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Enforcement of Arbitral Awards Against Foreign States or State Agencies

Dr. S.I. Strong*

Britain's Lord Denning once said that "as a moth is drawn to the light, so is a litigant drawn to the United States."\(^1\) Certainly, as a pro-arbitration state and a signatory to various international conventions concerning the enforcement of foreign arbitral awards,\(^2\) the United States seems a natural place to bring an action to enforce an arbitral award against a foreign state or state agency. However, suing a sovereign has not traditionally been a simple task in the United States or elsewhere. Most nations grant foreign states the presumption of immunity, thus denying that their domestic courts have jurisdiction to hear a dispute involving a foreign sovereign unless an exception to immunity exists.\(^3\)

For years, U.S. courts took a highly deferential, "hands-off" approach to litigation involving a foreign sovereign. However, recent case law out of the D.C. Circuit has radically diminished the jurisdictional elements that plaintiffs must establish before a U.S. court will assert its power to enforce an arbitral award against a foreign state or state agency. This Article

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investigates this recent shift and describes what contacts, if any, a foreign state or state agency must have with the United States before a U.S. court will assert jurisdiction under sections 1605(a)(1) and 1605(a)(6) of the U.S. Foreign Sovereign Immunities Act ("FSIA"). This Article will also discuss the likelihood and propriety of other circuits following the D.C. Circuit's lead.

I. THE STATUTORY BASIS FOR SOVEREIGN IMMUNITY UNDER U.S. LAW

Most parties coming to the United States to enforce foreign arbitral awards proceed under the Federal Arbitration Act ("FAA"). The FAA gives U.S. federal courts the power to enforce agreements to arbitrate by compelling arbitration, staying litigation in the federal courts, and confirming and enforcing arbitral awards. Chapter 2 of the FAA gives domestic effect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), thus making enforcement of foreign arbitral awards under the Convention a matter of federal rather than state, law. According to section 203 of the FAA, U.S. federal district courts have original jurisdiction over actions to enforce foreign arbitral awards. Chapter 3 of the FAA gives domestic effect to the Inter-American Convention on International Commercial Arbitration, with original jurisdiction being given to the federal district courts under section 302. Actions under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID") fall outside of the FAA, although federal district courts also have exclusive jurisdiction over actions to enforce ICSID awards.

However, parties seeking to enforce arbitral awards against foreign states or state agencies do not establish subject-matter jurisdiction under the FAA. Instead, they must proceed under the FSIA. Passed in 1976, the FSIA codifies the rules relating to sovereign immunity and provides "the sole basis for obtaining jurisdiction over a foreign state" in U.S. courts. The term "foreign state" includes political subdivisions of a foreign state as

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6 New York Convention, supra note 2.
7 See S.I. Strong, Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States, 21 J. INT'L ARB. 479 (2004), for a discussion of recent developments concerning personal jurisdiction under the FAA.
8 Inter-American Convention, supra note 2.
9 ICSID Convention, supra note 2.
10 22 U.S.C. § 1650a(b).
well as their agencies and instrumentalities. Agencies and instrumentalities “are accorded a presumption of independent status.” Federal district courts have original (but not exclusive) jurisdiction over any dispute against a foreign state and the FSIA will, in appropriate circumstances, be applied retroactively to claims arising prior to its enactment.

The FSIA grants foreign states immunity from legal action in the United States unless one of the several exceptions described in sections 1605 to 1607 of the Act applies. Under the original text of the Act, a state became subject to the jurisdiction of U.S. courts if it waived its claim to immunity, either explicitly or implicitly, engaged in commercial activity, expropriated property in violation of international law, gained rights to property situated in the United States, or engaged in certain types of tortious activity giving rise to personal injury or death in the United States. States also lost immunity if they became involved in an admiralty suit to enforce a maritime lien.

In 1988, Congress added a new exception addressing actions to enforce or confirm arbitral awards to which a foreign state is a party. Prior to 1988, parties could overcome a state’s claim to sovereign immunity in actions to enforce arbitral awards by establishing the existence of an implied waiver under section 1605(a)(1) of the FSIA. Discrepancies in the application of the implied waiver exception arose among the various federal circuits, however, leading Congress to create a new exception. Nevertheless, U.S. courts continue to rely on implied waivers in enforcement proceedings, using them to establish jurisdiction in instances where the arbitration exception does not apply.

In 1996, Congress amended the FSIA again, this time creating an exception to address states that engage in certain acts of state-sponsored

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14 Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 446 (D.C. Cir. 1990).
19 Id. § 1605(a)(2).
20 Id. § 1605(a)(3).
21 Id. § 1605(a)(4).
22 Id. § 1605(a)(5).
23 Id. § 1605(b).
25 See infra Section II.A.1.
terrorism causing harm to U.S. citizens. Courts and commentators agree that this amendment constitutes a radical departure from previous conceptions about sovereign immunity under both U.S. and international law.

