

Recommended citation:¹

Am. Soc’y Int’l L., “Immunities and Other Preliminary Considerations,” in *Benchbook on International Law* § II.B (Diane Marie Amann ed., 2014), available at www.asil.org/benchbook/immunities.pdf

B. Immunities and Other Preliminary Considerations

Some issues with a transnational dimension may cause a court to decline to adjudicate a case before it. Several such issues – which courts typically address before turning to the merits of a case – are discussed in this section. They are:

- Immunities
- Act of state
- Political question
- *Forum non conveniens*
- Time bar
- Exhaustion of remedies
- Comity

This section also touches on two other considerations:

- Choice of law when the law of a foreign country is at issue
- Enforcement in U.S. courts of judgments by courts of a foreign state²

Each is discussed in turn below.

1. Immunities

Immunity issues may arise in various contexts. This section treats the following:

- Foreign sovereign states
- Foreign officials, including diplomats and consular officers
- International organizations and officials of those organizations

Each is discussed in turn below. On the operation of immunities in the specific context of the Alien Tort Statute, 28 U.S.C. § 1350 (2006), see *infra* § III.E.1.

¹ For what this section contains, see the Detailed Table of Contents, <http://www.asil.org/benchbook/detailtoc.pdf>.

² In international law writings, the term “state” typically refers to a country – a sovereign nation-state – and not to a country’s constituent elements. This *Benchbook* follows that usage, so that “state” means country, and individual states within the United States are designated as such.

a. Foreign Sovereign Immunity

“Foreign sovereign immunity” refers to the doctrine by which the courts of one sovereign state decline to adjudicate lawsuits against a foreign sovereign state or a foreign state’s “instrumentalities” – a statutory term discussed *infra* § II.B.1.a.ii. By application of this doctrine, the foreign state may be deemed immune from suit in the courts of the other sovereign state.

i. The United States: The 1976 Foreign Sovereign Immunities Act (FSIA)

Foreign sovereign immunity doctrine in the United States is often traced back to an early Supreme Court decision, *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812). Chief Justice John Marshall held that a warship belonging to a friendly foreign sovereign and located in a U.S. port was not amenable to suit in a U.S. court. He reasoned that, as a matter of “comity,” or friendship between states, the United States tacitly had consented to waive jurisdiction it normally could exercise within its own territory.

For more than a century after the decision in *Schooner Exchange*, courts in the United States determined the amenability to suit of a foreign state through case-by-case adjudication. Then, starting in the 1930s, courts generally deferred to U.S. Executive Branch determinations on foreign state immunity.

Foreign sovereign immunity acquired a statutory basis in 1976, when Congress passed the Foreign Sovereign Immunities Act, codified at 28 U.S.C. § 1602 *et seq.* (2006). Civil actions against foreign sovereign states may not go forward in the United States unless they satisfy the narrow exceptions set forth in this statute, typically called the FSIA. As the Supreme Court wrote in one case brought against a foreign country:

[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989); *see id.* at 434, 439 (reiterating this principle). The Court repeatedly has reaffirmed that conclusion. *E.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (restating proposition, yet concluding, as discussed *infra* § II.B.1.b, that the FSIA does not cover foreign officials); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (affirming proposition, yet permitting case to go forward pursuant to an exception enumerated in the FSIA). The scope of this statute is described in the ensuing sections.

Certain matters not covered by the FSIA – in particular, the amenability to suit of officials of a foreign sovereign state – remain governed by common law principles and in some cases by other statutes. *See infra* §§ II.B.1.b, III.E.1.

i.1. International Law Corollary to the FSIA

Even as the 1976 statute governs foreign state sovereign immunity in the United States, this form of immunity also may be applied outside the United States. Foreign state sovereign immunity recently was enforced as a matter of customary international law by the International Court of Justice, the judicial organ of the United Nations seated at The Hague, Netherlands. The decision, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 143 (Feb. 3), available at <http://www.icj-cij.org/docket/index.php?p1=3&k=60&case=143&code=ai&p3=4> (last visited Nov. 30, 2013), pertained only to the immunities enjoyed by a sovereign state; it did not address any immunities that may apply to foreign officials. On customary international law as a source of international law, see *supra* § I.

ii. The FSIA in General

Foreign states are immune from the jurisdiction of the courts of the United States – at the federal and individual-state levels alike – unless one of the FSIA’s exceptions applies. Thus the statute provides, at 28 U.S.C. § 1604:

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.

In other words, a federal court may proceed to adjudicate if it finds one of the exceptions enumerated in the FSIA, 28 U.S.C. §§ 1605-07, applicable to the case. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). These exceptions are described *infra* § II.B.1.a.iii.

ii.1. Removal to Federal Court

Lawsuits filed against foreign states in the courts of constituent states of the United States may be removed to federal court, pursuant to 28 U.S.C. § 1441(d) (2006).

ii.2. Retroactive Application of the FSIA

The FSIA was enacted in 1976. It was held to apply retroactively – that is, to cover claims arising before 1976 – in *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004), which involved a suit to recover a painting that had been stolen during the World War II occupation of Austria by the Nazis.

iii. FSIA Definition of “Foreign State”

The statutory term “foreign state” is defined in the FSIA to include more than just a foreign country. To be precise, “foreign state” comprehends:

- The state itself, 28 U.S.C. § 1603(a) – by way of example, the named petitioner in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004);
- “[A] political subdivision of a foreign state,” 28 U.S.C. § 1603(a), (b) – by way of example, the named defendant in *Big Sky Network Canada, Ltd. v. Sichuan Provincial Government*, 533 F.3d 1183, 1198 (10th Cir. 2008); and
- “[A]n agency or instrumentality of a foreign state,” 28 U.S.C. § 1603(a), defined in 28 U.S.C. § 1603(b) as a non-U.S. citizen that is “a separate legal person, corporate or otherwise” and “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.” By way of example, in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the FSIA was applied in a lawsuit naming as defendant a bank, for the reason that the bank was an agency or instrumentality of the Republic of Nigeria.

iii.1. Corporations as State Instrumentalities

For a corporation to fall within the just-quoted definition set out in 28 U.S.C. § 1603(b), the foreign state must both:

- Own a majority of the corporation’s shares at the time the complaint is filed; and
- Hold its shares directly, rather than through an intermediate entity.

Dole Food Co. v. Patrickson, 538 U.S. 468, 477-78 (2003).

iv. FSIA Exceptions to Sovereign’s Immunity from Suit

The most important among the exceptions to foreign sovereign immunity enumerated in the FSIA, 28 U.S.C. §§ 1605-07, include:

- Waiver
- Commercial activity
- Expropriation
- Torts occurring in the United States
- Enforcement of arbitration agreements or awards
- Terrorism

Each of these is discussed below.

