicago, LL.B. (Honors) University of Sydney, BSc. Cornell University, currently a practicing lawyer at Clayton Utz (a top tier firm in Australia).*

I. The Evolution of the FSIA

The principle of sovereign immunity derived from English law, which assumed that "the King can do no wrong."[12] In *Schooner Exchange v. McFaddon*, Justice Marshall, writing for the Supreme Court, for the first time held that sovereign states have absolute immunity.[13] In the 1926 case *Berizzi Bros. Co. v. S.S. Pesaro*,[14] the Court broadened the scope of sovereign immunity by extending the immunity traditionally accorded to military vessels to foreign commercial ships because "all ships held and used by a government... for the purpose of advancing the trade of its people or providing reserve for its treasury... are public ships in the same sense that warships are."

Following World War II, sovereigns increasingly became engaged in commercial activity and utilized the sovereign immunity defense for tort and breach of contract actions.[15] This paved way for concern that granting absolute immunity to sovereigns gave foreign nations a commercial advantage in the market over private firms not so privileged, especially because governments began to rely increasingly upon sovereign immunity to avoid commercial commitments.[16] In 1952, the U.S. State Department announced in the Tate letter that it was shifting away from the absolute sovereign immunity doctrine and adopting a restrictive theory of sovereign immunity. The letter stated:

> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity… According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to the sovereign or public acts (juri imperii) of a state, but not with respect to private acts (jure gestionis)… [T]he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.[17]

However, the Tate letter did not improve potential plaintiffs' ability to sue sovereign states because it failed to define "commercial activity," thus making it unclear under what circumstances these plaintiffs could sue. Secondly, the Tate letter was only applicable for the purposes of obtaining jurisdiction to sue a sovereign state and did not provide any guidance on executing judgments.[18] This created "considerable uncertainty" and a "troublesome inconsistency" in immunity decisions.[19] Accordingly, to remedy the situation, Congress codified the requirements to sue a foreign state by passing the FSIA in 1976.[20] The issue of sovereign immunity thus became a question of statutory subject matter jurisdiction, the determination of which was removed from the executive branch and solely vested in the judiciary.[21] The FSIA imposes a dual form of immunity for sovereigns which presents two significant hurdles for vulture funds: (i) jurisdictional immunity,[22] and (ii) immunity from having their property attached in satisfaction of judgment.[23]

II. The Challenges of Overcoming the Jurisdictional Immunity Hurdle

Section 1604 starts from the premise that a foreign sovereign[24] is presumed to be immune from a suit in a U.S. court. Accordingly, the vulture fund has the burden of establishing that the U.S. court has jurisdiction over the foreign state. To rebut this presumption, the plaintiff must demonstrate that one of the exceptions to immunity under sections 1605-1607 of the FSIA is applicable.[25] In the context of vulture fund litigation, the most commonly utilized exceptions are (i) the commercial activity exception,[26] and (ii) the waiver of immunity exception.[27]

A. Commercial Activity Exception

The commercial activity exception in section 1605(a)(2) is the most litigated exception in the FSIA.[28] To demonstrate that a court has jurisdiction over a foreign state, a vulture fund must establish two elements: (i) the foreign state's act is a "commercial activity" within the definition of the FSIA, and (ii) there is some connection between the commercial activity and the United States.

Whether a foreign state's action is a commercial activity is determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[29] In the 1992 case *Republic of Argentina v. Weltover, Inc.*,[30] the issue before the Supreme Court was whether the issuance of debt by the Republic of Argentina constituted a "commercial activity" under the FSIA. In its discussion of the definition of "commercial activity" under section 1603(d), the Court stated:

> When a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce." Because the FSIA has now clearly established that the "nature" governs, we perceive no basis for concluding that the issuance of debt should be treated as categorically different from other activities of foreign states.[31]

In relation to the second element, the FSIA provides three situations in which there is a connection between the commercial activity and the United States: (i) the activity was carried on in the United States by the foreign state; (ii) an act performed in the United States was connected to a commercial activity of the foreign state elsewhere; or (iii) an act performed outside the territory of the United States caused a direct effect in the United States and was connected to a commercial activity of the foreign state.[32]

