Cross-border enforcement of judgments against states – jurisdiction-by-jurisdiction guide

United States of America **(District of Columbia and New York)**	
Maria Kostytska, partner Winston & Strawn LLP mkostytska@winston.com	
1.	**What are the basic criteria for the courts of your jurisdiction to allow enforcement of a foreign judgment?**
	Recognition of foreign judgments is governed by state law (as opposed to federal law) and therefore may vary by jurisdiction. To harmonize state law on recognition of foreign judgments, the Uniform Law Commission prepared the Uniform Foreign-Country Money Judgment Recognition Act (Model Act) in 1962 and updated it in 2005. The 2005 Model Act has been enacted by 29 States and the District of Columbia. The 1962 Model Act has been enacted by 9 additional states and the U.S. Virgin Islands. In the 12 remaining states, recognition of foreign judgments is governed by common law. The adoption of the 2005 Model Act by the District of Columbia is important because it is a proper venue for any civil action "brought against a foreign state or political subdivision thereof." *See* 28 U.S.C. § 1391(f)(4). The adoption of the 2005 Model Act by New York is important because New York may be a place where an "agency or instrumentality" of a foreign state "is licensed to do business or is doing business," or where a "substantial part of property that is the subject of the action is situated." *See* 28 U.S.C. § 1391(f)(3) and (1). Under the Model Act, D.C. Code and New York CPLR, the party seeking recognition of a foreign judgment has the burden of establishing that the statute applies. Model Act § 3(c); D.C. Code § 15-363(c); NY CPLR § 5302(c). The statutes apply to a foreign judgment that: - "grants or denies recovery of a sum of money" and - Is "final," "conclusive," and "enforceable" under the law of the country where it was rendered. Model Act § 3(a); NY CPLR § 5302(a); D.C. Code § 15-363. Once the judgment creditor has demonstrated that the statute applies, recognition is presumed and the burden shifts to the judgment debtor to establish grounds for nonrecognition. Model Act § 4(a), (d); NY CPLR §§ 5303(a), 5304(c); D.C. Code § 15-364(a), (d). The grounds for non-recognition of foreign judgments are limited to those specifically enumerated by statute. Model Act § 4(a), (d); NY CPLR §§ 5303(a), 5304(c); D.C. Code § 15-364(a), (d). The mandatory grounds for non-recognition are:

1. the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
2. the foreign court did not have personal jurisdiction over the defendant; or
3. the foreign court did not have jurisdiction over the subject matter.

Model Act § 4(b); D.C. Code § 15-364(b); NY CPLR § 5304(a).

The discretionary grounds for non-recognition are:

1. the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
2. the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
3. the judgment or the cause of action / claim for relief on which the judgment is based is repugnant to the public policy of this state / the District of Columbia or of the United States;
4. the judgment conflicts with another final and conclusive judgment;
5. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;
6. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;
7. the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
8. the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

Model Act § 4(c); D.C. Code § 15-364(c); NY CPLR §§ 5304(b).

In the states that have not adopted the Model Act, recognition of foreign judgments is controlled by state common law, which was aptly summarized by the Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895). In that seminal case, the Supreme Court held that a foreign judgment should be considered binding where:

- "there has been opportunity for a full and fair trial abroad
- before a court of competent jurisdiction,
- conducting the trial upon regular proceedings,
- after due citation or voluntary appearance of the defendant, and
- under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and
- there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or
- fraud in procuring the judgment, or
- any other special reason why the comity of this nation should not allow it full effect."

Id. at 202.

In addition, some states may continue the traditional requirement of reciprocity and deny recognition of a judgment issued by the courts of a country that does not recognize U.S.

