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Removal from State Court under the FSIA: Escape Hatch or Booby Trap

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REMOVAL FROM STATE COURT UNDER THE FSIA: ESCAPE HATCH OR BOOBY TRAP?

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I. INTRODUCTION

In presenting the Foreign Sovereign Immunities Act (FSIA or Act)[1] to Congress for approval, the Executive Branch consistently identified its broad purposes as the "facilitat[ion] and depoliticiz[ation] [of] litigation against foreign states and [the] minimiz[ation] [of] irritations in foreign relations arising out of such litigation."[2] To facilitate litiga-

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1. 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11 (1994 & Supp. IV 1998).

2. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong. 29 (1976) [hereinafter *Hearings*] (testimony of Monroe Leigh, Legal Adviser, Department of State); Letter from Robert S. Ingersoll, Deputy Secretary of State, and Harold R. Tyler, Jr., Deputy Attorney General, to Hon. Carl O. Albert, Speaker of the House of Representatives (Oct. 31, 1975), *in* H.R. REP. NO. 94-1487, at 44-45 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6634; Letter from Robert S. Ingersoll, Deputy Secretary of State, and Harold R. Tyler, Jr., Deputy Attorney General,

tion against foreign states,[3] the FSIA codifies the doctrine of restrictive sovereign immunity,[4] provides generous subject matter jurisdiction and personal jurisdiction for suits originally brought against foreign states in federal courts,[5] and enables private litigants to obtain in personam jurisdiction over foreign states by service of process.[6] To minimize the

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to Hon. Nelson D. Rockefeller, President of the Senate (Oct. 31, 1975), *reprinted in* 15 I.L.M. 88, 88 (1976). *See also Hearings*, *supra*, at 68 (statement of the International Law and Transactions Division of the District of Columbia Bar) (indicating that the FSIA would promote greater fairness to litigants and "reduce political friction and embarrassment in . . . dealings with foreign governments").

Facilitation of litigation and the minimization of irritations in foreign relations constitute two particular elements of the depoliticization of litigation against foreign states, which many observers identified as the FSIA's overarching goal. *See Hearings*, *supra*, at 31 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice), 60 (testimony of Peter D. Trooboff, Co-Chairman, Committee on Transnational Judicial Procedure, American Bar Association), 71 (Letter from Timothy W. Stanley, President of the International Economic Policy Association, to Hon. Walter Flowers, Chairman of the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary (June 24, 1976)).

3. For most purposes, the FSIA defines a "foreign state" to include the foreign state itself and its political subdivisions, as well as agencies or instrumentalities of the foreign state and its political subdivisions. *See* 28 U.S.C. § 1603(a). Enterprises preponderantly owned by foreign states often fall within this definition. *See* H.R. REP. NO. 94-1487, *supra* note 2, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614. In a few situations, however, the FSIA distinguishes between foreign states and their political subdivisions, on the one hand, and their agencies and instrumentalities, on the other hand. *See* 28 U.S.C. §§ 1605(a)(3) (exceptions to immunity from suit based on acts of expropriation), 1606 (punitive damages), 1608(a), (b) (service of process), 1610(a), (b) (exceptions to immunity from execution). Where appropriate, this article also distinguishes between foreign states and political subdivisions and their agencies and instrumentalities.

4. *See* 28 U.S.C. § 1602; H.R. REP. NO. 94-1487, *supra* note 2, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. Essentially, the doctrine of restrictive foreign sovereign immunity maintains immunity for claims based on the sovereign acts of foreign states, but withholds their immunity for claims based on non-sovereign acts. *See id.*; Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 2 (2000).

5. *See* 28 U.S.C. § 1330(a), (b).

6. *See* 28 U.S.C. § 1608(a), (b). Before passage of the FSIA, plaintiffs lacked a statutory mechanism for gaining in personam jurisdiction over foreign states. *See* H.R. REP. NO. 94-1487, *supra* note 2, at 8, *reprinted in* 1976 U.S.C.C.A.N. at 6606. As a result, plaintiffs developed the practice of using in rem attachments to commence litigation. *See id. Accord Hearings*, *supra* note 2, at 28 (testimony of Monroe Leigh, Legal Adviser, Department of State),

irritations associated with such litigation, the FSIA insulates foreign states from some of the more offensive aspects of U.S. litigation. Thus, foreign states enjoy significant protection from in rem jurisdiction,[7] prejudgment attachment,[8] punitive damages,[9] and jury trials.[10] They also receive spe-

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68 (statement by the International Law and Transactions Division of the District of Columbia Bar), 97 (testimony of Michael Marks Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association).

Frequent interference with the property rights of foreign states became a source of diplomatic friction that the FSIA sought to eliminate. *See Hearings*, *supra* note 2, at 28 (testimony of Monroe Leigh, Legal Adviser, Department of State), 31 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice), 68 (statement by the International Law and Transactions Division of the District of Columbia Bar), 97 (testimony of Michael Marks Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association); H.R. REP. NO. 94-1487, *supra* note 2, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626; JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 75 (1988).

7. *See Hearings*, *supra* note 2, at 28 (testimony of Monroe Leigh, Legal Adviser, Department of State), 68 (statement by the International Law and Transactions Division of the District of Columbia Bar), 97 (testimony of Michael Marks Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association); H.R. REP. NO. 94-1487, *supra* note 2, at 26, *reprinted in* 1976 U.S.C.C.A.N. at 6625; DELLAPENNA, *supra* note 6, at 76.

8. *See* 28 U.S.C. §§ 1609, 1610 (a)-(d). The FSIA permits prejudgment attachment only if (1) the foreign state has *explicitly* waived its immunity from prejudgment attachment and (2) the purpose of the attachment is to secure satisfaction of any future judgment (and not to obtain jurisdiction). *See* 28 U.S.C. § 1610(d).

9. The exemption from punitive damages applies to foreign states and their political subdivisions, but not to their agencies and instrumentalities. *See* 28 U.S.C. § 1606; H.R. REP. NO. 94-1487, *supra* note 2, at 10, *reprinted in* 1976 U.S.C.C.A.N. at 6609. In addition, the exemption does not apply to claims brought by U.S. nationals 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" by designated state sponsors of terror. 28 U.S.C. § 1605(a)(7). *See also* 28 U.S.C. § 1606.

10. The exemption from jury trials applies to actions originally commenced in federal court or removed to federal court, but not to actions pending in state courts. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 458(4) & cmt. b (1987); H.R. REP. NO. 94-1487, *supra* note 2, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611. The elimination of jury trials obviously creates a strong incentive for foreign states to remove actions from state courts to federal courts. *Cf.* H.R. REP. NO. 94-1487, *supra* note 2, at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6631 (noting the FSIA's "preference that actions involving foreign states be tried in federal courts"); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497 (1983) (stating that "Congress deliberately sought to channel cases against foreign sovereigns away from state courts and into federal courts"). Responding to this incentive, foreign states

cial treatment with respect to service of process and additional time for answering complaints.[11] Furthermore, when foreign states fail to appear, plaintiffs may not obtain judgments without establishing their claims by "evidence satisfactory to the court."[12] Most importantly, foreign states have the absolute right to remove civil actions from state court to federal court without regard to the nature of the claim, the amount in controversy or the wishes of other defendants.[13] In brief, the FSIA balances the rights of plaintiffs and defendants by promoting the initiation of legitimate claims against foreign states, but limiting the opportunities for harassment of foreign states.[14]

Although the FSIA generally strikes an acceptable balance between these two goals, this article examines one

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have removed nearly all suits brought against them in state court. *See* DELLAPENNA, *supra* note 6, at 64.

11. *See* 28 U.S.C. § 1608(a), (b), (d).

12. 28 U.S.C. § 1608(e). *See* DELLAPENNA, *supra* note 6, at 359 (observing that the "demand for satisfactory proof effectively charges courts to prevent undue offense to foreign states by dismissing unfounded claims"). This requirement apparently has served the gate-keeping function intended by Congress. One early study found that plaintiffs succeeded in collecting judgments in only two of seventeen instances where foreign states failed to appear. *See id.*

13. *See* 28 U.S.C. § 1441(d); H.R. REP. NO. 94-1487, *supra* note 2, at 32-33, *reprinted in* 1976 U.S.C.C.A.N. at 6631-32; *Verlinden*, 461 U.S. at 489; Nolan v. Boeing Co., 919 F.2d 1058, 1065 (5th Cir. 1990) (quoting H.R. No. 94-1487); Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1409 (9th Cir. 1990); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 530 (S.D. Tex. 1994); Talbot v. Saipem A.G., 835 F. Supp. 352, 353 (S.D. Tex. 1993); John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 873 (1998); Jonathan Remy Nash, *Pendent Party Jurisdiction Under the Foreign Sovereign Immunities Act*, 16 B.U. INT'L L.J. 71, 78, 117 (1998); Carol K. Young, *Defending Litigation Against a Foreign Airline Under the Foreign Sovereign Immunities Act*, 51 J. AIR. L. & COM. 461, 485 (1986).

