

Client Alert

International Arbitration Practice Group

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JASTA Amendments to FSIA Become Law

Introduction¹

On September 28, 2016, the U.S. Congress overwhelmingly voted to override President Obama's veto of the Justice Against Sponsors of Terrorism Act (JASTA), a bill whose purpose was to curtail foreign states' ability to invoke sovereign immunity in response to civil lawsuits alleging that the state(s) had committed or aided a terrorist attack against U.S. nationals or interests. JASTA was first introduced in Congress in December 2009, and more recently reintroduced on September 16, 2015. Although members of Congress expressed misgivings about JASTA's "unintended consequences" that could affect U.S. interests abroad, it by overriding the veto by wide majorities, JASTA has become law.

JASTA amends the U.S. Foreign Sovereign Immunities Act (FSIA), the legal regime that governs litigation against foreign sovereigns and state instrumentalities in American courts. The FSIA establishes a general presumption that foreign sovereigns are immune from suit, subject to certain exceptions.² JASTA, however, creates a significantly expanded exception to sovereign immunity designed to enable private plaintiffs to bring suit against foreign states based on allegations that the state(s) committed or aided terrorist acts against U.S. interests or nationals, and to legislatively abrogate judicial decisions that had dismissed such cases brought by victims of the September 11, 2011 attacks on the United States. While JASTA secured major support in Congress, even though it was the subject of little committee consideration, it passed the House and Senate unanimously by voice vote, many members from both the House and Senate expressed concerns over the legislation and flagged the need to "fix" the law. In addition, several commentators – including the national security and defense establishment, major think tanks and the editorial boards of major U.S. newspapers – inveighed against its adoption and argued for reconsideration.³ Furthermore, several U.S. allies expressed alarm at Congress' willingness to tinker with the well-understood system of sovereign immunity.⁴

Sovereign Immunity under U.S. Law

The doctrine of sovereign immunity "occupies an important place in international law and international relations".⁵ It is derived from the principle of sovereign equality, meaning that all sovereign states are equal on the international plane and, consequently, that no state should sit in judgment of

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another. Historically, sovereign immunity was absolute – no foreign state could be haled before the courts of another state – the prevailing view being that conflicts involving states should be resolved through diplomacy, not private litigation.⁶ In recent decades, however, as states and their instrumentalities have begun to take a more active and direct role in world commerce, the international consensus moved toward a system of “restrictive immunity,” whereby states retain their immunity for sovereign acts, but may be sued for commercial or other acts that are non-discretionary in nature or viewed as being clear violations of international law (such as expropriation of property).

The U.S. approach to sovereign immunity has broadly mirrored the international consensus. The U.S. began to follow the restrictive immunity doctrine in 1952, when it was adopted as policy by the U.S. Department of State;⁷ and the restrictive immunity doctrine forms the framework of the FSIA, which was adopted in 1976 to eliminate the executive branch’s involvement in immunity determinations and give that role to the judiciary..

Section 1604 of the FSIA provides that foreign states are generally immune from the jurisdiction of U.S. state and federal courts. This immunity extends not only to the state itself, but also to any “agency or instrumentality” of the foreign state, including political organs and corporate bodies that are majority-owned by the foreign state directly.⁸ Section 1605 sets forth a limited number of exceptions to sovereign immunity, including:

- Where the foreign state has waived immunity, either expressly or by implication;
- Where the claim is based on a commercial activity with some nexus to the United States;
- Where the claim is based on an expropriation of property in violation of international law;
- Where the claim involves a tort that has caused injury in the United States;
- Where the claim seeks to enforce an award resulting from an arbitration that the foreign state agreed to participate in;
- Where the claim seeks redress for injuries suffered as a result of an act of terrorism, but only where the foreign state was designated as a “state sponsor of terrorism” under U.S. law.

The FSIA provides for several other limitations on the ability to bring suit against foreign states within the U.S. For instance, foreign states are entitled to specific methods of service of process, punitive damages may not be imposed against a foreign state,⁹ cases against foreign states may not be tried to a jury, and foreign states enjoy immunities from attachment and execution which can make it difficult to enforce judgments rendered against them.

What JASTA Changes

JASTA amends the FSIA by creating a new Section 1605B, allowing U.S. courts to hear any case where a plaintiff seeks money damages from a foreign state for physical injury to person or property or death occurring in the United States, provided that these injuries are caused by:

- an act of international terrorism in the United States; and
- a tortious act of the foreign state, or of any official, employee or agent of the foreign state while acting within the scope of his or her office, employment or agency.¹⁰

The effect of this provision is to make it significantly easier for a plaintiff to sue a foreign state that is accused of either committing or abetting an act of international terrorism that injures U.S. citizens.