In *Croesus EMTR Master Fund L.P. v. Brazil*,[33] three hedge funds sued the Federative Republic of Brazil ("Brazil") for failure to pay the principal and interest on Brazilian bonds they held. Brazil filed a motion to dismiss the complaint on the basis that the court lacked subject matter jurisdiction under the FSIA. The court first considered whether a commercial activity was carried on in the United States by Brazil. The hedge funds argued that this exception to immunity applied because Brazil engaged in the commercial activity of issuing securities and promoting secondary markets for its securities to and by persons in the United States.[34] The court found that there was no exception to immunity under the first clause of §1605(a)(2) because even if Brazil knew there was a secondary market for the bonds in the United States, and even if Brazil fostered that market, its failure to pay the principal and interest on the bonds was not "based upon" its purported promotion of the secondary market.[35]

The court also considered whether there was an act performed outside the territory of the United States which was connected to a commercial activity of Brazil elsewhere and which caused a direct effect in the United States.[36] The hedge funds identified two acts by Brazil that fit within this section: (i) Brazil's alleged failure to "keep market participants informed of actions affecting the value of the [b]onds"; and (ii) Brazil's failure to repay the principal and interest on the bonds.[37] The court promptly dismissed the first alleged act by Brazil because it considered that Brazil's failure to pay the principal and interest on the bonds was not "based upon" an alleged failure to inform market participants.[38] The hedge funds submitted that Brazil's failure to repay the principal and interest on the bonds had a "direct effect" in the United States because they had intended to direct the payments to their U.S. bank accounts.

The court acknowledged the Supreme Court's decision in *Weltover*, where the Court had held that a foreign state's unilateral rescheduling of bond maturity dates had a "direct effect" in the United States because the plaintiffs had indicated that their New York accounts were the place of payment and the foreign state had already made some interest payments into these accounts.[39]

However, the court found the facts distinguishable from *Weltover* since the hedge funds failed to designate any U.S. location as the "place of performance" where money was "supposed"[40] to have been paid.[41] Ultimately, the court held that Brazil was entitled to jurisdictional immunity because the hedge funds had not established an exception under §1605(a)(2) of the FSIA.

In *Global Index, Inc. v. The Honourable H.E. Benjamin W.Mkapa*,[42] the court was concerned with whether the failure by a sovereign to honor promissory notes constituted an exception to jurisdictional immunity pursuant to §1605(a)(2) of the FSIA. The court had little difficulty determining that the issuance of promissory notes by the sovereign constituted a commercial activity under §1605(a)(2) of the Act and primarily focused on whether the sovereign's failure to honor the promissory notes had a direct effect in the United States, thereby satisfying §1605(a)(2) of the FSIA. The court held that although the express text of the promissory note required payment in U.S. currency to a U.S. company in the United States, this was not sufficient to establish that the sovereign's commercial activity had a direct effect in the United States. In arriving at this finding, the court also focused on the fact that the plaintiffs had not designated any place of payment, let alone a bank or city in the United States.[43]

The decisions in *Croesus*, *Weltover*, and *Global Index* suggest that for vulture funds to prove that an exception to immunity exists under §1605(a)(2), they must first ensure that a clause exists within the contract that designates a location in the United States as the place of payment of principal and interest. If the vulture fund then proceeds to sue the foreign state on the basis that it has failed to repay the principal and interest on the bonds, it should have little difficulty convincing a court that the issuance of sovereign bonds constitutes a "commercial activity" which caused a direct effect in the United States pursuant to §1605(a)(2) of the FSIA.

B. Waiver of Immunity Exception

The second frequently-used exception to the general grant of immunity is §1605(a)(1) of the FSIA provides that a foreign sovereign is not immune if it has implicitly or expressly waived immunity from suit.[44] Explicit waivers, which are construed narrowly, could only be obtained if the foreign sovereign clearly and unambiguously granted a waiver in its contract with the vulture fund.

The FSIA does not define an implied waiver, but the courts narrowly construe this provision as well.[45] Determining whether a foreign sovereign has impliedly waived its immunity will depend on the facts of each case. For example, an implied waiver of immunity will be found if the foreign state demonstrates a conscious decision to take part in litigation in the United States by failing to raise the sovereign immunity defense despite an opportunity to do so.[46] However, in general, the courts are likely to find an implied waiver of sovereign immunity under the FSIA in only three circumstances: (i) a foreign state has agreed to arbitration in another country;[47] (ii) a foreign state has agreed that a contract is governed by the laws of the United States;[48] or (iii) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity.[49]

III. The Practical Challenges of Enforcing a Judgment Against a Foreign State

Merely obtaining jurisdiction over a foreign state is futile if the sovereign's property is immune from execution. A court must be capable of enforcing its judgment by allowing the vulture creditor to execute on the assets of the sovereign debtor. Although the FSIA applies the restrictive principle to immunity from execution on a sovereign's property, the FSIA requires a plaintiff to clear several hurdles before it allows a court to grant an execution order.[50]