14. *See* 28 U.S.C. § 1602 (stating that the FSIA will "protect the rights of both foreign states and litigants in United States courts"). *See also Hearings*, *supra* note 2, at 59 (testimony of Peter D. Trooboff, Co-Chairman, Committee on Transnational Judicial Procedure, American Bar Association) (observing that the FSIA would provide "highly beneficial" reforms to private litigants, but would also provide foreign states important procedural safeguards), 97 (testimony of Michael Marks Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association) (indicating that the United States never allowed itself to be subjected to harassment by private litigants and describing the State Department's belief that the exposure of foreign states to such harassment could disrupt foreign relations).

possible area of failure, namely the interaction between the FSIA's provisions for removal, jurisdiction, and venue. As previously observed, the FSIA encourages foreign states to remove actions from state court to federal court, and foreign states almost invariably use removal as an escape hatch.[15] Upon removal, however, foreign states may find that federal venue rules lock them into inconvenient fora with unfavorable choice-of-law rules and unexpectedly long statutes of limitations. To prepare the ground for a discussion of this phenomenon, Part I describes the FSIA's use of restrictive venue rules to counteract its expansive jurisdictional provisions for actions originally commenced in federal courts. Part II then examines the failure of venue rules to moderate the exercise of jurisdiction in removed actions, as well as the resulting opportunities to harass foreign states. Part III discusses the futility of using a frequently proposed tool to resolve this problem, namely the transfer of venue under 28 U.S.C. § 1404(a). Finally, Part IV suggests that federal courts may eliminate the problem through a more rigorous and attentive interpretation of the FSIA.

At one level, this article represents a technical discussion of the FSIA's neglected,[16] but important,[17] venue provisions. In addition, two important themes run throughout the article's text, both of which merit discussion on the FSIA's silver anniversary. First, the Act tries to strike a balance between the facilitation of litigation against foreign states and the protection of foreign states from aggravating features of U.S. litigation. In our zeal to satisfy the first objective, we often lose sight of the second objective. Second, although the FSIA may be "complex and difficult to apply,"[18]

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15. *See supra* note 10.

16. *See* DELLAPENNA, *supra* note 6, at 126-27 (describing venue as a "neglected" concept that "has not been the focus of significant scholarship").

17. Identification of the appropriate venue for trial "is no trivial question, as proper venue is a component of the due process requirement of 'a fair trial in a fair tribunal.'" Crumrine v. NEG Micon USA, Inc., 104 F. Supp. 2d 1123, 1124 (N.D. Iowa 2000) (quoting Holt v. Virginia, 381 U.S. 131, 136 (1965)).

18. William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 301 (1997) (quoting Mark Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 318 (1986)).

rigorous and attentive analysis can resolve most interpretive questions. All too often, we manufacture problems through cursory analysis of the statute and then blame its "bizarre structure" for the curious results.[19] Like everything else, proper husbandry of the FSIA requires care and attention.

II. JURISDICTION, VENUE, AND EQUILIBRIUM

Foreign states enjoy a presumption of immunity in civil actions brought against them in state and federal courts.[20] That presumption remains subject to a limited number of exceptions,[21] most of which require a significant nexus between the defendant's conduct and the United States.[22] For example, the most frequently relevant exceptions[23] involve

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19. *See, e.g.*, Callejo v. Bancomer, S.A., 764 F.2d 1101, 1107 (5th Cir. 1985) (quoting Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1105-06 (S.D.N.Y. 1982)).

20. *See* 28 U.S.C. § 1604; H.R. REP. NO. 94-1487, *supra* note 2, at 17, *reprinted in* 1976 U.S.C.C.A.N. at 6616.

21. *See* 28 U.S.C. §§ 1605, 1607.

22. During congressional hearings, the State Department's Legal Adviser stated that "each" of the FSIA's exceptions to immunity "requires some connection with the United States." *See Hearings*, *supra* note 2, at 28 (testimony of Monroe Leigh, Legal Adviser, Department of State). *See also* H.R. REP. NO. 94-1487, *supra* note 2, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626 (suggesting that the FSIA would provide jurisdiction only "in cases where there is a nexus between the claim and the United States").

The author states that "most" exceptions require some connection because it is not clear if the FSIA's waiver exception requires a nexus with the United States. *See* 28 U.S.C. § 1605(a)(1). *Compare* Sampson v. Federal Republic of Germany, 975 F. Supp. 1108, 1116 (N.D. Ill. 1997) (indicating that the FSIA's waiver exception "requires that the foreign state express a willingness to appear in United States courts" (quoting Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (1994))), *with* Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981, 985-86 (N.D. Ill. 1980) (stating that a "waiver [of immunity] does not necessarily confer personal jurisdiction" and concluding that the FSIA's waiver provision permits the exercise of jurisdiction "regardless of the nature or quality of [the defendant's] contacts with this country"), *and* Victoria A. Carter, Note, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U.S. Courts*, 82 VA. L. REV. 357, 364 (1996) (asserting that the FSIA's "waiver exception[] contains no nexus requirement"). Furthermore, it is quite evident that the new exception for certain acts of state-sponsored terror does not require any connection with the United States, except the nationality of the victim. *See* 28 U.S.C. § 1605(a)(7).

23. *See* H.R. REP. NO. 94-1487, *supra* note 2, at 18, *reprinted in* 1976

civil actions based on (1) commercial activities carried on by foreign states in the United States; (2) the acts of foreign states performed within the United States in connection with their commercial activities elsewhere; or (3) the acts of foreign states outside of the United States in connection with their commercial activities outside the United States that have direct effects within the United States.[24]

Furthermore, in civil actions originally commenced in federal courts, the FSIA collapses the tests for subject matter jurisdiction and personal jurisdiction into the test for immunity.[25] Thus, 28 U.S.C. § 1330(a) provides federal district courts with original subject matter jurisdiction over claims in which foreign states are not entitled to immunity.[26] Likewise, 28 U.S.C. § 1330(b) provides that, for cases falling within the original jurisdiction of federal district courts under § 1330(a), subject matter jurisdiction plus service of process establishes personal jurisdiction over foreign states.[27] While unique, this melding of tests for jurisdiction and immunity appears sensible because most of the exceptions to immunity identify both a class of claims appropriate for adjudication (e.g., commercial activities) and a sufficient territorial nexus to attract the judicial jurisdiction of U.S. courts.[28]

U.S.C.C.A.N. at 6617; Theo. H. Davies & Co. v. Republic of Marshall Islands, 174 F.3d 969, 973 (9th Cir. 1999) (quoting Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 307 (2d Cir. 1981)); Dorsey, *supra* note 18, at 264.

24. *See* 28 U.S.C. § 1605(a)(2).

25. *See, e.g., Hearings*, *supra* note 2, at 28 (testimony of Monroe Leigh, Legal Adviser, Department of State); H.R. REP. NO. 94-1487, *supra* note 2, at 23, *reprinted in* 1976 U.S.C.C.A.N. at 6622; Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 485 n.5 (1983); Hon. Marianne D. Short & Charles H. Brower, II, *The Taming of the Shrew: May the Act of State Doctrine and Foreign Sovereign Immunity Eat and Drink as Friends?*, 20 HAMLINE L. REV. 723, 730 (1997); Young, *supra* note 13, at 475.

26. Specifically, the statute provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a).

27. Specifically, the statute provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have

This melding of jurisdiction and immunity also encourages the commencement of litigation against foreign states in federal courts.[29] Because the exceptions to immunity refer to contacts with the "United States," plaintiffs can establish personal jurisdiction in federal district courts based on contacts with the United States as a whole, as opposed to contacts with individual states.[30] According to one observer, this means that "if a foreign sovereign is subject to personal jurisdiction in any state, it is subject to personal jurisdiction in every state."[31] That may constitute an understatement, however, because foreign states not subject to personal jurisdiction in *any* state of the United States could, theoretically, be subject to personal jurisdiction in *every* judicial district of the United States. For example, a foreign state that lacks significant contacts with any individual state, but that has aggregately sufficient contacts with several states in the Southeast, would be subject to personal jurisdiction in the Districts of Alaska, Hawaii, and Minnesota. As the Executive Branch and Congress both observed, plaintiffs "clearly benefit" from this broad jurisdictional structure.[32]

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jurisdiction under subsection (a) where service has been made under section 1608 of this title." *Id.* § 1330(b). *See also* U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 151 (2d Cir. 2001) (quoting *Texas Trading*, 647 F.2d at 308); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 151 (D.C. Cir. 1994) (quoting *Texas Trading*, 647 F.2d at 308).

