Congressional Research Service
Informing the legislative debate since 1914

In Re Terrorist Attacks on September 11, 2001: Claims Against Saudi Defendants Under the Foreign Sovereign Immunities Act (FSIA)

Jennifer K. Elsea
Legislative Attorney

January 22, 2015

Congressional Research Service
7-5700
www.crs.gov
RL34726

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Practical and legal hurdles, including the difficulty of locating hidden al Qaeda members and the infeasibility of enforcing judgments in terrorism cases, hinder victims' attempts to establish liability in U.S. courts against, and recover financially from, those they argue are directly responsible for the September 11 terrorist attacks. Instead, victims have sued numerous individuals and entities with only indirect ties to the attacks, including defendants who allegedly provided monetary support to al Qaeda prior to September 11, 2001. Within the consolidated case *In re Terrorist Attacks of September 11, 2001*, one such group of defendants was the Kingdom of Saudi Arabia, several Saudi princes, a Saudi banker, and a Saudi charity. Plaintiffs argued that these Saudi defendants funded groups that, in turn, assisted the attackers.

A threshold question in *In re Terrorist Attacks* was whether U.S. courts have the power to try these Saudi defendants. In August 2008, the U.S. Court of Appeals for the Second Circuit affirmed dismissals of all claims against the Saudi defendants, holding that U.S. courts lack jurisdiction over the claims. Specifically, the court of appeals held that in this case, U.S. courts lack (1) subject matter jurisdiction over the Kingdom of Saudi Arabia, because the Kingdom is entitled to immunity under the Foreign Sovereign Immunities Act (the FSIA) and no statutory exception to immunity applies; (2) subject matter jurisdiction over the Saudi charity and Saudi princes acting in their official capacities, because they are "agents or instrumentalities" of the Kingdom and thus, under the FSIA, are entitled to immunity to the same extent as the Kingdom itself; and (3) personal jurisdiction over Saudi princes sued in their personal capacities, because the princes had insufficient interactions with the forum to satisfy the "minimum contacts" standard for personal jurisdiction under the Fifth Amendment due process clause.

In 2011, the Second Circuit reversed itself with respect to the immunity of non-terrorist states, finding that the tort exception under the FSIA does not exclude terrorist acts that take place within the United States. In 2013, the court ordered these claims against Saudi Arabia and its agencies or instrumentalities be reinstated in the interest of justice to determine whether the tort exception applies.

To address some issues related to the interpretation of the FSIA, among other related matters, the Senate passed the Justice Against Sponsors of Terrorism Act, S. 1535 (113th Congress), but the House did not take it up or vote on its companion bill, H.R. 3143 (113th Congress). This report summarizes the FSIA and jurisdiction in cases against foreign defendants, analyzes the court of appeals decision, and reviews legislative efforts to revise the FSIA and other relevant statutes.

Contents

Contacts

Numerous legal and practical obstacles, such as the infeasibility of locating al Qaeda operatives, stand in the way of victims seeking to establish liability in U.S. courts against, and recover damages from, the terrorists who planned and carried out the September 11, 2001, attacks. Victims, however, have sued numerous individuals and groups with only indirect ties to the attackers, including defendants who allegedly provided monetary support to al Qaeda prior to September 11, 2001.

In re Terrorist Attacks on September 11, 2001, is a consolidated case that includes, among other claims, claims against the Kingdom of Saudi Arabia, several Saudi princes, a Saudi banker, and a Saudi charity.[1] Plaintiffs argued that these Saudi defendants played a "critical role" in the September 11 attacks by giving money to Muslim groups, which in turn funded al Qaeda.[2] In August 2008, the U.S. Court of Appeals for the Second Circuit affirmed dismissals of the claims against the Saudi defendants.[3] However, part of the reasoning for the dismissals was later overturned, and the plaintiffs may now get a second chance to bring their suit against the Saudi government and government-owned charity. This report explains the legal bases for the initial dismissals and provides an update to the status of the case.

To address the court's initial interpretation of the FSIA, among other related matters, the Senate passed the Justice Against Sponsors of Terrorism Act, S. 1535 (113th Congress). However, the House did not take it up or vote on its companion bill, H.R. 3143 (113th Congress). This report addresses relevant legislative developments in its final section.