Because Congress is constitutionally empowered to determine which controversies may be heard by Article III courts, the FSIA’s ability to establish subject-matter jurisdiction in the federal courts has never been denied. However, the analysis does not stop once subject-matter jurisdiction has been established. Under U.S. law, federal courts must also establish personal jurisdiction over a defendant, and it is here that problems arise under the FSIA.

II. DUE PROCESS CONCERNS UNDER THE FSIA

Courts may obtain personal jurisdiction over a defendant or a defendant’s property in one of two ways: through specific jurisdiction or through general jurisdiction. In a recent case considering personal jurisdiction in an action to enforce a foreign arbitral award against a private party, the Ninth Circuit stated that:

A court exercises specific jurisdiction where the cause of action arises out of or has a substantial connection to the defendant’s contacts with the forum. Alternatively, a defendant whose contacts are substantial, continuous, and systematic is subject to a court’s general jurisdiction even if the suit concerns matters not arising out of his contacts with the forum. Whether dealing with specific or general jurisdiction, the touchstone remains “purposeful availment.” By requiring that “contacts proximately result from actions by the defendant himself that create a ‘substantial connection’ with the forum State,” the Constitution ensures that “a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.”

As this statement indicates, the need to establish personal jurisdiction is a constitutional mandate rather than a statutory one.

28 U.S. CONST. art. III.
30 Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1123 (9th Cir. 2002) (citations omitted).
In the years since the FSIA was enacted, courts have struggled to identify whether and to what extent the constitutional aspects of personal jurisdiction apply to foreign states. The debate has its roots in Title 28 of the United States Code, section 1330(b), which states that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."\(^{31}\) Section 1330(a) of Title 28 states:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under . . . this title or under any applicable international agreement.\(^{32}\)

When read together, these provisions suggest that "the [FSIA] makes the statutory aspect of personal jurisdiction simple: subject-matter jurisdiction plus service of process equals personal jurisdiction."\(^{33}\)

As is often the case, the apparent clarity of the statutory language has given rise to extreme confusion, with courts struggling to coordinate the language of section 1330 with common law constitutional principles concerning personal jurisdiction. For example, some courts have relied on section 1330(b) to hold explicitly that a party may not assert a lack of personal jurisdiction if one of the exceptions to immunity exists and service of process is proper.\(^{34}\) In courts that adopt this approach, there is no need to demonstrate the same sort of "minimum contacts" that are normally required to establish personal jurisdiction as a matter of constitutional law.\(^{35}\) Advocates of this position rely on several different rationales. Some claim that the constitutional protections of due process were built into the statute by Congress,\(^{36}\) thus implying that any judicial oversight is either unnecessary or unwarranted. This position is based on the FSIA's legislative history, which states:

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\(^{31}\) 28 U.S.C. § 1330(b).

\(^{32}\) Id. § 1330(a).


\(^{35}\) See Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (describing the constitutional "minimum contacts" analysis); see also supra notes 29–30 and accompanying text.

\(^{36}\) See, e.g., M.B.L. Int'l Contractors, 725 F. Supp. at 55.
Section 1330(b) provides in effect, a Federal long-arm statute over foreign states . . . . The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision . . . . Significantly, each of the immunity provisions, sections 1605 [including original subsections (a)(1) through (5)] – 1607, requires some connection between the lawsuit and the United States or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill.37

Thus, "this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state."38

The trouble with this approach is that it reverses the normal order of precedence in American constitutional law. Unlike jurisdictions where the legislature reigns supreme, in the United States the judiciary has the power and the obligation to review the constitutionality of all legislation. Congress does not decide whether it has adequately complied with constitutional principles; the courts do so.

Giving literal effect to the quoted portion of the FSIA’s legislative history would also give short shrift to other aspects of the legislative history, including the statement that “[a] principle purpose” of the FSIA “is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.”39 Requiring the courts to adhere slavishly to the statutory elements of personal jurisdiction would limit the judiciary’s oversight capacity, as envisioned by the FSIA itself. However, parsing out phrases from the legislative history has proved problematic, particularly since at least one court has termed that history inconclusive,40 while another has termed it insufficiently authoritative.41 Instead, it is more appropriate to

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39 FLOWERS, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. No. 91-1487 at 7 (1976), as cited in Halverson, supra note 27, at 119 n. 21.
interpret the statute in accordance with longstanding principles of constitutional law.

U.S. courts recently reviewed the rights of private individuals in actions to enforce arbitral awards and explicitly considered the question of personal jurisdiction under the FAA. As these cases make clear, subject-matter jurisdiction arises out of the provisions of Article III of the U.S. Constitution which divide power among the branches of government. Personal jurisdiction arises out of a completely separate area, namely the liberty-oriented Due Process Clause. The two issues cannot be collapsed into a single analysis, even if Congress wished to do so.