28. The Executive, Congress, and the Judiciary have agreed that the territorial nexuses embedded in the exceptions to immunity "prescribe the necessary contacts before our courts can exercise personal jurisdiction over a foreign state." *Hearings*, *supra* note 2, at 28 (testimony of Monroe Leigh, Legal Adviser, Department of State); H.R. REP. NO. 94-1487, *supra* note 2, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6612; Dar El-Bina Eng'g & Contracting Co. v. Republic of Iraq, 79 F. Supp. 2d 374, 388 (S.D.N.Y. 2000) (quoting H.R. REP. NO. 94-1487).

29. *See* DELLAPENNA, *supra* note 6, at 106.

30. *See, e.g.*, *Texas Trading*, 647 F.2d at 314. *See also U.S. Titan*, 241 F.3d at 152 n.12; Theo. H. Davies & Co. v. Republic of Marshall Islands, 174 F.3d 969, 974 (9th Cir. 1999); Antoine v. Atlas Turner, Inc., 66 F.3d 105, 111 (6th Cir. 1995); Southway v. Cent. Bank of Nigeria, 994 Supp. 1299, 1312 (D. Colo. 1998); United World Trade v. Mangyshlakneft Oil Prod. Ass'n, 821 F. Supp. 1405, 1410 (D. Colo. 1993), *aff'd*, 33 F.3d 1232 (10th Cir. 1994).

31. Young, *supra* note 13, at 475, 479.

32. *See* H.R. REP. NO. 94-1487, *supra* note 2, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626; Section-by-Section Analysis accompanying Letter from Robert S. Ingersoll, Deputy Secretary of State, and Harold R. Tyler, Deputy Attorney General, to Hon. Nelson D. Rockefeller, President of the Senate (Oct.

Members of the defense bar have suggested that the FSIA's broad jurisdictional grant puts foreign states at a "distinct disadvantage" when compared to other defendants.[33] This criticism seems misplaced with respect to actions falling within the original jurisdiction of federal courts. In such cases, the FSIA's general venue provisions impose serious limits on plaintiffs' choice of forum.[34] For example, 28 U.S.C. § 1391(f) directs plaintiffs to one of four locations:

> (1) any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated;
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> (2) any judicial district in which the vessel or cargo of a foreign state is situated, if the the claim is asserted under § 1605(b) of [the FSIA, dealing with admiralty suits brought to enforce maritime liens];
>
> (3) any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of [the FSIA]; or
>
> (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

To return to the example discussed above,[35] if a plaintiff sued the foreign state in the United States District Court for the District of Alaska, Hawaii, or Minnesota, that court would have personal jurisdiction but would have to dismiss or transfer the action for improper venue pursuant to 28 U.S.C. § 1406(a). Plaintiffs gain no advantage by suing foreign states in jurisdictionally proper, but seriously inconvenient, fora because transferee courts must apply their

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31, 1975), *supra* note 2, *reprinted in* 15 I.L.M. at 113 (1976).

33. Young, *supra* note 13, at 461, 475.

34. *See* Joel Mendal Overton, *Will the Real FSIA Choice-of-Law Rule Please Stand Up?*, 49 WASH. & LEE L. REV. 1591, 1608 (1992). *See also* Tifa Ltd. v. Republic of Ghana, 692 F. Supp. 393, 405 (D.N.J. 1988) (observing that "[c]ourts have required extensive events or omissions giving rise to the claim to occur in the forum in order for venue to be appropriate under [§1391(f)(1)]").

35. *See supra* notes 31-32 and accompanying text.

own choice-of-law rules[36] and statutes of limitations[37] following transfers under § 1406(a). Thus, for actions originally brought in federal courts, the FSIA facilitates litigation by subjecting foreign states to personal juris-diction throughout the United States on the basis of national contacts, but minimizes the potential for irritation by using venue requirements to "assure foreign states of an appropriate forum."[38]

III. REMOVAL: ESCAPE HATCH OR BOOBY TRAP?

Although the FSIA's broad jurisdictional provisions encourage plaintiffs to bring actions against foreign states in federal court, plaintiffs often file their claims in state courts where they may be able to demand jury trials. While the FSIA certainly permits state-court litigation,[39] the FSIA's removal provisions ensure that civil actions remain in state court only at the sufferance of foreign states.[40] Because removal extinguishes the possibility of a jury trial[41] and increases the perceived competence and objectivity of the forum,[42] foreign states typically remove actions from state

36. *See, e.g.*, LaVay Corp. v. Dominion Fed. Savings & Loan Ass'n, 830 F.2d 522, 526 (4th Cir. 1987); Martin v. Stokes, 623 F.2d 469, 471-72 (6th Cir. 1980); Young, *supra* note 13, at 492.

37. *See, e.g.*, Translinear, Inc. v. Republic of Haiti, 538 F. Supp. 141, 143 (D.D.C. 1982). *See also Martin*, 623 F.2d at 471-72.

38. *Hearings*, *supra* note 2, at 59 (testimony of Peter D. Trooboff, Co-Chairman, Committee on Transnational Judicial Procedure, American Bar Association). *See also* DELLAPENNA, *supra* note 6, at 127, 133 (observing that the FSIA's general venue rules operate like traditional long-arm statutes).

39. *See* H.R. REP. NO. 94-1487, *supra* note 2, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611; Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 489 (1983); Nash, *supra* note 13, at 78. In discussing draft legislation predating the FSIA, the Departments of State and Justice jointly observed that plaintiffs would "have an election to proceed in a federal court or in a court of a State." Section-by-Section Analysis accompanying Letter from William P. Rogers, Secretary of State, and Richard G. Kleindienst, Attorney General, to President of the Senate (Jan. 22, 1973), *reprinted in* 12 I.L.M. 118, 156-57 (1973).

40. *See* Oakley, *supra* note 13, at 873.

41. *See* H.R. REP. NO. 94-1487, *supra* note 2, at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6632; Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 530 (S.D. Tex. 1994) (quoting *In re* Delta Am. Reinsurance Co., 900 F.2d 890, 893 (6th Cir. 1990)); RESTATEMENT (THIRD), *supra* note 10, § 458(4) & cmt. b; Young, *supra* note 13, at 487.

42. *See* DELLAPENNA, *supra* note 6, at 61 (noting that foreign states often

court to federal court.[43] To this extent, removal resembles an escape hatch. Under certain circumstances, however, removal can activate a booby trap, which the author has encountered in practice. Returning to the example discussed above,[44] assume that a plaintiff sued the foreign state in a state court sitting in Alaska, Hawaii, or Minnesota. The foreign state would almost certainly remove the action to federal court. The foreign state might also prepare a motion to dismiss for improper venue on the assumption that 28 U.S.C. § 1391(f) governs federal venue in removed actions.[45] Upon further analysis, however, the foreign state would discover that the FSIA's removal provision (28 U.S.C. § 1441(d)), and not the general venue provision, defines the proper federal venue for removed actions.[46] According to §

"seek to remove a case . . . to avoid local bias in state courts or to seek the supposed greater expertise of federal courts"). In discussing draft legislation pre-dating the FSIA, the Departments of State and Justice jointly observed that "federal courts may be expected to have greater familiarity with [the controlling legal principles] than would be true of courts of the States." Section-by-Section Analysis accompanying Letter from William P. Rogers, Secretary of State, and Richard G. Kleindienst, Attorney General, to President of the Senate (Jan. 22, 1973), *supra* note 39, *reprinted in* 12 I.L.M. at 156-57.

43. *See supra* note 10. A review of reported FSIA cases confirms the frequency with which foreign states exercise the right of removal. *See, e.g.*, Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 844-45 (5th Cir. 2000); Theo. H. Davies & Co. v. Republic of Marshall Islands, 174 F.3d 969, 972 (9th Cir. 1999); Vermeulen v. Renault, U.S.A., 985 F.2d 1534, 1541 (11th Cir. 1993); Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1405 (9th Cir. 1990); Security Pac. Nat'l Bank v. Derderian, 872 F.2d 281, 282 (9th Cir. 1989); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1106 n.3 (5th Cir. 1985); Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 392 (2d Cir. 1985); Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 252 (7th Cir. 1983); Phoenix Consulting, Inc. v. Republic of Angola, 35 F. Supp. 2d 14, 16 (D.D.C. 1999), *rev'd*, 216 F.3d 36 (D.C. Cir. 2000); Ratnaswamy v. Air Afrique, 1996 WL 507267, at *2 (N.D. Ill. Sept. 4, 1996); Berdakin v. Consulado de la Republica de El Salvador, 912 F. Supp 458, 460 (C.D. Cal. 1995); Coleman v. Alcolac, Inc., 888 F. Supp. 1388, 1394 (S.D. Tex. 1995); *Kern*, 867 F. Supp. at 529; Talbot v. Saipem A.G., 835 F. Supp. 352, 353 (S.D. Tex. 1993); Moore v. Nat'l Distillers & Chem. Corp., 143 F.R.D. 526, 529 (S.D.N.Y. 1992); Zernicek v. Petroleos Mexicanos (Pemex), 614 F. Supp. 407, 408 (S.D. Tex. 1985).

