U.S. Claims against Iraq Outside UNCC Jurisdiction: Focus on Letters of Credit

Part I: Issues Related to Filing Suit in U.S. Courts

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In this two-part article, Abed Awad examines issues related to U.S. claims against Iraq outside the jurisdiction of the United Nations Compensation Commission, focusing on claims related to letters of credit. In Part II of the article, to appear in a future issue, the author examines a series of U.S. court decisions regarding U.S.-Iraqi letters of credit.

For many U.S. firms with claims against Iraq, the United Nations Compensation Commission (UNCC) will provide little help, since their claims arise from transactions that occurred prior to Iraq's invasion of Kuwait and are therefore outside the UNCC's jurisdiction.[1] These claims total an estimated $5 billion,[2] while the funds available for paying them are limited to frozen Iraqi assets in the U.S., estimated at $1.2 billion.[3]

Approximately one third of the frozen Iraqi funds in the United States are related to pre-invasion business transactions financed or secured by pending letters of credit (LCs).[4] Most of these commercial claims, and LC claims in particular, are therefore not within the UNCC's jurisdiction because they arise from transactions that occurred prior to Iraq's invasion.[5]

U.S. claimants with claims arising from transactions prior to Iraq's invasion are not without a remedy, however. They may have a remedy through an Iraq claims adjudication or pre-adjudication program that will likely be set up under the U.S. Foreign Claims Settlement Commission (FCSC) pursuant to authorizing legislation or a government-to-government claims settlement agreement.[6] Currently, there is one bill pending in the U.S. House of Representatives that would authorize the FCSC to establish an Iraqi claims adjudication program.[7]

Also, U.S. claimants have filed actions in U.S. courts to obtain judgments against Iraq. Since in most cases the applicable period for filing a court suit has expired,[8] few if any new cases are likely to be filed. For ongoing cases and cases where a judgment has been entered, however, there should eventually be enforcement opportunities.

This article reviews events of the last few years regarding the Iraqi claims process, and where it stands now. After discussing some of the relevant judicial decisions,

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the author makes a few suggestions about how U.S. firms can protect themselves in future transactions in areas where political instability may be an issue.

Part I of the article examines the FCSC and the current status of bills in Congress that would establish a U.S.-Iraq adjudication program, and then discusses the hurdles that have existed and still exist for U.S. claimants filing actions in U.S. courts: the U.S. executive orders regarding sanctions against Iraq; the need to obtain a litigation license from the U.S. Treasury Department's Office of Foreign

Assets Control (OFAC), which administers the U.S. sanctions against Iraq (with an examination of OFAC regulations and LCs); the need for the plaintiff to satisfy the jurisdictional requirement under the U.S. Foreign Sovereign Immunities Act of 1976 (FSIA)[9] (with an examination of relevant court cases); and finally, for the plaintiff who wins such a suit, the need to obtain a "specific" license from OFAC to unfreeze the Iraqi assets in question in order to collect any money.

Foreign Claims Settlement Commission

The FCSC is an "independent quasi-judicial federal agency."[10] Its primary function is to evaluate U.S. nationals' claims for loss of property in foreign countries. The FCSC may adjudicate claims only if authorized to do so by Congress or if the U.S. has entered into a government-to-government claims settlement agreement.[11] Since 1950, the FCSC and its predecessors have administered 42 claims programs in which more than 660,000 claims have been filed and more than $3 billion in awards granted.[12]

The FCSC adjudication process includes staff review of related exhibits, documents and other evidence. The FCSC may also seek additional information or evidence from the claimant and other sources, if necessary. The process is not adversarial. The FCSC "seeks to do all that is reasonably possible to assist each claimant in establishing a compensable claim."[13] After a claim has been fully developed by the staff, it is presented to the FCSC for adjudication.