The Second Circuit recognized as much in Texas Trading & Milling Corp. v. Fed. Republic of Nigeria, an early FSIA case. Here, the court downplayed the legislative history and stated that "the [FSIA] cannot create personal jurisdiction where the Constitution forbids it." Numerous U.S. courts have followed Texas Trading and undertaken separate constitutional analyses after evaluating the statutory elements of personal jurisdiction under the FSIA. Although courts in several other circuits, including the Eleventh and Ninth Circuits as well as the D.C. District Court, followed Texas Trading, others have begun to question it on the grounds that foreign states may not be "persons" within the meaning of the U.S. Constitution and therefore may not be entitled to the same "minimum contacts" analysis that private parties are entitled to claim. This rationale arises as a result of the 1992 U.S. Supreme Court decision of Argentina v. Weltover, which assumed, without deciding, that a foreign state was a "person" under the Due Process Clause of the U.S. Constitution. However, the Supreme Court phrased its opinion in such a way as to signal a disinclination to extend due process protections to foreign states, should the question ever arise in the future. In so doing, the Supreme Court relied heavily on a

44 Id. at 308.
46 See, e.g., S & Davis Int'l Inc., 218 F.3d at 1303; Creighton Ltd. v. Gov't of the State of Qatar, 181 F.3d 118, 124–25 (D.C. Cir. 1999).
previous decision holding that individual U.S. states are not "persons" under the Due Process Clause.\footnote{\textit{Id.} (citing \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 323–24 (1966)).}

In 1981, when the Second Circuit held in \textit{Texas Trading} that a foreign state was a "person" within the meaning of the U.S. Constitution, it engaged in only a cursory analysis of the subject.\footnote{\textit{Texas Trading & Milling Corp. v. Fed. Republic of Nigeria}, 647 F.2d 300, 313 (2d Cir. 1981) (invoking the commercial activity exception under the FSIA), \textit{cert. denied}, 454 U.S. 1148 (1982).} Because \textit{Texas Trading} is not binding outside of the Second Circuit, the D.C. Circuit was able to undertake its own analysis of the constitutional status of foreign states in the 2002 case of \textit{Price v. Socialist People's Libyan Arab Jamahiriya}.\footnote{\textit{Price v. Socialist People's Libyan Arab Jamahiriya}, 294 F.3d 82 (D.C. Cir. 2002).} There, the D.C. Circuit concluded that foreign states are not "persons" as a matter of U.S. constitutional law and are therefore exempt from due process protections of personal jurisdiction.\footnote{\textit{Id.} at 99.} According to \textit{Price}, courts faced with actions under the FSIA need not—and indeed should not—consider the amount and type of contacts between a foreign state and the United States, but instead need only adopt the statutory "subject-matter jurisdiction plus service of process" test described above.\footnote{\textit{Id.}}

It was unclear whether \textit{Price}, which arose under section 1605(a)(7) (the terrorism exception) would apply to enforcement actions under sections 1605(a)(1) (implied waiver) or 1605(a)(6) (arbitration) of the FSIA. Recently, however, the D.C. Circuit demonstrated its willingness to extend the principles of \textit{Price} to actions to enforce foreign arbitral awards in \textit{TMR Energy Ltd. v. State Property Fund of Ukraine}.\footnote{\textit{TMR Energy Ltd. v. State Property Fund of Ukraine}, 411 F.3d 296, (D.C. Cir. 2005).} Whether this approach will be adopted outside the D.C. Circuit and whether it will (or should) be upheld within the Circuit remains to be seen.

III. JURISDICTION IN ENFORCEMENT ACTIONS

Parties wishing to enforce a foreign arbitral award against a foreign state or state party tend to proceed under either section 1605(a)(6), the arbitration exception, or section 1605(a)(1), the implied waiver exception.\footnote{A party could also rely on section 1605(a)(2), the commercial activity exception, but arguments under that section do not rely on the existence of an arbitral award, as arguments under sections 1605(a)(1) and 1605(a)(6) do. Therefore, this Article focuses solely on sections 1605(a)(1) and 1605(a)(6).} We will review each section in turn.
A. Personal Jurisdiction Under the Arbitration Exception

1. Prior Case Law

The text of section 1605(a)(6) of the FSIA is quite lengthy. The relevant portion states:

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

... (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards . . . .

Only a handful of federal cases discuss the issue of personal jurisdiction under the arbitration exception, and all of them combine the arbitration analysis with an implied waiver argument based on section 1605(a)(1). So closely are the two arguments linked that it is unclear whether the courts will allow a party to argue jurisdiction based only on the arbitration exception. For example, the plaintiff in TMR Energy explicitly denied its reliance on the implied waiver exception in the trial court, choosing instead to focus on the arbitration exception. Nevertheless, the D.C. District Court raised the implied waiver issue sua sponte, eventually basing its decision on those grounds despite the defendant's claim that a court may not consider jurisdictional grounds explicitly eschewed by the plaintiff.

57 Brief of Appellant State Property Fund of Ukraine, p. 25 (document on file with the author and with the D.C. Circuit Court).
58 Id. at 25, 30 (citing World Wide Minerals, Ltd. v. Republic of Kazakhstan, 296 F.3d
Of the six other cases involving the arbitration exception, only two have held that subject-matter jurisdiction existed based on that exception. Both are questionable on personal jurisdiction grounds. For example, \textit{S & Davis International v. Republic of Yemen} \textsuperscript{59} involved an arbitral award against a Yemeni corporation that was held to be an agency or instrumentality of the state of Yemen. There was some question as to whether the exception could apply against Yemen itself, since it was not a signatory to the arbitration agreement, but the Eleventh Circuit held that the defendant corporation was under the control of the state and that therefore section 1605(a)(6) applied. \textsuperscript{60} The Eleventh Circuit addressed the question of personal jurisdiction separately from that of subject-matter jurisdiction but did not discuss its reasons for undertaking a constitutional due process analysis. Instead, the court sidestepped the issue of whether a foreign state or agency is a “person” under the U.S. Constitution, preferring to hold that, in any event, the constitutional elements of personal jurisdiction were met in these circumstances. \textsuperscript{61} Although the Eleventh Circuit’s opinion is evenhanded in many respects, it provides fodder for those who believe that a state’s agreement to arbitrate a dispute opens that state up to enforcement proceedings in virtually any country \textsuperscript{62} by indicating that it is “only ‘fair and just’ [for a plaintiff] to seek enforcement of the outcome of a good faith agreement to arbitrate.” \textsuperscript{63} The court also held that this sort of enforcement action “comports with the minimum contacts determination that the defendant ‘should reasonably anticipate being haled into court’ in the forum’s jurisdiction.” \textsuperscript{64}

\textit{Creighton Ltd. v. Government of the State of Qatar} also involved the successful application of the arbitration exception to the issue of subject-matter jurisdiction, although the primary question here was whether the arbitration exception could be applied retroactively, which was answered in the affirmative. \textsuperscript{65} However, the D.C. Circuit separated its discussion of subject-matter jurisdiction from its discussion of personal jurisdiction, stating that “although subsection (a)(6) confers subject matter jurisdiction upon the court, it does not follow that Qatar waived its objection to personal

\textsuperscript{59} S & Davis Int’l, 218 F.3d at 1292.
\textsuperscript{60} Id. at 1302.
\textsuperscript{61} Id. at 1303.
\textsuperscript{62} See, e.g., Halverson, supra note 27, at 179–84.
\textsuperscript{63} S & Davis Int’l, 218 F.3d at 1304–05 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
\textsuperscript{64} S & Davis Int’l, 218 F.3d at 1304–05.
\textsuperscript{65} Creighton Ltd. v. Government of the State of Qatar, 181 F.3d 118 (D.C. Cir. 1999). The retroactivity of the FSIA was confirmed by the U.S. Supreme Court in Austria v. Altmann, 541 U.S. 677 (2004).
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jurisdiction.”

Indeed, the D.C. Circuit claimed that “the decisions of which we are aware have held that an implicit waiver of personal jurisdiction in a defendant’s agreement to litigate or to arbitrate in a particular jurisdiction is applicable only within that jurisdiction.” Thus “[i]t seems . . . implausible that Qatar, by agreeing to arbitrate in France, a signatory to a treaty containing a similar reciprocal ‘recognition and enforcement’ clause, should be deemed thereby to have waived its right to challenge personal jurisdiction in the United States.” This, of course, takes the opposite view of S & Davis by suggesting that courts that rely on the arbitration exception must do more than simply establish the existence of an arbitral award before concluding that personal jurisdiction exists.

Although the D.C. Circuit was influenced by the fact that Qatar was not a signatory to the New York Convention, the case provides a useful analysis of section 1605(a)(b)’s ability to confer personal jurisdiction, as opposed to its ability to confer subject-matter jurisdiction.

2. TMR Energy

Given the dearth of case law regarding personal jurisdiction and enforcement of arbitral awards under the FSIA, TMR Energy takes on additional importance. TMR Energy followed the holding in Price, namely that foreign states are not entitled to due process protections under the U.S. Constitution, and extended that principle to include state agencies and instrumentalities. If one agrees to the basic principle in Price—that a state should not be accorded due process under the U.S. Constitution—then the outcome in TMR Energy is a foregone conclusion. As the D.C. Circuit stated, “[i]f the State of Ukraine exerted sufficient control over the [State Property Fund, or SPF] to make it an agent of the State, then there is no reason to extend to the SPF a constitutional right that is denied to the sovereign itself.” As a result, “SPF—like its principal, the State of Ukraine—is not a ‘person’ for purposes of the due process clause and cannot invoke the minimum contacts test to avoid the personal jurisdiction of the district court.”