Specifically, JASTA serves to expand the “noncommercial tort” exception to the FSIA.¹¹ Since the Supreme Court’s 1989 decision in *Argentine Republic v. Amerada Hess Shipping Corp.*,¹² the tort exception has been interpreted as applying only where both the tort was committed in the United States and the resulting injury occurred in the United States. This “entire tort rule” was applied to dismiss actions brought against certain foreign state instrumentalities that the plaintiffs alleged had assisted with the September 11th attacks. Because the alleged tortious conduct occurred outside the United States, however, the court found that the entire tort rule barred the suit.¹³ JASTA, however, abrogates the entire tort rule in cases involving international terrorism, specifically providing that foreign states may be subject to jurisdiction “regardless of where the tortious act or acts of the foreign state occurred.” As such, a foreign state can now be sued in U.S. courts for alleged tortious conduct committed anywhere in the world, as long as there is a nexus to an act of terrorism occurring within the United States.

In addition to this expansion of the tort exception, JASTA has retroactive effect. Section 7 of the law provides that it will apply to any civil action pending on, or commenced on or after, JASTA’s date of enactment. Moreover, JASTA will apply to any civil action arising out of an injury to person, property, or business on or after September 11th, 2001.¹⁴

JASTA includes a mechanism through which U.S. courts can stay civil actions brought against foreign states. Section 5(b) of the Act allows the Attorney General to intervene in any proceeding brought under JASTA for the purpose of seeking a stay.¹⁵ Section 5(c) authorizes U.S. courts to stay JASTA proceedings if the Secretary of State certifies that the U.S. is engaged in good faith negotiations with the foreign state defendant concerning the resolution of claims against that foreign state. This stay may last a maximum of 180 days, but extensions must be granted if the Secretary of State certifies that discussions are still ongoing.¹⁶ This provision appears to have been designed to ensure that private lawsuits brought under JASTA do not undermine diplomatic efforts undertaken in the wake of a terrorist event.

What JASTA Doesn’t Change

These significant changes notwithstanding, JASTA does not alter the FSIA’s regime pertaining to attachment and execution of foreign state assets. FSIA Sections 1609–1611 continue to provide that the property of a foreign state is only subject to attachment and execution if that property is (a) located in the United States, **and** (b) used for a commercial activity in the United States.¹⁷ Furthermore, U.S. law continues to provide that foreign states and their agencies and instrumentalities are entitled to a presumption of judicial independence for purposes of execution of judgments, meaning that where a judgment is rendered against a state, that judgment cannot be executed against the assets of a state instrumentality (or vice versa) unless the instrumentality is shown to be a mere “alter ego” of the state.¹⁸ Finally, JASTA does not alter the legal regime governing the immunity of foreign *individuals* from suit in U.S. Courts. This type of immunity falls outside the ambit of the FSIA, and rather is governed by judge-made common law.¹⁹

JASTA’s Consequences and Implications

It is, at this early state, impossible to predict how JASTA will change the legal landscape surrounding acts of terrorism. It seems likely, however, that plaintiffs seeking to bring claims in response to terrorist acts now have a clear incentive to allege foreign state involvement. The most likely consequence of JASTA’s adoption in the immediate term, therefore, will be a significant increase in civil actions against foreign states in U.S. courts. In fact, the first suit brought under JASTA was filed only two days after President Obama’s veto was overridden.²⁰ Plaintiffs may be particularly eager to bring suit against foreign states viewed as having “deep pockets”, and therefore able to pay the large judgments that may often result from terrorist attacks. JASTA may also spur the reinstatement of cases related to the September 11th attacks that had previously been dismissed by federal courts.

Additional consequences seem likely as well:

- Plaintiffs bringing JASTA cases against foreign states will seek to use expansive U.S. discovery procedures to search for any potential proof of foreign states' complicity in terrorist attacks. This politically-charged discovery has the potential to be viewed as particularly sensitive or invasive, and may lead to considerable tensions between plaintiffs, foreign states, and even the U.S. government, which may fear the disclosure by foreign states of sensitive diplomatic communications that the defendant state may, through the discovery process, be compelled to reveal.
- JASTA seems likely to encourage other states to adopt reciprocal statutes in foreign states, thus subjecting the U.S. and its instrumentalities (and, potentially, service members) to additional lawsuits in foreign courts. This was a central concern of the Obama administration and other U.S. critics of the Act.²¹ Whereas the United States has long sought to compensate foreign victims of U.S. action through voluntary compensation programs, foreign states threatened by JASTA may decide to allow their citizens to sue the United States in their own courts, rather than rely on U.S. compensation programs. Already, there has been a suggestion by an Iraqi lobbyist group that, in light of JASTA, the U.S. should be made to pay compensation for damages arising out of the 2003 invasion of Iraq.²²
- Foreign states and instrumentalities – and their business partners – may seek to reduce their exposure to U.S. judgments by removing their assets from the United States and/or reconsider their commercial relationships with U.S. firms.

