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SPECIAL ISSUE BRIEF | OCTOBER 4, 2016

JUSTICE AGAINST SPONSORS OF TERRORISM ACT (JASTA)

Key Provisions, Practical Implications, and Why Reciprocal Retaliatory Measures by Other Countries Will Not Level the Civil Litigation Playing Field

This Special Issue Brief discusses some of JASTA's key sovereign immunity provisions, practical implications, and why reciprocal retaliatory measures by foreign states—*i.e.,* the denial by other countries to the United States of sovereign immunity in foreign *civil proceedings*—likely will not level the civil litigation playing field in most cases.

JASTA BACKGROUND

"Neither members of Congress that wish to be reelected nor a newly-elected President likely would want to be seen as supporting measures that would deprive victims of September 11, 2001 of the "justice" that JASTA purports to deliver. Foreign states and others pressing for a reversal or substantial modification of JASTA's sovereign immunity provisions should bear the politics and optics in mind."

JASTA is Significant as a Matter of Domestic Politics

The Justice Against Sponsors of Terrorism Act (**JASTA**) became law on September 28, 2016.[1] As a matter of domestic politics, JASTA is significant because it is the first law in the eight-year presidency of Barack Obama passed by a Congressional override of a Presidential veto.[2]

VOTES IN CONGRESS: OVERRIDE PRESIDENTIAL VETO OF JASTA				
	For	Against	Not Voting	"Present"
Senate	97	1	2	n/a
House	348	77	4	1

JASTA Purpose and Removal of Foreign Sovereign Immunity

JASTA's stated purpose is to "provide civil litigants with the broadest possible basis . . . to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States."[3] To achieve these ends, JASTA strips foreign states of sovereign immunity in U.S. courts in civil actions for money damages arising out of certain U.S.-linked acts of international terrorism. JASTA also creates substantive causes of action for aiding and abetting and for conspiracy.[4]

Opposing Views of JASTA

JASTA's foreign sovereign immunity provisions generated much debate, both before and after its passage. The law's proponents have argued that it advances interests—namely justice for the victims of September 11, 2001—that outweigh its disruption of U.S. and international sovereign immunity norms. The law's opponents, including President

Obama,[5] have countered that JASTA is legally and tactically unsound because it undermines (and perhaps conflicts with) international law and may lead foreign states to retaliate with reciprocal measures, namely depriving the United States and its employees, military personnel, agents, and other representatives of sovereign immunity from foreign legal proceedings.

"Rapid Onset Buyer's Remorse" in Congress After JASTA Passage; Potential Modifications of JASTA

Following JASTA's passage, some members of Congress—including those who voted in favor of JASTA—expressed doubts about the law's wisdom and indicated that JASTA may be revisited, including as soon as during the "lame duck" session of Congress after the U.S. election of November 8, 2016.[6] Just one day after JASTA became law, a bill was introduced in the House of Representatives to limit JASTA's scope to claims arising out of September 11, 2001 only.[7] The proposed amendment does not, as some opponents of JASTA desire, entirely restore the foreign sovereign immunity that JASTA removed.

"In a post-JASTA environment, a foreign state could be found liable in court for supporting international terrorism but continue to engage in business as usual with the U.S. Government, without being subject to political and punitive measures that often attach to states deemed terrorism sponsors, such as adverse unilateral or multilateral foreign policy stances, and export controls and economic sanctions."

Should Congress take serious action to modify JASTA, the process is likely to be more controversial and politically difficult than the process leading to JASTA's enactment, as neither members of Congress that wish to be reelected nor a newly-elected President will want to be seen as supporting measures that would deprive victims of September 11, 2001 of the "justice" that JASTA purports to deliver.[8] Foreign states and others pressing for a reversal or substantial modification of JASTA's sovereign immunity provisions should bear in mind the politics and optics.

Saudi Arabia Has Been the Primary Target, But Other States Will Likely Be Sued

Often referred to as the "9/11 bill" in the media, JASTA's thrust is to provide victims and families of victims of the September 11, 2001 attacks with a cause of action against foreign states. Saudi Arabia has been the chief target of the law. But other foreign states will likely be sued U.S. courts in connection with September 11 and other acts of "international terrorism."[9]

JASTA'S SOVEREIGN IMMUNITY PROVISIONS

JASTA Amends Foreign Sovereign Immunities Act; Covers Knowing and Reckless Acts or Omissions in Support of International Terrorism by Foreign States and Certain of Their Representatives