Following a review of the claim, the FCSC issues a written proposed decision, to which the claimant has the right to object within a specified period of time. The claimant may present any additional evidence to support an objection. After any additional evidence is presented, the FCSC reconsiders the entire record and issues a written final decision.[14]

Although FCSC decisions are final and not subject to judicial review,[15] the FCSC may, after making a final decision, allow a claimant to file a petition to reopen the claim for further consideration based on new evidence. In addition, if relevant new information is discovered by sources other than the claimant, "the Commission may reopen a claim on its own motion to allow a more favorable decision."[16]

The FCSC's adjudication process is constrained by time limits. After the specified time limit for a settlement program, the claims process regarding the program also ends.[17] The FCSC only certifies awards; it is not involved in paying them. Its responsibility is discharged upon entry of a final decision. The Secretary of the Treasury has sole jurisdiction, under specific statutory authority, to make payment for awards out of the funds established for that purpose.[18] Because in most settlement programs, the funds available for compensating U.S. claimants have been limited, awards are usually paid on a pro rata basis.[19]

Proposed Authorizing Legislation

As noted, the FCSC has not yet been authorized to start an Iraq claims settlement program. Once authorized, it likely will have authority to evaluate and adjudicate all claims against Iraq that arose prior to Iraq's invasion of Kuwait on August 2, 1990; all claims of U.S. military personnel or their survivors, arising out of Desert Shield and Desert Storm; and all claims arising out of Iraq's 1987 attack on the *U.S.S. Stark*.

Several proposed bills authorizing the FCSC to begin adjudicating Iraqi claims passed at least one house of Congress, but they all failed to become law: (1) the Iraqi Claims Act of 1994 passed the House but died in the Senate;[20] (2) the Foreign Relations Revitalization Act, Fiscal Years 1996 and 1997 passed both houses of Congress but was vetoed by President Clinton;[21] and (3) the Foreign Affairs Reform and Restructuring Act of 1997, which included a provision authorizing the FCSC to begin adjudicating claims against Iraq,[22] also passed both houses but was vetoed by President Clinton.[23]

The two bills that passed both houses of Congress were vetoed by President Clinton for reasons unrelated to the Iraqi claims provisions. Nevertheless, there have been strong disagreements in Congress about various aspects of an Iraqi claims settlement program. One contentious issue has been whether to grant advised Iraqi LCs the same priority that was given to confirmed Iraqi LCs. Pursuant to the express provisions of the Iraqi Sanctions Regulations, discussed fully below, OFAC issued specific licenses in 1990 and 1991 to pay out over $100 million from blocked Iraqi accounts to U.S. companies that held confirmed and collateralized LCs. Companies holding advised Iraqi LCs, which are estimated at over $300 million, are seeking the same priority treatment.[24]

There is a fundamental difference between an LC that is advised and one that is confirmed. When a bank confirms an LC, it undertakes an obligation to pay the beneficiary. The confirming bank substitutes its own credit for that of the issuing bank.[25] This principle is well recognized by U.S. courts.[26] Unless an advising bank confirms an LC, its primary task is generally to notify the beneficiary that the credit was issued or has been amended.[27] Thus, the beneficiary of an advised LC may collect payment only from the issuing bank.[28]

The Clinton Administration and the banking industry have opposed extending priority to unsecured LCs, while Senator Jesse Helms (R-NC), Chairman of the Senate Foreign Relations Committee, backed by grain and tobacco interests, has supported such extension.[29] Senator Helms' proposed Senate amendment to the original House version of the Foreign Relations Revitalization Act, which did not survive, would have granted advised Iraqi LCs the same payment priority as confirmed Iraqi LCs.[30] The amendment proposed by Senator Helms would have given priority to U.S. agricultural interests that chose to do business with Iraq without getting their LCs secured by a U.S. bank.[31] In the author's opinion, Senator Helms' proposal to grant advised Iraqi LCs payment priority is contrary to U.S. law and LC jurisprudence.

Three other draft bills regarding the Iraqi Claims Program were also introduced during the 105th Congress, but they all died because the Congress adjourned before any floor action was taken on them: S. 856, S. 1794, and H.R. 3484.

