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PERSPECTIVE

## 9/11 bill stays true to current policy

By Juan C. Basombrio

Last week, shortly before the 15-year anniversary of the September 11 terrorist attacks, the House of Representatives passed the Justice Against Sponsors of Terrorism Act (JASTA), previously passed by the Senate in May. JASTA is now under consideration by the White House, which has indicated that it may veto the bill.

JASTA is an amendment to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. Sections 1602 et seq., which “provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U. S. 428 (1989). Under the FSIA, foreign states are immune from the jurisdiction of U.S. courts unless a statutory exception to foreign sovereign immunity enumerated in Section 1605 applies. Typical exceptions include when a claim is based upon commercial activity conducted by a foreign state, or one of its organs, agencies or instrumentalities, in the United States or outside of the United States having a direct effect in the United States, or when a foreign state waives its foreign sovereign immunity in the course of a commercial transaction.

JASTA would be an important development in the fight against international terrorism because it introduces an explicit exception to foreign sovereign immunity under the FSIA that would broaden the reach of U.S. courts in actions involving acts of international terrorism committed in the United States.

JASTA, which would become Section 1605B of the FSIA, would not introduce a new subject matter to the exceptions enumerated in the FSIA. The FSIA already contains an exception for acts of terrorism (Section 1605A, enacted in 2008), but it is limited to claims against foreign states designated by the State Department as state sponsors of terrorism: currently Iran, Sudan and Syria. JASTA would instead create jurisdiction over actions seeking damages against a foreign state for physical injury to person or property or death occurring in the United States, and caused by (1) an act of international terrorism in the United States, and (2) a tortious act of the foreign state regardless of where the tortious act occurred. JASTA is thus in-line with the general jurisdictional approach of the FSIA, which is to deprive sovereign immunity for acts carried-on by foreign states in the United States or carried-on by foreign states outside of the United States having a direct effect in the United States, as in the case of the commercial activity exception (Section 1605).

However, JASTA would expand the terrorism exception. The act would allow courts to make a



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A memorial gallery of victims' faces, at the National Sept. 11 Memorial Museum in New York, Sept. 9, 2016.

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case-by-case jurisdictional determination based upon the existence of both an international terrorist act in the United States and a tort by the foreign state regardless of where it is committed, instead of limiting jurisdiction to a narrow class of defendants comprised of only countries labeled state sponsors of terrorism. Further, although the FSIA already contains an exception to sovereign immunity for non-commercial torts committed by a foreign state in the United States, that exception is presently limited to torts committed in connection with commercial activity by the foreign state outside of the United States (Section 1605(a)(2)).

JASTA also would have broad reach because “foreign state” is defined by Section 1603(a) of the FSIA to include its organs, agencies and instrumentalities, and JASTA provides for aiding and abetting liability. Thus, a foreign state’s acts through such entities may not shield the foreign state from the jurisdiction of U.S. courts, so long as the foreign state controlled that entity. This would be consistent with existing law including an early Supreme Court ruling on the FSIA, *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983).

Critics note that JASTA may damage foreign relations or result in retaliatory actions by foreign states (they may amend their laws to expand the reach of their own courts over American entities). However, JASTA contains limitations to help ameliorate international comity concerns; plaintiffs must base actions upon an act of international terrorism com-

mitted in the United States. Such a principle also is not alien to basic jurisdictional principles like those found in the landmark Supreme Court decision of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). It also is consistent with the latest Supreme Court pronouncement on the FSIA, which requires courts to focus on the location where the gravamen of a tort action arose, *OBB Personenverkehr v. Sachs*, 136 S. Ct. 390 (2015). JASTA also would provide that a foreign state may not be subjected to U.S. jurisdiction merely because of an omission or a tortious act that constitutes mere negligence, which means that the failure to prevent an act of international terrorism, without more, would be insufficient to abrogate foreign sovereign immunity. This approach is also consistent with FSIA provisions that courts have interpreted to require a nexus to the United States by an act of the foreign state and not by a mere omission.

In addition, although the FSIA’s enactment in 1976 shifted the foreign sovereign immunity determination from the State Department to the courts, the State Department retained the ability to provide courts with statements of interest. These statements allow courts to consider the United States’ views regarding foreign sovereign immunity in particular cases, and thus further safeguard international relations. JASTA would go further and allow courts to stay an action where the State Department is engaged in good faith discussions with the foreign state to resolve the disputed matter. Another important limitation is that although the Supreme Court has held that the FSIA is generally retroactive, JASTA is explicitly made retroactive only back to Sept. 11, 2001, which underscores the tragic events that compelled the passing of JASTA.

As the White House considers whether the president should sign into law or veto JASTA, it should keep in mind that JASTA is an extension of, and not a departure from, existing foreign sovereign immunity law. JASTA would be consistent with existing law because the FSIA already provides terrorism and tort exceptions to foreign sovereign immunity, and JASTA’s approach mirrors the overall jurisdictional reach permitted by the FSIA and settled precedents like *International Shoe*.



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