Section 1609 of the FSIA starts with a general presumption that a foreign state's property located in the United States is immune from attachment unless it qualifies under an exception.[51] If a sovereign asserts this immunity, then the vulture fund must prove that one of the exceptions in §1610 of the FSIA is applicable. Section 1610 is applicable only to property that is located in the United States and creates no exception for property located outside of the United States,[52] since such property is absolutely immune from execution.[53] §1611 of the FSIA further extends unwaivable immunity to any property used in connection with a military activity and of either a military character or under the control of a defense agency. The FSIA also provides immunity to immovable property used for a diplomatic or consular mission.

Assuming that the sovereign's property can be located, it is a relatively simple task to demonstrate that the foreign state's property is located within the United States when a party seeks to attach tangible property.[54] However, complexities arise when dealing with intangible property. In *Af-Cap Inc. v. Republic of Congo* ("*Af-Cap II*"),[55] following the entry of a default judgment against the Republic of Congo in London, the Connecticut Bank of Commerce filed suit in New York state court to turn the foreign judgment into a U.S. judgment. The New York court entered judgment in the bank's favor and entered an order of attachment authorizing the bank to execute judgment against the Congo's property. On appeal to the Fifth Circuit, the issue before the court was whether the property the bank sought to garnish was in the United States. The court held that the relevant property was the garnishee's obligation to pay taxes and royalties to the Congo. It found that since the garnishees were business entities formed and headquartered in the United States, the property was in the United States for the purpose of the FSIA.[56]

Even if the vulture fund identifies property situated in the United States, §1610(a)(2) of the FSIA further provides that execution may be sought only against property in the United States which "is or was used for the commercial activity upon which the claim is based."[57] When dealing with sovereign states, one of the difficulties is distinguishing commercial from "official" property. This difficulty is apparent from the Fifth Circuit's previous decision in *Connecticut Bank of Commerce v. Republic of Congo*,[58] where it grappled with the words "used for" in §1610(a)(2):

> What matters under the statute is what the property is "used for," not how it was generated or produced. If property in the United States is used for a commercial purpose here, that property is subject to attachment and execution even if it was purchased with tax revenues or some other noncommercial source of government income. Conversely, even if a foreign state's property has been generated by commercial activity in the United States, that property is not thereby subject to execution or attachment if it is not "used for" a commercial activity within our borders.[59]

In *Birch Shipping Co. v United Republic of Tanzania*,[60] where the Tanzanian embassy in Washington, D.C. had used funds in an account for both commercial and non-commercial purposes, the D.C. district court took a practical approach in interpreting §1605(a)(2), holding that the funds could be attached to satisfy judgment against Tanzania on the basis that any other finding would mean that all sovereign accounts with funds used for multiple purposes would be beyond the reach of creditors. In *Eastern Timber Corp. v. Government of Republic of Liberia*,[61] the same court took a narrower approach, concluding that "funds used for commercial activities which are 'incidental' or 'auxiliary,' not denoting the essential character of the use of the funds in question, would not cause the entire bank account to lose its mantle of sovereign immunity."[62]

In *Af-Cap, Inc v. Chevron Overseas (Congo)*,[63] the judgment creditor sought to appeal the district court's judgment dissolving and vacating garnishments and liens filed against any property of the Republic of Congo, held by third party ChevronTexaco Corporation. The property that the creditor sought to garnish included intangible obligations of ChevronTexaco owed to Congo for various bonuses, taxes, and royalties related to the extraction of hydrocarbons, oil, and other of Congo's natural resources. The issue before the Ninth Circuit was whether Congo's property was used for a commercial activity in the United States. The Ninth Circuit adopted the Fifth Circuit's principle from *Connecticut Bank of Commerce v. Republic of Congo*[64] and held that under §1610(a) "property is 'used for a commercial activity in the United States' when the property is put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity, or in relation to a commercial activity." Ultimately the court concluded that Af-Cap could not garnish the obligation to pay bonuses or the bonus payments up to the prepayment amount because they did not belong to the Congo. The court also found that since the obligation or bonus payment merely had a nexus or connection with a commercial activity in the United States, this was not sufficient to satisfy §1605(a) of the FSIA. For these two reasons, it held that the obligations of ChevronTexaco owed to the Congo were immune from execution or collection.