Proposed Senate Bill S. 856, To Provide for the Adjudication and Payment of Certain Claims Against the Government of Iraq, was introduced on June 9, 1997, by Sen. Chuck Robb (D-VA). This bill was identical to S. 903, which was incorporated in H.R. 1757 (the Foreign Affairs Reform and Restructuring Act of 1997, discussed above). S. 856 was read twice in the Senate and referred to the Committee on Foreign Relations. The 105th Congress adjourned before any floor action was scheduled.

The other two draft bills involved another contentious

issue in Congress: whether to grant Gulf War veterans' claims priority over commercial claims. The Gulf War Veterans' Iraqi Claims Protection Act of 1998 was introduced in both houses: in the House as H.R. 3484 on March 18, 1998, by Congressman Lloyd Doggett (D-TX), and in the Senate on the same date as S. 1794, by Sen. Tom Harkin (D-IA). It instructed the FCSC to decide "all pending non-commercial claims of active, retired, or reserve members of the United States Armed Forces . . . and other individuals arising out of Iraq's invasion and occupation of Kuwait or out of the 1987 attack on the *USS Stark*," before deciding "any other claim against the Government of Iraq."[32] It was not surprising that the 105th Congress adjourned before any action was taken on the bill in either house, since Sen. Helms did not schedule a hearing on the bill, nor did Speaker of the House Newt Gingrich schedule any House action on the bill.

The only bill regarding the Iraqi claims settlement program currently pending before the 106th Congress is the Gulf War Veterans' Iraqi Claims Protection Act of 1999 (H.R. 618) which was introduced in the House on February 8, 1999 by Congressman Doggett.[33] H.R. 618 is identical to the draft bill (H.R. 3484) introduced by Congressman Doggett last year.

It is expected that other proposed bills are likely to follow. Legislation authorizing the FCSC to begin the process of adjudicating U.S. claims against Iraq will likely be passed; the only question is when.

Obstacles to Suits against Iraq

U.S. Executive Orders

In view of U.S. Executive Orders (EOs) relating to sanctions on Iraq and the resultant body of law, there have been hurdles for U.S. plaintiffs filing suit against Iraq in U.S. courts.

- *EO 12,722.* On August 2, 1990, U.S. Executive Order (EO) No. 12,722 was issued, blocking "[a]ll property and interests in property of the Government of Iraq . . . in the United States."[34] Except for food, clothing, and medicine "intended to relieve human suffering,"[35] the EO prohibited practically everything else from being exported to or imported from Iraq.[36] EO 12,722 authorized the Secretary of the Treasury to promulgate "rules and regulations, as may be necessary to carry out the purposes of this Order."[37] Section 4 of the EO provided that the Secretary of Treasury may, among other things, prohibit or regulate "payments or transfers of any property or any transaction involving the transfer of anything of economic value by any United States person to the Government of Iraq."[38]

- *EO 12,724.* On August 9, 1990, President Bush issued EO No. 12,724,[39] which revoked EO No. 12,722 to the extent that it was inconsistent with EO 12,724[40] and implemented the U.N. Security Council's Resolution 661, which imposed economic sanctions against Iraq.[41] Since then, Iraqi assets have continued to be blocked under annual extensions, most recently on July 28, 1998.[42]

As noted, a U.S. plaintiff needs to clear several hurdles in order to file suit against Iraq in U.S. courts: obtaining a litigation license from OFAC; satisfying the jurisdictional requirement under the FSIA; and obtaining a "specific" license from OFAC to unfreeze the Iraqi assets in question in order to collect any money.

OFAC Licensing

OFAC is responsible for administering U.S. economic embargoes and sanctions programs against foreign countries during war or national emergencies.[43] It was designated as the administrator of EO 12,722 and then of EO 12,724.[44]

To implement EO No. 12,724, OFAC issued and administered the Iraqi Sanctions Regulations (ISR) effective January 18, 1991,[45] which consist of eight parts.[46] The ISR set forth in great detail the substantive and procedural terms of the economic embargo on Iraq, reflecting the U.S.'s economic, legal and political policy on Iraq.