Other exceptions exist for cases involving: “rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States,” 28 U.S.C. § 1605(a)(4); maritime liens, *id.* § 1605(b); and counterclaims, *id.* § 1607.

iv.1. Waiver Exception

In establishing waiver as an exception to foreign sovereign immunity, the FSIA, 28 U.S.C. § 1605(a)(1), provides that a foreign state is not immune if

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

The waiver exception in the FSIA is to be “narrowly construed.” *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 720 (9th Cir. 1992) (quoting *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988)), *cert. denied*, 507 U.S. 1017 (1993).

“If a sovereign files a responsive pleading without raising the defense of sovereign immunity, then the immunity defense is waived.” *Haven v. Rzeczpospolita Polska*, 215 F.3d 727, 731 (7th Cir.), *cert. denied*, 531 U.S. 1014 (2000).

Among the provisions held to constitute a waiver is a contract clause that designates a U.S. forum for the resolution of disputes. *See Themis Capital, LLC v. Democratic Republic of Congo*, 881 F. Supp. 2d 508, 516-17 (S.D.N.Y. 2012).

iv.2. Commercial Activity Exception

A foreign state is not immune from a suit that is based on the state’s commercial activities. FSIA, 28 U.S.C. § 1605(a)(2). By the terms of the statute, whether an activity is “commercial” is to be

determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Id. § 1603(d). The Supreme Court has elaborated, holding that an activity is commercial if

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.’

Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) (emphasis in original) (quoting *Black’s Law Dictionary* 270 (6th ed. 1990)).

Pursuant to the statute, the commercial activity must also have one of three connections to the United States; 28 U.S.C. § 1605(a)(2) thus states that the action must be based on:

- “[A] commercial activity carried on in the United States by the foreign state”; or

- “[A]n act performed in the United States in connection with a commercial activity of the foreign state elsewhere”; or
- “[A]n 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”

iv.3. Expropriation Exception

Unlawful expropriation, or the taking of private property for the use of the sovereign state, also may constitute a basis for exception from the general rule of foreign sovereign immunity. The FSIA, 28 U.S.C. § 1605(a)(3), states that the exception will apply if:

- “[R]ights 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
 - “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.”

With regard to the first prong – rights in property – the *Restatement (Third) of the Foreign Relations Law of the United States* § 712(1) & cmt. *b* (1987)³ provides that a state violates international law when it takes the property of a nonnational, if the taking “is not for a public purpose; is discriminatory; or is not accompanied by . . . just compensation.”

iv.4. Exception for Torts Occurring in the United States

A foreign state is not immune in a suit for money damages for “personal injury or death, or damage to or loss of property, occurring in the United States and caused by” torts committed by the state or its officials or employees acting within the scope of their employment in the United States. 28 U.S.C. § 1605(a)(5); *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

³ Designated subsequently as *Restatement*; any other *Restatement* discussed in this section is designated by a different ordinal number – for example, *Restatement (Second)*. These American Law Institute treatises compile many of the doctrines discussed in this chapter. The provisions must be consulted with due caution, however, particularly given the publications predated, by decades, the Supreme Court’s most recent interpretations of some of these issues. On the use of the *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, *see infra* § IV.B.1.

iv.4.a. Applicability of Exception

The exception applies only to noncommercial torts. 28 U.S.C. § 1605(a)(5). The Supreme Court explained:

Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law.

Amerada Hess, 488 U.S. at 439-40.

iv.4.b. Circumstances in Which Exception Does Not Apply

The FSIA exception for torts occurring in the United States does not apply to any claim alleging that the foreign state:

- Performed, or did not perform, a discretionary function, 28 U.S.C. § 1605(a)(5)(A); or
- Engaged in “malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights,” *id.* § 1605(a)(5)(B).

iv.5. Exception for Enforcement of Arbitration Agreements or Awards

A foreign state is not immune from an action brought to enforce an arbitration “agreement made by the foreign state with or for the benefit of a private party” or to recognize and enforce an arbitration award made pursuant to such an arbitration agreement, 28 U.S.C. § 1605(a)(6), provided that the:

- Arbitration either takes place or is intended to take place in the United States;
- Agreement or award is governed by a treaty on recognition and enforcement of arbitral awards to which the United States is a party; or
- Underlying claim (absent the arbitration agreement) could have been brought in the United States.

Id. See, e.g., TMR Energy Ltd. v. State Prop. Fund of Ukraine, 411 F.3d 296, 305 (D.C. Cir. 2005) (holding an arbitral award pursuant to the New York Convention enforceable under the FSIA exception).

One U.S. Court of Appeals has held that a court may issue a contempt order if a foreign state that lacks immunity on account of this exception fails to participate in the suit at bar. *FG Hemisphere Assoc., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011).

iv.6. Terrorism Exception

If the United States designates a foreign state to be a state sponsor of terrorism, the terrorism exception to the FSIA, 28 U.S.C. § 1605A, renders that state not immune from certain suits. To be specific, in such an instance there is no immunity from suits seeking money damages

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.

28 U.S.C. § 1605A(a)(1).

iv.6.a. Countries Designated State Sponsors of Terrorism

For a court to exercise jurisdiction over a foreign state pursuant to the terrorism exception of the FSIA, the United States must have designated the foreign state a state sponsor of terrorism either:

- At the time that the act occurred when the act occurs; or
- As a result of the action on which the suit is based.

Generally, the foreign state must still be so designated:

- When the claim is filed; or
- Within the six-month period before the claim was filed.