These decisions suggest that if a vulture creditor seeks an order of attachment against a foreign state's intangible property, such as a bank account, there is an onerous evidentiary burden to prove that foreign state's funds were being used for a commercial activity in the United States. In practice, the decisive question is whether the foreign state's moneys have been specifically designated for a particular purpose. Even if a creditor is able to overcome the evidentiary hurdle of proving that a foreign state's property is located in the U.S. and is used for a commercial activity, that creditor must still establish entitlement to a §1610 exception before a court will grant an order of attachment execution.[65] The most common exceptions in the context of vulture fund litigation are the waiver of immunity exception and use of the property for the commercial activity upon which the claim is based.

A. Waiver of Immunity Exception

The first exception is the foreign state's waiver of its immunity from attachment "either explicitly or by implication."[66] The Ninth Circuit has held that this provision must be construed narrowly.[67] With respect to contractual waiver of immunity, the court has held that the language must be explicit, although it is not necessary to recite the words "prejudgment attachment" to effect a waiver.[68]

An example of language within a contract that satisfies the "explicit" waiver test is in the case of *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* ("*Pertamina*").[69] The court held that pursuant to the FSIA, a company waived its sovereign immunity from attachment in United States courts when, in its geothermal energy contracts with the judgment creditor, it waived any "right of immunity (sovereign or otherwise) which it or its assets now has or may have in the future... and consent[ed] in respect of the enforcement of any judgment against it."[70]

A commonly-used clause in sovereign bond and loan agreements is "the borrower waives its immunity from attachment prior to entry of judgment and from attachment in aid of execution against any of its property and assets irrespective of their use or intended use."[71] However, such a clause does not entitle a vulture creditor to attach any of the sovereign's assets because the FSIA permits courts to execute only against a foreign state's property that is located in the United States and is used for a commercial activity in the United States.[72] The reason for this strict approach is that "confiscating funds that are being put immediately to some sovereign use interrupts a sovereign's public acts."

B. Property Used for Commercial Activity Upon Which the Claim is Based

The second exception states that property in the United States of a foreign state is not immune from attachment if "the property is or was used for the commercial activity upon which the claim is based."[73] This provision serves to ensure that an antecedent basis for the adjudicative jurisdiction exists, and limits the property at issue to satisfy the judgment to resources that had already been allocated to a commercial transaction.[74] In the context of sovereign debt litigation, this provision is understood to mean that the judgment creditor may only execute on the sovereign state's property located in the United States used for the issuance of bonds. This provision places an onerous evidentiary burden on the creditor to prove the sovereign's intended use of the funds. These funds are unlikely to exist, or, if they do exist, are unlikely to be separated from other funds for the sole purpose of servicing a loan.

IV. The Final Steps

Even if the creditor is able to cross the jurisdictional immunity and immunity-from-enforcement hurdles, the court must not make an order of attachment or execution until it has determined that "a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under §1608(c) of this chapter."[75] This provision poses particular difficulty for creditors since the foreign state's property is required to be located in the United States at the time the court authorizes execution.[76] This loophole invites foreign sovereigns to move their property outside the United States after a suit is brought and before execution is rendered.[77]

Fortunately, §1610(d) of the FSIA provides some recourse to vulture creditors who are in danger of such a situation:

> 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 waivers; 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.

Despite the usefulness of this provision, a vulture creditor cannot utilize its benefit unless it satisfies both conditions. The first condition suggests, due to the "explicit waiver"[78] language, implicit waiver of immunity is not sufficient for pre-judgment attachment. The second condition prevents the prejudgment attachment from being used to obtain jurisdiction of the foreign state. From a practical perspective, the vulture creditor would have to demonstrate that it has a well-founded fear that the foreign state's assets will be removed from the court's jurisdiction prior to an order of execution.

Conclusion

The original intention of Congress enacting the FSIA was to make foreign states fully responsible for their commercial activities.[79] Although the initial impression of the FSIA is that it is a suitable repayment vehicle for vulture creditors, this is not so, due to the dualism of immunity and nexus requirements within provisions 1605 and 1610. These provisions make the FSIA unduly restrictive and provide substantial protection to sovereigns.