Overview of the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (the FSIA) applies to all foreign states and their "agents and instrumentalities."[4] Immunity for sovereign nations against suits in U.S. courts has a long history and is based on the principle that conflicts with foreign nations are more effectively addressed through diplomatic efforts than through judicial proceedings.[5] Congress passed the FSIA to codify these long-standing principles and to clarify limitations on the scope of immunity that had emerged in international practice.[6]

The FSIA contains both a general, presumptive rule against litigation in U.S. courts and a number of exceptions permitting suits. As a general rule, foreign states, together with their agents and instrumentalities, are "immune from the jurisdiction of the courts of the United States and from the states."[7] However, the FSIA authorizes jurisdiction over foreign nations in several

[1] *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71 (2d Cir. 2008), *cert. denied sub nom.* Federal Ins. Co. v. Kingdom of Saudi Arabia, 557 U.S. 935 (2009) ("*Terrorist Attacks III*").

[2] 538 F.3d at 76.

[3] *Id*. at 75-76.

[4] Foreign Sovereign Immunities Act of 1976, P.L. 94-583; codified at 28 U.S.C. §1602 *et seq.*

[5] For more on the history of foreign sovereign immunity and the FSIA, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea. *See also* Elizabeth L. Barh. *Is the Gavel Mightier Than the Sword? Fighting Terrorism in American Courts*. 15 GEO. MASON L. REV. 1115, 1125 (2008).

[6] *See* Permanent Mission of India to United Nations v. City of New York, 551 U.S. 193, 199 (discussing Congress's intention to codify an understanding of immunity as restricted to public acts and to codify the real property exception existing in international practice at the time).

[7] 28 U.S.C. §1604.

exceptions.[8] Namely, a foreign state is not immune from U.S. courts' jurisdiction where (1) the foreign state has waived its immunity;[9] (2) the claim is a specific type of admiralty claim;[10] (3) the claim involves commercial activities;[11] (4) the claim implicates property rights connected with the United States;[12] (5) the claim arises from tortious conduct that occurred in the United States;[13] (6) the claim is made pursuant to an arbitration agreement;[14] or (7) the claim seeks money damages against a designated state sponsor of terrorism for injuries arising from a terrorist act.[15]

The exception for designated state sponsors of terrorism provides jurisdiction over cases involving designated "state sponsor[s] of terrorism" in suits involving "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."[16] However, the exception seems to apply only to countries designated by the U.S. Department of State as state sponsors of terrorism.[17] This list currently includes Cuba, Iran, Sudan, and Syria.[18] At the time suit was brought in the *In re Terrorist Attacks* litigation, the previous terrorism exception remained in force.

[8] 28 U.S.C. §1605.

[9] 28 U.S.C. §1605(a).

[10] 28 U.S.C. §1605(b).

[11] The commercial activities exception applies if a foreign state (1) conducts the relevant commercial activity in the U.S.; (2) performs an act in the U.S. related to the commercial activity in question; or (3) conducts commercial activity that causes a "direct effect" in the U.S. 28 U.S.C. §1605(a)(2).

[12] The property rights exception applies if (1) rights in property have been taken in violation of international law and the property at issue (or property exchanged for the property at issue) is located in the United States; (2) the property at issue (or property exchanged for the property at issue) is owned or operated by the foreign state or its agent or instrumentality and the foreign state or its agent or instrumentality is engaged in commercial activity in the United States; or (3) "the property rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue." 28 U.S.C. §1605(a)(3),(4).

[13] 28 U.S.C. §1605(a)(5).

[14] 28 U.S.C. §1605(a)(6).

[15] 28 U.S.C. §1605A.

[16] *Id.* Previously codified at 28 U.S.C. Section 1605(a)(7), the terrorist state exception has served as the basis for significant litigation since Congress added it to the FSIA in 1996. The exception has also spurred legal disputes over attachment of assets. As a result, it has been amended several times, most recently by Section 1083 of the National Defense Authorization Act for FY2008, which provided a new federal cause of action for lawsuits that rely on the exception and added provisions regarding attachment of foreign assets to facilitate satisfaction of money damages awards. P.L. 110-181. For information on suits against terrorist states, generally, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

[17] 28 U.S.C. Section 1605A(a)(2)(i)(I) provides that a "claim under this section" shall be heard if "the foreign state was designated as a state sponsor of terrorism" at the relevant time. 28 U.S.C. Section 1605A(a)(1) seems to remove immunity more broadly.