44. *See supra* notes 31-32.

45. *See* Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 940 n.153 (1985) (assuming that the "protections [of § 1391(f)] would be available to a defendant under the [FSIA] through removal").

46. *See* RESTATEMENT (THIRD), *supra* note 10, § 458 reporters' note 1; *Ratnaswamy*, 1996 WL 507267, at *11; Translinear, Inc. v. Republic of Haiti,

1441(d), the proper venue for such actions lies in the "district court of the United States for the district and division where the action is pending." Because venue would thus be proper in Alaska, Hawaii, or Minnesota, it appears that removal may inadvertently lock foreign states into seriously inconvenient, but proper, fora. This result can encourage plaintiffs to bring claims in remote states with particularly favorable choice-of-law rules and statutes of limitations, which federal courts might have the obligation to apply following removal.[47] Thus, if properly set up by a cunning plaintiff, removal can become a trap for the unwary.

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538 F. Supp. 141, 143-44 (D.D.C. 1982); 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3810.1 (2d ed. 1986);Young, *supra* note 13, at 491-92.

This principle is also well established outside of the FSIA. *See, e.g.*, Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665-66 (1953); PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 72 (2d Cir. 1998); Peterson v. BMI Refractories, 124 F.3d 1386, 1392 (11th Cir. 1997); Lambert v. Kysar, 983 F.2d 1110, 1113 n.2 (1st Cir. 1993); IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, 125 F. Supp. 2d 1008, 1013 (N.D. Cal. 2000); Crumrine v. NEG Micon USA, Inc., 104 F. Supp. 2d 1123, 1127-28 (N.D. Iowa 2000); Willowbrook Found., Inc. v. Visiting Nurse Ass'n, Inc., 87 F. Supp. 2d 629, 635 (N.D. Miss. 2000); JMTR Enters., L.L.C. v. Duchin, 42 F. Supp. 2d 87, 89 (D. Mass. 1999); Palace Exploration Co. v. Petroleum Dev. Co., 41 F. Supp. 2d 427, 437 (S.D.N.Y. 1998); Kumarelas v. Kumarelas, 16 F. Supp. 2d 1249, 1256 (D. Nev. 1998); Burlington N. & Santa Fe Ry. v. Herzog Servs., Inc, 990 F. Supp. 503, 504 (N.D. Tex. 1998); Jeffrey Mining Prods. v. Left Fork Mining Co., 992 F. Supp. 937, 938 (N.D. Ohio 1997); Hi-Pac, Ltd. v. Avoset Corp., 980 F. Supp. 1134, 1142 (D. Haw. 1997); Totonelly v. Cardiology Assocs. of Corpus Christi, 932 F. Supp. 621, 622 (S.D.N.Y. 1996); Dunn v. Babco Textron, 912 F. Supp. 231, 232 (E.D. Tex. 1995); Bacik v. Peek, 888 F. Supp. 1405, 1413 (N.D. Ohio 1993); Hartford Fire Ins. Co. v. Westinghouse Elec. Corp., 725 F. Supp. 317, 320 (S.D. Miss. 1989); Orn v. Universal Auto. Ass'n of Indiana, 198 F. Supp. 377, 379-80 (D. Wis. 1961).

47. A split of authority exists regarding the obligation of federal courts to apply the choice-of-law rules of the states in which they sit. *See, e.g.*, Overton, *supra* note 34. Joined by federal district courts in the District of Columbia and New Jersey, the United States Court of Appeals for the Second Circuit holds that federal courts must apply state choice-of-law rules in cases falling under the FSIA. *See, e.g.*, Barkanic v. General Admin. of Civil Aviation of P.R.C., 923 F.2d 957, 959 (2d Cir. 1991); Virtual Defense & Dev., Inc. v. Republic of Moldova, 133 F. Supp. 2d 9, 15 (D.D.C. 2001); Pittston Co. v. Allianz Ins. Co., 795 F. Supp. 678, 682 (D.N.J. 1992). The United States Court of Appeals for the Ninth Circuit, by contrast, requires federal courts to apply choice-of-law rules based on federal common law. *See, e.g.*, Schoenberg v. Exportadora de Sal, 930 F.2d 777, 782 (9th Cir. 1989).

Because Congress did not want the FSIA to alter the substantive laws applicable to disputes, the Second Circuit's view seems more compelling, at least for causes of action and interpretive questions not arising under federal

IV. ELIMINATING THE BOOBY TRAP: THE FUTILITY OF CONVENTIONAL TOOLS

To resolve the predicament of foreign states trapped in inconvenient fora, observers have proposed transfers of venue under 28 U.S.C. § 1404(a) "for the convenience of the parties and witnesses, in the interest of justice."[48] As explained below, virtually no one has recognized that the requirements for such transfers seriously discourage foreign states from making viable applications under § 1404(a). Furthermore, as some observers have acknow-ledged, transfers pursuant to § 1404(a) do not completely eliminate the opportunities for harassment.[49]

Writers tend to forget that § 1404(a) requires the moving party to prove[50] that the plaintiff could originally have

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statutes. *See* H.R. REP. NO. 94-1487, *supra* note 2, at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6610 (stating that the FSIA "is not intended to affect the substantive law of liability"); *Pittston Co.*, 795 F. Supp. at 682 (acknowledging that federal choice-of-law rules govern "if they are applicable on a basis independent of the FSIA"). *See also* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that choice-of-law rules constitute substantive, as opposed to procedural, rules of law). Furthermore, the Second Circuit's view also comports with the Department of State's and Department of Justice's joint analysis of draft legislation pre-dating the FSIA. *See* Section-by-Section Analysis accompanying Letter from William P. Rogers, Secretary of State, and Richard G. Kleindienst, Attorney General, to President of the Senate (Jan. 22, 1973), *supra* note 39, *reprinted in* 12 I.L.M. at 158 ("Under the *Erie* doctrine state substantive law, including choice of law rules, will be applied if the issue before the court is non-federal. On the other hand, federal law will be applied if the issue is a federal matter.").

In FSIA cases, federal courts seem inclined to apply the limitation principles of the state in which the action is brought. *See* Dar El-Bina Eng'g & Contracting Co. v. Republic of Iraq, 79 F. Supp. 2d 374, 388 (S.D.N.Y. 2000). *Accord* Lord Day & Lord v. Socialist Republic of Vietnam, 134 F. Supp. 2d 549, 561 (S.D.N.Y. 2001); Proctor & Gamble Cellulose Co. v. Viskoza-Loznica, 33 F. Supp. 2d 644, 666 (W.D. Tenn. 1998); Sampson v. Federal Republic of Germany, 975 F. Supp. 1108, 1122 (N.D. Ill. 1997).

48. *See* RESTATEMENT (THIRD), *supra* note 10, § 458 reporters' note 1; Section-by-Section Analysis accompanying Letter from William P. Rogers, Secretary of State, and Richard G. Kleindienst, Attorney General, to President of the Senate (Jan. 22, 1973), *supra* note 39, *reprinted in* 12 I.L.M. at 160-61; DELLAPENNA, *supra* note 6, at 128.

49. *See infra* notes 61-62 and accompanying text.