28 U.S.C. § 1605A(a)(2)(i)(I).

The United States named four countries – Cuba, Iran, Sudan, and Syria – state sponsors of terrorism as of November 2013. *See* U.S. Dep’t of State, *State Sponsors of Terrorism*, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Nov. 30, 2013).

iv.6.b. Time Bar

The statutory text expressly provides that for a suit to go forward based on the terrorism exception, it must have been filed within ten years after April 24, 1996, or within ten years after the cause of action arose. *See* 28 U.S.C. § 1605A(b).

iv.6.c. Litigation under the Terrorism Exception

The FSIA terrorism exception, 28 U.S.C. § 1605A, has been the subject of considerable litigation. Sample decisions include:

- A bar against suits by persons who had been held hostage following the 1979 takeover of the U.S. embassy – a bar contained in the 1981 U.S.-Iran agreement known as the Algiers Accords – was enforced notwithstanding 2008 amendments to the FSIA terrorism exception. *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 62 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).
- A foreign state’s motion to vacate a default judgment against it was denied in *Gates v. Syrian Arab Republic*, 646 F.3d 1, 6 (D.C. Cir.), *cert.denied*, 132 S. Ct. 422 (2011).

v. Extent of Liability under the FSIA

The FSIA, 28 U.S.C. § 1606, provides that in any case in which a foreign state is not immune,

the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Some distinctions are made by statute. These include:

- *Punitive damages.* A foreign state generally may not be held liable for punitive damages, though an agency or instrumentality of the foreign state may. 28 U.S.C. § 1606; *see, e.g., West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 824 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987). Furthermore, punitive damages may be awarded even against the foreign state in cases brought under the FSIA terrorism exception described *supra* § II.B.1.i.3.a, pursuant to the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008), codified at 28 U.S.C. § 1605A(c).
- *Default judgment.* No default judgment may be entered against a foreign state or its agency or instrumentality “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e).

vi. Execution of Judgments under the FSIA

Under the FSIA, the property of a foreign state is “immune from attachment arrest and execution” unless an exception to such immunity applies. 28 U.S.C. § 1609. The general rules are set forth in the ensuing sections.

The court should note, however, that the rules for the execution of judgments under the FSIA’s terrorism exception are substantially broader. When the terrorism exception is at issue, the court should consult 28 U.S.C. §§ 1610(a)(4)(b), 1611(b).

vi.1. Attachment of Foreign State Property before Judgment

The property of a foreign state is immune from attachment before entry of a judgment, unless the foreign state has explicitly waived such immunity. *Id.* § 1610(d).

vi.2. Attachment or Execution of Foreign State Property after Judgment

Attachment of execution of a foreign state's property is permitted after judgment if the:

- Property is “used for a commercial activity in the United States,” *id.* § 1610(a).
- Judgment is against an agency or instrumentality engaged in a commercial activity in the United States; generally, all of its property is subject to post-judgment attachment or execution. *Id.* § 1610(b).

Diplomatic or military property of a foreign state is immune from post-judgment attachment and execution, as are the assets of a foreign central bank unless the central bank has explicitly waived such immunity. *Id.* §§ 1610(a)(4)(b); 1611(b).

vii. Jurisdictional Discovery in FSIA Cases

A district court may allow discovery, albeit limited, for the purpose of determining a jurisdictional challenge based on the FSIA. Decisions to this effect include:

- *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176-77 (2d Cir. 1998) (holding that court below abused its discretion by refusing request for additional discovery and proceeding to grant defendant's motion to dismiss on FSIA ground).
- *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.) (ruling that a district court authorized “prematurely,” and cautioning that, in light of “the tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery,” courts should order discovery “circumspectly and only to verify allegations of specific facts crucial to an immunity determination”), *cert. denied*, 506 U.S. 956 (1992).

b. Immunity of Foreign Officials: Common Law Principles

The Foreign Sovereign Immunities Act, codified at 28 U.S.C. § 1602 *et seq.* (2006), applies only to states, not to foreign officials. *Samantar v. Yousuf*, 560 U.S. 305, ___, 130 S. Ct. 2278, 2292 (2010), detailed *infra* § III.E.1. (This statute, known as the FSIA, may nevertheless require dismissal of a suit against a foreign official if a foreign state is a required party or the real party in interest.)

Under “the common law of official immunity,” which the Supreme Court held applicable in *Samantar*, 560 U.S. at ___, 130 S. Ct. at 2290-91, foreign officials may be entitled to immunity

from suit based either on their present status or on the character of their acts. Certain treaties and statutes may inform this analysis. The principal treaties are:

- 1961 Vienna Convention on Diplomatic Relations⁴
- 1963 Vienna Convention on Consular Relations⁵

Principal statutes are:

- Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006)
- International Organizations Immunities Act of 1945, as amended, 22 U.S.C. §§ 288 *et seq.* (2006)

The application of foreign official immunity is discussed below.

i. Head of State/Head of Government Immunity

Pursuant to immunity principles under common law and customary international law, sitting heads of state and heads of government are absolutely immune from the civil and criminal jurisdiction of U.S. courts, subject to exceptions such as waiver. *See Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005); *Lafontant v. Aristide*, 844 F. Supp. 128, 131-32 (E.D.N.Y. 1994).

Head of state immunity also extends to foreign ministers, and may extend to certain other high-ranking officials of foreign governments. Thus ruled the International Court of Justice, in *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, 22 (Feb. 14), available at <http://www.icj-cij.org/docket/index.php?p1=3&k=36&case=121&code=cobe&p3=4> (last visited Nov. 30, 2013). The court further ruled that although head of state or head of government immunity ends when the official leaves office, the former official enjoys certain “residual” immunities. *Id.* at 26. On customary international law as a source of international law, see *supra* § I.B.2.

⁴ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, available at http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf. This treaty, which entered into force on Apr. 24, 1964, has 189 states parties; among them is the United States, which ratified on Nov. 13, 1972. See U.N. Treaty Collection, *Vienna Convention on Diplomatic Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en (last visited Nov. 30, 2013). The Convention has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006).

⁵ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77; T.I.A.S. 682, 596 U.N.T.S. 261, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf>. This treaty, which entered into force on Mar. 24, 1967, has 176 states parties; among them is the United States, which ratified on Nov. 24, 1969. See U.N. Treaty Collection, *Vienna Convention on Consular Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last visited Nov. 30, 2013).

i.1. Head of State Immunity As Status-Based Immunity

The immunity accorded a head of state or a head of government is a status-based immunity, dependent on the person's position rather than on the nature of the person's alleged conduct.

i.2. Significance of Executive Branch View on Head of State Immunity

Courts generally defer to the determination by the Executive Branch that a person is, or is not, entitled to head of state immunity. The U.S. Court of Appeals for the Fourth Circuit thus held in 2012 that a "district court properly deferred to the State Department's position" and denied a request for head-of-state immunity brought by the defendant, formerly "a high-ranking official in Somalia." *Yousuf v. Samantar*, 699 F.3d 763, 766, 772 (4th Cir. 2012), *cert. denied*, 2014 WL 102984 (Jan. 13, 2014). (The case arrived at the Fourth Circuit following the Supreme Court remand in *Samantar v. Yousuf*, 560 U.S. 305, ___, 130 S. Ct. 2278, 2286 (2010), discussed *supra* § II.B.1.b.)