While a vulture fund may have little difficulty establishing an exception to jurisdictional immunity, the threshold requirement in Section 1610(a) of the FSIA poses particular problems. At the outset, the evidentiary requirements of Section 1610(a) eliminate large classes of property that might be candidates for execution in satisfaction of a judgment against a foreign sovereign.[80] The Ninth Circuit recently emphasized that the statutory structure and construction reflects a pivotal purpose of the FSIA, which is to limit execution against property directly belonging to a foreign state.[81]

It is evident from the cases discussed above that holdout litigation is often not successful due to the restrictiveness of the FSIA. However, the Fifth Circuit's decision in *Connecticut Bank of Commerce v. Republic of Congo* suggests that the FSIA provides no obstacle to garnishment if the foreign state has waived its immunity in the underlying loan contract and if the obligation sought to be garnished satisfies two conditions: (i) the obligation is located in the United States; and (ii) the obligation is used for a commercial activity in the United States. The Ninth Circuit also recently agreed with this approach.[82] Should a vulture fund succeed in attaching royalties that oil companies agreed to pay in exchange for their oil rights, they will reap extraordinary profits at the expense of U.S. companies and U.S. foreign relations.[83] To prevent this from becoming a reality, an option for sovereign debtors is to include a clause in the loan agreement that imposes a cooling off period, during which time "bondholders would be prevented from initiating litigation." At present, it seems that although holdout litigation appears to be gaining momentum in the United States, the restrictive immunity principle engrained in the FSIA will continue to provide protection to sovereign debtors.

Endnotes

1 Christopher Wheeler & Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defence in Sovereign Debt Litigation*, 39 Stanf. J. of Int'l L. 253, 253 (2003).

2 Jill E. Fisch & Caroline M. Gentile, *Vulture or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 Emory L. J. 1043, 1070 (2004).

3 Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 Am. Bankr. Inst. L. Rev. 179, 185 (2003).

4 Diana B. Henriques, *The Vulture Game*, N.Y. Times 1 (July 19, 1992). The term "vulture" comes from the analogy that these investors "get rich by feeding on the carcasses of corporate America."

5 Deepak Gopinath, *The Debt-Crisis Crisis*, Institutional Investor, 36, 38 (August 2002).

6 Jill E. Fisch & Caroline M. Gentile, *Vulture or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 Emory L.J. 1043, 1072-1073 (2004).

7 Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101(4) Am. J. Int'l L. 711, 713 (Oct. 2007).

8 Argentine Republic v. Amerada Hess, 488 U.S. 428, 434 (1989).

9 Michael L. Morkin, Ethan A. Berghoff & Richard S. Pike, *Doing Business with Foreign Sovereign Entities. Who Are They and What Are the Risks*, 17(2) Business Law Today, (Nov./Dec. 2007).

10 Molly Steele & Michael Heinlen, *Challenges to Enforcing Arbitral Awards Against Foreign States in the United States*, 42 Int'l Law. 87, 88 (2008).

11 Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. Int'l L. Rev. 1, 1 (2008).

12 Erwin Chemerinsky, *Against Sovereign Immunity*, 53(5) Stan. L. R. 1201, 1201 (May 2001).

13 11 U.S. 116 (1812).

14 271 U.S. 562 (1926).

15 Jonathan C. Lippert, *Vulture Funds: The Reason Why the Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. Int'l L. Rev. 1 (2008).

16 Stella Havkin, *The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of* De Sanchez v. Banco Central Di Nicaragua, 10 Hastings Int'l & Comp. L. Rev. 455, 459 (1987).

17 *Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Philip B. Perlman*, 26 Dep't. St. Bull. 984 (May 1952).

18 Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. Int'l L. Rev. 1, 11 (2008).

19 Republic of Austria v. Altmann, 541 U.S. 677, 716 (Kennedy, J., dissenting).

20 42 Fed. Reg. 6366 (February 2, 1977).

21 Gary W Larson, Default on Foreign Sovereign Debt: A Question for the Courts? 18 Ind. L. Rev. 959, 965 (1985).

22 28 U.S.C. § 1604.

23 28 U.S.C. § 1609.

24 For FSIA purposes, 28 U.S.C. § 1603(a) defines "foreign states" as not only states, but also political subdivisions, agencies, and instrumentalities. For the purposes of this paper, only a state will be considered.

25 Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. Int'l L. Rev. 1, 12 (2008).

26 28 U.S.C. §1605(a)(2).

27 28 U.S.C. §1605(a)(1).

28 Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. Int'l L. Rev. 1, 12 (2008).

29 28 U.S.C. § 1603(d).

30 504 U.S. 607 (1992).

31 *Id.* at 614-615.

32 28 U.S.C. §1605(a)(2).

33 212 F.Supp.2d 30, 34 (D.D.C.2002).