50. *See* Del Monte Fresh Produce Co. v. Dole Food Co., 136 F. Supp. 2d 1271, 1281 (S.D. Fla. 2001); PI, Inc. v. Ogle, 932 F. Supp. 80, 85 (S.D.N.Y. 1996); Resorts Int'l, Inc. v. Liberty Mut. Ins. Co., 813 F. Supp. 289, 290 (D.N.J. 1992); Martin v. S.C. Bank, 811 F. Supp. 679, 683 (M.D. Ga. 1992).

brought the action in the transferee court regardless of the defendant's wishes.[51] In other words, the foreign state must prove not only that the transferee court would have been a proper venue,[52] but also that it would have had subject matter jurisdiction over the action[53] and personal jurisdiction

51. *See* Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960). *See also Del Monte Fresh Produce*, 136 F. Supp. 2d at 1281 ("Whether a transfer is appropriate depends on two inquiries: (1) whether the action 'might have been brought' in the proposed transferee court and (2) whether various factors are satisfied so as to determine if a transfer to a more convenient forum is justified."); *Resorts Int'l*, 813 F. Supp. at 290 ("[S]ection 1404(a) transfer analys[e]s require[] two steps. First, the court must determine whether the transferee district is one in which the action might have originally been brought. . . . Second, the court must . . . determine whether the transfer [serves] the convenience of the parties and witnesses and . . . the interest of justice."); Abdulghani v. Virgin Islands Seaplane Shuttle, Inc., 749 F. Supp. 113, 113-14 (D.V.I. 1990) (quoting Hatch v. Reliance Ins. Co., 758 F.2d 409, 414 (9th Cir.), *cert. denied*, 474 U.S. 1021 (1985)) (emphasizing that "[s]ection 1404(a) requires two findings—'that the district court is one where the action might have been brought and that the convenience of the parties and witnesses in the interest of justice favor[s] the transfer'"). *See also* Isbrandtsen Marine Servs. v. Shanghai Hai Xing Shipping Co., Civ., 1991 WL 211293, at *1 (D. Or. Apr. 1, 1991) (involving a transfer motion under 28 U.S.C. § 1404(a) and the FSIA, and observing that the transferee court must be one in which the plaintiff might have brought the action).

52. *See Hoffman*, 363 U.S. at 343-44; Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1545 (10th Cir. 1996); Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1104 n.5 (5th Cir. 1981); *Del Monte Fresh Produce*, 136 F. Supp. 2d at 1281; Diebold, Inc. v. Firstcard Fin. Servs., Inc., 104 F. Supp. 2d 758, 763 (N.D. Ohio 2000); FS Photo, Inc. v. PictureVision, Inc., 48 F. Supp. 2d 442, 448 (D. Del. 1999); Hi-Pac, Ltd. v. Avoset Corp., 980 F. Supp. 1134, 1139 (D. Haw. 1997); *PI, Inc.*, 932 F. Supp. at 84; Johnston v. Foster-Wheeler Constr., Inc., 158 F.R.D. 496, 503-04 (M.D. Ala. 1994); E&J Gallo Winery v. F&P S.p.A., 899 F. Supp. 465, 466 (E.D. Cal. 1994); Bacik v. Peek, 888 F. Supp. 1405, 1413 (N.D. Ohio 1993); Tomar Elecs., Inc. v. Whelen Techs., Inc., 819 F. Supp. 871, 877 (D. Ariz. 1992); *Resorts Int'l*, 813 F. Supp. at 290; *Martin*, 811 F. Supp. at 683; 15 CHARLES ALAN WRIGHT ET AL., *supra* note 46, § 3845. *See also* Ratnaswamy v. Air Afrique, 1996 WL 507267, at *11 (N.D. Ill. Sept. 4, 1996) (involving a 28 U.S.C. § 1404 transfer motion under the FSIA); *Isbrandtsen Marine Servs.*, 1991 WL 211293, at *2 (same); 15 CHARLES ALAN WRIGHT ET AL., *supra* note 46, § 3810.1 (applying this rule to FSIA cases).

53. *See Ellis*, 646 F.2d at 1104 n.5; *Diebold*, 104 F. Supp. 2d at 763; Union Planters Bank, N.A. v. EMC Mortgage Corp., 67 F. Supp. 2d 915, 920-21 (W.D. Tenn. 1999); *FS Photo*, 48 F. Supp. 2d at 448; *Johnston*, 158 F.R.D. at 503-04; *E&J Gallo Winery*, 899 F. Supp. at 466; *Bacik*, 888 F. Supp. at 1413; *Resorts Int'l*, 813 F. Supp. at 290; *Martin*, 811 F. Supp. at 683; *Abdulghani*, 749 F. Supp. at 114; 15 CHARLES ALAN WRIGHT ET AL., *supra* note 46, § 3845. *See also Isbrandtsen Marine Servs.*, 1991 WL 211293, at *2 (involving a 28 U.S.C. § 1404 transfer motion under the FSIA).

over the defendant.[54] However, because the FSIA makes subject matter jurisdiction and personal jurisdiction coextensive with *non-immunity* for actions originally brought in federal court, it seems unlikely that foreign states will want to establish the most fundamental requirement for transfer unless they are prepared to concede their lack of immunity.[55] Since it is the author's experience that foreign states are unwilling to do so except in clear cases, one should not expect transfers of venue under § 1404(a) to provide a viable solution.

Furthermore, most foreign states will not succeed in demonstrating that transfers serve the convenience of the parties and witnesses and the interests of justice. To carry that burden, defendants must usually establish that they have strong contacts with the transferee forum, that important witnesses and evidence lie within the transferee forum, and that legally significant events transpired within the transferee forum.[56] However, since the exceptions to immu-

54. *See Hoffman*, 363 U.S. at 343-44; *Trierweiler*, 90 F.3d at 1545; Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991); *Ellis*, 646 F.2d at 1104 n.5; *Del Monte Fresh Produce*, 136 F. Supp. 2d at 1281; *Diebold*, 104 F. Supp. 2d at 763; *Union Planters Bank*, 67 F. Supp. 2d at 920-21; *FS Photo*, 48 F. Supp. 2d at 448; Moore v. McKibbon Bros., 41 F. Supp. 2d 1350, 1352 (N.D. Ga. 1998); *PI, Inc.*, 932 F. Supp. at 84; *Johnston*, 158 F.R.D. at 503-04; *E&J Gallo Winery*, 899 F. Supp. at 466; *Bacik*, 888 F. Supp. at 1413; *Tomar Elecs.*, 819 F. Supp. at 877; *Resorts Int'l*, 813 F. Supp. at 290; *Martin*, 811 F. Supp. at 683; 15 CHARLES ALAN WRIGHT ET AL., *supra* note 46, § 3845.

55. *See Isbrandtsen Marine Servs.*, 1991 WL 211293, at *2-*3 (involving the FSIA and granting a 28 U.S.C. § 1404 transfer motion only after determining that the foreign state lacked immunity under the commercial activities exception and that the transferee court would, therefore, have had subject matter jurisdiction in a case originally brought before it). *Cf.* Tifa Ltd. v. Republic of Ghana, 692 F. Supp. 393, 398 (D.N.J. 1988) (observing that the transferor court must also have subject matter jurisdiction to grant a transfer under 28 U.S.C. § 1406(a) and ordering a transfer of venue only after determining that the foreign state lacked immunity under the commercial activities exception).

56. *See* Totonelly v. Cardiology Assocs. of Corpus Christi, 932 F. Supp. 621, 623 (S.D.N.Y. 1996) (quoting Viacom Int'l, Inc. v. Melvin Simon Prods., Inc., 774 F. Supp. 858, 868 (S.D.N.Y. 1991), for the proposition that "[c]ourts routinely transfer cases where the principal events occurred, and the principal witnesses are located in another district"); *Johnston*, 158 F.R.D. at 504-05 (citing the location of proof, witnesses and the occurrence of operative facts as factors supporting the transfer of venue under 28 U.S.C. § 1404(a)).

nity require important contacts with the United States,[57] strong transfer motions tend to undermine assertions of immunity. Thus, in the rare cases where foreign states combine assertions of immunity with alternative requests for transfers of venue under § 1404(a), they have claimed that the underlying events lack significant contact with the United States, but that any conceivable nexus would lie within the transferee forum.[58] By asserting a general absence of contact with the United States, however, foreign states subvert the argument that litigation in the transferee courts would be so overwhelmingly more convenient as to overcome the plaintiffs' choice of forum.[59] Thus, to the extent that foreign states actually request transfers under § 1404(a), they seem unlikely to prevail on the merits (unless they are prepared to concede non-immunity).[60]

Finally, even if foreign states could make persuasive requests for transfers of venue, § 1404(a) would not completely eliminate the booby trap. To be sure, transfers of venue would move the litigation to more convenient locations. Following transfers under § 1404(a), however, the transferee courts must apply the same choice-of-law rules[61] and statutes of limitations[62] that the transferor courts would have applied. This, in turn, preserves the incentive for plaintiffs to secure tactical advantages by initiating litigation in remote state courts with favorable choice-of-law rules and statutes of limitations.

Thus, transfers of venue under § 1404(a) hold little promise in protecting foreign states from inconvenience,

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57. *See supra* notes 22 and 24 and accompanying text.

58. *See* Alonso v. Saudi Arabian Airlines Corp., 1999 WL 244102, at *7 (S.D.N.Y. Apr. 23, 1999); *Ratnaswamy*, 1996 WL 507267, at *12.