Upon closer examination, one sees the circularity of the D.C. Circuit’s reasoning. The court decided that, “where the issue is not service of process under the FSIA but whether an agency or instrumentality of a foreign state is entitled to the protection of the due process clause,” then a different analysis regarding what constitutes an agency or instrumentality of

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66 Id. at 126.
67 Id. (citations omitted).
68 Id. at 127.
69 Id.
71 Id. at 302.
a foreign state is necessary. However, the court's inquiry will always result in the agency or instrumentality not receiving any due process protections. Basically, the court recognizes that agencies and instrumentalities are normally presumed to be distinct and independent from the state unless a sufficient amount of control exists so as to create a relationship of principal and agent. If no such relationship exists, then the agency or instrumentality will not constitute a "foreign state" and will not be eligible for any immunity from suit under the FSIA. However, if a principle-agent relationship does exist, then the agency or instrumentality can be equated with the state and the U.S. court need not extend any due process rights to the agency or instrumentality under the U.S. Constitution. Thus, the analysis will always result in the court embracing jurisdiction over the state or state agency.

Both TMR Energy and Price relied heavily on the fact that individual U.S. states are not considered "persons" under the Due Process Clause and that it therefore "would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system." The D.C. Circuit stated in Price that:

Never has the Supreme Court suggested that foreign nations enjoy rights derived from the Constitution, or that they can use such rights to shield themselves from adverse actions taken by the United States. This is not surprising. Relations between nations in the international community are seldom governed by the domestic law of one state or the other. And legal disputes between the United States and foreign governments are not mediated through the Constitution.

On its face, this appears to be a valid argument. Upon closer examination, however, it rings somewhat false. If foreign states are not entitled to some sort of due process protections, then why did so many courts, including the D.C. Circuit in Creighton, follow the lead of the Second Circuit in Texas Trading and undertake separate constitutional analyses concerning the

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72 Id. at 301.
73 Id.
75 Price, 294 F.3d at 97 (citations omitted).
76 Creighton Ltd. v. Government of the State of Qatar, 181 F.3d 118, 124-25 (D.C. Cir. 1999) (but noting that because the plaintiff did not make the argument that Qatar was not a "person" as a matter of constitutional law, the court could not address the issue).
limits of personal jurisdiction? One answer may be that in undertaking the "minimum contacts" analyses, the courts were recognizing, however inelegantly, that principles of international law and comity require some sort of nexus between the forum and the defendant state,78 and were merely channeling their inquiries through a familiar constitutional construct. Certainly the decision in TMR Energy suggests that to be true, with the court noting that denying constitutional due process protections is not to say a foreign state is utterly without recourse but only that, "unlike private entities, foreign nations [being] the juridical equals of the government that seeks to assert jurisdiction over them," have available "a panoply of mechanisms in the international arena through which to seek vindication or redress" if they believe they have been wrongly haled into court in the United States.79

A close reading of the FSIA's statutory declaration of purpose also indicates that the FSIA was intended to conform with international norms regarding sovereign immunity and thus "serve the interests of justice" and "protect the rights of both foreign states and litigants."80 Notably, however, neither Price nor TMR Energy undertook any such international analysis. TMR Energy recognized that the defendant raised a defense based on customary international law,81 but held that customary international law cannot "prevail over a contrary federal statute," in this case 28 U.S.C. § 1330(b), which states that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."82 Again, however, that strict statutory reading flies in the face of the FSIA's statutory declaration of purpose, which references "international law"—and acknowledges the desire to "protect the

78 See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 313 (5th ed. 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 121(2) (1987).
79 TMR Energy, 411 F.3d at 300 (quoting Price, 294 F.3d at 98).
80 28 U.S.C. § 1602. But see Texas Trading, 647 F.2d at 310 (noting § 1602 contains a reference to international law "but fails wholly to adopt it").
81 It is unclear what aspects of customary law were asserted by the defendant, but the opinion is silent concerning the propriety, as a matter of comity, of adjudicating the rights of a foreign state or state agency in a situation like this, where no property of the agency existed in the United States. The decision is also silent regarding whether and to what extent the United States has ever permitted its agencies and instrumentalities to be subject to the jurisdiction of foreign courts where no minimum contacts existed.
82 TMR Energy, 411 F.3d at 303.
83 The term "international law" would appear to include customary international law concerning sovereign immunity, since the United States is not and never has been a party to any multilateral treaties on immunity, whereas other countries, such as the United Kingdom, are. See European Convention on State Immunity (ETS no. 074), entered into force June 11, 1979. In addition, the U.S. Supreme Court has held that any alleged waiver of immunity
rights . . . of foreign states." 84