JASTA adds a new section—"Responsibility of foreign states for international terrorism against the United States"—to the Foreign Sovereign Immunities Act of 1976 (FSIA), which sets for the general rule of foreign sovereign immunity and its express exceptions.[10] JASTA vests U.S. courts with jurisdiction over "foreign states" in civil actions for money damages for death or "physical injury to person or property" that occurred in the United States and were caused by acts of "international terrorism"[11] *knowingly or recklessly* committed by such foreign states or their officials, employees or agents acting within the scope of their authority.[12] Negligent acts or omissions are outside of the law's ambit.[13]

JASTA Authorizes Civil Actions Commenced or Pending After the Date of JASTA's Passage For Injuries Occurring on or After September 11, 2011

JASTA applies to "any civil action . . . pending on or commenced after" September 28, 2016 (the date of its enactment) "and arising out of an injury to a person, property, or business on or after September 11, 2011."[14]

JASTA Expands the FSIA's State-Sponsored Terrorism Exception to Sovereign Immunity and Diminishes Executive Branch Prerogative

As stated above, JASTA amends the FSIA. Notably, JASTA adds to a previously existing FSIA "terrorism exception" to foreign sovereign immunity, which allows U.S. courts to exercise jurisdiction in civil cases over foreign states designated by the U.S. Secretary of State as "state sponsors of terrorism."[15]

By empowering private litigants to proceed in U.S. courts against foreign states that have not been designated as "state sponsors of terrorism," JASTA interjects plaintiffs into U.S. anti-terrorism policy and diminishes the prerogative of the Secretary of State and the Executive Branch more generally to determine on a case-by-case basis the status and dictate the treatment of "state sponsors of terrorism" in federal courts. This, of course, has ramifications for the coordination and conduct of U.S. foreign relations. Peculiarly, in a post-JASTA environment, a foreign state could be found liable in court for supporting international terrorism but continue to engage in business as usual with the U.S. Government, without being subject to political and punitive measures that often attach to states deemed terrorism sponsors, such as adverse unilateral or multilateral foreign policy stances, and export controls and economic sanctions.

"By allowing for Executive Branch intervention in JASTA-authorized civil actions against foreign states, JASTA effectively politicizes—and thereby complicates—the very justice it purports to deliver, to the detriment of claimants, foreign state defendants, and the conduct of foreign relations."

JASTA Politicizes the Civil Litigation, Undermines a Key Objective of the Foreign Sovereign Immunities Act

As stated above, JASTA's purpose is to "provide justice for victims" of certain acts of international terrorism. But this stated purpose is undermined by provisions of JASTA that permit the Executive Branch—the Attorney General and the Secretary of State, respectively—to intervene in and stay civil litigation against foreign states.[16] By allowing for Executive Branch intervention in JASTA-authorized civil against foreign states, JASTA effectively politicizes—and thereby complicates—the very "justice" it purports to deliver, to the detriment of claimants, foreign state defendants, and the conduct of foreign relations. In this respect, and importantly, JASTA undermines a key objective of the Foreign Sovereign Immunities Act of 1976, which was to depoliticize determinations of foreign sovereign immunity.[17]

RECIPROCAL RETALIATORY MEASURES BY OTHER COUNTRIES WILL NOT ALONE LEVEL THE CIVIL LITIGATION PLAYING FIELD

While other countries may, as some opponents of JASTA have argued, adopt laws to diminish the sovereign immunity of the United States, such measures alone are not likely, in most cases, to expose the United States and U.S. persons to civil litigation, liability, and extraterritorial consequences on par with U.S. *civil* litigation and its

consequences (**criminal cases are a different matter and are not addressed here, only civil litigation is addressed in this document**).[18]

As discussed below, some features of U.S. civil litigation and related aspects of international litigation would likely render reciprocal retaliatory measures—*i.e.*, the removal of sovereign immunity in civil cases—by foreign states insufficient to level the civil litigation playing field. In most cases, foreign states will likely face comparatively more rigorous, costly litigation in the United States (the United States and U.S. persons are not likely to face comparable civil litigation in most foreign jurisdictions). And, foreign laws adopted in retaliation to JASTA may authorize civil suits against the United States and U.S. persons, but without additional legal and procedural changes, many foreign plaintiffs are unlikely to benefit from the control, litigation and post-litigation tools, and damages awards generally available to plaintiffs in U.S. civil litigation. Thus, many foreign plaintiffs are not likely to be positioned equally to U.S. plaintiffs, even if local laws authorize suits against the United States and U.S. persons.