59. *See id.*

60. *See Isbrandtsen Marine Servs.*, 1991 WL 211293, at *1-*4 (granting a 28 U.S.C. § 1404(a) transfer motion under the FSIA after determining that most of the witnesses were located in the transferee court's jurisdiction, a substantial part of the events or omissions giving rise to the claim occurred in the transferee forum, and the transferee court would have subject matter jurisdiction due to the defendant's apparent lack of immunity).

61. *See* Moore v. Nat'l Distillers & Chem. Corp., 143 F.R.D. 526, 530 (S.D.N.Y. 1992) (quoting Van Dusen v. Barrack, 376 U.S. 612, 639 (1964)); DELLAPENNA, *supra* note 6, at 132-33; Young, *supra* note 13, at 492-93.

62. *See* Translinear, Inc. v. Republic of Haiti, 538 F. Supp. 141, 143 (D.D.C. 1982) (citing *Van Dusen*, 376 U.S. at 639).

unfavorable choice-of-law rules, and lengthy statutes of limitations following removal of actions from remote state courts. Because the legal requirements for transfer seem incompatible with the assertion of immunity, foreign states will rarely request transfers or make compelling applications for transfer. Furthermore, because successful transfers under § 1404(a) do not prevent the application of the transferor courts' choice-of-law rules and statutes of limitations, foreign states remain exposed to the sort of harassment that the FSIA seeks to avoid.

V. ELIMINATING THE BOOBY TRAP THROUGH RIGOROUS AND ATTENTIVE CONSTRUCTION

Although one might be tempted to blame the FSIA's drafters for creating a statutory pitfall, the booby trap actually represents an illusion perpetuated by cursory interpretations of the FSIA. Activation of the booby trap depends on two assumptions about the powers of federal district courts following removal from seriously inconvenient state courts, namely that they provide the appropriate venue and can exercise personal jurisdiction over foreign states. As explained below, the first assumption enjoys only partial validity and—contrary to the prevailing view of federal courts—the second assumption may be utterly false.

For civil actions removed to federal court by a foreign state, 28 U.S.C. § 1441(d) indisputably fixes federal venue in the district and division embracing the place where such action was pending in state court.[63] Although one might assume that this provision extinguishes all objections to venue,[64] one observer suggests that principles of derivative jurisdiction preserve the ability of foreign states to raise objections to venue under state law even after removal.[65] According to traditional principles of derivative jurisdiction, federal courts sit in a "strictly derivative posture relative to . . . state court proceedings" after removal,[66] so that de-

63. *See supra* note 46 and accompanying text.

64. *See* Young, *supra* note 13, at 492-93. *See also infra* note 76 and accompanying text.

65. *See* DELLAPENNA, *supra* note 6, at 132 & n.40.

66. *Id.* at 132.

fendants can make any objection to subject matter jurisdiction, personal jurisdiction, or venue that might have been available had the action remained in state court.[67] Furthermore, because the FSIA's venue provisions apply only in federal district courts, state courts would apply their own venue rules.[68] Therefore, under the principles of derivative jurisdiction, foreign states may protect themselves from harassment by objecting to venue under *state* law in *federal* court following removal.

Although several federal courts have permitted venue objections on state-law grounds following removal in non-FSIA cases,[69] this view has not received universal acceptance. In one recent case, a federal district court held that the 1988 enactment of 28 U.S.C. § 1441(e) completely supplanted the principle of derivative jurisdiction by providing that federal courts are "not precluded from hearing and determining any claim . . . because the State court . . . did not have jurisdiction over that claim."[70] Therefore, the federal court refused to consider the defendant's state-law objections to venue.[71] One may reject this holding as a misinterpretation of § 1441(e). Although the statute is not a model

67. *See, e.g.*, Freeman v. Bee Mach. Co., 319 U.S. 448, 449 (1943); Lambert Run Coal Co. v. Baltimore & Ohio R.R., 258 U.S. 377, 382 (1922); Nationwide Eng'g & Control Sys., Inc. v. Thomas, 837 F.2d 345, 347-48 (8th Cir. 1988); Garden Homes, Inc. v. Mason, 238 F.2d 651, 653 (1st Cir. 1956); Dunn v. Cedar Rapids Eng'g Co., 152 F.2d 733, 734 (9th Cir. 1945); McCurtain County Prod. Corp. v. Cowett, 482 F. Supp. 809, 813 (E.D. Okla. 1978); *In re* Lummis' Estate, 118 F. Supp. 436, 440 (D.N.J. 1954); Laffoon v. J.M. Farrin & Co., 57 F. Supp. 908, 910-11 (W.D. Mo. 1944); Harrison v. Steffen, 51 F. Supp. 225, 226 (E.D. Ky. 1943).

68. *See* DELLAPENNA, *supra* note 6, at 132. *Accord* Lucchino v. Foreign Countries of Brazil, South Korea, Spain, Mexico & Argentina, 476 A.2d 1369, 1375 (Pa. Commw. Ct. 1984) (applying state venue rules in a case against foreign states).

69. *See* PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 72-73 (2d Cir. 1998); *Lambert*, 983 F.2d at 1113 n.2; Crumrine v. NEG Micon USA, Inc., 104 F. Supp. 2d 1123, 1127-28 (N.D. Iowa 2000); Tanzman v. Midwest Express Airlines, 916 F. Supp. 1013, 1018 (S.D. Cal. 1996); Brown v. Texarkana Nat'l Bank, 889 F. Supp. 351, 352 (E.D. Ark. 1995) (quoting Cobb v. Nat'l Lead Co., 215 F. Supp. 48, 51 (E.D. Ark. 1963)). *See also* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722 n.140 (3d ed. 1998) (asserting that "[t]he derivative-jurisdiction concept still applies to venue").

70. IBC Aviation Servs., Inc. v. Compania Mexicana de Aviacion, 125 F. Supp. 2d 1008, 1014 (N.D. Cal. 2000).

71. *Id.*

of clarity,[72] its sole purpose and effect is to eliminate the derivative character of *subject matter jurisdiction* in removed cases.[73]

Other federal courts and observers have rejected post-removal, state-law objections to venue because: the principle of derivative jurisdiction does not apply to non-jurisdictional concepts like venue;[74] removal constitutes a general waiver of objections to venue;[75] and federal law governs procedural issues (such as venue) following removal.[76] This diversity of precedent renders the ability to raise post-removal, state-law objections to venue so unclear that a major treatise seems to take conflicting positions.[77] Under the circumstances, one cannot conclude that post-removal,

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72. *See* Oakley, *supra* note 13, at 983 (acknowledging that 28 U.S.C. § 1441(e) "may not be ideally drafted").

73. *See id.* (observing that 28 U.S.C. § 1441(e) permits federal courts to exercise removal jurisdiction over actions within the exclusive jurisdiction of federal courts that were mistakenly filed in state court). *See also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1075 n.58 (2d ed. 1987) (recognizing that 28 U.S.C. § 1441(e) "deals only with subject matter jurisdiction").

74. *See* Buffington v. Vulcan Mfg. Corp., 94 F. Supp. 13, 15-16 (W.D. Ark. 1950).

75. *See* Boyce v. St. Paul Fire & Marine Ins. Co., 1993 WL 175371, *4 (E.D. Pa. May 25, 1993); 14C CHARLES ALAN WRIGHT ET AL., *supra* note 69, § 3726. While not specifically mentioning state law, a number of courts have treated removal as a waiver of objections to venue. *See, e.g.*, Willowbrook Found., Inc. v. Visiting Nurse Ass'n, Inc., 87 F. Supp. 2d 629, 635 (N.D. Miss. 2000); Suarez Corp. v. McGraw, 71 F. Supp. 2d 769, 779 (N.D. Ohio 1999); Burlington N. & Santa Fe Ry. v. Herzog Servs., Inc, 990 F. Supp. 503, 504 (N.D. Tex. 1998); Jeffrey Mining Prods. v. Left Fork Mining Co., 992 F. Supp. 937, 939 (N.D. Ohio 1997).

76. *See* Minnesota Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 317, 321-22 (D. Minn. 1980) (holding that 28 U.S.C. § 1441 governs the venue of removed actions, thus rendering "irrelevant" any original impropriety of venue in the state court). *See also* Tehan v. Disability Mgmt. Servs., Inc., 111 F. Supp. 2d 542, 547-48 (D.N.J. 2000) ("Once a case has been removed to federal court, federal rather than state law governs the future course of proceedings . . . . Therefore, federal procedure, rather than state procedure governs [the action following removal]").