34 *Id.*

35 *Id.*

36 28 U.S.C. §1605(a)(2).

37 212 F.Supp.2d 30, 35 (D.D.C.2002).

38 *Id.*

39 504 U.S. 607, 619 (1992).

40 In *Goodman Holding v. Rafidian Bank*, 26 F.3d 1143 (D.C.Cir.1994), the D.C. Circuit clarified that a "direct effect" in the United States occurs only where payment was "supposed" to have been made or received in the United States.

41 212 F.Supp.2d 30, 36 (D.D.C.2002).

42 290 F.Supp.2d 108 (D.D.C. 2003).

43 290 F.Supp.2d 114 (2003).

44 28 U.S.C. §1605(a)(1).

45 Sampson v. Federal Republic of Germany, 250 F.3d 1145 (7th Cir. 2001).

46 Talbot v. Saipem A.G., 835 F. Supp. 352 (S.D. Tex. 1993).

47 In re Republic of Phillippines, 309 F.3d 1143 (9th Cir. 2002).

48 Calzadilla v. Banco Latina Internacional, 413 F.3d 1285 (11th Cir. 2005).

49 Haven v. Polska, 215 F.3d 727, 46 Fed. R. Serv. 3d 1180 (7th Cir. 2000).

50 28 U.S.C. §1610.

51 28 U.S.C. §1609.

52 Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian, 218 Cal. App.3d 1058, 1093 (6th Dis. 1990).

53 Fidelity Partners, Inc. v. Philippine Export and Foreign Loan Guarantee Corp., 921 F.Supp. 1113, 1117 (S.D.N.Y.1996).

54 S & S Machinery Co. v. Masinexportimport, 802 F.Supp.1109, 1110 (S.D.N.Y.1992).

55 Af-Cap Inc. v. Republic of Congo, 383 F.3d 361, 364 (5th Cir. 2004).

56 *Id.* at 373.

57 28 U.S.C. §1610(a)(2).

58 309 F.3d 240, 251 (5th Cir. 2002).

59 *Id.*

60 507 F.Supp.311, 313 (D.D.C. 1980).

61 659 F.Supp. 606 (D.D.C. 1987).

62 Eastern Timber Corp. v. Government of Republic of Liberia, 659 F.Supp. 606, 610 (D.D.C.1987).

63 475 F.3D 1080 (9th Cir.).

64 309 F.3d 240 (5th Cir. 2002).

65 It is important to note that section 1611 of the FSIA recognizes the following types of property as absolutely immune from attachment: assets held in international organizations, property of military character, and property of a central bank or monetary authority.

66 28 U.S.C. §1610(a)(1).

67 Af-Cap, Inc v. Chevron Overseas (Congo), 475 F.3D 1080, 1087 (9th Cir. 2007).

68 Libra Bank, Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47, 49-50 (2nd Cir. 1982).

69 313 F.3d 70 (2d Cir. 2002).

70 *Id.* at 75.

71 Georges R. Delaume, *The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later*, 88 Am. J. Int'l L. 257, 270 (1994).

72 Connecticut Bank of Commerce v. Congo 309 F.3d 240 (5th Cir. 2002); Af-Cap Inc. v. Republic of Congo 383 F.3d 361, 366 (5th Cir. 2004).

73 § 1610(a)(2).

74 Jin Sun, *Immunity From Execution of Judgments Under the FSIA – Moderate Balance to the New UN Convention*, 4(5) US-China L. Rev. 13,15 (2007).

75 28 U.S.C. §1610(c).

76 FG Hemisphere Assocs. v. Republique du Congo, 455 F.3d 575 (5th Cir. 2006).

77 Timothy B. Atkeson & Stephen D. Ramsey, *Proposed Amendment of the Foreign Sovereign Immunities Act: The Mathias Bill*, 79 Am. J. Int'l L. 770, 776 (1985).

78 Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007).

79 Timothy B. Atkeson & Stephen D. Ramsey, *Proposed Amendment of the Foreign Sovereign Immunities Act: The Mathias Bill*, 79 Am. J. Int'l L. 770, 776 (1985).

80 Af-Cap, Inc v. Chevron Overseas (Congo), 475 F.3d 1080, 1089 (9th Cir. 2007).

81 *Id.* at 1088.

82 Af-Cap, Inc v. Chevron Overseas (Congo), 475 F.3d 1080 (9th Cir. 2007).

83 Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N. Y. Int'l L. Rev.1, 2 (2008).