The U.S. Adversarial System is Comparatively Rigorous and Costly and Puts Litigants in the Driver's Seat

Litigation in the United States is known for its rigor and costliness, even when compared to litigation in "Western" jurisdictions that are sometimes assumed to be the same or very similar. U.S. litigation is conducted in an adversarial system in which litigants are the primary drivers of proceedings, subject primarily to applicable rules of civil procedure and evidence (including as interpreted by the courts), and relevant rules of court. The finders of facts and legal liability in U.S. courts—a judge in a bench trial or a jury in a jury trial—play passive roles in civil litigation, relative particularly to the roles played by judges in many other countries (*e.g.*, civil law jurisdictions). Thus, determined plaintiffs—as victims of acts of terrorism and their attorneys would, of course, be—are likely to push civil proceedings to the limits of their resources and applicable rules.

The U.S. Discovery Process Can Be Burdensome and Intrusive

The rules of civil procedure in federal courts allow for relatively wide-ranging pre-trial discovery (the process by which litigants collect information—*e.g.*, facts, documents, objects, deposition—to prepare for trial). The discovery process is not unlimited, but nevertheless provides litigants with a fairly wide degree of latitude. The discovery process in U.S. courts is unique for its breadth and the leeway it affords to individual litigants (again, subject to limitations). Thus, foreign state defendants in U.S. civil litigation are likely to be subjected to more burdensome (and intrusive) discovery than the United States and U.S. persons might be in a foreign court. It is not likely that, generally, foreign plaintiffs bringing civil actions in foreign courts against the United States or U.S. persons would have comparable discovery tools and the leverage that the U.S. discovery process affords litigants.

U.S. Monetary Damages Amounts Can Be Massive

Damages awards in most foreign jurisdictions generally are dwarfed by U.S. damages awards. Foreign states and their representatives who are subject to civil litigation in U.S. courts will face the prospect of significant damages in addition to costs and attorneys' fees (the subject matter and likely multijurisdictional aspects of JASTA cases, among other of their features, make such cases complex, labor-intensive and protracted, and therefore significantly costly). It is unlikely that a foreign plaintiff suing the United States or U.S. persons in a foreign court would, in ordinary circumstances, obtain a damages award comparable to what might be awarded to U.S. plaintiffs suing foreign defendants under JASTA in U.S. courts.

"Damages awards in most foreign jurisdictions generally are dwarfed by U.S. damages awards—it is unlikely that a foreign plaintiff suing the United States or its representatives in a foreign court would, in ordinary circumstances, obtain a damages award comparable to what might be awarded to U.S. plaintiffs suing foreign defendants under JASTA in U.S. courts."

Compliance with Foreign Pre- and Post-Judgment Rules and Procedures for Obtaining Evidence and Legal Assistance, and for the Enforcement of Judgments, Can be Disadvantageous to Plaintiffs in Non- "Western" Jurisdictions

It is not uncommon for plaintiffs in foreign jurisdictions to encounter difficulties in obtaining evidence, locating assets, and generally obtaining legal cooperation overseas, particularly in "Western" jurisdictions in which rules often require that overseas litigants follow specific procedures and meet certain criteria, such as demonstrating that proceedings in their home jurisdiction meet foreign or international standards. Where the proceedings in a local jurisdiction do not meet (or are not shown to meet) such foreign standards, foreign litigants can be (and have been) thwarted in their efforts.

Related issues tend to arise where a foreign plaintiff has obtained a judgment and seeks to enforce it in one or more overseas jurisdictions. A foreign litigant will often be required to complete procedures and meet legal and policy criteria in order to enforce a judgment in, for example, the United States and other "Western" jurisdictions. Courts in such jurisdictions often must be satisfied that the proceedings leading to judgment being enforced accorded due process—*e.g.*, notice, sufficient opportunity to defend, procedural integrity generally—and that the enforcement of a foreign judgment would not contravene or undermine the enforcing jurisdiction's public policy.[19] Where such criteria are not satisfied, a foreign judgment will not be enforced. In such cases, particularly where the assets of a defendant are located in one or more jurisdictions, the possession of an unenforceable judgment can be a hollow victory.

CONCLUSION

JASTA is politically and legally significant. Some of JASTA's practical implications are foreseeable—both for U.S. plaintiffs[20] and foreign state defendants—but a fuller picture of JASTA's ramifications for litigants, countries, foreign relations, and anti-terrorism efforts is likely to come into focus over time.

While foreign states may adopt reciprocal retaliatory measures to expose the United States and U.S. persons to civil proceedings, such measures are not likely, as a general matter, to level the playing field for foreign plaintiffs or subject the United States and U.S. persons to civil litigation on par with what foreign defendants will face in U.S. civil litigation.