In many respects, the D.C. Circuit would have been far better off limiting the applicability of Price to its particular facts, as problematic as they were. Price involved a new exception to sovereign immunity, added in 1996, which gave the United States jurisdiction over acts involving torture, hostage taking, and extrajudicial killing. 85 This is a radical departure from the bases for the other exceptions to sovereign immunity, which require either "commercial activity" or waiver. 86 Instead, section 1605(a)(7) seems to give the United States the right and the power to police other state's human rights violations, something that has been hotly debated and contested as a matter of international law. 87 In light of the extraordinary nature of section 1605(a)(7), courts should be loath to extend Price to the other exceptions to sovereign immunity, as the D.C. Circuit has done in TMR Energy.

Instead, a narrow construction of Price seems much more appropriate. First, Price itself recognized that "[u]nder the original FSIA . . . it was generally understood that in order for immunity to be lost, there had to be some tangible connection between the conduct of the foreign defendant and the territory of the United States." 88 Price asserted that the 1996 amendment "changed this statutory framework," 89 but did not state whether that change affected all exceptions to sovereign immunity or only those relating to terrorism. Second, the D.C. District Court recognized in BPA Int'l, Inc. v. Kingdom of Sweden, a case involving personal jurisdiction under the FSIA decided just three months after Price, that "before the 1996 amendments to the FSIA . . ., FSIA clearly required a nexus between a plaintiff's claims and the United States, comparable to minimum contacts." 90 It is notable that the court included the arbitration exception, created by amendment in 1988, in this statement. The court in BPA Int'l went on to assert that:

The 1996 amendments relaxed these requirements for claims under a new exception to the presumption of immunity for foreign nations—

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88 Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 89 (D.C. Cir. 2002)
89 Id. at 90.
claims such as torture, hostage taking and extrajudicial killing. Neither the amendments nor the discussion in Price changed the pre-existing requirements that there must be some connection between a plaintiff’s claims and the United States for a U.S. court to assert jurisdiction over a foreign government or its instrumentality.

*BPA Int’l* thus clearly suggested that *Price* was to be limited to its facts. Although *BPA Int’l* involved the commercial activity exception rather than the arbitration exception, *Creighton*—also from the D.C. Circuit—and *S & Davis Int’l* from the Eleventh Circuit—both provide additional support for the proposition that due process analyses are proper and necessary under the arbitration exception.

As the cases demonstrate, the arbitration exception has not often been successfully applied in practice. Courts faced with actions to enforce arbitral awards in the past have often preferred to proceed under section 1605(a)(1) of the FSIA, the implied waiver exception, discussed below.

**B. Personal Jurisdiction Under the Implied Waiver Exception**

### 1. Prior Case Law

According to section 1605(a)(1) of the FSIA, foreign states “shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication . . .”92 Prior to 1988, parties wishing to enforce an arbitral award against a foreign state had to proceed under an implied waiver theory, since section 1605(a)(6) had not yet been enacted.93 Typically, in the context of enforcement decisions, U.S. courts have held that where the defendant state is a contracting state to an enforcement treaty such as the New York Convention, to which the United States is also a party, then that state has waived any defense based on lack of subject-matter jurisdiction (and, in some cases, personal jurisdiction). The argument is that the defendant must have contemplated that the courts of one or more contracting states would become involved in an enforcement action at the time it signed the convention and the defendant cannot now be

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91 *Id.* at 82 (citations omitted).
heard to say that it should not be subject to the jurisdiction of U.S. courts.94

However, not every international treaty will give rise to an implied waiver. For example, in *Argentine Republic v. Amerada Hess Shipping*, the U.S. Supreme Court considered whether several international agreements that created no "private rights of action for foreign corporations to recover compensation from foreign states in United States courts" could provide the basis for a claim that a state had implicitly waived its immunity under section 1605(a)(1).95 As the Supreme Court stated, "we [do not] see how a foreign state can waive its immunity under [section] 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."96 Similarly, in *Frolova v. Union of Soviet Socialist Republics*, the Seventh Circuit rejected the argument that the Soviet Union had implicitly waived its sovereign immunity because it was a signatory to the United Nations Charter and the Helsinki Accords.97 These international agreements were deemed to be too vague and general, giving the court no basis for concluding that "the nations that are parties to these agreements anticipated when signing them that American courts would be the means by which the documents' provisions would be enforced."98