Section 575.201(a) of the ISR states that "[e]xcept as authorized by regulations, rulings, instructions, licenses, or otherwise, no property or interest in property of the Government of Iraq that are [sic] in the United States . . . may be transferred, paid, exported, withdrawn or otherwise dealt in." Sections 575.201-212 list the prohibited activities under the ISR. The prohibitions include both importing goods from Iraq and exporting them to Iraq, dealing in property of Iraqi origin, transactions relating to travel to Iraq, transactions related to transportation to or from Iraq, performance of contracts related to Iraq, transfer of funds to and from Iraq, and transactions to evade or avoid the provisions of the ISR.[47]

OFAC issues two types of licenses: general and specific.

- *General Licenses.* A general license authorizes a certain otherwise-prohibited type of transaction without the need to file an application with OFAC. Until the ISR went into effect on January 18, 1991, OFAC administered the sanctions against Iraq by issuing 13 general licenses.[48] These licenses pertained to transactions ranging from completion of oil shipments from Iraq en route to the U.S. before the sanctions were imposed, to the status of LCs and performance bonds.[49] Most of these 13 general licenses were incorporated into the ISR.[50]

- *Specific Licenses.* A specific license is a "permit issued by OFAC on a case-by-case basis to a specific individual or company allowing an activity that would otherwise be prohibited by the embargo or sanctions program."[51] Under the ISR, OFAC may issue specific licenses to "parties having a stake in property blocked by the Executive Order" so that they may be paid.[52] For any litigation against Iraq, as well as for attempts to be paid from frozen Iraqi assets in the U.S., a specific license must be obtained from OFAC.[53] Although OFAC has broad authority in granting licenses since its "decisions on any application constitute final agency actions,"[54] its decisions are subject to judicial review under the Administrative Procedure Act.[55]

OFAC has been very conservative in issuing specific licenses regarding transactions involving Iraq;[56] and it has issued none to unfreeze Iraqi assets except in certain LC cases.[57] Nevertheless, thousands of U.S. claimants have applied to OFAC for litigation licenses to sue Iraq,[58] in the hope of recovering damages for their losses indirectly due to the Iraqi invasion. While OFAC discourages lawsuits against Iraq,[59] it has granted many litigation licenses.

OFAC Regulations[60] and Irrevocable LCs[61]

The main provision of the ISR dealing with LCs is § 575.510. Section 575.510(a) provides that as long as the

underlying exportation occurred "prior to the effective date" of the sanctions (August 2, 1990), "[s]pecific licenses may be issued on a case-by-case basis to permit payment involving an irrevocable letter of credit issued or confirmed by a U.S. bank, or a letter of credit reimbursement confirmed by a U.S. bank, from a blocked account. . . . "

R. Richard Newcomb, the Director of OFAC, stated in a 1995 article that if an OFAC specific license is granted pursuant to ISR § 575.510, "[t]he confirming bank, in turn, may be licensed to reimburse itself from blocked Iraqi funds that, prior to the imposition of sanctions, and pursuant to the confirmation, were specifically pledged as collateral for the U.S. bank's payment obligations."[62]

As noted, many U.S. plaintiffs obtained OFAC litigation licenses and filed suit against Iraq in U.S. courts. Initially, Iraq was not represented in these cases in U.S. courts, and default judgments were granted in favor of U.S. plaintiffs, at little cost to the plaintiffs. In order to appear in court on behalf of an Iraqi entity, U.S. attorneys must obtain a specific license from OFAC. In 1992, Iraq retained U.S. attorneys[63] and began to appear in court.[64]

Many commentators at the time suggested that this was a positive development that might encourage negotiated settlements and payments.[65] So far, this has not happened. Also, in January 1998, in *Bank of China v. Central Bank of Iraq*, the New York Supreme Court entered a $4.1-million default judgment against the Central Bank of Iraq (CBI) because CBI failed to answer the Bank of China's summons and complaint (after service of process upon CBI using three different methods).[66] It seems that Iraq is defending itself in U.S. courts only in some cases.

