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NOTE

Chinese Assault Rifles, Giant Pandas, and Perpetual Litigation: The “Rights Without Remedies” Dead-End of the FSIA

Walters v. Industrial & Commercial Bank of China, Ltd., 651 F.3d 280 (2d Cir. 2011).

J.F. HULSTON*

I. INTRODUCTION

A recent decision by the U.S. Court of Appeals for the Second Circuit involved very high-profile parties: the People’s Republic of China, its Embassy in Washington, D.C., and multiple branch representatives of its billion-dollar, state-owned bank operating in New York City.¹ However, this case arose from a small-scale business transaction: the retail purchase of a Chinese-manufactured SKS semi-automatic rifle² during the regular course of business in the small town of Lamar, Missouri.³ This rifle, purchased by a father for his son in 1993, allegedly malfunctioned during a hunting trip and discharged a bullet into the son’s head, killing him in front of his father.⁴ Since this event, the son’s parents have pursued many avenues of legal action seeking justice for their loss against China and its state-affiliated companies and assets.⁵ This process, pursued intermittently from 1993 to 2011, just shy of two decades, reached yet another dead end for the parents on July 7, 2011, in the Second Circuit.⁶

Walters v. Industrial & Commercial Bank of China, Ltd. presented the Second Circuit with the issue whether, in the context of the execution of assets, immunity for foreign states under the Foreign Sovereign Immunities Act (FSIA) may be considered sua sponte by a district court or at the behest of a

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1. *See* *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 283 (2d Cir. 2011).

2. *See* Appellants’ Brief & Special Appendix at 12, *Walters*, 651 F.3d 280 (No. 10-806-cv), 2010 WL 2602428, at *11-12.

3. *See id.* at 12.

4. *Id.*

5. *See id.* at 14.

6. *See id.* at 11-14; *see also* *Walters*, 651 F.3d at 299.

third party.⁷ The Second Circuit held that “where a judgment creditor seeks to enforce a judgment rendered against a foreign [state] by attaching or executing upon its property, a district court may [have the power to] apply the FSIA’s execution immunity provisions [sua sponte,] regardless of whether the foreign sovereign enters an appearance.”⁸ Sua sponte, Latin for “of one’s own accord; voluntarily,” refers to the power of a court to raise an issue or motion without the need for another party to raise it first.⁹ In the context of the FSIA, raising execution immunity sua sponte refers to the ability of a court to raise the issue of immunity without requiring a representative of a foreign state or a third party to appear in court and/or raise it personally.¹⁰ In reaching this conclusion, the Second Circuit relied on the structure, history, and purpose of the FSIA.¹¹

Walters is noteworthy for addressing several aspects of the FSIA. In addition to holding that a district court can raise the issue of immunity sua sponte, *Walters* reaffirmed the independence of the issues of jurisdictional immunity and execution immunity as separate and distinct principles under the FSIA.¹² *Walters* also asserted the narrow and “restrictive” view toward the exceptions to execution immunity under the FSIA.¹³

Walters clarifies the FSIA execution provisions, which have been described “as among the most confusing and ineffectual in the statute” and in need of reform.¹⁴ The execution provisions under the FSIA are confusing and ineffectual for a multitude of reasons, including structure and procedure.¹⁵ Structurally, the execution provisions are confusing because: they grant differing levels of execution immunity to instrumentalities based on whether they conduct commercial activity in the U.S.; they distinguish different

7. *Walters*, 651 F.3d at 290.

8. *Id.*

9. BLACK’S LAW DICTIONARY 1560 (9th ed. 2009).

10. Federal district courts have followed a tradition of raising jurisdictional immunity sua sponte under the FSIA, which preceded their growing resolution to allow execution immunity to be raised sua sponte. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1126 (9th Cir. 2010); see *infra* Part III.D. In the Fifth Circuit, the action of a court raising immunity sua sponte in the context of execution under the FSIA has been referred to as raising “execution immunity” sua sponte. *Walters*, 651 F.3d at 290; see *infra* Part IV.B. In the Seventh Circuit, it has been referred to as raising “attachment immunity” sua sponte. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 801 (7th Cir. 2011); see *infra* Part III.D. In the Ninth Circuit, it has been referred to as raising “immunity from execution” sua sponte. *Peterson*, 627 F.3d at 1126. These phrases all describe the same specific court action in the context of the FSIA.

11. See *Walters*, 651 F.3d at 289-92; *infra* Part IV.A.

12. See *infra* Part IV.B.

13. *Walters*, 651 F.3d at 289, 298.

14. Working Grp. of the Am. Bar Ass’n, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT’L L. 489, 581 (2002) [hereinafter ABA Report].

15. See *id.* at 581-86.

grounds for obtaining attachment before or after judgment against a foreign state; and they suggest that a non-foreign state party seeking a contractual waiver of immunity with a foreign state party to attain three separate waivers of immunity for pre-judgment attachment, jurisdiction, and execution.¹⁶ Procedurally, the execution immunity provisions are ineffectual and prevent practical application because they create an exceedingly “restrictive regime” in order to successfully enforce judgments against foreign states.¹⁷

This confusion arising from the execution immunity provisions under the FSIA has been a source of prolonged litigation in U.S. federal courts.¹⁸ The *Walters* decision follows several recent high profile cases in U.S. federal courts where plaintiffs were awarded default judgments against foreign states that ranged from tens of millions to several billion U.S. dollars.¹⁹ These default judgments created the misleading impression that the actual collection or attachment of such assets against a foreign state is not only possible, but also the next logical step of seeking justice.²⁰

Further, the FSIA execution immunity provisions are ineffectual because they were intentionally designed to be arduous to the plaintiff.²¹ Congress designed the FSIA with the understanding that it only provides “rights without remedies,” with the execution of judgments against foreign states totally dependent on the voluntary compliance of foreign states with U.S. court judgments.²² Moreover, the practical application of execution provisions under the FSIA is so extremely restrictive as to make the enforcement of judgments against foreign sovereigns nearly impossible.²³

By extending a uniform interpretation of the FSIA to a fourth U.S. appellate court,²⁴ *Walters* reminds plaintiffs of the unlikely, if not insurmountable, possibility of collecting assets of a foreign state in U.S. federal courts

16. *Id.* at 583-84.

17. *Id.*

18. *See infra* Part III.C-D.

19. *See infra* Part III.D.

20. Unless the Plaintiffs in *Rubin*, *Peterson*, and *Walters* sought to execute on assets just in order to create a symbolic victory against foreign state defendants, it can be inferred that Plaintiffs in each case pursued extensive litigation against defendant foreign states (in the case of *Walters*, for almost two decades) because they believed it was possible to execute their default judgments and attach assets from the foreign state defendants. *See infra* Parts II, III.D.

21. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011).

22. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) (citing *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007)); *see also Walters*, 651 F.3d at 289 (“Yet, since it was not Congress’ purpose to lift execution immunity wholly and completely, a right without a remedy does exist in [some] circumstances” (quoting *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984))).

23. ABA Report, *supra* note 14, at 584.

24. *See infra* Part III.D.

under the FSIA. Given the special sensitivities implicated in executing against foreign state property, the *Walters* decision reduces the anxiety of foreign states holding assets in the U.S.²⁵ *Walters* also prevents the U.S. Department of State from further undue embarrassment in foreign relations, as it reaffirms the longstanding respect for the immunity of both foreign states and their property held inside the U.S.²⁶

This Note will examine whether execution immunity under the FSIA may be considered *sua sponte* by a district court judge and the broad judicial considerations in preserving the narrow and restrictive view of the FSIA to the attachment of assets of a foreign state. To do this, this Note will review the facts and holding of *Walters*.²⁷ This Note will then survey the legal background of sovereign immunity, the adoption of the “restrictive immunity” principle in the U.S., and the creation of the FSIA and the decisions of three appellate courts to adopt the uniform holding that district courts have the right to raise the issue of immunity *sua sponte*.²⁸ Next, this Note will look at the reasoning of *Walters* in light of the decisions of its sister circuits and the broader foreign policy goals of the FSIA, concluding that *Walters* was decided in accordance with the text and structure of the FSIA.²⁹ However, this Note will argue that the court’s decision leaves certain questions unresolved regarding the scope of discovery against a foreign state and the potential challenges of attaching the assets of a foreign state.³⁰

II. FACTS AND HOLDING

On November 11, 1990, thirteen-year-old Kale Ryan Walters was killed on a hunting trip with his father in an accident involving his operation of a Chinese-manufactured SKS semi-automatic rifle.³¹ The Walters family (Peti-

25. As a result of *Walters*, foreign states who possess property in the jurisdiction of the Second Circuit now know, with certainty, that they do not have to make personal appearances in federal court in order raise the issue of immunity in response to execution actions seeking attachment of a foreign state’s property situated in the Second Circuit. *See Walters*, 651 F.3d at 290.

26. *See infra* Part III.

27. *See infra* Part II.

28. *See infra* Part III.

29. *See infra* Part IV.

30. *See infra* Part V.