77. *Compare* 14B CHARLES ALAN WRIGHT ET AL., *supra* note 69, § 3722 n.140 (asserting that "[t]he derivative-jurisdiction concept still applies to venue"), *with* 14C CHARLES ALAN WRIGHT ET AL., *supra* note 69, § 3726 (stating that "venue may be proper in the federal court even if it was not proper in the state court in which the action originally was brought, since the defendant effectively waives any objection to the state court's venue by seeking removal").

state-law objections to venue can eliminate the booby trap, at least in all jurisdictions.

Even if federal courts were prepared to receive post-removal, state-law objections to venue, one struggles to identify the appropriate remedy. Although dismissal for improper venue remains a possibility,[78] few courts would have enthusiasm for that result in the absence of a jurisdictional defect.[79] While federal courts might readily agree to transfer such cases,[80] the proper mechanism remains unclear. After sustaining a post-removal, state-law objection to venue, one federal court recently transferred the action pursuant to 28 U.S.C. § 1406(a).[81] Because that statute governs the transfer of improperly venued actions and requires transferee courts to apply their own choice-of-law rules and statutes of limitations, its application eliminates the opportunity for forum-shopping and, with it, the booby trap.[82]

Other federal courts have indicated that post-removal transfers must occur under 28 U.S.C. § 1404(a) because federal venue remains proper in the transferor court.[83] This

78. *See* Brown v. Texarkana Nat'l Bank, 889 F. Supp. 351 (E.D. Ark. 1995).

79. *See* DELLAPENNA, *supra* note 6, at 127 (implying that successful venue challenges do not often result in outright dismissal). *See also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *supra* note 72, § 1075 n.58 (indicating that 28 U.S.C. § 1441(e) reflects congressional disapproval of dismissals of removed actions over which federal courts have jurisdiction).

80. *See* DELLAPENNA, *supra* note 6, at 127 (observing that successful venue challenges usually result in transfers to appropriate fora).

81. *See* Crumrine v. NEG Micon USA, Inc., 104 F. Supp. 2d 1123, 1127-30 (N.D. Iowa 2000).

82. *See supra* notes 36-37 and accompanying text.

83. *See* Jeffrey Mining Prods. v. Left Fork Mining Co., 992 F. Supp. 937, 938 (N.D. Ohio 1997) ("A defendant who removes an action from state court cannot then turn around and request a venue transfer pursuant to § 1406(a) . . . because that party implicitly sanctioned venue in the federal district where he sought to move the state lawsuit."). A major treatise advocates the same principle:

> If a district court is the appropriate forum for venue purposes under Section 1441, then a subsequent transfer to another federal district court must be based on Section 1404(a), rather than on Section 1406(a) of the Judicial Code. The latter section is applicable only in actions in which there is improper venue in the transferor court, which would not be the case since venue would be proper under Section 1441 . . . .

14C CHARLES ALAN WRIGHT ET AL., *supra* note 69, § 3726. This also seems

view seems consistent with the reasoning of the only FSIA case remotely on point.[84] In that case, the U.S. plaintiff sued a foreign state in a state court sitting in Harris County, Texas (near Houston and within the Southern District of Texas), which presumably would have been an improper venue because the relevant contacts and events occurred in Dallas, Texas (in Dallas County, about 250 miles from Houston and within the Northern District of Texas). After removal from state court to the Southern District of Texas, the foreign state moved to dismiss for improper venue or, in the alternative, to transfer the action to the District of Columbia under 28 U.S.C. § 1406(a).[85] Although the Southern District of Texas granted the latter request, the District of Columbia District Court held that the Texas court had applied the wrong transfer statute.[86] Since federal venue was proper in the Texas court, 28 U.S.C. § 1404(a) provided the only authority to transfer venue.[87] Because that statute requires application of the transferor court's choice-of-law rules and statutes of limitations,[88] its application preserves opportunities for forum-shopping and, thus, fails to eliminate the booby trap.[89]

To recapitulate, some jurisdictions would eliminate the booby trap by allowing foreign states to raise venue objections under state law after removal. By contrast, several other jurisdictions either do not recognize the propriety of such objections or seem to identify 28 U.S.C. § 1404(a) as the sole authority for post-removal transfers. Under these circumstances, it becomes difficult to treat post-removal,

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consistent with the text of 28 U.S.C. § 1406(a), which only provides a remedy for defects in *federal* venue. *See* 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong *division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.") (emphasis added).

84. *See generally* Translinear, Inc. v. Republic of Haiti, 538 F. Supp. 141 (D.D.C. 1982).

85. *See id.* at 143.

86. *See id.* at 143-44.

87. *See id.* at 144. *See also* Young, *supra* note 13, at 491 n.146 (discussing the FSIA's removal provision and concluding that "[i]f an action is removed pursuant to § 1441(d), any subsequent transfer *must* be pursuant to § 1404(a)") (emphasis added).

88. *See Translinear*, 538 F. Supp. at 143-44; Young, *supra* note 13, at 492-93.

89. *See supra* notes 61-62 and accompanying text.

state-law venue objections as a reliable tool for avoiding the booby trap.

Objections to personal jurisdiction based on state long-arm statutes and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provide a stronger conceptual basis for eliminating the booby trap. Despite some initial confusion,[90] most authorities now recognize that the FSIA's provisions on subject matter jurisdiction and personal jurisdiction do not apply to state-court litigation.[91] This, in turn, prevents the tests for jurisdiction and immunity from melding in state court. To obtain personal jurisdiction over non-immune foreign states in state courts, plaintiffs must satisfy the applicable state long-arm statutes, as limited by the Fourteenth Amendment.[92] At the

90. *See* DELLAPENNA, *supra* note 6, at 106 (noting a failure of courts and writers to recognize that the FSIA does not alter ordinary rules of state judicial jurisdiction).

91. *See* Interlotto, Inc. v. Nat'l Lottery Admin., 689 A.2d 148, 151 (N.J. App. Div. 1997); Martinelli v. Djakarta Lloyd P.N., 431 N.Y.S.2d 748, 749 (N.Y. City Ct. 1980); RESTATEMENT (THIRD), *supra* note 10, § 458; DELLAPENNA, *supra* note 6, at 106-07. *See also* H.R. REP. NO. 94-1487, *supra* note 2, at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6611 (explaining that "section 1330 . . . provides for subject matter and personal jurisdiction of *U.S. district courts* over foreign states and their political subdivisions, agencies and instrumentalities") (emphasis added); Sablic v. Croatia Line, 719 A.2d 172, 173 (N.J. App. Div. 1998) (using contacts with the forum state to assess the foreign state's amenability to personal jurisdiction); Lucchino v. Foreign Countries of Brazil, South Korea, Spain, Mexico & Argentina, 476 A.2d 1369, 1376 (Pa. Commw. Ct. 1984) (citing a state statute as the source of authority for exercising personal jurisdiction over the foreign-state defendants).

Although the House Report suggests that the FSIA's jurisdictional structure would apply in state courts, this probably represents an incorrect paraphrasing of the section-by-section analysis jointly submitted by the Departments of State and Justice. *Compare* H.R. REP. NO. 94-1487, *supra* note 2, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626 ("Claimants will clearly benefit from . . . the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in *Federal and State* courts as to every claim for which the foreign state is not entitled to immunity.") (emphasis added), *with* Section-by-Section Analysis accompanying Letter from Robert S. Ingersoll, Deputy Secretary of State, and Harold R. Tyler, Deputy Attorney General, to Hon. Nelson D. Rockefeller, President of the Senate (Oct. 31, 1975), *supra* note 2, *reprinted in* 15 I.L.M. at 113 ("Claimants will clearly benefit from . . . the certainty that . . . service [of process] will, under Section 1330(b) of the bill, confer personal jurisdiction over a foreign state in *federal* court as to every claim for which the foreign state is not entitled to immunity.") (emphasis added).

92. *See* RESTATEMENT (THIRD), *supra* note 10, § 458; *Interlotto*, 689 A.2d at 151; DELLAPENNA, *supra* note 6, at 106-07. *Accord Sablic*, 719 A.2d at 173;

very least, this requires plaintiffs to demonstrate that the defendants have established minimum contacts with the forum state (as opposed to the entire United States), and that the exercise of jurisdiction would comport with traditional notions of fair play and substantial justice.[93] The need to demonstrate the existence of minimum contacts with a particular state makes it incrementally more difficult to establish personal jurisdiction over non-immune foreign states.[94]

Returning to the previous example and the discussion of derivative jurisdiction,[95] if (a) a plaintiff sued the foreign state in an Alaska, Hawaii, or Minnesota state court, and (b) the foreign state removed the action to federal court, then (c) the foreign state should be able to request dismissal for lack of personal jurisdiction under the state long-arm statute, as limited by the Fourteenth Amendment. The argument for applying the principle of derivative jurisdiction seems compelling because Congress explicitly did not intend 28 U.S.C. § 1441(e) to cure defects in territorial jurisdiction.[96] Furthermore, it seems well established that removal does not waive objections to personal jurisdiction.[97]

Lucchino, 476 A.2d at 1376.