The Fourth Circuit's reasoning comported with that of other circuits considering the question. *See Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998).

ii. Diplomatic Immunity

Rules regarding the immunities enjoyed by foreign diplomats derive from the 1961 Vienna Convention on Diplomatic Relations,⁶ as implemented in the United States via the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006).

International law confers the immunities on the sending state, not the individual; accordingly, only the state to which the diplomat is attached can waive such immunities. *Restatement*, § 464, cmt. j, rep. note 15.

Diplomatic immunities may be divided into:

- Status-based
- Conduct-based

⁶ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, available at http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf. This treaty, which entered into force on Apr. 24, 1964, has 189 states parties; among them is the United States, which ratified on Nov. 13, 1972. *See* U.N. Treaty Collection, *Vienna Convention on Diplomatic Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtds_g_no=III-3&chapter=3&lang=en (last visited Nov. 30, 2013).

Each is discussed in turn below.

ii.1. Status-Based Diplomatic Immunity

Status-based immunities depend on a person's present status as a diplomat or head of state. Status-based diplomatic immunity ends once a person's status as a diplomatic agent ends and the person has had a reasonable opportunity to leave the United States. Vienna Convention on Diplomatic Relations, art. 39(2).

The 1961 Vienna Convention on Diplomatic Relations provides that diplomats – including chiefs of mission, *i.e.* ambassadors, and members of the diplomatic staff of a mission – are immune from criminal jurisdiction and are generally immune from civil jurisdiction. Limited exceptions exist for immunity from civil jurisdiction, such as those involving real property, the administration of estates, and commercial activities outside their official functions. Vienna Convention on Diplomatic Relations, art. 31.

A diplomatic agent's family members, "traditionally defined to include the agent's spouse, minor children, and other dependents forming part of the household," are also entitled to the agent's immunities if they are not nationals of the receiving state. *Restatement* § 464, cmt. *a*; Vienna Convention on Diplomatic Relations, art. 37(1). Immunity from criminal jurisdiction extends to the administrative and technical staffs of the mission and their families. Vienna Convention on Diplomatic Relations, art. 37(2). In addition, "service staff who are not nationals or permanent residents of the receiving state are afforded immunity from legal process only in respect of their official acts or omissions." *Id.*; *Restatement* § 464, cmt. *a*.

A determination by the Executive Branch that a person is or is not a diplomatic agent is conclusive upon the courts. *See Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328, 1331 (11th Cir.1984); *Restatement* § 464, rep. note 1. The type of passport a person carries – for example, a diplomatic or an official passport – is not determinative. *See Restatement* § 464, rep. note 1.

ii.2. Foreign Officials and their Families When Visiting or in Transit

The *Restatement* § 464, cmt. *i*, provides:

High officials of a foreign state and their staffs on an official visit or in transit, including those attending international conferences as official representatives of their country, enjoy immunities like those of diplomatic agents when the effect of exercising jurisdiction against the official would be to violate the immunity of the foreign state.

When members of an accredited diplomatic mission and their family are in or transiting through the territory of a third state, "while proceeding to take up or to return to [their] post, or when returning to [their] own country," they are entitled to such immunities "as may be required to ensure [their] transit and return." Vienna Convention on Diplomatic Relations, art. 40(1).

ii.3. Conduct-Based Diplomatic Immunity

Conduct-based immunities continue after a person has left the office in which the acts were done. Former diplomats continue to enjoy conduct-based immunity only with respect to acts performed in an official capacity as members of a diplomatic mission. Vienna Convention on Diplomatic Relations, art. 39(2).

It is unsettled whether Executive Branch determinations of conduct-based immunities are as conclusive as are determinations of status-based immunities. *See Yousuf v. Samantar*, 699 F.3d 763, 777-78 (4th Cir. 2012) (stated that the Executive's views regarding assertions of conduct-based immunity added to but were not determinative of the question before the court), *cert. denied*, 2014 WL 102984 (Jan. 13, 2014).

iii. Consular Immunity

Unlike diplomats, consular officers do not have status-based immunity. They have only more limited, conduct-based immunity. Under the 1963 Vienna Convention on Consular Relations,⁷ consular officers and employees are immune from jurisdiction "in respect of acts performed in the exercise of consular functions," except for suits arising out of contracts not entered on behalf of the sending state; suits arising out of accidents caused by vehicles, vessels, or aircraft; suits in which the sending state has waived immunity; and counterclaims. *Id.*, arts. 43, 45.

An Executive Branch determination of whether a person is a duly accredited consular officer is conclusive, although in some situations whether a given act falls within the scope of consular functions may be determined through litigation. *Restatement* § 464, rep. notes 1, 2.

iv. Other Foreign Officials

The issue of whether foreign officials other than diplomats, consular officials, or heads of state/heads of government are afforded immunity for acts performed under color of law remains unsettled:

- According to the *Restatement (Second) of the Foreign Relations Law of the United States* § 66(f), cmt. b (1965),⁸ officials are entitled to immunity only if the effect of exercising jurisdiction would be to enforce a rule of law against the state.

⁷ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77; T.I.A.S. 682, 596 U.N.T.S. 261, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf>. This treaty, which entered into force on Mar. 24, 1967, has 176 states parties; among them is the United States, which ratified on Nov. 24, 1969. *See* U.N. Treaty Collection, *Vienna Convention on Consular Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last visited Nov. 30, 2013).

⁸ This treatise designated as *Restatement (Second)* in order to distinguish it from *Restatement (Third) of the Foreign Relations Law of the United States* (1987), which is cited throughout simply as *Restatement*. These American Law (continued...)

- But in *Samantar v. Yousuf*, 560 U.S. at 305, n.15 (2010), the Supreme Court wrote that such officials do not fall within the scope of the FSIA, and expressed “no view” on whether the *Restatement (Second)* “correctly sets out the scope of the common law immunity applicable to current or former foreign officials.”

v. Immunity of Diplomatic and Consular Premises, Archives, Documents, and Communications

A foreign state’s embassy or consulate is, as a general rule, not to be disturbed:

The premises, archives, documents, and communications of an accredited diplomatic mission or consular post are inviolable, and are immune from any exercise of jurisdiction by the receiving state that would interfere with their official use.

Restatement § 466 (citing Vienna Convention on Diplomatic Relations, arts. 21-24, 27, & 30; Vienna Convention on Consular Relations, arts. 27, 30-33, & 35).

The archives of a mission or consulate, including all papers, documents, etc., are inviolable regardless of location. Vienna Convention on Diplomatic Relations, art. 24; Vienna Convention on Consular Relations, art. 33.