31. *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 283 (2d Cir. 2011). This weapon was apparently manufactured by China North Industries Corporation, generally known as “Norinco,” an agency or instrumentality of China conducting commercial activity in the U.S. *See* Appellants’ Brief & Special Appendix, *supra* note 2, at 5. On November 4, 1993, Petitioners filed a Complaint against China, “Norinco,” and other China-based companies in the Missouri district court following the death of their son, which was allegedly “caused by one of thousands of

tioners) claimed the rifle was to blame for Kale's death because it allegedly malfunctioned and discharged.³² In November 1993, Petitioners sued the People's Republic of China and entities allegedly controlled by China, including Century International Arms,³³ in the U.S. District Court for the Western District of Missouri (Missouri district court) for products liability, negligence, and breach of warranty related to the rifle at controversy.³⁴

In response to Petitioner's complaint,³⁵ China claimed sovereign immunity and chose not to appear in the Missouri action.³⁶ On October 22, 1996, the Missouri district court rendered a default judgment against China for ten million dollars (Missouri Default Judgment).³⁷ The Missouri district court decided that it had jurisdiction over China "under FSIA exceptions to sovereign immunity for carrying on commercial activity within the United States [under] 28 U.S.C. § 1605(a)(2), and committing a 'tortious act or omission' causing damages in this country [under 28 U.S.C. § 1605(a)(5)]."³⁸ The Missouri district court also dismissed Petitioners' claims against the single and last remaining Chinese-controlled corporation named by Petitioners at the commencement of their lawsuit.³⁹

defective 'SKS' rifles designed, manufactured and exported to the United States by [China]." *Id.*

32. *Walters*, 651 F.3d at 283.

33. *Id.*

34. *Id.*

35. *Id.* The complaint was served pursuant to 28 U.S.C. § 1608 (a)(2)-(4). *Id.*

36. *Id.* Even without the appearance of China, the Missouri district court conducted a bench trial on this controversy. *See id.* at 283-84.

37. *Id.* at 283-84.

38. *Id.* at 284; *see* 28 U.S.C. § 1605(a)(2), (5) (2006).

39. *Walters*, 651 F.3d at 284. "In March 1996, Petitioners had entered into a settlement with what appears to have been either this corporation or an affiliated entity, releasing all claims against it in exchange for \$5,000." *Id.* at 284 n.2. "On November 4, 1993, the [Petitioners] commenced a lawsuit . . . against six named defendants, including several U.S.-based companies and China North Industries, a/k/a Norinco, as well as John Does 1-10." Brief for Respondents-Appellees at 9, *Walters*, 651 F.3d 280 (No. 10-806-cv), 2010 WL 3866772 at *9. "On November 12, 1993, [Petitioners] filed an amended complaint, naming [China] as a defendant." *Id.* China replied with a claim of sovereign immunity. *Id.* "On April 18, 1994, the [Petitioners] filed their third amended pleading, naming ChinaSports, Inc., a/k/a China North Industries a/k/a Norinco, as a defendant." *Id.* at 9-10. The Missouri district court "did not adjudicate the liability of any [China] agency or instrumentality." *Id.* at 10. The Missouri district court "did not find that Norinco was an alter ego of China." *Id.* The Missouri district court

did not . . . mention Norinco, except to note that the [Petitioners] had dismissed [the] claims against it. The [Petitioners] apparently dismissed their claims against Norinco because, in March 1996, they settled with ChinaSports, which the Petitioners alleged was the company under which Norinco was doing business in the [U.S].

For the next decade, Petitioners attempted to collect assets against China on the basis of the Missouri Default Judgment.⁴⁰ All of Petitioners' attempts to collect were unsuccessful.⁴¹ However, the Missouri district court denied this motion because Petitioners did not pinpoint specific property owned by China that fell within any exception to execution immunity under 28 U.S.C. § 1610(a) or (b) of the FSIA.⁴² In 2001, Petitioners attempted to execute the Missouri Default Judgment on China's two Giant Pandas, currently on loan to the U.S. and held at the National Zoo in Washington, D.C.⁴³ The United States formally opposed this action, and the Missouri district court dismissed with prejudice the attempt to attach the pandas.⁴⁴ In October 2006, after ten years of failed attempts by Petitioners to execute the Missouri Default Judgment against China's assets, the Missouri district court authorized a ten-year extension to allow Petitioners to execute on the Missouri Default Judgment.⁴⁵

In 2009, Petitioners changed their enforcement strategy and attempted to collect against the assets of China in the courts of New York instead of Missouri.⁴⁶ Petitioners first filed the Missouri Default Judgment in the U.S. District Court for the Southern District of New York and later served several New York branches of Chinese banks, the Industrial and Commercial Banks of China, Ltd., Bank of China, Ltd., and China Construction Bank Corp. (collectively, the Banks) with restraining notices and subpoenas, which forbade the Banks from relocating any of China's assets under the Bank's control and asked peremptorily for documents associated with these particular assets.⁴⁷ Petitioners later clarified that their intent was to restrain assets held by China *outside* the U.S.⁴⁸

In the Southern District, the Banks argued that China's immunity as a sovereign foreign state was a defense against Petitioner's motions, and therefore should be vacated and quashed.⁴⁹ Petitioners countered by claiming that the FSIA extended no protection to China's assets outside of the U.S. and that

At the time of the [M]issouri [D]efault [J]udgment, the [Petitioners] had obtained judgments in their favor from other defendants totaling \$200,000.00.

Id.

40. *Walters*, 651 F.3d. at 284.

41. *Id.* In 1998, Petitioners submitted a motion in the Missouri district court "for an order of attachment and execution in the amount of [ten] million [dollars]." *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (citing *Walters v. People's Republic of China*, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009)).

48. *Id.*

49. *Id.* at 284-85.

the Banks had no standing to assert immunity on China's behalf.⁵⁰ China believed that its sovereignty rendered it immune from attempts to restrain its funds, including those attempts by Petitioner; on November 20, 2009, the Chinese embassy forwarded a letter to the district court explaining this position.⁵¹

The court granted the Bank's motion to vacate the restraining orders and quash the subpoenas on the grounds that "the FSIA's exceptions to sovereign immunity did not apply to China's assets outside the United States."⁵² The Southern District relied on China's formal assertion of immunity via its letter to the U.S. Department of State in regards to the suit by Petitioners.⁵³ Petitioners did not appeal this order from the Southern District.⁵⁴

The court further addressed the "present petition for issuance of a turnover," which was filed by Petitioners against the Banks in the Southern District.⁵⁵ This petition was served on China's Ministry of Justice and broadly requested the attachment of the assets owned by China and held by the Banks, both inside and outside of the U.S., in order to compensate for the Missouri Default Judgment.⁵⁶ China formally asserted its immunity in response to this petition in a letter to Petitioners.⁵⁷

The Banks moved to dismiss the petition and the district court granted the Banks' motion.⁵⁸ The Southern District dismissed the petition with prejudice to the extent it pursued assets held by China outside of the U.S. or China's assets located inside the U.S. that did not fall within the commercial activity exception of foreign state under 28 U.S.C. § 1610(a)(2).⁵⁹ The Southern District also dismissed without prejudice Petitioners' motions to execute any assets held by China inside the United States and falling within

50. *Id.*

51. *Walters*, 672 F. Supp. 2d at 574.

52. *Walters*, 651 F.3d at 285 (emphasis added). The court stated that China maintain[s and] enjoys sovereign immunity with respect to petitioner's claim[], that it had made in this case repeated representations to the U.S. side through diplomatic channel[s] and stressed that China enjoys sovereign immunity and is not subject to jurisdiction of U.S. courts, and that it does not accept the jurisdiction of U.S. courts and the so-called default judgment.

Id. (third alteration in original) (internal quotation marks omitted).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

the statutory scope.⁶⁰ In response, Petitioners chose not to file a new petition.⁶¹ Instead, Petitioners filed an appeal in the U.S. Court of Appeals for the Second Circuit contesting the court's order regarding China's assets held *inside* the United States.⁶²

The Second Circuit issued its ruling in July 2011.⁶³ The court noted that it “accord[s] deferential review to a district court ruling on a petition for an order of attachment or execution under the FSIA, and . . . reverse[s] only for abuse of discretion.”⁶⁴

Petitioners argued that the Southern District erred as a matter of law in failing to concede that

(1) sovereign immunity can be asserted only by the foreign state itself and that the Banks, therefore, lack[ed] standing to assert China's immunity as a basis for dismissal; (2) China waived its sovereign immunity by both (a) its commercial and tortious conduct underlying the Missouri [D]efault [J]udgment and (b) its failure to appear in the Missouri or New York proceedings; (3) no new filing is necessary because the petition already satisfie[d] all [the] FSIA requirements, including those of § 1610(a)(2) and § 1610(c); and (4) the FSIA authorizes the collection of assets of a state's agencies and instrumentalities, in addition to those of the state itself.⁶⁵

The Second Circuit held that in spite of China's failure to appear and assert its sovereign immunity, the lower court did not err in relying on the FSIA to dismiss with prejudice, and that China did not waive its immunity.⁶⁶ Further, the Second Circuit held that the Southern District

did not err in dismissing the petition without prejudice to the extent it failed to satisfy the requirements of § 1610(a)(2) and § 1610(c) [and that P]etitioners [were] not entitled to execute the Missouri

60. *Id.* “[T]he district court ordered dismissal without prejudice to the Walters filing a new Petition narrowly tailored to the requirements of § 1610(a)(2) and pursuant to § 1610(c).” *Id.* (internal quotation marks omitted).