[18] 22 C.F.R. §126.1(d).

Jurisdiction in Cases Against Foreign Defendants

Before asserting jurisdiction to accept a case, a federal court[19] must establish its authority over the dispute involved and the parties to the litigation. In other words, courts must assert both subject matter jurisdiction over each claim and personal jurisdiction over each defendant in a case. For cases involving foreign defendants, the analyses for subject matter and personal jurisdiction differ according to whether the FSIA applies.

Subject Matter Jurisdiction

For claims by U.S. plaintiffs against foreign non-state defendants to whom the FSIA does not apply—for example, claims against individuals or corporations—federal law authorizes subject matter jurisdiction as long as the "amount in controversy" exceeds $75,000.[20]

In contrast, for claims against foreign states and their instrumentalities, the FSIA is a jurisdictional gatekeeper. The FSIA denies subject matter jurisdiction over claims against foreign defendants entitled to immunity.[21] Conversely, the FSIA authorizes subject matter jurisdiction over claims in which a foreign state would be entitled to immunity under the FSIA but for the application of an exception.[22] Individual foreign officials are not covered by the FSIA if they are sued in their capacity as individuals, but may be immune from suit under the common law of foreign sovereign immunity.[23]

Personal Jurisdiction

Personal jurisdiction is the second threshold hurdle for assertion of judicial authority in cases involving foreign defendants. Whereas subject matter jurisdiction governs courts' power over particular claims, personal jurisdiction governs courts' power over particular defendants. Thus, even if a court establishes jurisdiction over the subject matter of a claim, it cannot exercise its authority over a defendant for whom it lacks personal jurisdiction.[24]

---

[19] Although state courts occasionally hear cases involving foreign defendants, cases involving foreign states or foreign officials are usually removed to federal courts under 28 U.S.C. Section 1441(d). For this reason, this discussion focuses on jurisdiction in federal courts.

[20] 28 U.S.C. §1332(a).

[21] 28 U.S.C. §1330(a).

[22] *See* Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) ("'At the threshold of every action in a district court against a foreign state, ... the court must satisfy itself that one of the [FSIA] exceptions applies,' as 'subject-matter jurisdiction in any such action depends' on that application" (quoting *Verlinden v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1962)).

[23] Yousef v. Samantar, 560 U.S. 305 (2010). For more information about foreign official immunity, see CRS Report R41379, *Samantar v. Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, by Jennifer K. Elsea.

[24] *In rem* jurisdiction is an alternative jurisdictional basis permitting suits in some admiralty cases and in cases in involving immovable property. *In rem* jurisdiction does not authorize judicial power over particular defendants; rather, it provides jurisdiction over property located in the United States. As a practical matter, *in rem* jurisdiction is unlikely to serve as a basis for a defendant to which the FSIA applies, because the FSIA's exceptions effectively cover *in rem* jurisdiction. For this reason, in *Permanent Mission of India to the United Nations v. City of New York*, a case involving real property located in the United States, the Supreme Court essentially ignored any potential analysis of *in rem* jurisdiction and focused instead on the interpretation of the property exception under the FSIA. 551 U.S. 193 (2007).

Personal jurisdiction requires both statutory authority and satisfaction of Fifth Amendment due process standards. As with subject matter jurisdiction, statutory authority for personal jurisdiction over foreign defendants follows one of two distinct routes according to the FSIA's application. If the defendant is a foreign state or its agent or instrumentality, personal jurisdiction is statutorily authorized under the FSIA if subject matter jurisdiction is established.[25] Alternatively, for a defendant who is not a foreign state or its agency or instrumentality, the ordinary procedure for obtaining statutory authority for personal jurisdiction applies; typically, a federal court must find statutory authority for personal jurisdiction in the laws of the state in which it sits.[26]