	judgments. *See id.* at 227–28. However, this reciprocity requirement is not incorporated into the Model Act and has become less and less common over time. Once a foreign judgment is recognized in the United States, it is "enforceable in the same manner and to the same extent as a judgment rendered in state [or the District of Columbia] granting recognition]." *See* NY CPLR § 5307(a)(2); D.C. Code § 15-367(2). It should be noted that the United States has signed the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "2019 Hague Convention"). However, the United States has not yet ratified the 2019 Hague Convention. The Convention enters into force on September 1, 2023, for 28 states including Ukraine. Until the United States ratifies the 2019 Hague Convention, it will not apply to recognition of Ukrainian and other foreign-country money judgments. Even if the United States were to ratify the 2019 Hague Convention, its applicability would be subject to the exception for "activities of armed forces, including the activities of their personnel in the exercise of their official duties," or to "liability for nuclear damage." 2019 Hague Convention, art. 2.1(h), (n).
2.	**What other considerations may apply to enforcement of a foreign judgment against a state in your jurisdiction, e.g. notice provisions?**
	Section 1608(a) of the U.S. Foreign Sovereign Immunities Act ("FSIA") provides for four methods of service on a foreign state or its political subdivision in U.S. proceedings (including in proceedings for recognition of a foreign judgement), listed in the mandatory order of preference: (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or (2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state— (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or (C) as directed by order of the court consistent with the law of the place where service is to be made." It is worth noting that although the United States and the Russian Federation have both signed the 1965 Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters ("Hague Service Convention"), Russia does not apply the Convention in its relations with the United States. This is ostensibly a response to the United States requiring applicants to reimburse the cost of governmental

	assistance in accomplishing service, which the Russian Federation characterizes as a violation of the Convention.
3.	**What special considerations apply where the defendant/debtor in enforcement proceedings is a state, e.g. doctrine of sovereign immunity?**
	A claimant bringing an action for recognition and enforcement of a foreign judgment against a foreign state in the United States would need to overcome sovereign immunity and establish subject-matter jurisdiction over the foreign state under the Foreign Sovereign Immunities Act ("FSIA"). The FSIA, enacted in 1976, embodies the restrictive theory of sovereign immunity. Section 1603(a) defines a "foreign state" that benefits from sovereign immunity under the FSIA as "political subdivision of a foreign state or an agency or instrumentality of a foreign state." Section 1603(b), in turn, defines an "agency or instrumentality of a foreign state" as "any entity 1) which is a separate legal person, corporate or otherwise, and 2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and 3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country. These terms give rise to complex issues of interpretation, as discussed further below in the context of enforcement of judgments rendered against foreign states using the assets of their agencies and instrumentalities. The FSIA distinguishes between two types of sovereign immunity: (1) jurisdictional immunity of a foreign state; and (2) immunity of the property from attachment, arrest, and execution. First, Section 1604 of the FSIA contains the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to certain international agreements and the exceptions enumerated in Sections 1605 and 1607 of the FSIA. 28 U.S.C. § 1604. Second, Section 1609 of the FSIA contains the general rules that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution," subject to certain international agreements and exceptions enumerated in Sections 1610 and 1611 of the FSIA. The FSIA is a jurisdictional statute. The U.S. federal courts have subject matter jurisdiction over the matter only if one of the enumerated exceptions to immunity applies under the FSIA. In the words of the U.S. Supreme Court, the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts," *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434 (1989). A foreign state's sovereign immunity from jurisdiction is the corollary of the U.S. court jurisdiction. If the foreign state is entitled to immunity under the FSIA, then the U.S. court lacks jurisdiction; and vice versa,

if the foreign state is not entitled to jurisdictional immunity under the FSIA (because one of the enumerated exceptions applies), the U.S. court has jurisdiction.

Because the issue of sovereign immunity is jurisdictional, the U.S. court "must satisfy itself that one of the exceptions [to immunity] applies"—"even if the foreign state does not enter an appearance to assert an immunity defense." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 & n.20 (1983). In practice, therefore, the burden of production and persuasion as to the applicability of the FSIA exceptions from immunity may fall on the petitioner. *See, e.g.*, *Sheafen Kuo v. Taiwan*, 802 F. App'x 594, 596–97 (2d Cir. 2020) (noting that, although a defendant ordinarily makes a prima facie showing of immunity before a plaintiff bears the burden of negating it, the district court properly raised immunity *sua sponte* and the defendants "failed to meet [their] burden"). A recent illustration of this principle (in the context of a direct claim as opposed to a claim for recognition of a foreign judgment) is *Namystiuk v. Russian Federation et al.*, 2022 WL 17092578 (D.D.C. Nov. 17, 2022). In that case, the U.S. District Court for the District of Columbia dismissed a complaint filed by a Ukrainian *pro se* claimant under the "terrorism" exception in Section 1605A of the FSIA (discussed in more detail below). Although the Russian Federation did not participate in the proceedings, the court dismissed the complaint *sua sponte*, as it was required to verify subject matter jurisdiction over an action against a foreign state under the FSIA.