61. *Id.*

62. *Id.*

63. *See id.* at 280.

64. *Id.* at 285-86 (citing *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129 (2d Cir. 2009)). “A district court abuses its discretion ‘if it applies legal standards incorrectly, relies on clearly erroneous finding of fact, or proceeds on the basis of an erroneous view of the applicable law.’” *Id.* at 286 (quoting *Aurelius*, 584 F.3d at 129).

65. *Id.* at 286.

66. *Id.* at 299.

[D]efault [J]udgment against . . . China's agencies [and] instrumentalities or from any entity other than China itself.⁶⁷

III. LEGAL BACKGROUND

This Part will be broken down into four subsections. First, this Part will explore the evolving doctrine of sovereign immunity in the U.S.⁶⁸ Next, this Part will address the formation and meaning of the FSIA,⁶⁹ followed by an exploration of the components of execution immunity and its narrow exceptions under the FSIA.⁷⁰ The fourth and final section will survey the decisions of three sister appellate circuit courts which held immunity under the FSIA may be considered *sua sponte* by a district court or at the behest of a third party.⁷¹

A. The Evolving Doctrine of Sovereign Immunity in the U.S.

Initially, the practice of foreign sovereign immunity was divided into two theories.⁷² Some states practiced the “absolute” theory of foreign sovereign immunity, whereby courts refused to hear any suit against another state.⁷³ Other states employed a “restrictive” theory of foreign sovereign immunity, whereby the courts denied immunity for states sued for activities of a commercial or private nature.⁷⁴

Restrictive immunity became increasingly common among foreign states in the early twentieth century.⁷⁵ The U.S. did not adopt the restrictive theory until later, in the mid-twentieth century.⁷⁶ For several years prior to its adoption of the restrictive theory, “the [U.S.] found itself in [a] position of being subject to suit in other states while it continued to extend absolute immunity to those states” in the U.S.⁷⁷ This situation, coupled with a sharp rise in international commerce being conducted by state-owned enterprises, creat-

67. *Id.*

68. *See infra* Part III.A.

69. *See infra* Part III.B.

70. *See infra* Part III.C.

71. *See infra* Part III.D.

72. David P. Vandenberg, Comment, *In the Wake of Republic of Austria v. Altmann: The Current Status of Foreign Sovereign Immunity in United States Courts*, 77 U. COLO. L. REV. 739, 741 (2006); *see Interpreting Silence: The Roles of the Courts and the Executive Branch in Head of State Immunity Cases*, 124 HARV. L. REV. 2042, 2044-47 (2011).

73. Vandenberg, *supra* note 72, at 741.

74. *Id.*

75. *Id.* at 744.

76. *Id.* at 742.

77. *Id.* at 744.

ed an inequitable dilemma for the U.S.⁷⁸ The U.S. was forced to assess a way to protect its core business interests in dealing with state entities that could successfully claim immunity in American courts and leave American businesses without legal remedy for breaches of their contracts.⁷⁹

These problems led the U.S. Department of State to re-examine its position on foreign sovereignty. In 1952, the U.S. Department of State formally approved the restrictive theory of immunity in a letter sent from the State Department's legal adviser, Jack B. Tate, to the U.S. Attorney General.⁸⁰ This correspondence is now popularly known as the "Tate Letter."⁸¹ The Tate Letter made note of other states' positions on sovereign immunity and observed that many states had embraced the restrictive theory of immunity.⁸² Tate concluded that "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity."⁸³

After the Tate Letter, the restrictive theory required a careful case-by-case consideration of immunity, but it did not alter the then-incoherent procedure for determining immunity.⁸⁴ While the procedure's structure was still the same, the U.S. Department of State continued to advise the courts on granting immunity, the U.S. Department of State politicized the procedure, and the U.S. Department of State guided its recommendations of whether to grant immunity largely on its foreign policy goals of favoritism for certain nations during the Cold War, regardless of the merits of any particular case.⁸⁵ Prior to the Tate Letter, courts usually did not ask the State Department's opinion on immunity because the consistent procedure was to uphold immunity.⁸⁶ The U.S. Department of State used the determination of immunity as a "negotiating tool in international relations" based largely on the identity of the state, which led to inconsistent results.⁸⁷ When the U.S. Department of State would not give an opinion, and left the immunity question to the courts, the courts also rendered inconsistent decisions.⁸⁸

78. *Id.*

79. *Id.*

80. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 app. 2 (1976) (reprinting the entire text of the Tate Letter).

81. *See id.* at 698; *see also Former General Counsel Jack B. Tate*, U.S. DEP'T HEALTH & HUM. SERVICES (Nov. 25, 2002), <http://www.hhs.gov/ogc/personnel/tatebio.html>.

82. *Alfred Dunhill*, 425 U.S. at 711-14.

83. *Id.* at 714.

84. Vandenberg, *supra* note 72, at 745.

85. *Id.*

86. *Id.*; *see, e.g., Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 587-88 (1943).

87. Vandenberg, *supra* note 72, at 745.

88. *Id.* at 745-46.

B. *The Foreign Sovereign Immunities Act*

The problems created between the U.S. Department of State and the courts after the Tate Letter led Congress to seek a process for determining foreign sovereign immunity.⁸⁹ In 1976, Congress effectuated this process by passing the Foreign Sovereign Immunities Act,⁹⁰ which made it the responsibility of the courts, not the State Department, to make immunity determinations.⁹¹

The Supreme Court stated the express policy objective of the FSIA in *Verlinden B.V. v. Central Bank of Nigeria*:⁹²

In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to “assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure [sic] due process.” To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities.⁹³

The FSIA establishes the standards and procedures for adhering to a formal lawsuit against a foreign sovereign state, or its agencies or instrumentalities, in U.S. federal or state courts.⁹⁴ Moreover, the FSIA describes the detailed methods of serving process and attaching property in lawsuits against a foreign state.⁹⁵ The basis and procedures outlined in the FSIA must be followed to bring a lawsuit in the United States against a foreign sovereign.⁹⁶

89. *Id.* at 746.

90. *Id.*

91. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127 (9th Cir. 2010).

92. 461 U.S. 480 (1983).

93. *Id.* at 488 (alteration in original) (citation omitted).

94. The FSIA is codified in 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1601-1611. See *Foreign Sovereign Immunities Act*, TRAVEL.STATE.GOV, http://travel.state.gov/law/judicial/judicial_693.html (last visited Mar. 1, 2012) [hereinafter TRAVEL.STATE]; *U.S. Supreme Court Limits Coverage of the Foreign Sovereign Immunities Act*, AVIATION L. ALERT (Nixon Peabody LLP, New York, N.Y.), June 30, 2003, at 1, available at http://www.nixonpeabody.com/linked_media/publications/ALA_06302003.pdf (referring to § 1441(d) of the FSIA); see generally H.R. REP. NO. 94-1487, at 28 (1976), reprinted in 1976 U.S.C.A.N. 6604, 6604-35.

95. See TRAVEL.STATE, *supra* note 94.

96. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

The FSIA's applicability is limited to lawsuits in which "foreign states" are involved.⁹⁷ Two entities are included in the FSIA's definition of "foreign state": political subdivisions of foreign states, and agencies or instrumentalities of a foreign state.⁹⁸ An "agency or instrumentality" is defined as an entity which: (1) has a separate legal identity and (2) is either an "organ of a foreign state or political subdivision" or an entity, the "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision" and (3) "is neither a citizen of the United States as defined in [28 U.S.C. §] 1332(c) and (e) . . . nor created under the laws of any third country."⁹⁹ It is currently unclear what qualifies as an agency or instrumentality; however, case law has made it clear that foreign government agencies and foreign government-owned corporations are generally considered to be "foreign states."¹⁰⁰

C. *The Mechanics and Exceptions of Immunity under the FSIA*

The FSIA is comprised of two distinct and independent components that address immunity.¹⁰¹ The first component establishes the general rule of jurisdictional immunity, which states that "a foreign state shall be immune from the jurisdiction of the courts of the United States,"¹⁰² and, in §§ 1605-1605A, also chisels out several exceptions to jurisdictional immunity from suit.¹⁰³ The second component, laid out in § 1609, establishes execution immunity, which states that "property in the United States of a foreign state shall be immune from attachment[,] arrest and execution."¹⁰⁴ Further, sections 1610-11 chisel out several exceptions from execution immunity.¹⁰⁵ One such exception is that commercial property owned by a foreign state that is physically located inside the United States is susceptible to attachment provided such property "relates to a claim for which the foreign state is not immune [from suit] under § 1065A."¹⁰⁶ Sections 1609 and 1610 assert the

97. See TRAVEL STATE, *supra* note 94.

98. 28 U.S.C. § 1603(a) (2006).