However, constitutional limits apply regardless of a statutory basis for personal jurisdiction. Under the due process clause, personal jurisdiction is constitutional if (1) defendants have had "certain minimum contacts with" the judicial forum attempting to assert jurisdiction, and (2) asserting such jurisdiction "does not offend traditional notions of fair play and substantial justice."[27] The type and quantity of contacts necessary to constitute "minimum contacts" differ according to the type of personal jurisdiction—general or specific—that applies. General jurisdiction, which allows a court to exercise jurisdiction over a foreign defendant for any claim, does not require contacts related to the specific claim in the case but instead requires "continuous and systematic" contacts with a forum.[28] Conversely, specific jurisdiction, which limits a court's jurisdiction over a defendant to claims in a particular case, involves no "continuous and systematic" requirement; instead, it requires that a defendant's contacts with the forum "relate to" or "arise out of" the claim at issue in the case.[29]

U.S. Court of Appeals Decision in *In Re Terrorist Attacks on September 11, 2001* ("*Terrorist Attacks III*")

In August 2008, the U.S. Court of Appeals for the Second Circuit affirmed dismissals of claims against the Kingdom of Saudi Arabia, a Saudi charity, Saudi princes, and a Saudi banker in *In re Terrorist Attacks on September 11, 2001*.[30] Plaintiffs in the case are victims of the September 11 terrorist attacks. They alleged that the Saudi defendants had supported al Qaeda's financial backers prior to the attacks and were therefore civilly liable for plaintiffs' injuries. However, the court of appeals did not reach the merits of these allegations.

Instead, the court held that U.S. courts lack jurisdiction over the claims against the Saudi defendants.[31] The legal bases for this holding were lack of subject matter jurisdiction under the FSIA and lack of personal jurisdiction. The most significant aspects of the court of appeals'

[25] 28 U.S.C. §§1330(b), 1608.

[26] Fed. R. Civ. P. 4(k). However, most U.S. states' so-called "long-arm" statutes extend personal jurisdiction to the extent authorized under the U.S. Constitution. Thus, in many cases, identical statutory and constitutional analyses apply to personal jurisdiction questions.

[27] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotations omitted).

[28] Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 416 (1984) (internal quotation marks omitted).

[29] *Id*. at 414 n.8.

[30] *Terrorist Attacks III*, 538 F.3d 71 (2d Cir. 2008).

[31] *Id*. at 75-76.

opinion were interpretations of the FSIA, namely (1) its interpretation of "agency or instrumentality" under the FSIA as extending both to the Saudi charity and to individuals sued in their official capacities, and (2) its interpretation of the commercial activities and tort exceptions under the FSIA as having a narrower scope than plaintiffs had advocated.

The Supreme Court later abrogated the first of these holdings,[32] and the Second Circuit reversed its own position with respect to the tort exception to foreign sovereign immunity.[33] In December 2013, the Second Circuit ordered these claims against Saudi Arabia and its agencies or instrumentalities be reinstated in the interest of justice to determine whether the tort exception applies.[34] The plaintiffs now have a second chance to bring suit against the Kingdom of Saudi Arabia and the Saudi charity.

Background

In re Terrorist Attacks is a case consolidated for pre-trial purposes in the U.S. District Court for the Southern District of New York.[35] The Second Circuit Court of Appeals opinion reviewed dismissals of only a subset of the claims at issue in the case.

Plaintiffs in *In re Terrorist Attacks* are individuals and businesses injured by the September 11 terrorist attacks. They brought claims based on state and federal tort law and various federal laws, including the Torture Victim Protection Act, for injuries suffered as a result of the attacks.[36]

The dismissed claims fall into four categories: (1) claims against the Kingdom of Saudi Arabia; (2) claims against four Saudi princes in their official capacities; (3) claims against the Saudi High Commission for Relief to Bosnia and Herzegovina (the SHC), a charitable organization operated in connection with the Saudi government; and (4) claims against a banker and Saudi princes in their personal capacities.[37] Underlying all of the claims was the allegation that defendants had "played a critical role in the September 11 attacks by funding Muslim charities that, in turn, funded al Qaeda."[38]

The court in 2008 affirmed dismissals of the first three sets of claims for lack of subject matter jurisdiction under the FSIA. Because the FSIA precludes courts from asserting jurisdiction over

---

[32] The Supreme Court's 2010 decision in Yousef v. Samantar, 560 U.S. 305 (2010), rejected the majority position among the judicial circuits holding that individual foreign officials are "agencies or instrumentalities" of the foreign government. Instead, foreign officials are not covered by the FSIA but may be entitled to immunity under the common law. For more information about foreign official immunity, see CRS Report R41379, *Samantar v. Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, by Jennifer K. Elsea.