Additionally, courts may find that there is no implied waiver if the defendant state is not a signatory to an enforcement treaty such as the New York Convention, even if the award would otherwise be enforceable under the treaty. For example, in *S & Davis Int'l*, a Yemeni corporation agreed to arbitrate a dispute in London under the GAFTA rules.99 Although the award was enforceable in the United States as a foreign arbitral award under the New York Convention, the Eleventh Circuit refused to find that Yemen had relinquished its sovereign immunity under section 1605(a)(1) because Yemen was not a signatory to the New York Convention.100 Similarly, in *Creighton Ltd.*, the D.C. Circuit Court held that in agreeing to arbitrate a case in France, Qatar (a non-signatory to the New York Convention) did not

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96 *Id.* at 442–43.
97 *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 376–78 (7th Cir. 1985).
98 *Id.* at 378 (quoted in *Seetransport Wiking Trader*, 989 F.2d at 578).
99 *S & Davis Int'l Inc. v. Republic of Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000).
100 *Id.*
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waive its objection to personal jurisdiction in the United States.\(^{101}\)

Courts are split when it comes to deciding whether merely agreeing to arbitrate a dispute constitutes an implicit waiver to the jurisdiction of U.S. courts. Some courts look at the legislative history of the original FSIA, which suggests that "with respect to implicit waivers, the courts [in the pre-FSIA common law] have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract."\(^{102}\) Courts that take this approach often decide that the existence of an implicit waiver under section 1605(a)(1) grants both subject-matter jurisdiction and personal jurisdiction.\(^{103}\) However, these cases are older and from district, rather than circuit, courts.

The majority of courts take a restrictive view of implied waivers, noting that "[f]ederal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly."\(^{104}\) Indeed, "[i]f the language of the Act is applied literally, the result is that a foreign sovereign which has waived its immunity can be subjected to the personal jurisdiction of United States courts regardless of the nature or quality of its contacts with this country."\(^{105}\) A broad reading of the FSIA would presage a vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations: whenever a foreign sovereign had contracted with a private party anywhere in the world, and chose to be governed by the laws or answer in the forum of any country other than its own, it would expose itself to personal liability in the courts of the United States.\(^{106}\)

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\(^{101}\) Creighton Ltd. v. Government of the State of Qatar, 181 F.3d 118, 127 (D.C. Cir. 1999); see also supra notes 64–65 and accompanying text.

\(^{102}\) H.R. REP. No. 1487, 94th Cong. 2d Sess. at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617 (as quoted in S & Davis Int'l, 218 F.3d at 1301 (choosing the narrow approach)).


\(^{104}\) But see Creighton Ltd., 181 F.3d at 122 (noting the unwelcome effects of following the suggestions contained in the legislative history).


\(^{107}\) Id.
For these reasons, "it is incumbent upon the Court to narrow that provision's scope."\textsuperscript{107} The exception would be if the parties named the United States as the arbitral forum. In that case, courts would likely hold that an implicit waiver exists\textsuperscript{108} since the requisite level of intentionality would appear to exist.\textsuperscript{109} Selecting U.S. law to govern the dispute would also suggest that a foreign state has implicitly waived its objections to the jurisdiction of U.S. courts.\textsuperscript{110}

As always, it is important to distinguish between an exception's ability to grant subject-matter jurisdiction and its ability to grant personal jurisdiction.\textsuperscript{111} Only two cases appear to have concluded that the implicit waiver of subject-matter jurisdiction also implicitly waives personal jurisdiction.\textsuperscript{112} Numerous other cases concerning enforcement actions have considered the two issues separately. The best discussion of how an implicit waiver in an enforcement action affects personal jurisdiction appears in \textit{Creighton}. There, the D.C. Circuit held that although the arbitration exception granted subject-matter jurisdiction, it did not necessarily follow that Qatar waived its objection to personal jurisdiction.\textsuperscript{113} The court's rationale was that the arbitration exception dealt not with waiver (as did subsection (1)) but with forfeiture of the right to claim sovereign immunity and thus did not carry the same degree of intentionality as the waiver provision did.\textsuperscript{114} Therefore the court had to ask whether Qatar had waived its objections to personal jurisdiction in the U.S. courts, and if it had not, whether the constitutional due process requirements were met.\textsuperscript{115}

As indicated above, \textit{Creighton} concluded that a state's agreement to arbitrate in a jurisdiction other than the United States did not constitute a waiver of personal jurisdiction in the United States.\textsuperscript{116} While the court's opinion was likely influenced by the fact that Qatar was not a signatory to

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Maritime Ventures Int'l}, 689 F. Supp. at 1351.

\textsuperscript{109} \textit{Creighton Ltd.}, 181 F.3d at 122 ("[I]mplicit in [section] 1605(a)(1) is the requirement that the foreign state have intended to waive its sovereign immunity.").

\textsuperscript{110} \textit{Verlinden B.V.}, 488 F. Supp. at 1301.