99. *Id.* § 1603(b).

100. See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003) (determining that a government-owned corporation qualifies as a foreign state under FSIA if a majority of its shares of interest are under the direct ownership of the foreign state).

101. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1124 (9th Cir. 2010); see generally H.R. REP. NO. 94-1487, at 28 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6616-30.

102. *Peterson*, 627 F.3d at 1124 (quoting 28 U.S.C. § 1604).

103. *Id.* (citing 28 U.S.C. §§ 1605-1605A); see also H.R. REP. NO. 94-1487, at 28 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6616-21.

104. *Peterson*, 627 F.3d at 1124 (quoting 28 U.S.C. § 1609).

105. *Id.* (citing 28 U.S.C. §§ 1610-11); see also H.R. REP. NO. 94-1487, at 28 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6626-29.

106. *Peterson*, 627 F.3d at 1124 (quoting 28 U.S.C. § 1610(a)(7)).

standards of execution immunity and the narrow exceptions to execution immunity.¹⁰⁷ As noted in *Peterson*, these sections “are silent as to who has the burden of pleading and proving immunity from execution, or whether a court may decide immunity sua sponte.”¹⁰⁸ In order to resolve such burdens, courts have looked to the “structure, history, and purpose of the FSIA for guidance.”¹⁰⁹

The FSIA has confused judges and attorneys alike.¹¹⁰ A common source of confusion under the FSIA is that jurisdictional immunity and execution immunity are two independent concepts.¹¹¹ Confusion arises due to the fact that it may not be obvious for a court to raise execution immunity sua sponte after it has established jurisdiction over a foreign state.¹¹² This issue often arises when a plaintiff wins a cause of action against a foreign state under an FSIA exception to jurisdictional immunity and then attempts to execute a prior judgment in a different jurisdiction holding assets of the foreign state.¹¹³ The FSIA, by creating narrow exceptions to an overarching rule of immunity, suggests a presumption that foreign states are immune from both jurisdiction

107. *See id.* (citing 28 U.S.C. §§ 1609-10).

108. *Id.*

109. *Id.* (citing *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010)).

110. This confusion arises from both a flawed interpretation of the structure and spirit of the FSIA in the courts and a misreading of the plain language of the FSIA by attorneys. The most notable misread in the courts of the spirit of the FSIA was in *Rubin v. Islamic Republic of Iran*, where the United States District Court for the Northern District Court of Illinois incorrectly ruled that execution immunity was an affirmative defense personal to the foreign state and must be specifically pleaded by a foreign state in a court appearance, and that a court cannot compel a foreign state to submit to a general discovery about all of its assets in the United States. *Rubin v. Islamic Republic of Iran*, 436 F. Supp. 2d 938, 941 (N.D. Ill. 2006), *rev'd*, 637 F.3d 783 (7th Cir. 2011). The attorneys representing Petitioners before and during the instant case made multiple misreadings of the plain language of the FSIA. In 1998, Petitioners filed an execution to collect assets against China, yet did not “identify any property belonging to China falling within one of the . . . exceptions to execution immunity listed [under] 28 U.S.C. § 1610 (a) or (b).” *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 284 (2d Cir. 2011). In 2001, Petitioners failed in an attempt to attach the two Giant Pandas on loan to the Washington D.C. National Zoo because Petitioners could not satisfy the three-part test under § 1610(a)(2). *See id.* Finally, in 2009, Petitioners sought to attach assets of China outside of the U.S., which is categorically prohibited by the plain language of the FSIA. *See id.* at 285.

111. *See Walters*, 651 F.3d at 288; *see generally* 28 U.S.C. §§ 1604-05, 1609-11.

112. *Peterson*, 627 F.3d at 1125. This source of confusion had led courts, as in *Walters*, to dedicate an expansive section of their opinion to differentiating between the independent concepts of jurisdictional and execution immunity. *See Walters*, 651 F.3d at 288-90.

113. *See Peterson*, 627 F.3d at 1121-22.

and execution, and that the plaintiff must then prove a narrow exception to either jurisdictional immunity or execution immunity.¹¹⁴

*D. Raising Execution Immunity Sua Sponte: The
Uniform Interpretation in U.S. Federal Courts*

Until the last decade, only a small number of courts addressed the issue of who, specifically, was entitled to raise execution immunity under the FSIA.¹¹⁵ In *Walker International Holdings Ltd. v. The Republic of Congo*,¹¹⁶ the Fifth Circuit held that there is no requirement under the FSIA that only a foreign state has standing to raise the defense of sovereign immunity.¹¹⁷ In *Walker*, the Republic of Congo (ROC) refused to pay a judgment arising from an arbitration proceeding before the International Chamber of Commerce.¹¹⁸ The judgment creditor, Walker International, filed a garnishment proceeding in the Southern District of Texas against an American company that owed the ROC signing bonuses and other payments.¹¹⁹ Walker also moved for a temporary restraining order to prevent the garnishee from making any payments to either ROC or ROC's national oil company.¹²⁰ The Southern District of Texas dismissed the suit, and Walker appealed.¹²¹ Walker claimed that only ROC had standing to raise ROC's sovereign immunity.¹²² The Fifth Circuit ruled that Walker could cite to "no authority . . . for the proposition that it is the [foreign state's] 'exclusive right' to raise the issue of . . . immunity under the FSIA."¹²³ The Fifth Circuit held that neither § 1610(a) nor (b) under the FSIA requires the presence of the foreign state or grants the foreign state exclusive standing to raise the waiver element.¹²⁴ In other words, the Fifth Circuit held that a district court judge could raise the issue of execution immunity sua sponte.¹²⁵

114. *Id.* at 1125 (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)).

115. *Id.* at 1124.

116. 395 F.3d 229 (5th Cir. 2004).

117. *See id.* at 233.

118. *Id.* at 231-32.

119. *Id.* at 232.

120. *Id.* at 231-32.

121. *Id.* at 232.

122. *Id.* at 233.

123. *Id.*

124. *Id.*

125. *See id.* In *Walker*, the issue of raising immunity sua sponte was not specifically labeled as either "execution immunity" or "immunity from execution." *See id.* Unlike *Walters*, *Walker* began with an execution action after an arbitration proceeding and not a prior default judgment in a federal court. *Id.* at 232. However, like *Walters*, *Walker* took place in the context of a judgment creditor who sought to execute on the assets of a foreign state. *See id.* at 231. Therefore, *Walker* can be viewed in the general context of raising execution immunity sua sponte. *See id.* at 233.

In 2010, in *Peterson v. Islamic Republic of Iran*,¹²⁶ the Ninth Circuit joined the Fifth Circuit's conclusion in *Walker* and held that a district court can independently raise and decide the question of execution immunity *sua sponte*.¹²⁷ The facts of *Peterson* arose out of the 1983 suicide bombing attack against the U.S. marine barracks in Beirut, Lebanon, which killed 241 American servicemen and injured many others.¹²⁸ Eventually, it became apparent that the Iranian government had given vast material and technical assistance to Hezbollah.¹²⁹ Injured survivors and family members of the deceased sued in U.S. District Court for intentional infliction of emotional distress, battery, assault, and wrongful death.¹³⁰ Iran failed to respond to the complaint despite being properly served.¹³¹ The judge held that Iran was responsible for providing meaningful operational assistance to Hezbollah in association with the attack in Beirut and was therefore liable to the plaintiffs on the form of compensatory damages.¹³² In 2007, the judge entered a default judgment against Iran for \$2.7 billion.¹³³

The plaintiffs then sought to collect the default judgment in another state by registering their default judgment in the District Court for the Northern District of California pursuant to 28 U.S.C. § 1963.¹³⁴ The plaintiffs sought to collect their judgment from a French shipping company that frequents Iranian ports and owed tariffs to the Iranian government for its uses of Iranian ports.¹³⁵ Like in the original suit, Iran failed to appear.¹³⁶ The District Court for the Northern District of California raised the issue of immunity *sua sponte*.¹³⁷ The court noted that the exceptions to immunity under §§ 1610-11 “are silent as to who has the burden of pleading and proving immunity from execution, or whether a court may decide immunity *sua sponte*.”¹³⁸ The court also noted that “few courts have squarely addressed the [issue] of who [can] raise the issue of immunity from execution” and that there existed a division of opinion on that issue.¹³⁹

126. 627 F.3d 1117 (9th Cir. 2010).

127. *Id.* at 1127.

128. *Id.* at 1121.

129. *Id.* (quoting *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 58 (D.D.C. 2003)).

130. *Id.*

131. *Id.*

132. *Id.* at 1121-22.

133. *Id.* at 1122.

134. *Id.*

135. *See id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1124.