[33] Doe v. Bin Laden, 663 F. 3d 64 (2d Cir. 2011) (per curiam).

[34] *In re* Terrorist Attacks on September 11, 2001, 741 F.3d 353 (2d Cir. 2013), *cert denied*, 134 S. Ct. 2875 (2014). Before the court was the district court's denial of the plaintiffs' motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. Pro.). The appellate court found that relief was justified based on the fact that it had permitted similarly situated plaintiffs in the same set of cases to bring suit against a non-terrorist state after overturning its reasoning with respect to the tort exception to the FSIA. Issues to be decided on remand include whether the discretionary function limitation to the tort exception applies and whether the "entire tort" rule applies.

[35] *Terrorist Attacks III*, 538 F.3d at 78.

[36] *Id*. at 75.

[37] *Id*. at 76-78.

[38] *Id* at 76.

claims against foreign states, one of the FSIA exceptions must apply before a U.S. court may assert jurisdiction over the Kingdom of Saudi Arabia or any of its "agencies or instrumentalities." As discussed below, the Second Circuit held that none of the FSIA exceptions applied.

The fourth set of claims (those brought against princes in their personal capacities) fell outside of the scope of the FSIA. Nonetheless, as discussed below, the court dismissed those claims for lack of personal jurisdiction.

Charity and Princes as "Agencies and Instrumentalities" of the Kingdom

Because a foreign state's "agency or instrumentality" is entitled to the same immunity to which the state itself is entitled under the FSIA, a key threshold question was whether the SHC and the princes sued in their official capacities qualified as agents or instrumentalities under the FSIA. The FSIA defines "agency or instrumentality" as any entity which is (1) a "separate legal person, corporate or otherwise"; (2) "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and (3) not a U.S. citizen or created under the laws of a third country.[39]

The SHC Charity

Whether the SHC was an agent or instrumentality turned on whether it was an "organ" of the Kingdom of Saudi Arabia.[40] The court applied a multi-factor test, derived from a previous Second Circuit decision and from decisions from other circuits, to determine whether SHC was such an "organ."[41] Specifically, the court applied the following five criteria: "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity, (3) whether the foreign state requires the hiring of public employees and pays their salaries, (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law."[42] Emphasizing that the Saudi government had formed SHC and paid its employees, the court held that the SHC was an organ, and thus was an "agent or instrumentality," of the Kingdom.[43]

Officials

The plaintiffs sued four Saudi princes for actions taken within their official capacities.[44] All four princes hold positions of power in the SHC; three of the princes are members of the country's "Supreme Council of Islamic Affairs," the body responsible for monitoring and approving

[39] 28 U.S.C. §1603(b).

[40] *See* definition, 28 U.S.C. §1603(b).

[41] *Terrorist Attacks III*, 538 F.3d at 85-86 (citing *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004)).

[42] *Id*.

[43] *Id*.

[44] The four princes named were Prince Salman bin Abdulaziz al-Saud, Prince Sultan bin Abdulaziz al Saud, Prince Naif bin Abdulaziz al-Saud, and Prince Turki al-Faisal bin Abdulaziz al Saud. *Id*. at 77.

"Islamic charitable giving both within and outside the Kingdom"; and the fourth prince is the SHC's president, in addition to his roles as a provincial governor and crown prince.[45]

Although several other federal courts of appeals have ruled on the extension of foreign sovereign immunity to foreign officials, treatment of officials under the FSIA was a question of first impression for the Second Circuit.[46] Raising a number of textual arguments and referencing the FSIA's legislative history, the court held that individuals acting within their official capacities were indeed "agents or instrumentalities" of their states and were therefore entitled to immunity under the FSIA to the same extent as their states.[47] The court noted that at the time the FSIA was enacted, Congress expressed a desire to codify common law principles, one of which was that immunity extends to a state's officials.[48] The court also emphasized the potential erosion of immunity for foreign states if immunity extended only to government actions distinct from the actions of officials as individuals, noting that "the state cannot act except through individuals."[49]

The Second Circuit Court of Appeals' holding was consistent with the conclusions of five of the six other federal courts of appeals that had considered whether an individual may be protected as an agent or instrumentality.[50] Only the Court of Appeals for the Seventh Circuit had reached the opposite conclusion.[51] In *Terrorist Attacks III*, the Second Circuit characterized the Seventh Circuit as an "outlier" on this issue.[52] However, after the Fourth Circuit also adopted the minority position,[53] the Supreme Court granted review and established the minority position as the correct one.[54] Consequently, jurisdiction over remaining Saudi officials is subject to the same inquiry that applies to other individuals and possibly a determination as to whether common law immunity applies.[55] Because the officials dismissed from this case were not part of the motion to vacate, plaintiffs will not have an opportunity to pursue their lawsuit against them on remand. Claims against them in their official capacity would likely be deemed to be claims against the state or its instrumentality in any event.