Based on significant concerns expressed in the United States, including by members of Congress, JASTA may be amended to narrow its application in an attempt to avoid the passage of reciprocal measures internationally that could affect U.S. interests. The exact nature of amendments remain to be seen, but the debate will continue after the elections on November 8, 2016.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

¹ The authors wish to thank Timothy McKenzie, an associate at King & Spalding, for his assistance in preparing this client alert.

² 28 U.S.C. §§ 1604, 1605.

³ See, e.g., Editorial, *The Risks of Suing the Saudis*, N.Y. TIMES, Sept. 28, 2016, <http://www.nytimes.com/2016/09/28/opinion/the-risks-of-suing-the-saudis-for-9-11.html> ; Editorial, *An Obama Veto Worth Backing*, WALL ST. J., Sept. 20, 2016, <http://www.wsj.com/articles/an-obama-veto-worth-backing-1474413692> ; Editorial, *The 9/11 Bill Veto Override is Dangerous*, WASH. POST, Oct. 2, 2016, https://www.washingtonpost.com/opinions/the-911-bill-veto-override-is-dangerous/2016/10/02/6f7fd4ea-86b0-11e6-b57d-dd49277af02f_story.html .

⁴ See Patricia Zengerle, *U.S. Says Allies Oppose Bill Allowing 9/11 Lawsuits Against Saudi Arabia*, REUTERS, Jul. 14, 2016, <http://www.reuters.com/article/us-saudi-usa-congress-idUSKCN0ZU20T> (describing opposition to JASTA voiced by the Dutch Parliament and a UK legislator); see also William Dodge, *Does JASTA Violate International Law?*, JUST SECURITY (Sept. 30, 2016, 4:19 PM), <https://www.justsecurity.org/33325/jasta-violate-international-law-2/> (detailing the European Union's objection that JASTA "conflict[s] with fundamental principles of international law and in particular the principle of State sovereign immunity.").

⁵ Jurisdictional Immunities of the State (Ger. v. It), 2012 I.C.J. 99, ¶ 57 (Feb. 3).

⁶ See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (describing how the Supreme Court had long extended “virtually absolute immunity to foreign sovereigns”).

⁷ *Id.* at 487 (“Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns. But in the so-called Tate Letter, the State Department announced its adoption of the ‘restrictive’ theory of foreign sovereign immunity.”).

⁸ See 28 U.S.C. § 1603(a)-(b).

⁹ 28 U.S.C. § 1606.

¹⁰ Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 3 (2016) (to be codified at 28 U.S.C. § 1605B).

¹¹ 28 U.S.C. § 1605(a)(5).

¹² 488 U.S. 428 (1989).

¹³ *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 109, 116–17 (2d Cir. 2013).

¹⁴ Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-22, § 7 (2016).

¹⁵ *Id.* at § 5(b).

¹⁶ *Id.* at § 5(c).

¹⁷ See 28 U.S.C. § 1610.

¹⁸ See generally *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

¹⁹ See *Samantar v. Yousuf*, 560 U.S. 305 (2010).

²⁰ Greg Clary, *9/11 Widow Files Lawsuit Against Saudi Arabia*, CNN (Oct. 1, 2016, 7:36 PM),

<http://www.cnn.com/2016/10/01/politics/saudi-arabia-9-11-lawsuit/>.

²¹ See, e.g., Juliet Eilperin & Karoun Demirjian, *Congress Thwarts Obama on Bill Allowing 9/11 Lawsuits Against Saudi Arabia*, WASHINGTON POST (Sept. 28, 2016), https://www.washingtonpost.com/politics/congress-thwarts-obama-on-bill-allowing-911-lawsuits-against-saudi-arabia/2016/09/28/a93e31ba-859b-11e6-ac72-a29979381495_story.html.

²² *Iraqi group seeks US compensation in light of JASTA*, AL ARABIYA ENGLISH (Oct. 2, 2016, 8:41 PM),

<http://english.alarabiya.net/en/News/middle-east/2016/10/02/Iraqi-group-sees-opportunity-for-US-compensation-if-JASTA-implemented.html>.