139. *Id.*

The Ninth Circuit upheld the right for a district court to raise the issue of execution immunity *sua sponte*.¹⁴⁰ The Ninth Circuit also denied the plaintiffs' argument that execution immunity is an affirmative defense that requires the foreign state to make a court appearance.¹⁴¹ The Ninth Circuit held that the practice of courts independently raising and resolving execution immunity was consistent with historical practice and with the underlying rationale of the FSIA.¹⁴²

In 2011, the Seventh Circuit ruled on this issue in *Rubin v. The Islamic Republic of Iran*, holding that courts can raise execution immunity *sua sponte*.¹⁴³ In *Rubin*, the Islamic Republic of Iran appealed several U.S. court orders issued against Iran for providing "material support and training" to Hamas, a terrorist organization who was responsible for a 1997 terrorist attack in Jerusalem that killed several American citizens.¹⁴⁴ The U.S. District Court in Washington D.C. rendered a seventy-one million dollar default judgment against Iran for Plaintiffs, who later sought in the Northern District Court of Illinois (Northern District) to execute on several collections of Persian antiquities owned by Iran, but on extended loan to the University of Chicago's Oriental Institute.¹⁴⁵

The Northern District held that execution immunity was an affirmative defense personal to the foreign state and must be specifically pleaded by a foreign state in a court appearance.¹⁴⁶ Complying with that holding, Iran appeared and made an immunity claim, and was served with discovery requests "regarding all Iranian-owned assets located anywhere in the United States."¹⁴⁷ The discovery order was immediately appealable under the collateral-order doctrine, in that it effectively rejected Iran's claim of sovereign immunity.¹⁴⁸

The Seventh Circuit reversed the district court's orders, characterizing them as "seriously flawed."¹⁴⁹ The Seventh Circuit held that the orders of the district court were not reconcilable with the "text, structure, and history of the FSIA."¹⁵⁰ The Seventh Circuit also noted that its holding on *sua sponte* invo-

140. *Id.* at 1129.

141. *Id.* at 1132.

142. *Id.* at 1127.

143. 637 F.3d 783, 800-01 (7th Cir. 2011).

144. *Id.* at 786.

145. *Id.* The plaintiffs contended that a third collection, which was not on loan, actually belonged to Iran "but was stolen and smuggled out of the country in the 1920s or 1930s and later sold to the museum." *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*; see *infra* Part V.

150. *Rubin*, 637 F.3d at 785.

cation of execution immunity was consistent with the Ninth Circuit's decision in *Peterson* and the Fifth Circuit's decision in *Walker*.¹⁵¹

E. The Scope of Discovery under the FSIA in the Second Circuit

One notable Second Circuit case that addresses the scope of discovery within the FSIA is *First City, Texas-Houston, N.A. v. Rafidain Bank*.¹⁵² In *Rafidain*, First City, Texas-Houston, N.A., sued Rafidain and Central Bank of Iraq in the Southern District, under the theory that Central Bank was Rafidain's "alter ego," in order to collect a \$50 million unpaid debt to First City.¹⁵³ First City was awarded a \$53.2 million default judgment against both defendants.¹⁵⁴

Following the default judgment, First City sought discovery against Central Bank in an amended action.¹⁵⁵ Later, Central Bank attempted to dismiss First City's action and First City sought discovery against Central Bank.¹⁵⁶ The Southern District granted Central Bank's motion on "grounds of sovereign immunity."¹⁵⁷ First City appealed to the Second Circuit, who asserted that there would be no violation of sovereign immunity for Rafidain to comply with discovery.¹⁵⁸

On remand, the Second Circuit counseled the Southern District to permit "full discovery" by First City against Rafidain.¹⁵⁹ Following the remand, Rafidain refused to respond to First City's subpoenas seeking discovery.¹⁶⁰ The Southern District therefore held Rafidain in contempt.¹⁶¹ Rafidain attempted to vacate this contempt order but was denied by the Southern District.¹⁶² Rafidain then appealed the denial to vacate the contempt order and moved to halt "all discovery" until appeal.¹⁶³ On appeal, Rafidain claimed it was no longer a party to this action.¹⁶⁴ Therefore, Rafidain claimed that the Southern District was without subject matter jurisdiction under the FSIA to force Rafidain to comply with discovery.¹⁶⁵

151. *See id.* at 801.

152. 281 F.3d 48 (2d Cir. 2002).

153. *Id.* at 49-50.

154. *Id.* at 50.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 51.

161. *Id.*

162. *Id.*

163. *Id.* at 52.

164. *Id.*

165. *Id.*

The Second Circuit held that the waiver of sovereign immunity from jurisdiction resulting from a default judgment against a foreign state could give a court jurisdiction over discovery pertaining to the defendant's assets.¹⁶⁶ The Second Circuit went on to point out that the Federal Rules of Civil Procedure give broad discovery rights in judgment enforcement, including discovery of the judgment debtor's assets.¹⁶⁷

IV. INSTANT DECISION

A. *Clarifying the Mechanics of Jurisdictional & Execution Immunity under the FSIA*

The Second Circuit undertook a de novo review of the Southern District court's legal conclusions.¹⁶⁸ The Second Circuit noted that its review included a determination of whether the property of a foreign state is protected under immunity.¹⁶⁹ The court made a special point of discussing the two types of foreign sovereign immunity the FSIA addresses: (1) jurisdictional immunity of a foreign state from a United States court and (2) execution immunity of the property held by a foreign state inside the United States.¹⁷⁰ The court noted that while the only issue on appeal is execution immunity, the parameters of execution immunity are best understood when compared to jurisdictional immunity.¹⁷¹

The Second Circuit stated, under the principle of jurisdictional immunity in the FSIA, that federal district courts are allowed original jurisdiction to any civil action against a foreign state only if the claim for relief falls under an exception to immunity under §§ 1605 and 1607.¹⁷² The exceptions relevant to the instant case are (1) "cases in which the foreign sovereign has waived its immunity," (2) "cases based upon a commercial activity carried on in the United States by the foreign state," and (3) "cases in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state."¹⁷³ Further, the Second Circuit noted that the Supreme Court previously held that "subject matter jurisdiction turns on the existence of an excep-

166. *Id.* at 53-54.

167. Tyler B. Robinson & Erin Bradrick, *Judgment Enforcement in the United States Against Sovereign States: Some Interesting Procedural Questions*, 4 DISP. RESOL. INT'L 151, 155 (2010) (quoting *First City*, 281 F.3d 48, 54).

168. *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 286 (2d Cir. 2011).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 286-87.

173. *Id.* at 287 (internal quotation marks omitted); see 28 U.S.C. § 1605 (a)(1)-(2), (5) (2006).

tion to foreign sovereign immunity” and that “even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the FSIA.”¹⁷⁴ The court also noted that, in rendering the Missouri Default Judgment, the Missouri district court “relied on both the ‘commercial activity’ and ‘tortious act’ exceptions in § 1605(a)(2) and (5), to hold that China was not [granted jurisdictional immunity from Petitioners’] claims relating to the death of their son.”¹⁷⁵

The court noted that §§ 1610 and 1611 of the FSIA give execution immunity to certain property of the sovereign.¹⁷⁶ For example, under § 1610(a), attachment of the property of a foreign state may occur if the commercial property is “(1) used generally for commercial activity in the United States, but it must also be (2) either (a) subject to waiver of immunity, or (b) used for specific commercial activity upon which the underlying claim was based.”¹⁷⁷ There are additional immunity exceptions in § 1610(b), specifically for “any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States.”¹⁷⁸ The court noted that this property is not immune from execution where (1) “the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly,” or (2) where “the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2) . . . or (5) . . . regardless of whether the property is or was involved in the act upon which the claim is based.”¹⁷⁹ Thus, the court noted, an agency or instrumentality is subject to execution if it “(1) is engaged in commercial activity in the United States and (2) either (a) has waived execution immunity, or (b) is subject to jurisdiction on the underlying claim under certain subsections of § 1605.”¹⁸⁰

The court further addressed the law regarding the Missouri Default Judgment.¹⁸¹ The court stated that, following a default judgment, the execution of the property of a foreign state may proceed only (1) after the passage of a “reasonable period time” for the foreign state to be given notice of a default judgment, in accordance with § 1608(e), and (2) if the court’s order of

174. *Walters*, 651 F.3d at 287 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983)).

175. *Id.*

176. *Id.* Section 1609 states “the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611.” 28 U.S.C. § 1609.

177. *Walters*, 651 F.3d at 287; *see also* 28 U.S.C. § 1610(a).

178. *Walters*, 651 F.3d at 288 (quoting 28 U.S.C. § 1610(b)).

179. *Id.* (quoting 28 U.S.C. § 1610(b)).