“A diplomatic or consular bag may not be opened or detained.” *Restatement* § 466, cmt. *f*. It is noteworthy, however, that “if the competent authorities of the receiving state have ‘serious reason to believe’ that a consular bag contains something other than correspondence, documents, or articles for official use, the authorities may ask that the bag be opened in their presence”; should that request be “refused, the bag must be returned to its place of origin.” *Id.*; see Vienna Convention on Consular Relations, art. 35(3).

Communication is also protected, as pursuant to Article 27(1) of the Diplomatic Convention and Article 35(1) of the Consular Convention, the receiving state must “permit and protect freedom of communication by the mission or consular post for all official purposes.” *Restatement* § 466, cmt. *f*.

v.1. Consent As Exception

Consent is an exception to the rule against inviolability.

Institute treatises compile many of the doctrines discussed in this chapter. The provisions must be consulted with due caution, however, particularly given the publications predating, by decades, the Supreme Court’s most recent interpretations of some of these issues. On the use of the *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, see *infra* § IV.B.1.

Both Article 22 of the Vienna Convention on Diplomatic Relations and Article 31 of the Vienna Convention on Consular Relations prohibit officials of the receiving state from “enter[ing] upon the premises of a diplomatic or consular mission without consent.” *Restatement* § 466, cmt. *a*.

Under the Consular Relations Convention, consent is presumed “in case of urgency requiring prompt protective action,” such as fire, hurricane, or a riot. *Restatement* § 466, cmt. *a*. The same rules “might be assumed” to apply to the private residence of a diplomatic agent or a member of the diplomatic mission’s administrative and technical staff. *Id.* (citing Vienna Convention on Diplomatic Relations, arts. 30, 37). Inviolability does not extend to the residences of other mission personnel or consular officials, but individuals and items located within such residences “may enjoy immunities under this section.” *Id.*

c. Immunity of International Organizations and Officials of Those Organizations

International organizations generally enjoy “such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organization, including immunity from legal process, and from financial controls, taxes, and duties.” *Restatement* § 467(1). A high-level official of the organization may expressly waive immunity. *Id.* § 467, cmt. *e*.

An official of an international organization is immune from U.S. jurisdiction for “acts or omissions in the exercise of his official functions,” and for other acts if the exercise of jurisdiction “would interfere with the independent exercise of his official functions or with his status as an international official.” *Restatement* § 469.

The 1947 U.S.-U.N. Headquarters Agreement,⁹ art. V, § 15, extends diplomatic immunity to members of U.N. missions having diplomatic status. The International Organizations Immunities Act, 22 U.S.C. § 288 (2006), extends immunity from suit and legal process to officers and employees of international organizations in the United States if they have been so designated by executive order.

2. Act of State Doctrine

The act of state doctrine ordinarily requires U.S. courts to accept the validity of the public acts of a foreign sovereign performed within its own territory. This section discusses the doctrine in general. Other sections of this *Benchbook* may augment this discussion by specific reference to the statute or topic under review. *See, e.g., infra* § III.E.1 (setting forth act of state jurisprudence in suits brought under the Alien Tort Statute, 28 U.S.C. § 1350 (2006); *infra* §

⁹ Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, signed June 26, 1947, and approved by the U.N. General Assembly Oct. 31, 1947, *available at* http://avalon.law.yale.edu/20th_century/decad036.asp.

III.E.2 (describing act of state in relation to the Torture Victim Protection Act, note following 28 U.S.C. § 1350 (2006)).

a. In General

Describing the act of state doctrine in *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 409 (1990), the Supreme Court wrote:

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.

See also Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The doctrine is a rule of federal common law, which is binding on both federal and state courts, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964).

The jurisprudential foundation for the act of state doctrine has changed over the years, from a basis in international law to one in domestic separation of powers. *See Kirkpatrick*, 493 U.S. at 404. The Supreme Court has explained that the doctrine is not constitutionally required, but has “constitutional underpinnings.” *Sabbatino*, 376 U.S. at 423 (internal quotation omitted).

Congress may modify the act of state doctrine, and has done so in the past. *See Restatement* § 444, cmt. *a*.

b. Application

The act of state doctrine applies only to formal acts of state. In contrast, it does not apply to acts such as breach of contract by a state or repudiation of an obligation by a state’s counsel at trial. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693-95 (1976). Moreover, the doctrine applies only when a court must “declare invalid, and thus ineffective as a rule of decision for the courts of this country, the official act of a foreign sovereign . . . performed within its own territory.” *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 405 (1990).

c. Exceptions

The act of state doctrine has a number of exceptions. *See generally Restatement* § 443. Exceptions, as determined by statute or by case law in the lower courts, include the following:

- The doctrine does not apply to takings of property in violation of international law, if the property or proceeds of the property have been brought within the United States. 22 U.S.C. § 2370(e)(2) (2006). Enactment of this statute represented a reversal of the Supreme Court’s decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)

(holding that act of state doctrine barred suit alleging unlawful expropriation by a foreign state).

- The doctrine does not apply, some courts have ruled, if a treaty provides an unambiguous rule of international law for the court to apply. *See Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 428 (6th Cir. 1984); *see also Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995) (noting that *Sabbatino* applied the act of state doctrine only “in the absence of . . . unambiguous agreement regarding controlling legal principles,” and concluding that the doctrine should be applied only “in a context . . . in which world opinion [is] sharply divided”), *cert. denied*, 518 U.S. 1005 (1996); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 345 (S.D.N.Y. 2003) (writing that “[t]he more clear-cut the alleged violation of international law, the less deference is due to the acts of a foreign sovereign”).
- The doctrine does not apply, in the view of the U.S. Court of Appeals for the Second Circuit, if the U.S. Executive Branch has waived application of the doctrine by writing a so-called *Bernstein* letter. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954); *see also Restatement* § 443, rep. note 8. The Supreme Court declined to address the validity of the so-called *Bernstein* exception in *Sabbatino*, 376 U.S. at 420. In a later judgment, however, three Justices indicated that they would accept it. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972).