In a nutshell, the FSIA contains the following exceptions from jurisdictional immunity:

- waiver of jurisdictional immunity (Section 1605(a)(1))
- commercial activity (Section 1605(a)(2));
- expropriation (Section 1605(a)(3));
- immovable property (Section 1605(a)(4));
- tort (Section 1605(a)(5));
- arbitration (Section 1605(a)(6));
- maritime lien or foreclosure on a mortgage on a vessel (Section 1605(b)–(d));
- terrorism (Section 1605A);
- counterclaim (Section 1607).

The FSIA further contains the following exception from immunity of the property of a foreign state in the United States, used for a commercial activity in the United States, from attachment or execution:

- waiver of immunity from attachment or execution (Section 1610(a)(1));
- the use of the property for commercial activity upon which the claim is based (Section 1610(a)(2));
- judgment on expropriation of property (Section 1610(a)(3));
- judgment on property acquired by succession or gift, or immovable property (Section 1610(a)(4));
- judgment on insurance proceeds (Section 1610(a)(5));
- judgment confirming an arbitral award (Section 1610(a)(6));
- judgment in the absence of jurisdictional immunity under the terrorism exception (Section 1610(a)(7)).

The FSIA also contains specific exceptions from immunity of the property of an agency and instrumentality of a foreign state (Section 1610(b)).

4.	**What exceptions may apply where the claim results from improper actions of the defendant state, e.g. wars of aggression?**
	The FSIA does not contain a specific exception from immunity based on a war of aggression. Nor does a breach of international law, no matter how grave (e.g., a jus cogens violation), provide a basis for denying immunity under the FSIA. The exceptions from sovereign immunity under the FSIA that are most relevant in the context of a war of aggression and the surrounding occurrences are: (i) the terrorism exception; (ii) the tort exception; (iii) the expropriation exception. **Terrorism exception** The terrorism exception to the jurisdictional immunity of a foreign state applies where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605A(a)(1). There is no requirement that the terrorist acts occur on the U.S. territory, nor that their effects are suffered on the U.S. territory. Paragraph (a)(2) states that a U.S. court "shall hear a claim under this section if" two key requirements are met: 1. "the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and . . . either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section," and 2. "the claimant or the victim was, at the time the act described in paragraph (1) occurred—(I) a national of the United States; (II) a member of the [U.S.] armed forces; or (III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment." In essence, the terrorism exception applies if two key requirements are met. First, the foreign state must be designated by the U.S. State Secretary as a state sponsor of terrorism at the relevant time. Currently, four states are designated as state sponsors of terrorism: Cuba, North Korea, Iran, and Syria. https://www.state.gov/state-sponsors-of-terrorism/ Second, the claimant or the victim must be a U.S. national, a member of the U.S. armed forces or an employee of the U.S. government. In *Namystyuk v. Russian Federation et al.* mentioned above, the court dismissed a complaint filed by a Ukrainian *pro se* claimant under the FSIA "terrorism" exception in Section 1605A because: (1) the Russian Federation has not been designated as a state sponsor of terrorism by the U.S. State Secretary; and (ii) the claimant was a Ukrainian national, not an U.S. national or a member of the U.S. armed forces or an employee of the U.S. government, as required by the "terrorism" exception.

Tort exception

The tort exception to the jurisdictional immunity of a foreign state applies where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment[.]" 28 U.S.C. § 1605(a)(5). Textually, tort exception requires that (1) "personal injury or death, or damage to or loss of property" occur in the United States, and (2) they are "caused by the tortious act or omission of that foreign state." Although this text arguably requires only that the *effects* of the tort be suffered in the United States, without the tort occurring in the United States, the Supreme Court has held that "the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989). This prevents the tort exception from applying to tortious conduct that is part of the military aggression occurring outside of the U.S. territory.