180. *Id.*

181. *See id.*

execution is consistent with the execution provisions under the FSIA, in accordance with subsection (a) or (b) of § 1610.¹⁸²

The court then described how the FSIA provisions for jurisdictional immunity and execution immunity generate definite, acknowledged outcomes that were applicable to this appeal.¹⁸³ First, the court noted that the FSIA's provisions governing jurisdictional and execution immunity "operate independently."¹⁸⁴ Thus, the court concluded that the "recognition of exceptions to China's jurisdictional immunity in the Western District of Missouri . . . did not compel recognition of exceptions to the execution immunity of China's sovereign assets in the Southern District of New York turnover action."¹⁸⁵

Second, the court pointed out that the jurisdictional immunity of the sovereign is less broad as the execution immunity of sovereign property.¹⁸⁶ While a foreign state is not immune from its commercial activities or damages caused by its tortious acts, a plaintiff who prevails against a sovereign can only execute such a judgment on the assets for which a foreign state has waived immunity or used in the commercial activity upon which the claim is made.¹⁸⁷ As the court stated, "the asymmetry between jurisdiction and execution immunity in the FSIA reflects a deliberate congressional choice to create a 'right without a remedy' in circumstances where there is jurisdiction over a foreign state for purposes of obtaining a judgment, but its property is immune from attempts to execute a judgment."¹⁸⁸

Third, the court noted that "the property of an agency or instrumentality of a foreign state" receives less jurisdictional protection than the property of a foreign state.¹⁸⁹ In other words, the property of a foreign state is not subject to jurisdiction simply because the foreign state is not immune.¹⁹⁰

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 289.

186. *Id.*

187. *Id.* "[A]t the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002).

188. *Walters*, 651 F.3d at 289. For an expanded background on "right without a remedy," see *De Letelier v Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984). See also *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010).

189. *Walters*, 651 F.3d at 289-90 (citing *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 472-73 (2d Cir. 2007)).

190. *Id.* at 290; see 28 U.S.C. § 1610(a) (2006).

B. The Application of the FSIA to the Instant Case

1. Raising Execution Immunity Sua Sponte

The Second Circuit then applied these FSIA provisions and general conclusions to Petitioners' four points on appeal.¹⁹¹ First, the court addressed Petitioner's challenge that the Banks did not have standing to raise execution immunity and that China never appeared to claim it.¹⁹² The Second Circuit held that "where a judgment creditor seeks to enforce a judgment against an undisputed foreign [state] by collecting against [its] undisputed . . . assets, a [district] court may apply the immunity protections of the FSIA even if the [foreign state] does not appear in the action."¹⁹³ The court noted that it had never stated when execution immunity may be considered sua sponte or at the request of a third party.¹⁹⁴ Here, the Second Circuit relied on supplemental authority, which uniformly held that a district court may raise and grant the FSIA's execution immunity provision in response to a judgment creditor seeking enforcement, despite a foreign state's physical absence in court.¹⁹⁵ Thus, the court held that the Southern District was correct in applying the FSIA execution immunity to dismiss this case against the Banks, regardless of China's absence.¹⁹⁶ Further, the Second Circuit noted that it is statutorily required to specifically identify assets in a motion, which Petitioners failed to do.¹⁹⁷ Without such property identified, the court held that it "could not ade-

191. Petitioners submitted that abuse occurred because the district court failed to recognize that (1) sovereign immunity can be asserted only by the foreign state itself and that the Banks, therefore, lack[ed] standing to assert China's immunity as a basis for dismissal; (2) China waived its sovereign immunity by both (a) its commercial and tortious conduct underlying the Missouri [D]efault [J]udgment and (b) its failure to appear in the Missouri or New York proceedings; (3) no new filing is necessary because the petition already satisfie[d] all [of the] FSIA requirements, including those of § 1610(a)(2) and § 1610(c); and (4) the FSIA authorizes the collection of assets of a state's agencies and instrumentalities, in addition to those of the state itself.

Walters, 651 F.3d at 286. Petitioners raised more than four points on appeal, but the court chose not to address all of them. *See id.* at 299. The court stated, "We have considered petitioners' remaining arguments on appeal and conclude that they are without merit." *Id.*

192. *Id.* at 290.

193. *Id.* at 293-94.

194. *Id.* at 290.

195. *Id.*

196. *Id.*

197. *Id.* at 291 (quoting *Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan*, 134 F. Supp. 2d 528, 536 (S.D.N.Y. 2001)).

quately review the propriety of attaching the assets of the judgment-debtor.”¹⁹⁸

2. Waiver of Execution Immunity

Second, the court addressed the waiver of execution immunity.¹⁹⁹ Petitioners claimed that the Southern District “erred in failing to recognize that China had waived execution immunity under § 1610(a)(1) [on two counts: (1) by committing] the commercial and tortious conduct underlying the Missouri [D]efault [J]udgment; and [(2)] by its failure to appear in this proceeding and to assert sovereign immunity.”²⁰⁰ The court declined “both waiver theories as inconsistent with the terms of the FSIA . . . and the [general] doctrine of waiver.”²⁰¹ First, the instant court declined to accept the argument that China’s alleged commercial and tortious conduct waived their execution immunity, an argument relied on by the Missouri district court to exercise its subject matter jurisdiction.²⁰² The court stated that this contention was not compatible with the FSIA.²⁰³ Further, the Second Circuit held that Petitioners had conflated jurisdictional immunity and execution immunity, which do not share the same standards.²⁰⁴ Moreover, the court noted that “the existence of subject matter jurisdiction alone does not entitle [P]etitioners to execute upon sovereign assets.”²⁰⁵ In addition, the court rejected Petitioners’ argument that failure to appear was an implicit waiver of execution immunity.²⁰⁶ The court held Petitioner’s argument was “equally unavailing.”²⁰⁷ The court noted that “[a] mere failure to appear is not a sufficiently affirmative act,” as required by Congress to demonstrate a waiver of immunity, especially where China regularly asserted its jurisdictional and execution immunity in formal communications made by several of China’s state agencies.²⁰⁸

198. *Id.* (quoting *Olympic Chartering*, 134 F. Supp. 2d at 536).

199. *See id.* at 294.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 295.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 296.

[T]he legislative history of § 1610(a)(1) indicates that Congress contemplated that waiver of execution immunity would be accomplished by some affirmative act of the foreign sovereign: “A foreign state may have waived its immunity from execution, inter alia, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution.”

3. The Execution Requirements & Discovery

Third, the court addressed the satisfaction of § 1610(a)(2) and (c) requirements.²⁰⁹ Petitioners faulted the Southern District “for dismissing their petition in part without prejudice to the [Petitioners] filing a new Petition narrowly tailored to the requirements of § 1610(a)(2) and pursuant to § 1610(c).”²¹⁰ Petitioners also claimed that, due to the Banks’ resistance to discovery requests, the failure to identify the assets at issue should not be held against them.²¹¹

In response, the court held that the Southern District did not err in rendering its partial dismissal without prejudice to replead.²¹² The court held that not only did Petitioners fail to identify any specific assets held by the Banks that could be executed, but they also failed to demonstrate how any specified assets of the Banks are categorically executable by the exceptions to execution immunity under § 1610.²¹³ Under § 1610(a)(2), the Southern District determined that there was only one potentially applicable exception to execution immunity in this case: execution of commercial property used for activity related to the claim.²¹⁴ Therefore, because Petitioners failed to specify and tailor their petition on asset execution under the requirements of the FSIA, the court held that the Southern District properly dismissed Petitioners’ petition.²¹⁵

Further, the court noted that Petitioner failed to exhaust the power of discovery pertaining to the debtor’s assets pursuant to Federal Rule of Civil Procedure 69(a).²¹⁶ The court held that it was “not unreasonable” for the burden of identifying specific assets sought for attachment to be upon Petitioners and not the Banks.²¹⁷

4. Agencies & Instrumentalities

Fourth, the Second Circuit addressed the assets of China’s agencies or instrumentalities.²¹⁸ Petitioners argued that under § 1610(a) and (b) they were justified in executing assets pursuant to the Missouri Default Judgment

Id. at 295-96 (quoting H.R. REP. NO. 94-1487, at 28 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627).

209. *Id.* at 296.

210. *Id.* (internal quotation marks omitted).

211. *Id.* at 296-97.

212. *Id.* at 297.

213. *See id.* at 298.

214. *See id.* at 287.

215. *Id.* at 297.

216. *Id.*

217. *Id.*

218. *See id.*

from both China itself and China's agencies and instrumentalities.²¹⁹ The court held that the record did not support an exception to execution immunity and that it "need not here decide whether petitioners might ever be in a position to execute judgment against a specified Chinese agency or instrumentality that was an alter ego of China itself."²²⁰ The court reasoned that the argument was not properly preserved for appellate review because it was not properly raised in the district court.²²¹ Further, the court held that petitioners' failure to identify specific assets which could be executed constituted "no effort to satisfy the requirements of § 1610's exceptions to execution immunity."²²² The court emphasized that the Missouri Default Judgment was limited to China itself.²²³ The court held that Petitioners could make no argument to justify disregarding the Banks' separate legal status in order to attach their assets in satisfaction of a judgment against China, the parent foreign government.²²⁴

5. Holding

The court noted that Petitioners' renewed argument that China had waived its immunity failed on two counts.²²⁵ First, Petitioners "rel[ie]d on § 1603's broad definition of 'foreign state' to include 'an agency or instrumentality of a foreign state.'"²²⁶ However, the Missouri Default Judgment was entered against China itself.²²⁷ Therefore, Petitioners could not take advantage of § 1610(b)'s exceptions to execution immunity concerning the waiver of immunity of agencies and instrumentalities.²²⁸ Second, the Second Circuit held that Petitioners received the Missouri Default Judgment based on the waiver of immunity of a foreign state, not a foreign state's agencies or instrumentalities; therefore, an execution action could not proceed against the Banks.²²⁹

219. *Id.*

220. *Id.* at 298-99.