---

[45] *Id*.

[46] *Id*. at 80-81.

[47] *Id*. at 81-85.

[48] *Id*. at 81-83.

[49] *Id*. at 84.

[50] The Fourth, Fifth, Sixth, Ninth, and the D.C. Circuits had held that officials acting within their official capacities are "agents or instrumentalities" of their countries for the purpose of the FSIA. *See* Velasco v. Gov't of Indonesia, 370 F.3d 392, 399 (4th Cir. 2004); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101-03 (9th Cir. 1990).

[51] In *Enahoro v. Abubakar*, the Seventh Circuit rejected a military junta general's immunity claim. 408 F.3d 877 (7th Cir. 2005). Focusing on the text of the FSIA, the *Enahoro* court held that the phrase "separate legal person, corporate or otherwise" within the "agency or instrumentality" definition in the statute, together with a lack of statutory references to individuals, suggested a lack of congressional intent to extend immunity to individuals. *Id*. at 881-82.

[52] *Terrorist Attacks III*, 538 F.3d at 81.

[53] Yousef v. Samantar, 538 F.3d 71 (2d Cir. 2008).

[54] Yousef v. Samantar, 560 U.S. 305 (2010).

[55] *In re* Terrorist Attacks on September 11, 2001, 718 F. Supp. 2d 456, 466-67 (S.D.N.Y. 2010). The district court found, with respect to five foreign officials who were still defendants in the suit, that personal jurisdiction could not be established and that, therefore, there was no need to analyze whether common law immunity should be granted.

Relevant FSIA Exceptions

After holding that the FSIA applied not only to the Kingdom of Saudi Arabia but also to Saudi officials and the SHC as an agency or instrumentality of the Kingdom, the court of appeals next examined whether any FSIA exception applied. First, the court held that the terrorist state exception did not apply because the U.S. State Department has not designated the Kingdom of Saudi Arabia as a state sponsor of terrorism.[56] Next, although the court found two other exceptions—the commercial activity and tort exceptions—"potentially relevant,"[57] neither exception applied to the Saudi defendants.

Commercial Activities Exception

To support their argument that the commercial activities exception should apply to the Saudi defendants, the *In re Terrorist Attacks* plaintiffs characterized defendants' charitable contributions to Muslim groups as a form of money laundering.[58] The court rejected this characterization as incompatible with the Supreme Court's interpretation of the commercial activities exception.

The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act."[59] The court noted the "circularity" of this definition and relied upon the U.S. Supreme Court's definition of "commercial activity" (for the context of the FSIA exception) as "the *type* of actions by which a private party engages in 'trade and traffic or commerce.'"[60] Under this definition, the court noted that the appropriate focus in determining whether an action constitutes "commercial activity" is on an action's nature rather than its purpose. With this framework, the court upheld the district court's finding that defendants' "charitable contributions" fell outside the scope of the commercial activities exception by reason of their non-commercial nature, regardless of the contributions' alleged money laundering purpose.[61] This portion of the decision remains undisturbed.

Tort Exception

Finally, the court of appeals rejected the tort exception as inapplicable to claims against the Saudi defendants. Specifically, the court noted that Congress's purpose in enacting the tort exception was to create liability for incidents, such as traffic accidents, that occur in the United States.[62] Furthermore, the court was concerned about the effect that an expanded tort exception would have on the other FSIA exceptions. It emphasized that if the exception were expanded to include all conduct conceivably characterized as tortious, the tort exception would "vitiate" the terrorist state exception's limitation to designated terrorist states.[63] A later panel of the appellate court

[56] *Id*. at 75.

[57] *Id*. at 80.

[58] *Id*. at 90-91.