Moreover, the tort exception does not apply to:

A. "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, or

B. any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

Expropriation exception

The expropriation exception to the jurisdictional immunity of a foreign state applies where "rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]" 28 U.S.C. § 1605(a)(5). The expropriation exception requires a double territorial nexus to the United States in the form of: (1) the taken property (or property exchanged for such property) being present in the United States (2) "in connection with a commercial activity carried on by a foreign states in the United States." While expropriations may happen as part of military aggression, whereby the aggressor state (including its occupying authorities) expropriate property on the territory of the occupied state, such conduct will escape the expropriation exception absent a double territorial nexus to the United States.

To synthesize, the terrorism exception does not require a territorial nexus to the United States *ratione materiae* (except for the plaintiff being a U.S. national or a member of the U.S. armed forces or an employee of the U.S. government *ratione personae*), and therefore it covers terrorist acts occurring outside of the U.S. territory and allows their prosecution in U.S. courts without being hindered by sovereign immunity. By contrast, the tort exception and the expropriation exception require such territorial nexus to the

	United States *ratione materiae*, and accordingly only allow "prosecution" of tortious and expropriatory acts that have a connection to the U.S. territory. Such territorial nexus to the United States therefore limits the category of claims that can be brought in U.S. courts in connection with wars of aggression occurring abroad.
5.	**What due process standards and exceptions may apply in proceedings for enforcement of judgment against a state?**
	The U.S. court will verify compliance with general notions of due process, as part of its analysis under the Uniform Enforcement of Foreign Money Judgments Act. References to notions of due process can be seen among the mandatory grounds for non-recognition: - the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; - the foreign court did not have personal jurisdiction over the defendant . . . . Model Act § 4(b); D.C. Code § 15-364(b); NY CPLR §§ 5304(a). The discretionary grounds for non-recognition, too, refer to notions of due process: - the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend; - the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case; - the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or - the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law. Model Act § 4(c); D.C. Code § 15-364(c); NY CPLR §§ 5304(b). The Model Act, New York CPLR, and D.C. Code require only that the procedures used in foreign courts be *compatible with* due process, not that foreign courts have followed the same rules of procedure that would apply in the United States. As Comment 5 to Section 4 of the Model Act explains, "a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved. . . . The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure." In this regard, the Model Act does not expressly differentiate between foreign judgments rendered against private or state defendants. It should be noted, however, that the U.S. constitutional notion of due process, enshrined in the Due Process Clause of the Fifth Amendment providing that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law," does not apply to foreign states. The D.C. Circuit has held that "a foreign state is not a 'person' as that term is used in the due process clause." *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 300 (D.C. Cir. 2005). Thus, "minimum contacts" with the forum, for purposes of personal jurisdiction consistent with the due process clause, were not required to recognize an arbitral award against Ukraine and its State Property Fund in the District of Columbia under the New York Convention.

	Id. The foreign state could nevertheless look for protection to the principle of "comity among nations." *Id.* To synthesize, in U.S. proceedings for recognition of foreign judgments, defendant states can avail themselves of the specific provisions of the Model Act referring to general notions of due process, but not to the U.S. constitutional notion of due process. They can also raise considerations of sovereign immunity and international comity, insofar as they fall within the rubrics of public policy or jurisdiction under the Model Act.
a.	***What standard will the court apply in the enforcement proceedings when assessing whether the service requirements have been met in the original proceedings against a state?***
	As part of its analysis under the Uniform Enforcement of Foreign Money Judgments Act, the U.S. court will consider compliance with foreign procedural rules on service of process in the foreign proceedings. For example, in *DeJoria v. Maghreb Petrol. Expl., S.A.*, the Fifth Circuit applied Moroccan law to determine whether service of process was proper and held that the service requirements were satisfied in Moroccan proceedings. 804 F.3d 373, 378 (5th Cir. 2015). In *Nat'l Union Fire Ins. Co. of Pittsburgh v. People's Republic of the Congo*, 729 F. Supp. 936, 941 (S.D.N.Y. 1989), the court applied English service rules to assess service of process on the Congo in an English proceeding and concluded that service conformed with the requirements of English law and the parties' agreement. In *Commissions Imp. Exp., S.A. v. Republic of Congo*, 118 F. Supp. 3d 220, 227 (D.D.C. 2015), Commisimpex has submitted argument and authorities satisfactorily demonstrating that English law permits service through diplomatic channels, specifically on the Ministry of Foreign Affairs and Cooperation of the Government of the Republic of Congo in Brazzaville, through the British Embassy in Kinshasa. The U.S. court may also assess whether (i) the plaintiff in the foreign proceedings exhausted all reasonably available means to notify the defendant of the action; and (ii) whether the defendant in the foreign proceedings had actual notice of the action. *See Cassouto-Noff & Co. v. Diamond*, 170 N.E.3d 319, 322 (Mass. 2021) ("[W]hether notice is adequate is ultimately a functional, not formal, inquiry. The absence of service of process is not dispositive. The defendant received adequate notice." (internal citations omitted)).
b.	***What exceptions may apply where conventional forms of service against a state are impossible, e.g. due to absence of diplomatic relations?***
	As discussed above, U.S. courts will assess the sufficiency of service on the defendant in the foreign proceedings by reference to: (1) compliance with foreign procedural rules; and (2) actual notice to the defendant. U.S. case-law has not created any other exceptions to "conventional" forms of service in the foreign proceedings.