221. *Id.* at 297.

222. *Id.*

223. *Id.* at 298.

224. *Id.*

225. *Id.*

226. *Id.* (quoting 28 U.S.C. § 1603 (2006)).

227. *Id.*

228. *Id.*

229. *See id.* at 299.

V. COMMENT

Congress has relied on the work of the federal courts to advance the structure, history, and purpose of the FSIA since its enactment in 1976.²³⁰ In *Walters*, the court advanced the plain language, objectives, and purpose of the FSIA.²³¹ *Walters* resolved the issue left silent in the FSIA: whether a district court can raise the issue of execution immunity sua sponte.²³² The court held that immunity could be raised sua sponte by a district court or at the behest of a third party, even in the absence of a foreign state's appearance,²³³ adopting a uniform interpretation of this issue under the FSIA that now extends to four U.S. Courts of Appeals.²³⁴

This is a positive development. In allowing a district court to raise immunity sua sponte, the instant decision upholds the spirit of the FSIA in protecting foreign states from the undue burden of litigation and discovery.²³⁵ While the instant decision certainly does not fix the complications in the execution immunity provisions of the FSIA, or their restrictiveness, the instant court has made it clear that a party cannot successfully appeal to the Second Circuit on the grounds that a district court lacked the power to raise immunity under the FSIA, regardless of the absence of a foreign state's appearance in court or at the behest of a third party.²³⁶ If the Second Circuit instead had agreed with Petitioners' interpretation of the FSIA, the policy implications would be profound: namely that a foreign state must formally appear in an enforcement action or lose all of its procedural protections under the FSIA. In short, this would embolden a floodgate of suits by aggrieved parties against China who could then attach assets on the part of China's failure to make appearances in the litigation.

The jurisdiction of the Second Circuit includes the global financial epicenter New York City, a location of many foreign businesses and foreign assets as well as the United Nations.²³⁷ The instant decision creates certainty for foreign states operating in this jurisdiction that they bear neither the undue burden of having to personally raise the issue of sovereign immunity in a court appearance, nor the prospect of prolonged appeals by plaintiffs who claim that a federal district court lacks the power to assert immunity sua sponte. This decision, along with *Walker*, *Rubin*, and *Peterson*, will likely be

230. ABA Report, *supra* note 14, at 492-93.

231. *See Walters*, 651 F.3d at 291-93.

232. *See supra* Part IV.B.1.

233. *See Walters*, 651 F.3d at 293-94.

234. *See supra* Part III.D.

235. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795 (2011).

236. *See Walters*, 651 F.3d at 290.

237. *See A Profile of the Second Circuit of Appeals*, LAWS.COM, <http://appeal.laws.com/second-circuit-court-of-appeals> (last visited Mar. 20, 2012) [hereinafter LAWS.COM]. The Second Circuit covers the states of New York, Connecticut, and Vermont. *Id.*

weighed with a great deal of deference if the issue of raising immunity *sua sponte* is appealed in the Second Circuit's sister courts that have not yet resolved this issue.

However, the instant decision leaves open several unresolved problems concerning the role of discovery and attachment under the FSIA. The first unresolved problem is the issue of permissible discovery of a foreign state's assets under the FSIA. As two authors assert, the instant court suggests that the discovery of a foreign state defendant's property "is limited on jurisdictional grounds – just as discovery is limited when establishing jurisdiction over a sovereign defendant."²³⁸ This is because when a defendant waives its own immunity its property is statutorily excepted from immunity.²³⁹

Petitioners sought discovery from third party garnishees (i.e., the Banks) concerning assets of China held outside of the U.S.²⁴⁰ However, the FSIA's limited exception to execution immunity applies to assets that are inside the U.S. and used for commercial activity in the U.S.²⁴¹ The Southern District, as upheld by the instant court, "denied the requested discovery as beyond the scope of . . . 'jurisdiction' afforded by the FSIA."²⁴²

Similar to the view taken in *Rubin*, the instant court apparently viewed discovery under the FSIA in "jurisdictional terms," whereby U.S. courts do not permit discovery of potentially attachable assets outside of the court's jurisdiction, even if a foreign state was subject to a U.S. court's jurisdiction.²⁴³ One article has argued that an alternative view of the "scope of permissible discovery" in the context of judgment enforcement was already advanced by the very same Second Circuit in *Rafidain*.²⁴⁴ *Rafidain* was decided in 2002, nine years before *Walters*.²⁴⁵ In *Walters*, the Southern District, which is bound by Second Circuit decisions, did not mention or cite to *Rafidain*.²⁴⁶

In *Rafidain*, the Second Circuit held that "once there is jurisdiction over the [foreign state] defendant . . . , a federal court has jurisdiction to permit discovery from that defendant in aid of judgment enforcement to the same broad extent as is provided . . . with respect to any other judgment debtor."²⁴⁷ However, in *Walters* the Second Circuit held that it was not unreasonable for the burden to be on the Petitioners to identify specific, recoverable assets of the foreign state debtor that also fall under the narrow exceptions of execution

238. See, e.g., Robinson & Bradrick, *supra* note 167, at 155.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 156.

244. *Id.* at 156; First City, Texas-Houston, N.A. v. Rafidain Bank, 281 F.3d 48, 53-54 (2d Cir. 2002).

245. *Rafidain*, 281 F.3d at 48.

246. Robinson & Bradrick, *supra* note 167, at 156 n.17.

247. *Id.* at 157.

immunity in the FSIA.²⁴⁸ The instant court also noted that nothing prevented Petitioners “from pursuing Rule 69 discovery from the Banks as to China’s potentially recoverable assets held within the United States.”²⁴⁹ While not stated explicitly in the instant case, the broad-based discovery of foreign state assets outside of the U.S. would likely not be allowed by the court, because assets outside of the U.S. are categorically immune from attachment under the FSIA and would therefore serve no purpose.²⁵⁰

Under the FSIA, the need for discovery by a creditor of assets inside the U.S. is acute because a foreign state debtor “will have to adduce evidence not only to identify the existence and location of property belonging to the debtor, but also establish that any such property comes within the specific statutory exceptions to immunity from attachment and execution under the FSIA.”²⁵¹ Under the terms of the FSIA, this task becomes a formidable challenge to the creditor, because they are required to establish jurisdiction covering specified property, without the assistance of discovery, as a prerequisite to achieve the same discovery required to make a showing of jurisdiction.²⁵² Conversely, the judgment foreign state debtor is granted leverage to decide whether property in question is subject to the statutory exceptions to execution immunity while the creditor and court lack the power of discovery to examine the status of such property.²⁵³

The scope of permissible discovery of foreign state assets inside the U.S. was addressed in *Rubin*, a case heavily relied on as supplemental authority in *Walters*.²⁵⁴ In *Rubin*, unlike in the instant case, the plaintiffs sought a broad discovery of a foreign state’s assets inside the U.S.²⁵⁵ Before *Rubin* was appealed in the Seventh Circuit, the district court granted the plaintiffs a general discovery order for all of the assets of a foreign state held inside the U.S.²⁵⁶ The Seventh Circuit held that “[t]his approach is inconsistent with the presumptive immunity of foreign-state[-owned] property under § 1609” of the FSIA.²⁵⁷ The Seventh Circuit held that the FSIA limits the discovery process regardless of the fact Rule 69(a) of the Federal Rules of Civil Procedure governs discovery requests compatible with either federal rules or complementary state rules.²⁵⁸ The Seventh Circuit characterized discovery of a

248. *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011).

249. *Id.*

250. *See id.*

251. *Robinson & Bradrick*, *supra* note 167, at 158.

252. *Id.*

253. *Id.*

254. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 794 (7th Cir. 2011); *see Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280 (2d Cir. 2011).

255. *Rubin*, 637 F.3d at 794-95.

256. *Id.* at 785.

257. *Id.* at 795.