Some members of Congress, including some that voted in favor of JASTA, have indicated an interest in revisiting the law, particularly to avoid retaliatory measures by foreign states. Modifications to JASTA may be politically feasible, but the restoration of foreign sovereign immunity in international terrorism cases arising or commenced after September 11, 2001 seems much less likely, given the politics and optics surrounding JASTA. The political landscape is complicated by the fact that a new president[21] will take office in the United States within months of JASTA's adoption.

Foreign states and foreign persons subject to JASTA's provisions should acquaint themselves with and monitor JASTA, pending litigation in which they may be named as defendants in a post-JASTA environment, and JASTA-related developments in the United States and abroad. Foreign states should also not assume that only Saudi Arabia will be sued under JASTA.

NOTES

[1] Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, 130 Stat 852, 2016 Enacted S. 2040, (codified at, *inter alia*, Foreign Sovereign Immunities Act of 1996, 28 U.S.C.S. § 1605B (Lexis 2016)). It is worth noting that laws similar to JASTA—in name, substance, and import—had been introduced into Congress in previous years, but failed to progress. For example, there was the Justice Against Sponsors of Terrorism Act, which was introduced in the House in 2012 as H.R. 5904. *See, e.g.*, Bill Summary at www.congress.gov.

Citations to JASTA herein are alternatively to the Public Law and to its provisions as codified.

[2] The veto override was accomplished by a "supermajority" vote (at least two-thirds) in both chambers of Congress—the Senate and House of Representatives—as constitutionally required to override a presidential veto. U.S. Const. art. I, § 7, cl. 2.

[3] Pub. L. 114-222 at § 2(b).

[4] Pub. L. 114-222 at § 4.

[5] In his veto message, President Obama outlined the following arguments against JASTA, among others.

> JASTA would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests. The United States has a larger international presence, by far, than any other country, and sovereign immunity principles protect our Nation and its Armed Forces, officials, and assistance professionals, from foreign court proceedings. These principles also protect U.S. Government assets from attempted seizure by private litigants abroad. Removing sovereign immunity in U.S. courts from foreign governments that are not designated as state sponsors of terrorism, based solely on allegations that such foreign governments' actions abroad had a connection to terrorism-related injuries on U.S. soil, threatens to undermine these longstanding principles that protect the United States, our forces, and our personnel.
>
> Indeed, reciprocity plays a substantial role in foreign relations, and numerous other countries already have laws that allow for the adjustment of a foreign state's immunities based on the treatment their governments receive in the courts of the other state. Enactment of JASTA could encourage foreign governments to act reciprocally and allow their domestic courts to exercise jurisdiction over the United States or U.S. officials -- including our men and women in uniform -- for allegedly causing injuries overseas via U.S. support to third parties. This could lead to suits against the United States or U.S. officials for

> actions taken by members of an armed group that received U.S. assistance, misuse of U.S. military equipment by foreign forces, or abuses committed by police units that received U.S. training, even if the allegations at issue ultimately would be without merit. And if any of these litigants were to win judgments -- based on foreign domestic laws as applied by foreign courts -- they would begin to look to the assets of the U.S. Government held abroad to satisfy those judgments, with potentially serious financial consequences for the United States.

VETO MESSAGE FROM THE PRESIDENT, SEPTEMBER 23, 2016

[6] *See, e.g.,* Karoun Demirjian and David Nakamura, White House accuses Congress of 'buyer's remorse' on 9/11 bill, Washington Post, September 29, 2016 (reporting, *inter alia*, that "Republican congressional leaders said Thursday they might need to revisit a measure that allows victims of the Sept. 11 terrorist attacks to sue Saudi Arabia over worries that it will expose U.S. officials to lawsuits abroad") and Reuters, After Rejecting Obama Veto, Lawmakers Now Have Doubts About 9/11 Lawsuit Bill (quoting White House Press Secretary John Earnest as saying of Congress members' post-JASTA doubts, "I think what we've seen in the United States Congress is a pretty classic case of rapid onset buyer's remorse.").

[7] Safeguarding America's Armed Forces and Effectiveness Act or the "SAAFE Act," H.R. 6223, 114th Cong. § 2 (2016) (amending the Justice Against Sponsors of Terrorism Act as codified at 28 U.S.C. § 1605B(b)).

[8] Indeed, only one Senator, Senate Minority Leader Harry Reid of Nevada, voted against JASTA (97 Senators voted to override the President's veto, one voted against, and two did not vote. *See* U.S. Senate Roll Call Votes 114th Congress, 2nd Session. Notably, but unsurprisingly, Senator Reid is not seeking reelection. In the House, the vote to override the President's veto was: 348 in favor, 77 against, 1 voting present, and 5 not voting. *See* Clerk of the House, Final Vote Results for Roll Call 564, September 28, 2016.