[59] 28 U.S.C. §1603(d).

[60] *Terrorist Attacks III*, 538 F.3d at 91 (citing Republic of Argentina v. Weltover, 504 U.S. 607 (1992)).

[61] Because it determined that the contributions fell outside of the scope of "commercial activities," the court did not decide whether money laundering or other criminal acts could constitute "commercial activities" under the FSIA. *Id*. at n.17.

[62] *Id*. at 87.

[63] *Id*. at 88.

disagreed with this aspect of the decision, however, effectively overturning it for the Second Circuit.[64] In December 2013, the appellate court granted the plaintiffs relief from judgment[65] in the interests of justice, sending the case back to the district court to determine whether the tort exception applies or whether the defendants are entitled to immunity based on the discretionary nature of their actions.[66] The lower court will also be asked to determine whether the "entire tort" rule applies, in which case the fact that the relevant Saudi government activity took place outside the United States could make the tort exception inapplicable.[67]

Princes Sued in Their Personal Capacities

For claims made against a Saudi banker and against several Saudi princes for actions taken in their personal capacities, subject matter jurisdiction was not precluded by the FSIA. However, the court upheld the district court's determination that it lacked personal jurisdiction over the Saudi defendants sued in their personal capacities.[68]

Specifically, the court concurred with the district court's finding that the princes sued in their personal capacities lacked sufficient contacts with the forum to permit personal jurisdiction under the constitutional "minimum contacts" standard. Plaintiffs argued that the minimum contacts test was satisfied because the defendants had purposefully directed activity at the judicial forum by supporting the attacks. The court rejected this argument, acknowledging that it had been a successful argument in cases where defendants were "primary participants" in the terrorist acts but holding that the banker and princes' activities were too attenuated from the actual attacks to satisfy due process requirements.[69] Similarly, the court rejected the plaintiff's argument that potential foreseeability of the terrorist attacks was a sufficient basis for establishing minimum contacts.[70] It noted that foreseeability alone is insufficient to pass constitutional muster for personal jurisdiction; instead, the constitutional standard requires "intentional" conduct, "expressly aimed" at residents in the forum.[71]

---

[64] Doe v. Bin Laden, 663 F. 3d 64 (2d Cir. 2011) (per curiam) (FSIA non-commercial tort exception could be a basis for suit against Afghanistan arising from terrorist acts of September 11, 2001).

[65] *In re* Terrorist Attacks on September 11, 2001, 741 F.3d 353(2d Cir. 2013), *cert denied*, 134 S. Ct. 2875 (2014).

[66] 28 U.S.C. Section 1605(a)(5)(A) provides an exception to the tort exception for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." The district court had earlier held in the alternative that the tort exception to immunity did not apply on the basis of the discretionary function limitation, a finding the appellate court did not address because it held the tort exception inapplicable at any rate.

[67] The Second Circuit recently affirmed the dismissal of a related suit against two Saudi charities on the basis that the alleged torts they committed had occurred outside the United States. *In re* Terrorist Attacks on September 11, 2001, 714 F.3d 109 (2d Cir. 2013). For a discussion of the territorial requirements of the tort exception, see generally VED P. NANDA AND DAVID K. PANSIUS, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 3:21, *available at* Westlaw LOID.

[68] Doe v. Bin Laden, 663 F.3d at 96.

[69] *Id*. at 93-95.

[70] *Id*. at 94-95.

[71] *Id*.

Legislative Developments

In *Terrorist Attacks III*, the U.S. Court of Appeals for the Second Circuit adopted narrow interpretations of the commercial activities and tort exceptions under the FSIA, restraining efforts by September 11 victims and other plaintiffs seeking recovery in U.S. courts against foreign officials and government-controlled entities like the Saudi charity. The 111th Congress held a hearing to consider S. 2930, the Justice Against Sponsors of Terrorism Act,[72] which, among other measures, would have amended the tort exception to the FSIA specifically to cover terrorist attacks within the United States.

In the 112th Congress, new legislation was introduced to reduce some of the burdens faced by victims of state-sponsored terrorism in the United States who seek to bring lawsuits against foreign officials. S. 1894, the Justice Against Sponsors of Terrorism Act,[73] was ordered to be reported favorably out of the Senate Judiciary Committee in September 2012. A companion bill, H.R. 5904, did not receive further action.