93. *See Interlotto*, 689 A.2d at 151.

94. *See* Proctor & Gamble Cellulose Co. v. Viskoza-Loznica, 33 F. Supp. 644, 650 & n.2 (W.D. Tenn. 1998) (indicating that the requirements for personal jurisdiction are "somewhat more stringent" under state long-arm statutes than they are under 28 U.S.C. § 1330(b)). Congress evidently thought that this would provide further encouragement for plaintiffs to bring claims against foreign states in federal court. *Cf.* H.R. REP. NO. 94-1487, *supra* note 2, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611 (suggesting that "broad jurisdiction in the Federal courts should be conducive to uniformity in decision").

95. *See supra* notes 31-32 and 66-67.

96. The House Report states that "[o]ne commentator on the bill . . . suggested statutory clarification on the question of the impact of the bill on territorial jurisdiction. Federal courts are often confined to the long-[arm] authority of the states in which they sit. The Committee does not intend to cure any defect in territorial jurisdiction." H.R. REP. NO. 99-423, at 14, *reprinted in* 1986 U.S.C.C.A.N. 1545, 1554. *See also* Eccles v. Nat'l Semiconductor Corp., 10 F. Supp. 2d 514, 519 n.4 (D. Md. 1998) (holding that "§ 1441(e) does not prevent [a defendant] from raising the state court's lack of personal jurisdiction after removal"); DELLAPENNA, *supra* note 6, at 108 (suggesting that 28 U.S.C. § 1441(e) does not eliminate the principle of derivative jurisdiction with respect to personal jurisdiction).

97. *See, e.g.*, Morris & Co. v. Skandinavia Ins. Co., 279 U.S. 306, 314 (1929); Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 157 n.4 (2d Cir. 1996); Silva v. City of Madison, 69 F.3d 1368, 1376 (7th Cir. 1995).

Thus, objections to personal jurisdiction based on state long-arm statutes and the Fourteenth Amendment provide a more logical basis for eliminating the booby trap from the FSIA's removal provisions.

Diligent research, however, reveals that federal courts almost invariably cite 28 U.S.C. § 1330(b) as the source of authority for exercising personal jurisdiction over foreign states after removal to federal court.[98] In one removed action, a federal district court specifically rejected as "irrelevant" the parties' arguments regarding the exercise of personal jurisdiction under state law.[99] In another removed action, the federal district court held that the state long-arm statute and the Fourteenth Amendment required dismissal for lack of personal jurisdiction.[100] On appeal, the United States Court of Appeals for the Eleventh Circuit did not question the propriety of dismissal under state law and the Fourteenth Amendment,[101] but simply identified § 1330(b)

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98. *See, e.g.*, Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 845 (5th Cir. 2000); Theo. H. Davies & Co. v. Republic of Marshall Islands, 174 F.3d 969, 973-74 (9th Cir. 1999); Vermeulen v. Renault, U.S.A., 985 F.2d 1534, 1552-53 (11th Cir. 1993); Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1411 (9th Cir. 1990); Security Pac. Nat'l Bank v. Derderian, 872 F.2d 281, 283-84 (9th Cir. 1989); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1107 n.5 (5th Cir. 1985); Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 395 (2d Cir. 1985); Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 252-53 (7th Cir. 1983); Phoenix Consulting, Inc. v. Republic of Angola, 35 F. Supp. 2d 14, 17 (D.D.C. 1999), *rev'd*, 216 F.3d 36 (D.C. Cir. 2000); Ratnaswamy v. Air Afrique, 1996 WL 507267, at *10-*11 & n.4 (N.D. Ill. Sept. 4, 1996); Berdakin v. Consulado de la Republica de El Salvador, 912 F. Supp 458, 467 (C.D. Cal. 1995); Coleman v. Alcolac, Inc., 888 F. Supp. 1388, 1400-01 (S.D. Tex. 1995); Talbot v. Saipem A.G., 835 F. Supp. 352, 354 (S.D. Tex. 1993); Zernicek v. Petroleos Mexicanos (Pemex), 614 F. Supp. 407, 410 (S.D. Tex. 1985).

The author found one exception to this general trend. *See* Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 533-34 (S.D. Tex. 1994) (using contacts with the State of Texas to assess the amenability of foreign sovereign defendants to personal jurisdiction in a removed action). Because the court did not explain its selection of state contacts, as opposed to national contacts, one cannot be certain that the court attributed any significance to the fact that the case fell within its removal jurisdiction. In any event, the Fifth Circuit's contrary analysis in *Syria Shell Petroleum Dev.* diminishes the precedential importance that *Kern* might otherwise possess.

99. *Ratnaswamy*, 1996 WL 507267, at *11 n.4

100. *See Vermeulen*, 985 F.2d at 1541-42, 1552 .

101. The plaintiff purchased a 1982-model French automobile from her brother in North Carolina in 1988, when both the plaintiff and her brother resided in that state. *See id.* at 1537. Later, the plaintiff moved to Georgia,

and the Fifth Amendment to the U.S. Constitution as providing the applicable standards for the exercise of personal jurisdiction.[102] This allowed the Eleventh Circuit to meld the questions of immunity and jurisdiction into a single test based on national contacts. Concluding that the foreign state had sufficient contacts with the United States as a whole, the Eleventh Circuit held that the federal district court had personal jurisdiction over the foreign state.[103]

Although the foregoing precedent bodes ill for post-removal motions to dismiss based on state long-arm statutes and the Fourteenth Amendment, one should recognize that the holdings rest on a cursory and obviously flawed interpretation of the FSIA. The assertion that § 1330(b) governs the exercise of personal jurisdiction over foreign states in removed cases does not withstand critical analysis. Section 1330(b) only applies to "claims in which the district courts have [subject matter] jurisdiction under subsection (a) of [§ 1330]."[104] Section 1330(a), in turn, only defines the "original jurisdiction" of federal district courts, meaning their subject matter jurisdiction over civil actions originally brought against foreign states in federal courts. By contrast, 28 U.S.C. § 1441(d) defines the removal jurisdiction of federal district courts, meaning their subject matter jurisdiction over civil actions removed from state court to federal court. Following *removal*, federal district courts cannot possibly "have [*original* subject matter] jurisdiction under subsection (a) [of § 1330]."[105] Therefore, § 1330(b) cannot

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where she was involved in an automobile accident and where she sued the French manufacturer for negligent design and manufacture of the automobile's passenger restraint system. *See id.* at 1537, 1541. Although the French manufacturer had established a marketing subsidiary to sell automobiles in the United States, *see id.*, one struggles to identify any facts demonstrating that it purposefully established minimum contacts with the State of Georgia. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-96 (1980) (holding that a court in Oklahoma could not exercise personal jurisdiction over a New York automobile dealership based on the plaintiff's unilateral decision to move from New York to Arizona via Oklahoma).

102. *See Vermeulen*, 985 F.2d at 1553.

103. *See id.* at 1545-53.

104. *See* H.R. REP. NO. 94-1487, *supra* note 2, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6612 ("For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have *original jurisdiction* under section 1330(a) . . .") (emphasis added).

105. 28 U.S.C. §1330(b).

govern the exercise of personal jurisdiction over foreign states in cases removed to federal court.

Lacking any other statutory authorization for the exercise of personal jurisdiction over foreign states following removal, federal courts must turn to state long-arm statutes (as limited by the Fourteenth Amendment and imported via the principle of derivative jurisdiction). Restored to their proper role in removed actions, state long-arm statutes will protect foreign states against litigation in seriously inconvenient fora and from other forms of harassment. Thus, careful and attentive application of the FSIA by federal courts can eliminate a potential booby trap from the escape hatch that Congress made available to foreign states.

VI. CONCLUSION

The FSIA's removal provisions aim to give foreign states free access to the perceived high intellectual quality of federal courts, as well as protection from harassment and some irritating features of U.S. litigation. In an ironic twist of fate, state courts have perceived important limitations in the FSIA's jurisdictional structure, whereas cursory analyses by federal courts have prevented full appreciation of those limitations in removed actions. The resulting gap in understanding undermines the FSIA's broad objectives by exposing foreign states to harassment and forum-shopping.

The FSIA's silver anniversary provides the occasion not only to critique the statute, but also those who have applied it. As suggested by the foregoing discussion, one might fairly conclude that we have placed undue emphasis on the goal of facilitating litigation against foreign states and have neglected the goal of minimizing the irritations of such litigation. Too frequently, we fail to perform the careful and attentive analyses that provide the first line of defense against interpretive problems. The statute may require improvement, but so do we.