\textsuperscript{113} \textit{Creighton Ltd.}, 181 F.3d at 126.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.} at 126-27. \textit{See supra} notes 64-65 and accompanying text.
the New York Convention, the analysis underscores the fact that courts must define the precise nature of a state’s actions and identify whether those actions affect subject-matter jurisdiction, personal jurisdiction or both. As Creighton demonstrates, it is possible that an action can establish an exception to sovereign immunity (i.e., subject-matter jurisdiction under the FSIA) but still not eliminate a state’s ability to object to personal jurisdiction in the U.S. courts.

2. TMR Energy

As mentioned above, the lower court in TMR Energy turned what was a case regarding the arbitration exception into a case regarding the implied waiver exception.\(^\text{117}\) However, the D.C. Circuit bypassed the implied waiver argument altogether, relying solely on the defendant’s admission that section 1605(a)(6) of the FSIA applied.\(^\text{118}\) As such, the question of whether a defendant in an enforcement action proceeding under section 1605(a)(1) may insist on a minimum contacts analysis is technically still open.

As courts consider the question, they would be well served to consider the rationale behind the restrictive view of implied waiver.\(^\text{119}\) As the Second Circuit has noted, a majority of courts have construed the implied waiver exception narrowly.\(^\text{120}\) To decide otherwise would give U.S. courts jurisdiction over virtually any case where a foreign sovereign contracted with a private party and chose to have the contract governed by the laws or resolved in the courts of another state.\(^\text{121}\) As the Second Circuit and New York federal district courts have recognized, broad jurisdiction over foreign states and state agencies is antithetical to the perceived international understanding concerning sovereign immunity as well as the bulk of existing U.S. case law. Therefore, courts should hesitate before effectively reversing years of precedent by extending Price and TMR Energy to implied waiver situations. Although it is likely that future cases in the D.C. Circuit will follow TMR Energy rather than BPI Int’l,\(^\text{122}\) that is not


\(^{118}\) TMR Energy, 411 F.3d at 299.

\(^{119}\) See supra notes 99–101 and accompanying text.


necessarily true outside of the D.C. Circuit.

IV. FURTHER CONSIDERATIONS

As can be seen, the law concerning personal jurisdiction over foreign states or state agencies in enforcement actions is at a crossroads. For decades, courts have struggled to resolve the tensions between the language of the FSIA and constitutional notions of due process. On the one hand, the text and legislative history of the FSIA suggest that there is no need to establish a jurisdictional nexus between the foreign state and the United States in cases involving sections 1605(a)(6) and 1605(a)(1), while on the other hand, numerous decisions have held that parties must comply with constitutional principles governing personal jurisdiction. Although the debate seemed nearly settled at one point, the D.C. Circuit has transformed the issue by shifting the focus away from the FSIA to the U.S. Constitution itself. Courts in other circuits will doubtless be revisiting their decisions about the need to consider personal jurisdiction in FSIA actions in the wake of the D.C. Circuit’s recent decisions holding that a foreign state cannot be considered a “person” for purposes of the Due Process Clause of the Constitution.

At this point, the only other circuits that have addressed the question of personal jurisdiction in enforcement actions are the Second and the Eleventh Circuits. The Second Circuit appears to follow Texas Trading quite closely and consistently, and will likely not be swayed by the analysis in Price and TMR Energy. The Eleventh Circuit, on the other hand, demonstrated doubts about the personality of a foreign state in S & Davis and therefore may follow the D.C. Circuit given the opportunity. No other circuits appear to have addressed the issue at either the trial or appellate level, thus leaving parties likely to pursue an enforcement action in those courts with a great deal of uncertainty.

Although Price and TMR Energy create problems under U.S. law, they cause even greater concern under international law. The United States appears exceedingly anxious to grant itself jurisdiction over foreign sovereigns even though one doubts that the United States would allow itself, its agencies, or its instrumentalities to be subject to the jurisdiction of foreign courts under similar circumstances. Given that perspective, the D.C. Circuit’s elimination of minimum contacts as a requirement for jurisdiction becomes even more questionable. At the end of the day, it doesn’t really matter whether the analysis proceeds under U.S. constitutional law or international law, as long as it takes place. Unfortunately, the case law, taken as a whole, suggests that U.S. courts are more likely to consider such matters if they are embedded within the framework of domestic law. Indeed, if the opinion in TMR Energy is any indication, U.S. courts lack the inclination to analyze the question of
immunity and jurisdiction under international law.

There is also a wider policy point to consider. In a day and age where the United States is condemned for acting unilaterally, U.S. courts should be hesitant to accept a wider jurisdiction than previously existed as a matter of both domestic and international law. Demonstrating a judicious restraint would signify a respect for international norms that would serve U.S. interests—and the interests of justice—well.