c.	***What standard will the court apply in the enforcement proceedings when assessing whether the right to representation requirements have been met in the original proceedings against a state?***
	The U.S. court will verify compliance with general notions of due process, as part of its analysis under the Uniform Enforcement of Foreign Money Judgments Act. As part of that analysis, the U.S. court may consider whether the defendant had the opportunity to be represented by counsel in the foreign proceedings. *See, e.g.*, *LG Display Co. v. Obayashi Seikou Co.*, 919 F. Supp. 2d 17, 31 (D.D.C. 2013) (noting that defendants "were represented by counsel" at each stage of Korean judicial proceedings). But there appear to be no strict requirements in U.S. case-law regarding representation in foreign proceedings, either for private or state defendants.
d.	***What exceptions may apply where the defendant state cannot find legal representation, or chooses not to be represented?***
	Because U.S. courts have not developed any clear rule requiring representation in foreign proceedings, there are no clearly delineated exceptions. In the current state of the U.S. case-law development, it appears that legal representation or the lack therefore will be considered in light of the totality of the circumstances.
6.	**What assets may be subject of enforcement if the claim is against a state and what are the requirements, e.g. enforcement against assets of state owned entities?**
	As mentioned above, Section 1610 of the FSIA provides that the "property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State" in one of the following situations: - waiver of immunity from attachment or execution (Section 1610(a)(1)); - the use of the property for commercial activity upon which the claim is based (Section 1610(a)(2)); - judgment on expropriation of property (Section 1610(a)(3)); - judgment on property acquired by succession or gift, or immovable property (Section 1610(a)(4)); - judgment on insurance proceeds (Section 1610(a)(5)); - judgment confirming an arbitral award (Section 1610(a)(6)); - judgment in the absence of jurisdictional immunity under the terrorism exception (Section 1610(a)(7)). The threshold requirement of "a judgment by a court of the United States or of a State" is satisfied upon confirmation of a foreign judgment in the United States, as discussed above. With regard to the waiver exception in Section 1610(a)(1), it is well-established that a waiver of immunity from jurisdiction by a foreign state does not constitute a waiver of

immunity of state property from attachment or execution. *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 781 (D.C. Cir. 2020) (distinguishing "jurisdictional immunity" from "execution immunity"); *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 946 F.3d 120, 135 (2d Cir. 2019) (same). Waiver of immunity of state property can be provided by treaties and state contracts or occur by conduct, but it is rare in practice. *See Preble-Rish Haiti, S.A. v. Republic of Haiti*, 40 F.4th 368, 374 (5th Cir. 2022) (noting that § 1610(d) permits explicit waiver of immunity from attachment or execution but finding arbitration clause insufficient).

In practice, enforcement of judgments against state property commonly occurs under Section 1610(a)(2), where such property is located in the United States and used for a commercial activity in the United States upon which the claim is based. *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 785 (D.C. Cir. 2020) (adopting a "totality of the circumstances" test to determine commercial activity); *Aurelius Cap. Partners, LP v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009) (noting commercial activity exception of § 1610(a)(2) but holding that defendant had not yet used attached funds for commercial activity); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 371 (5th Cir.), decision clarified on reh'g, 389 F.3d 503 (5th Cir. 2004) (holding that because certain tax and royalty obligations had been used to pay commercial debts they were used for commercial activity).