258. *Id.* at 794-95.

foreign state's entire U.S. assets as a "blank check" that "inverts the statutory scheme."²⁵⁹ Further, *Rubin* held that only a "limiting discovery" targeting specifically-identified assets was permissible.²⁶⁰ *Rubin* held that "[n]othing . . . prevents judgment creditors [under the FSIA] from using private means to identify potentially attachable assets of foreign states [inside the U.S., and creditors can] enlist the assistance of the Secretary of the Treasury and the Secretary of State in identifying and executing against [such] assets," as provided under § 1610(f)(2)(A) of the FSIA.²⁶¹ Moreover, *Rubin* held that "[t]he general-asset discovery order issued in this case is incompatible with the FSIA."²⁶²

Because there was no grant of broad discovery to Petitioners in the instant case, the court did not rule as directly on the issue of broad discovery of a foreign state's assets inside the U.S., as in *Rubin*. *Rafidain* suggested that the Second Circuit had once viewed broad discovery of foreign assets favorably, but the instant court did not address the scope of permissible discovery.²⁶³ The instant case does not clarify whether broad discovery of a foreign state's assets inside the U.S. under the FSIA still enjoys favorable status under the Second Circuit.²⁶⁴

Further compounding the unresolved scope of permissible discovery under the FSIA is the rule that attachment or execution is not permitted without court approval.²⁶⁵ This creates a dilemma whether creditors and courts would be left with neither the means to attach or restrain the property of a foreign state during litigation, nor a determination whether the property is available to the creditor under the FSIA.²⁶⁶ Due to the FSIA requirement that only foreign state owned assets inside the U.S. are subject to attachment, a defiant foreign state defendant has the power to simply remove a certain asset away from the U.S. in order to preempt a court ruling that this asset falls under an exception to execution immunity.²⁶⁷ This process can only succeed with the cooperation of the foreign state debtor, which gives the debtor near-complete

259. *Id.* at 796.

260. *Id.* at 798.

261. *Id.*

262. *Id.* at 799.

263. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 295 (2d Cir. 2011).

264. *See id.* Addressing a district court ruling in the case, the court states that "[n]othing in that ruling, which petitioners did not appeal, prevents them from pursuing Rule 69 discovery from the Banks as to China's potentially recoverable assets held within the United States." However, the court does not address the scope of this permissible form of discovery. *Id.* at 297.

265. *Robinson & Bradrick*, *supra* note 167, at 161.

266. *Id.* at 162.

267. *Id.* Much of a foreign government's property can consist of electronic assets capable of being moved instantaneously. *Id.*

leverage to circumvent the discovery by the creditor.²⁶⁸ Also, the issue of establishing the precise nature of property, and its status as being “inside” the U.S. and used for “commercial activity,” can be a circuitous process that demands a rigorous fact-driven analysis, particularly when concerning intangible assets and complex financial instruments.²⁶⁹ One possibility is that this dilemma may be solved by applying to foreign state property the domestic law which allows a creditor to move quickly to restrain property subject to execution.²⁷⁰

While a judicial freeze on a foreign state’s assets may be a solution to this dilemma, it is unlikely that courts would adopt such freeze measures. As noted in *Peterson*, “the judicial seizure of the property of a friendly state may be regarded as an affront to its dignity and may . . . affect our relations with it.”²⁷¹ While a freeze of assets could assist the creditor in the discovery process, this action would generally be regarded as a seizure of a friendly state, and therefore contrary to the structure, history, and purpose of the FSIA. A freeze on a foreign state’s assets inside the U.S. is a tall order and difficult to enforce. Further, freezing assets achieves the complete opposite effect of the FSIA’s objective of protecting foreign states from litigation.²⁷²

Moreover, the Second Circuit left open the issue “whether [P]etitioners [would] ever be in a position to execute [a] judgment against a specified Chinese agency or instrumentality that was an alter ego of China itself,” stating that it would not decide the issue.²⁷³ While U.S. case law has stated that foreign government agencies and foreign government-owned corporations are generally considered to be foreign states, and therefore the FSIA applies,²⁷⁴ the Second Circuit decided to punt on the issue of suing Chinese state owned companies as “alter egos” of China. The Missouri Default Judgment was rendered against China and not any of its state related companies.²⁷⁵ The Second Circuit highlighted this fact in order to prevent an execution action against the Chinese government-affiliated banks.²⁷⁶

268. *See id.* at 164.

269. *Id.* at 163.

270. *See, e.g., id.* at 160.

271. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127 (9th Cir. 2010) (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008)).

272. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795 (7th Cir. 2011).

273. *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 298 (2d Cir. 2011). The court mentions that it has previously ruled on the “identifying circumstances under which presumption of separateness between government entities may be overcome.” *Id.* at 299 (citing *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 252 (2d Cir. 2000)).

274. *See TRAVEL.STATE*, *supra* note 94.

275. *See Walters*, 651 F.3d at 283-84.

276. *Id.* at 299 (“Petitioners are not entitled to execute the Missouri [D]efault [J]udgment against China by collecting assets from China’s agencies or instrumentalities or from any entity other than China itself.”).

Under § 1603(b) of the FSIA, an “agency or instrumentality” of a foreign state is so defined if it (1) has a separate legal identity, (2) is either (a) “an organ of a foreign state or political subdivision,” or (b) “a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) is neither a citizen of a state of the United States . . . nor created under the laws of any third country.”²⁷⁷ Notably, the “agency or instrumentality” test was not applied to the Banks in this opinion. Today, state-owned companies represent 80% of China’s stock market and conduct a large volume of business with the U.S.²⁷⁸ Further, state capitalism is trending not only in China but across the world, including rapidly growing countries like Russia and Brazil.²⁷⁹ Because the Missouri Default Judgment was only against China, the Second Circuit was given the opportunity to avoid the issue of applying a default judgment against a foreign state to its affiliated companies, which may or may not have fit within the legal description of what constitutes a foreign state under the FSIA. However, given the large volume of business of Chinese government-affiliated companies exporting products to the U.S., the Second Circuit may be forced to confront this issue, without a similar opportunity provided, in the near future.²⁸⁰

VI. CONCLUSION

Walters upheld the structure, history, and purpose of the FSIA, and added to a uniform interpretation in three other circuits with respect to a district court’s power to invoke immunity sua sponte.²⁸¹ The power of a district court to invoke immunity, not explicitly granted under the FSIA, will deter plaintiffs from appealing on the grounds that district courts overstepped their authority; it also will prevent foreign states from the burden of litigation by not having to appear in court to make the defense of immunity.

There are several immediate ramifications of this decision. First, this decision, along with *Walker*, *Rubin*, and *Peterson*, will likely be given a great deal of deference if the issue of raising immunity sua sponte is appealed in

277. 28 U.S.C. § 1603(b) (2006).

278. Adrian Wooldridge, *The Visible Hand*, THE ECONOMIST (London), Jan. 21, 2012, at 2, available at <http://www.economist.com/node/21542931>.

279. *Id.*

280. Consumer safety concerns in the U.S. over unsafe products exported from China affiliated companies is a rising concern and may result in lawsuits under the FSIA based on negligence in commercial activity from unsafe products. See Eric S. Lipton & David Barboza, *As More Toys Are Recalled, Trail Ends in China*, N.Y. TIMES, June 19, 2007, § A, at 1, available at <http://www.nytimes.com/2007/06/19/business/worldbusiness/19toys.html?pagewanted=all> (“Over all, the number of products made in China that are being recalled in the United States by the federal Consumer Product Safety Commission has doubled in the last five years, driving the total number of recalls in the country to 467 last year, an annual record.”).

281. See *supra* Part III.D.

the Second Circuit's sister courts who have not yet resolved this issue. Second, the decision reassures foreign states operating in the Second Circuit that they do not bear the undue burden of having to personally raise the issue of sovereign immunity in a court appearance or face the challenge of prolonged appeals by plaintiffs who claim that a federal district court lacks the power to assert immunity *sua sponte*.²⁸²

In crafting the FSIA, Congress understood that the outcome of many cases against immune foreign states would result in "rights without remedies," largely because judgment creditors are forced to rely on the voluntary compliance of foreign states.²⁸³ For this reason, the FSIA made the exceptions to execution immunity narrower than the exceptions to jurisdictional immunity from suit.²⁸⁴ It was therefore wise, and within the structure, history, and purpose of the FSIA, that *Walters* confirmed the Southern District's invocation of immunity *sua sponte*. Even if the issue of the scope of permissible discovery was definitively resolved in the Second Circuit in accordance with Seventh Circuit's ruling in *Rubin*, execution of the assets of a foreign state still depends on the voluntary compliance of foreign states and the difficulty of characterizing specific assets as "in the U.S."²⁸⁵ These combined factors make the execution of foreign assets under the FSIA an effectively toothless power.

Ultimately, the FSIA is an arm of U.S. foreign policy that encourages foreign countries to work and own property within the U.S. in furtherance of international cooperation and with immunity from suit and asset seizure. Anything short of upholding the structure, history, and purpose of the FSIA would lead to a floodgate of litigation against foreign states in the U.S. and the probable deterioration of diplomatic relations between the U.S. government and foreign states holding property inside the U.S. To its credit, the Second Circuit properly upheld the FSIA, thereby preventing the collection of immune assets of China held inside the U.S. Unfortunately for plaintiffs, who have justifiable grievances and are understandably motivated to seek collection after multi-million dollar default judgments against foreign states, the structure of the FSIA may create the promising yet misleading impression that collection is attainable. In the majority of cases of default judgments against foreign states, as in *Walters*, the FSIA's "right without a remedy" outcome creates a situation for judgment creditors that may seem illusory, as it more often than not yields no pot of gold at the end of the judgment rainbow.

282. See *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 290 (2d Cir. 2011).

283. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010).

284. *Id.*

285. See *Robinson & Bradrick*, *supra* note 167, at 158.