3. Political Question

The political question doctrine asserts that political acts of the U.S. government are nonjusticiable. This section discusses the doctrine in general. Other sections of this *Benchbook* may augment this discussion by specific reference to the statute or topic under review. *See, e.g., infra* § III.E.1 (setting forth political question jurisprudence in suits brought under the Alien Tort Statute, 28 U.S.C. § 1350 (2006)).

a. In General

Rooted in the separation of powers structure, the political question doctrine accords judicial deference to the executive and legislative branches. In its seminal decision in *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court articulated six formulations of a political question. “Prominent on the surface of any case held to involve a political question is,” the Court wrote, *id.* at 217:

- “[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or”
- “[A] lack of judicially discoverable and manageable standards for resolving it; or”
- “[T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or”

- “[T]he impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or”
- “[A]n unusual need for unquestioning adherence to a political decision already made; or”
- “[T]he potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

These factors “are probably listed in descending order of both importance and certainty,” Court observed in a subsequent judgment. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

If one of the factors is implicated and “inextricable” from the case, then a court may dismiss on the political question ground. *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006). The court need not address the other factors. *See Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 (2d Cir. 2005), *cert. denied*, 547 U.S. 1193 (2006).

In *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), the Supreme Court rejected the effort by the respondent, the U.S. Secretary of State, to secure dismissal of a suit based on the ground of political question. The opinion for the Court written by Chief Justice John G. Roberts, Jr., characterized the political question doctrine as a “narrow exception” to the general rule that courts must decide cases properly before them. *Id.* at 1427. Accordingly, the Court remanded for determination below whether the statute at issue, pertaining to issuance of passports for U.S. citizens born in Jerusalem, comported with the U.S. Constitution.

b. Application to Cases Touching on Foreign Relations

With respect to foreign relations specifically, the Supreme Court stated that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Baker v. Carr*, 369 U.S. 186, 211 (1962). Questions related to foreign relations or international law that the Supreme Court has held to be political include the:

- Recognition of a foreign government. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).
- Termination of war. *Ludecke v. Watkins*, 335 U.S. 160, 168-69 (1948).
- Need for the advice and consent of the Senate for U.S. ratification of an international agreement. *See Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir.), *cert. denied*, 534 U.S. 1039 (2001). *See also Goldwater v. Carter*, 444 U.S. 996 (1979) (four Justices would have held treaty termination to be a political question).

Furthermore, U.S. Courts of Appeals have determined foreign relations matters to constitute political questions in a number of matters; for example:

- A defamation claim, filed by the target of a U.S. military strike. *El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836, 841-44 (D.C. Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 997 (2011).
- Wrongful death and other claims against former U.S. officials, filed by survivors of a Chilean military officer, *Schneider v. Kissinger*, 412 F.3d 190, 193-97 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006).
- War crimes and extrajudicial killings, *inter alia*, claims, brought against a U.S. company for sales, financed by the U.S. government, of bulldozers to the Israeli Defense Forces, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007).

Questions that courts have held not to be political include:

- Interpretation of a treaty or executive agreement. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986).
- Application of universally recognized human rights law. *Kadić v. Karadžić*, 70 F.3d 232, 249-50 (2d Cir. 1995).
- Claims for the return of property looted during wartime. *Alperin v. Vatican Bank*, 410 F.3d 532, 548-58 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006).

4. *Forum Non Conveniens*

The doctrine of *forum non conveniens* allows a district court to dismiss a suit, even though jurisdiction and venue lie, on the ground that the case should be heard by a foreign court. This section discusses the doctrine in general. Other sections of this *Benchbook* may augment this discussion by specific reference to the statute or topic under review. *See, e.g., infra* § III.E.1 (setting forth inconvenient forum jurisprudence in suits brought under the Alien Tort Statute, 28 U.S.C. § 1350 (2006)).

a. In General

Within the federal system, Congress has codified the *forum non conveniens* doctrine, providing for transfer rather than dismissal of the case. *See* 28 U.S.C. § 1404(a); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). Dismissal for *forum non conveniens* is more likely to be based on a court's assessment of adjudicative efficiency and fairness. *See Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 521 (S.D.N.Y. 2006), *aff'd*, 343 Fed. Appx. 623 (2d Cir. 2009).

b. Procedure

A court has discretion to decide a *forum non conveniens* motion before determining that it has personal jurisdiction over the defendant or subject matter jurisdiction over the cause of action. *See Sinochem Int'l Co. Ltd.*, 549 U.S. at 424-25.

c. Substance

The grounds for dismissal under this doctrine are:

- The existence of an alternative forum that is both adequate and available; and
- Private and public interest factors substantially weigh in favor of litigating the case in that alternative forum.

See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 257 (1981). In weighing these two factors, courts place a strong presumption in favor of the forum chosen by the plaintiff; however, as the Supreme Court has written, that presumption “applies with less force when the plaintiff or real parties in interest are foreign.” *Id.* at 255. The U.S. Court of Appeals for the Second Circuit thus wrote:

[T]he greater the plaintiff’s or the lawsuit’s bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*.

Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001) (footnotes omitted).

The two factors – adequate alternative forum and balancing of interests – are discussed in turn below.

i. Adequate Alternative Forum

Pivotal to the question of whether an alternative forum is available is the following question: Is the defendant amenable to process in a forum that will permit adjudication of the merits of the dispute? *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *see also Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010). Factors considered in assessing the adequacy of the alternative forum include whether the:

- Dispute may be adjudicated with reasonable promptness;
- Forum is currently available; and
- Remedy provided by the forum is appropriate; or, to the contrary, is “so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all.”

Abdullahi, 562 F.3d at 189.

ii. Balancing of Private Interests and Public Interests

If an adequate alternative forum exists, the court must weigh the private interests and the public interests. As described by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), private interests include:

- The ease with which litigants will have access to proof;
- The cost of bringing in witnesses and whether the forum permits compulsory process to obtain the attendance of unwilling witnesses;
- The possibility, if appropriate, of viewing the location where the alleged tort occurred;
- Whether a judgment would be enforceable; and
- Any “other practical problems that make trial of a case easy, expeditious, and inexpensive.”

Public interests include the:

- “[A]dministrative difficulties” of congested courts and overburdened juries;
- “[L]ocal interest in having localized controversies decided at home”; and
- Avoidance of “problems in conflict of laws, and in [foreign] law.”

Id. at 508-09.

5. Time Bar

As in domestic litigation, suits that implicate international or transnational law may be subject to a limitations period – a period that sometimes may be suspended by virtue of equitable tolling. Examples of specific discussions regarding time bars in this *Benchbook* may be found *supra* § II.B.1.iii.5.b. (Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (2006)); *infra* § III.E.1. (Alien Tort Statute, 28 U.S.C. § 1350 (2006)); *infra* § III.E.2. (Torture Victim Protection Act, note following 28 U.S.C. § 1350 (2006)).

A court must consider this question with respect to the case before it.

6. Exhaustion of Remedies

U.S. domestic law may sometimes require a claimant to exhaust remedies in another venue before litigation may be pursued in federal court. What is called the local remedies rule provides that

ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.