Section 1610(a)(7) also recognizes an exception to attachment and execution immunity that is tied to the terrorism exception from jurisdictional immunity. If a judgment is rendered against a foreign state under the terrorism exception, then it does not matter whether the property is or was involved in the terrorist act, and it is not immune from attachment and execution. *See Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 484 (7th Cir. 2016), aff'd, 138 S. Ct. 816 (2018).

Notwithstanding the above-mentioned provisions of Section 1610 and case-law allowing attachment and execution against the property of a foreign state or its agencies and instrumentalities, certain types of property benefit from additional protection pursuant to Section 1611 and international treaties to which the United States are a party:

- property of international organizations (Section 1611(a) of the FSIA and the International Organizations Immunities Act);
- foreign central bank property held on its own account (Section 1611(b)(1));
- military property used or intended to be used for a military activity (Section 1611(b)(2));
- diplomatic or consular property used for diplomatic or consular purposes (Vienna Conventions on Diplomatic and Consular Relations);
- cultural artifacts (Mutual Educational and Cultural Exchange Program).

Enforcement of judgments rendered against foreign states also occurs against the property of their agencies and instrumentalities or alter egos, consistent with Section 1610.

Agencies and instrumentalities of foreign states are presumed to be separate juridical entities from the foreign states themselves, except in cases terrorism cases brought under section 1605A. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983) ("*Bancec*"); *see also* 28 U.S.C. § 1610(g)(1); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 827 (2018) (holding that § 1610(g) abrogated "*Bancec*

with respect to judgments held under § 1605A"). Accordingly, where a judgment creditor obtains a judgment against a foreign state—not against the agency or instrumentality of the foreign state—it cannot generally attach or execute upon the property of the agency or instrumentality to satisfy the judgment. *De Letelier v. Republic of Chile*, 748 F.2d 790, 798–99 (2d Cir. 1984). To attach or execute upon the property of a foreign state's agency or instrumentality in satisfaction of a judgment against the foreign sovereign in a non-§ 1605A case, a judgment creditor must therefore allege and prove that the agency or instrumentality is an "alter ego" of the foreign state—i.e., that the foreign state and its agency or instrumentality are the same juridical entity. *Bancec*, 462 U.S. at 1095. To overcome the presumption of separateness and establish that an agency or instrumentality of a foreign state is in fact an alter ego of a foreign state, a judgment creditor must establish either:

1) the instrumentality is so extensively controlled by its owner that a relationship of principal and agent is created; or
2) the recognition of an instrumentality's separate legal status would work a fraud or injustice.

EM Ltd. v. Banco Cent. De La Republica Argentina, 800 F.3d 78, 89–90 (2d Cir. 2015).

Courts have developed several tests to determine whether a principal-agent relationship exists between a foreign state and its agency or instrumentality. The Second Circuit has considered whether the foreign state:

1) uses the instrumentality's property as its own;
2) ignores the instrumentality's separate status or ordinary corporate formalities;
3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies;
4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and
5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state.

EM Ltd., 800 F.3d at 91.

Alternatively, to determine whether a "fraud or injustice" would result from recognizing the separate juridical status of a foreign state's agency or instrumentality, courts consider whether the foreign state uses the agency or instrumentality to abuse the corporate form. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 417 (5th Cir. 2006).

In *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, the United States Court of Appeals for the Third Circuit recently allowed a judgment creditor to satisfy a judgment against a foreign state, Venezuela, by attaching assets of its instrumentality, PDVSA. 932 F.3d 126, 133, 146–47 (3d Cir. 2019). The court found that the factual record supported the determination that Venezuela's wholly-owned oil company "is so extensively controlled by its owner [Venezuela] that a relationship of principal and agent is created," sufficient to overcome the presumption of separateness otherwise afforded to state-owned instrumentalities. *Id.* at 140, 148–52 (quoting *Bancec*, 363 U.S. at 629). The decision in *Crystallex* is remarkable because it rests solely on the degree of control and not on fraud or injustice. *Id.* at 148–52. *Crystallex* thus emphasizes that *Rubin* and

	Bancec present "extensive[] control[]" and "fraud or injustice" as truly alternative bases for rebutting the separate identity of a foreign state and its agency or instrumentality. *Id.*; *Rubin*, 138 S. Ct. at 822–23; *Bancec*, 462 U.S. at 629.