[9] Some commentators have opined that other foreign states are not likely to be sued. However, it is likely that JASTA will motivate suits against other states that heretofore have not been in the legal or political spotlight. As well, the definition of "international terrorism" is likely to be tested by litigants who may assert—successfully or not—claims for acts that are not widely known or identified as acts of international terrorism. Related to this, it is important to keep in mind that sovereign immunity includes not just immunity from being held legally liable; sovereign immunity includes immunity from having to answer in court, regardless of the ultimate strength or weakness of claims.

[10] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (Lexis 2016). The sovereign immunity exception created by JASTA, "Responsibility of foreign states for international terrorism against the United States," is codified at 28 U.S.C. § 1605B.

[11] JASTA incorporates the definition of "international terrorism" at 18 U.S.C. § 2331, as follows:

> (1) the term "international terrorism" means activities that--
>
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended--
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion; or
>
> (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
>
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . .

[12] The "knowing" and "reckless" elements of the law support the assertion of personal jurisdiction over defendants, as indicated in the following language: "Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and ***should reasonably anticipate being brought to court in the United States to answer for such activities***." JASTA (Findings and Purpose), Pub. L. 114-222, Sec. 2(a)(6) (emphasis added).

[13] 28 U.S.C. 1605B(d) sets forth the following "Rule of Construction": "A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence."

[14] Pub. L. 114-222 at § 7.

[15] 28 U.S.C.S. 1605A(a)(2)(A)(I) (Lexis 2016) (as amended by the National Defense Authorization Act for Fiscal Year 2008, Pub. Law 110–181, January 28, 2008, 122 Stat 3 (codified at 28 U.S.C. 1605A) (2016) (authorizing courts to hear claims against foreign a state that was designated "as a state sponsor of terrorism" *at the time* that the act(s) of terrorism and/or materials support for such act(s) giving rise to a legal claim occurred). *Id.* at 1605A

[16] Pub. L. 114-222 at § 5.

[17] "A primary purpose of . . . [the Foreign Sovereign Immunities] Act was to depoliticize sovereign immunity decisions by transferring them from the Executive to the Judicial Branch of government, thereby assuring litigants that such decisions would be made on legal rather than political grounds." *National Airmotive Corp. v. Government & State of Iran*, 499 F. Supp. 401, 406 (D.D.C. 1980).

[18] Retaliatory measures by foreign states in criminal contexts—*e.g.*, the denial of sovereign immunity to U.S. officials in connection with acts punishable by criminal laws in local jurisdictions—implicate different proceedings and consequences (*e.g.*, imprisonment). Such counter-measures could be, for the United States, other countries, and their representatives, quite severe and more difficult to counter on a case-by-case basis (*e.g.,* where a U.S. or other foreign official is detained without the benefit of a foreign sovereign immunity defense).

[19] Notably, holders of U.S. judgments may face difficulties enforcing judgments against foreign states, where those judgments were obtained in JASTA-authorized proceedings. Such judgments against foreign states may not be enforced if found to offend policies on foreign sovereign immunity that vest foreign states with immunity in connection with civil suits for acts of international terrorism.

[20] The path for U.S. plaintiffs proceeding under JASTA is not likely to be clear or easy. As noted above, JASTA effectively politicizes litigation by allowing the Attorney General and Secretary of state to, respectively, intervene in and stay litigation. Moreover, obtaining evidence, legal assistance, and other materials or cooperation overseas may be complicated or thwarted, particularly in jurisdictions where JASTA is incompatible with applicable law and/or policy.

[21] The Trump Campaign issued the following statement, made on the campaign's behalf by former New York City Mayor Rudy Giuliani, on Congress's override of the President's Veto of JASTA:

> President Obama's veto of the Justice Against Sponsors of Terrorism Act was an insult to the families of those we lost on 9/11 and I congratulate the Congress for righting that terrible wrong. The failure of Hillary Clinton's running mate Tim Kaine, who was obviously afraid to show up to work today and stand with these Americans, is a disgrace. It demonstrates his basic inadequacy as a leader. I will never forget that tragic day, nor the thousands who were lost, and neither will Donald Trump. These family members are wonderful people who have gone through the unimaginable. They deserve the opportunity to seek justice and gain closure on this painful chapter in their lives. Now they will finally have the chance to do it.

Trump Campaign Statement on Override of President Obama's Veto of JASTA, September 28, 2016. As with most statements made and positions taken during the 2016 presidential campaign, it is not at all clear which statements or positions should be understood as indications of potential policy. Thus, it remains to be seen what position(s) will be taken by a new administration.