Restatement § 713, cmt. *f*. The International Court of Justice has held this to constitute a norm of customary international law. *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21), available at <http://www.icj-cij.org/docket/index.php?p1=3&k=73&case=34&code=sus&p3=4> (last visited Nov. 30, 2013). On such a norm as a source of international law, see *supra* § I. On application of the exhaustion of remedies doctrine in suits alleging violations of human rights, see *infra* § III.E.1. (Alien Tort Statute Alien Tort Statute, 28 U.S.C. § 1350 (2006)); *infra* § III.E.2. (Torture Victim Protection Act, note following 28 U.S.C. § 1350 (2006)).

7. Comity

International comity is the practice by which courts in one country choose to respect the acts of another country. See *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575 (1926) (describing comity as a concept “which induces every sovereign state to respect the independence and dignity of every other sovereign state”). This section discusses the doctrine in general. Other sections of this *Benchbook* may augment this discussion by specific reference to the statute or topic under review. See *supra* § II.A.3.f (discussing comity and jurisdiction); *supra* § II.B.1.b.i (discussing comity and immunities); *infra* § III.E.1 (discussing comity as applied in suits under Alien Tort Statute, 28 U.S.C. § 1350 (2006)).

a. In General

The Supreme Court defined comity in its judgment in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), as follows:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

See also *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n.27 (1987) (“Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”).

b. Application

In practice, comity does not typically serve as an independent basis for a decision. Rather, it informs a court’s application of doctrines and statutes historically rooted in comity concerns. These areas of law include:

- Foreign sovereign immunity. *E.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (looking to comity in the course of construing the Foreign Sovereign Immunities Act, a statute outlined *supra* § II.B.1.a).
- Recognition of foreign laws and judgments. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); *Bank of Augusta v. Earle*, 38 U.S. 519, 589-90 (1839); Joseph Story, *Commentaries on the Conflict of Laws* §§ 23-38 (1834).
- Restraints on the extraterritorial application of U.S. law. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004), discussed *supra* § II.A.3.f.

Some U.S. Courts of Appeals have declined to exercise jurisdiction on grounds of “international comity” when parallel litigation is pending in a foreign court. *See, e.g.*, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004).

8. Choice of Law

The choice of law issue arises in cases involving the laws of the United States and of foreign countries, just as it does in cases involving the laws of two different U.S. states. The principles are largely the same in both contexts.

a. Choice of Law Overview

Federal courts sitting in diversity apply the choice of law rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990). As a general matter, courts apply the same choice of law rules to international cases as they do to interstate cases. Choice of law rules are used to decide which jurisdiction’s substantive law applies to the merits of a dispute. Procedural questions, by contrast, are governed by the law of the forum. *See Restatement (Second) of Conflict of Laws* § 122 & accompanying notes (1971). In general, the parties may agree on the law to govern their disputes *Id.* § 187.

b. Proof of Foreign Law

Under Federal Rule of Civil Procedure 44.1, a party who intends to rely on foreign law must give reasonable notice to the other party. A party relying on foreign law has the burden of proving that foreign law applies and the content of that law. *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 440-41 (3d Cir. 1999); *Restatement (Second) of Conflict of Laws* § 136, cmt. f (1971).

In the absence of adequate proof of foreign law, a court will apply the law of the forum, “except when to do so would not meet the needs of the case or would not be in the interests of justice.” *Restatement (Second)* § 136 cmt. h; *see Bel-Ray Co.*, 181 F.3d at 441. *See also Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 628-29 (7th Cir. 2010) (discussing the role of experts and treatises in determination of foreign law under Federal Rule of Civil Procedure 44.1).

9. Recognition and Enforcement of Foreign Judgments

Although the term “foreign judgment” is often used in domestic litigation as a term of art to refer to a judgment by a U.S. state, this *Benchbook* uses the term to denote a judgment rendered by the courts of a country other than the United States.

The Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, which applies to judgments of U.S. states, does not apply to foreign state judgments. *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912); *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 321 n.4 (1981) (Stevens, J., concurring in the judgment). U.S. courts typically recognize and enforce foreign judgments nevertheless. That process is described below.

a. Recognition of Foreign Judgments

Because recognition and enforcement are two distinct, although interrelated, concepts in U.S. law, a foreign judgment must be recognized before it can be enforced.

i. Governed by State Law

The vast majority of actions for recognition in the federal courts are diversity actions. As a result, the decision to give effect to a foreign judgment is almost always made under the law of a U.S. state. Such law typically entails application of either:

- A statute; or
- Common law principles of comity.

Each is discussed in turn below.

i.1. State Statutes Based on Uniform Acts

U.S. state laws pertaining to the recognition of foreign judgments typically derive from the state’s adoption of one of two foreign judgment recognition acts promulgated by the Uniform Law Commission, a Chicago-based nonprofit organization founded more than 120 years ago as the National Conference of Commissioners on Uniform State Laws. *See* Uniform L. Comm’n, *About the ULC*, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Nov. 30, 2013). The two statutes are:

- 1962 Uniform Foreign Money Judgments Recognition Act
- 2005 Uniform Foreign-Country Money Judgments Recognition Act

Each is discussed in turn below. For a more detailed account, see Ronald A. Brand, *Recognition and Enforcement of Foreign Judgments* (Fed. Judicial Ctr., 2012), available at [http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/\\$file/brandenforce.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf).

i.1.a. 1962 Uniform Foreign Money-Judgments Recognition Act

As of late 2013, thirty-one states, plus the District of Columbia and the U.S. Virgin Islands, had adopted the 1962 Uniform Foreign Money Judgments Recognition Act. *See* Uniform L. Comm'n, *Legislative Fact Sheet - Foreign Money Judgments Recognition Act*, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited Nov. 30, 2013).

Referred to here as the 1962 Foreign Judgments Recognition Act, this uniform statute is codified in the *Uniform Laws Annotated* and designated 13 U.L.A. 149 (1986); full text also is available at <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjr%20final%20act.pdf>.

As stated in § 2, the 1962 Foreign Judgments Recognition Act applies to “any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.” A judgment is conclusive “to the extent that it grants or denies recovery of a sum of money.” *Id.* § 3.

Thus premised on the assumption that the judgment is valid, the 1962 Act specifies the grounds for nonrecognition. Section 4(a) of the Act requires nonrecognition if one of three situations is present; that is, if the:

- Judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;¹⁰ or
- Foreign court did not have personal jurisdiction over the defendant; or
- Foreign court did not have jurisdiction over the subject matter.