Identical versions of the Justice Against Sponsors of Terrorism Act were introduced in the 113th Congress as S. 1535 and H.R. 3143. S. 1535 was reported favorably out of the Senate Judiciary Committee with some amendments to the findings and provisions addressing aiding and abetting liability under the Anti-Terrorism Act,[74] and was passed by the Senate in December 2014. The House did not vote on either version of the bill.

The bills would have amended the tort exception to the FSIA expressly to include "any statutory or common law tort claim arising out of an act of extrajudicial killing, aircraft sabotage, hostage taking, terrorism, or the provision of material support or resources for such an act.... " Although the aspect of the *Terrorist Attacks III* decision interpreting the tort exception as inapplicable to terrorist acts occurring in the United States was effectively overruled by another panel of judges,[75] it is possible that other courts could read the terrorism exception as foreclosing suits against states not designated as sponsors of terrorism. The tort exception would also have been amended to clarify that there is no rule holding that the "entire tort" must occur within the United States, but rather that such claims are covered "regardless of where the underlying tortious act or omission occurs."

---

[72] *Evaluating the Justice Against Sponsors of Terrorism Act, S. 2930: Hearing of the Crime and Drugs Subcommittee of The Senate Judiciary Committee*, 111th Cong. (2010).

[73] For more analysis of H.R. 3143 and S. 1535, see CRS Report R41379, *Samantar v. Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, by Jennifer K. Elsea.

[74] 18 U.S.C. Sections 2331 *et seq*. provide for treble damages for injuries caused by certain acts of international terrorism. The U.S. Court of Appeals for the Second Circuit dismissed actions against banks accused of providing support to the perpetrators of the 9/11 terrorist attacks on the basis that the ATA does not encompass liability for aiding and abetting acts of international terrorism. *In re* Terrorist Attacks on September 11, 2001, 714 F.3d 118 (2d Cir. 2013), *cert. denied sub nom.* O'Neill v. Al Rajhi Bank, 134 S. Ct. 2870 (2014). For more information about aiding and abetting liability and the Justice Against Sponsors of Terrorism Act (as reported out of the Judiciary Committee, 112th Congress), including proposed revisions to the ATA, see CRS Report WSLG250, *Who is Liable to Pay Damages to Victims of Terrorism?*, by Jennifer K. Elsea; CRS Report R41379, *Samantar v. Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, by Jennifer K. Elsea.

[75] Doe v. Bin Laden, 663 F. 3d 64 & n. 10 (2d Cir. 2011) ("mini-en banc" procedure employed by circulating draft opinion to other circuit judges, which did not draw objections from any of them).

Additionally, the bills would have expanded liability for foreign government officials in civil actions for terrorist acts no matter where they occur by amending 18 U.S.C. Section 2337, which currently exempts all government officials. The amended version of Section 2337 would have exempted only U.S. officials. In an effort to overcome difficulties in exercising personal jurisdiction over foreign nationals, including foreign officials, S. 1535 would have codified Congress's intent that

> district courts shall have personal jurisdiction, to the maximum extent permissible under the Fifth Amendment of the United States Constitution, over any person who commits or aids and abets an act of international terrorism or otherwise sponsors such an act or the person who committed such act, for acts of international terrorism in which any national of the United States suffers injury in his or her person, property, or business by reason of such an act....[76]

H.R. 3143 would have included the provision of material support for terrorism in the jurisdiction provision, although its revision of the ATA cause of action did not expressly include liability for material support.[77]

Author Contact Information

Jennifer K. Elsea
Legislative Attorney
jelsea@crs.loc.gov, 7-5466

Acknowledgments

An earlier version of this report was prepared by former Legislative Attorney Anna C. Henning.

[76] S. 1535 (as passed by the Senate, 113th Cong.), §5. The bill also contained a finding that appears to counter the Second Circuit's holding with respect to personal jurisdiction. Section 2(a)(9) of the bill provided the following:

> Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities.

[77] H.R. 3143 (113th Cong.) §4 (proposed amendment to 18 U.S.C. §2333 to enable claims against those accused of aiding and abetting acts of international terrorism or conspired with perpetrators). Section 4 of S. 1535 was amended to limit the cause of action to injuries arising from acts of international terrorism committed, planned, or authorized by a designated terrorist organization.