Generally, OFAC has not issued any specific licenses to unfreeze blocked Iraqi funds in the United States except in the case of confirmed and collateralized LCs. Although thousands of suits have been filed in U.S. courts against Iraq, only a small percentage of them are related to LC claims. OFAC issued specific licenses in 1990 and 1991 to pay out over $100 million from blocked Iraqi accounts to U.S. companies that held confirmed and collateralized LCs. These specific licenses covered most of the confirmed and collateralized LC claims.[67] There are between 50 and 100 U.S. companies, however, holding advised Iraqi LCs with an estimated value of over $300 million, which remain unpaid.[68]

Foreign Sovereign Immunities Act

As noted, after obtaining a license from OFAC to file suit against Iraq, the plaintiff has another hurdle to clear: the requirement that a U.S. court have jurisdiction. In cases where the defendant is a foreign state, the provisions of the Foreign Sovereign Immunities Act[69] (FSIA) determine whether a U.S. court has jurisdiction. The FSIA is a federal "long-arm" statute that authorizes U.S. courts to exercise jurisdiction over foreign state defendants in limited situations.

The principle that foreign nations have immunity from jurisdiction in the courts of other nations is not a recent one.[70] In the United States, foreign sovereign immunity had its judicial origin in the famous *Schooner Exchange* case of 1812.[71] In that case, two American citizens filed suit against France to recover a French warship docked in U.S. waters. The U.S. plaintiffs claimed that Napoleon had seized the schooner from them and converted it into a French naval vessel.[72] Relying primarily on public policy and the principle of equality among sovereigns, the Supreme Court held that a foreign sovereign enjoys absolute immunity from suits arising from the sovereign's public activities.[73] Over time, the "absolute" theory of foreign sovereign immunity gave way to the "restrictive" theory, which was codified in the FSIA of 1976.[74]

Jurisdiction over Foreign States

The FSIA is the sole basis for federal subject matter jurisdiction in civil actions against a foreign state.[75] Section 1604 of the FSIA provides that a foreign state[76] "shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."[77] Sections 1605-1607 enumerate eight exceptions to a foreign state's immunity defense:

- if the foreign state explicitly or by implication waives its immunity;
- if the foreign state's action is of a commercial nature and causes a direct effect in the United States;
- if "rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by a foreign state";
- if the suit is for money damages for personal injury, death, or damage to or loss of property "occurring in the United States by the tortious act or omission of a foreign state" or foreign official within the scope of his or her employment;[78]
- if the suit is in admiralty "to enforce maritime liens against a vessel or cargo of a foreign state";
- if "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking"; or
- if the foreign state files an action or intervenes in a U.S. court, then it is not immune from a counterclaim as long as the counterclaim arises out of the same transaction or occurrence and "the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."

The FSIA determines both subject matter and personal jurisdiction.[79] If the foreign state defendant is not entitled to immunity under the FSIA, the U.S. district courts have "original jurisdiction."[80] Moreover, as long as process was served in accordance with § 1608 of the FSIA,[81] the court may assert personal jurisdiction.[82] The applicability of any of the FSIA exceptions, however, does not automatically give the court personal jurisdiction over the foreign state defendant. Another test must be satisfied: the exercise of personal jurisdiction must comport with the due process requirement;[83] that is, the foreign state defendant must either have consented to the forum's jurisdiction,[84] or had sufficient contacts with the forum.[85]

Commercial Activity Exception

Of the exceptions listed above, the commercial activity exception is generally the most frequently used,[86] and it is by far the most relevant in LC cases. It provides that a foreign sovereign is not immune from the jurisdiction of U.S. courts in any case

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[87]

Thus, two requirements must be met in order for the commercial activity exception to apply: the foreign state must have engaged in a commercial activity; and such commercial activity must have a direct effect in the United States.