The Act also permits non-recognition on six grounds enumerated in Section 4(b); to precise, if the:

- Party that was the defendant in the foreign court proceedings did not receive notice of the proceedings in sufficient time to enable that party to defend;
- Judgment was obtained by fraud;
- Cause of action on which the judgment is based is repugnant to the public policy of the state in which the proceedings are taking place;

¹⁰ Refusals to enforce on this ground are rare. *But see Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (refusing to recognize a \$97 million Nicaraguan judgment on the ground of systemic lack of impartiality).

- Judgment conflicts with another final and conclusive judgment;
- Proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
- Foreign court was a seriously inconvenient forum for the trial of the action, in a case in which jurisdiction is based only on personal service.

The Act does not require reciprocity in recognition. Moreover, it does not cover judgments for taxes, fines, penalties, or matrimonial or family matters.

i.1.b. 2005 Uniform Foreign-Country Money Judgments Recognition Act

As of late 2013, eighteen states and the District of Columbia had adopted the 2005 Foreign-Country Money Judgments Recognition Act. *See* Uniform L. Comm'n, *Legislative Fact Sheet - Foreign-Country Money Judgments Recognition Act*, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Nov. 30, 2013).

Referred to here as the 2005 Foreign Judgments Recognition Act, this uniform statute is codified in the *Uniform Laws Annotated* and designated 13 U.L.A. 7 (2005); full text also is available at http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf.

The 2005 Foreign Judgments Recognition Act updates and revises certain aspects of the 1962 Act. For example, it expands the scope of the public policy exception. Furthermore, it adds two discretionary grounds for nonrecognition; specifically, that the:

- Judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
- Specific proceedings leading to the foreign court judgment were incompatible with the requirements of due process of law.

2005 Foreign Judgments Recognition Act, § 4(c)(7)-(8), 13 U.L.A. 7 (2005).

i.1.c. Procedure for Recognition of Foreign Judgments

The filing of a separate action on the judgment is the most frequently used procedure under state law for seeking recognition and enforcement of a foreign judgment. Rule 64 of the Federal Rules of Civil Procedure allows federal courts to apply these state law mechanisms.

Also pertinent may be the 1964 Revised Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. 261 (1999), available at <http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf>.¹¹

ii. Federal Law on Recognition in Defamation Suits

Although typically state law governs U.S. courts' recognition of foreign judgments, a 2010 congressional enactment constitutes an exception to this general rule. The enactment is intended to undermine what is known as "libel tourism"; that is, the practice by which a plaintiff brings a defamation suit in a country where freedoms of speech and press are more circumscribed than in the United States. The 2010 federal law aimed at preventing U.S. courts from enforcing ensuing foreign judgment is entitled the Securing the Protection of our Enduring and Established Constitutional Heritage Act. More commonly called the SPEECH Act, it is codified at 28 U.S.C. § 4101 *et seq.*

The protections of the SPEECH Act extend only to:

- U.S. citizens;
- Aliens who either are permanent U.S. residents or were lawfully residing in the United States when the allegedly defamatory speech was researched, prepared or disseminated; and
- Business entities either "incorporated in" or having their "primary location or place of operation, in the United States." 28 U.S.C. § 4101(6).

The SPEECH Act prohibits recognition and enforcement of a foreign defamation judgment unless the court concludes:

1. Either that the:

- Defamation law applied in the foreign court provided at least as much protection of freedom of speech and press as would have been provided in the case under U.S. federal and state law; or
- Foreign law provides less protection, but the judgment debtor nevertheless would have been found liable for defamation under U.S. law;

¹¹ See Uniform L. Comm'n, *Legislative Fact Sheet – Enforcement of Foreign Judgments Recognition Act*, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Enforcement%20of%20Foreign%20Judgments%20Act> (last visited Nov. 30, 2013) (indicating that nearly all the U.S. states, as well as the District of Columbia and the U.S. Virgin Islands, had adopted this 1964 Act).

2. The foreign court's exercise of personal jurisdiction over the judgment debtor comported with the due process requirements imposed on U.S. courts by the U.S. Constitution; and
3. If the judgment debtor is an interactive computer service under section 230 of the Communications Act of 1934, 47 U.S.C. §230 (2012), the defamation judgment is consistent with that section.

28 U.S.C. § 4102 (a)-(c). The party seeking recognition has the burden of proof to establish that these requirements for recognition have been met. *Id.* §4102 (a)(2). Appearance in the foreign court does not deprive the judgment debtor of the right to oppose recognition and enforcement, nor does it constitute a waiver of any jurisdictional claims the judgment debtor may have. *Id.* §4102(d).

b. Enforcement by U.S. Courts of Judgments by Courts of Foreign States

Once the terms of a judgment have been recognized using one of the mechanisms described above, a court will turn to consideration of whether to enforce the judgment; that is, whether it will require the judgment debtor to carry out the terms of the judgment.

The specific procedures available to a court for enforcement of a recognized foreign judgment are determined by state law. Federal Rule of Civil Procedure 64 provides that federal, as well as state courts, may take advantage of these procedures.

If the court determines that the foreign judgment should be recognized, then it will determine whether the means of enforcement requested by the plaintiff should be granted. Federal Rule of Civil Procedure 69(a).

Also pertinent may be the 1964 Revised Uniform Enforcement of Foreign Judgments Act,¹³ U.L.A. 261 (1999), available at <http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf>.¹²

c. Enforcement of Arbitral Awards

The recognition and enforcement of international arbitral awards is governed by the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹³ as

¹² See Uniform L. Comm'n, *Legislative Fact Sheet – Enforcement of Foreign Judgments Recognition Act*, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Enforcement%20of%20Foreign%20Judgments%20Act> (last visited Nov. 30, 2013) (indicating that nearly all the U.S. states, as well as the District of Columbia and the U.S. Virgin Islands, had adopted this 1964 Act).

¹³ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/XXII_1_e.pdf. This treaty, which entered into force on June 7, 1959, has 149 states parties; among them is the United States, for which the treaty entered into force on Dec. 29, 1970. See U.N. Comm'n Int'l Trade Law, *Status*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Nov. 30, (continued...))

implemented domestically via chapter 2 of the U.S. Federal Arbitration Act, codified at 9 U.S.C. §§ 201-08 (2006). This and other aspects of foreign arbitrations, as they arise in U.S. courts, may be found *infra* § III.A.

2013). Practitioners in this area sometimes call this the New York Convention; the court should be aware that practitioners in other areas may refer to other treaties promulgated in New York by the same shorthand name.