• In 1992, the Supreme Court in *Republic of Argentina v. Weltover*[88] addressed commercial activity that had a direct effect in the United States as provided by Section 1605(a)(2) of the FSIA. In this case, Argentina defaulted on bonds that it had issued to stabilize its currency.[89] When the bonds matured, Argentina unilaterally refinanced them.[90] As a result, three banks filed suit in U.S. district court for breach of contract to recover on the bonds, claiming New York as the place of payment.[91] The district court asserted personal jurisdiction under the FSIA, and the 2d Circuit Court of Appeals affirmed. The Supreme Court agreed, stating that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."[92]

Moreover, the Supreme Court held that Argentina's issuance of the bonds was a "commercial activity" because bonds are "debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market . . . ."[93] The Court held that because New York was the "place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank was not forthcoming."[94]

In view of the Supreme Court's broad definition of commercial activity with a direct effect[95] in the *Weltover* case, it has become easier for U.S. plaintiffs to establish that an Iraqi party (or any other foreign state) has engaged in a commercial activity within the meaning of the FSIA.

U.S. courts have consistently found banking in general, and LC transactions in particular, to be a commercial activity within the meaning of the FSIA, and all banks in Iraq are considered an instrumentality of the state since banks in Iraq are nationalized.[96] Following are some U.S. court rulings regarding the commercial activity exception under the FSIA in LC cases filed against Iraqi entities.

• The parties in *National Bank of Kuwait v. Rafidain Bank*[97] were involved in an extensive business relationship. The National Bank of Kuwait (NBK) filed suit in the Federal District Court for the Southern District of New York to recover damages based on claims ranging from breach of contract to wrongful dishonor.[98] In July 1994, the court granted a default judgment on several of the counts and denied the others for lack of jurisdiction. It found that a contractual obligation to pay NBK in New York on an LC was a commercial activity within the meaning of the FSIA. However, the court found that the commercial activity exception did not apply where an LC, a transfer and an international promissory note were not to be paid to NBK in New York.[99]

• In *Dibrell Bros. Tobacco Co., Inc. v. Rafidain Bank*,[100] the plaintiff had contracted to sell tobacco to an Iraqi government-owned corporation. The transaction was to be financed through irrevocable LCs. The court, the U.S. District Court for the District of Columbia, held on June 15, 1994 that "[t]he tobacco transaction, including the arrangement for credit and later payment plainly constitute [sic] commercial activity within the meaning of the Act [FSIA]."[101]

• Along the same lines, on January 19, 1994, the 2d Circuit Court of Appeals in *The Commercial Bank of Kuwait v. Rafidain Bank and Central Bank of Iraq*[102] affirmed the district court's decision indicating that the Iraqi banks were contractually bound to remit funds in New York, and their failure to do so had "a direct effect in the United States."[103]

• Unlike the above cases, on June 24, 1994, in *Goodman Holdings; Anglo Irish Beef Processors International v. Rafidain Bank*,[104] the Court of Appeals for the D.C. Circuit narrowly construed the commercial activity exception, affirming the lower court's dismissal of the case for lack of jurisdiction. Goodman initially had filed suit in England to recover under an irrevocable LC, but Rafidain Bank was subjected to involuntary liquidation there. Goodman than filed suit in the United States.[105] The court found that Rafidain was a branch of the Iraqi government and was immune from suit pursuant to the FSIA. The Court of Appeals affirmed the district court's decision that neither the commercial activity nor the direct effect requirement of the commercial activity exception applied. It held that Rafidain's maintaining accounts in the United States and paying Goodman from those accounts was not sufficient to consider such activity as commercial activity within the meaning of the FSIA. Moreover, Rafidain's failure to honor the LCs was found to have no "immediate consequence" in the United States because neither New York nor any other United States location was designated as the "place of performance."[106] The fact that Rafidain did not consistently pay Goodman from its New York accounts was the determinant in the court's rationale for not considering Rafidain's conduct within the commercial activity exception.[107]

In light of these cases, if the foreign government is contractually bound to pay its obligations in a U.S. location, or perhaps if it consistently pays its obligations in a U.S. location, that would satisfy both the commercial activity and direct effect requirements for the commercial activity exception under the FSIA.

Footnotes

[1]In addition to U.S. claims arising from transactions prior to Iraq's invasion of Kuwait, claims by U.S. military personnel, except claims for inhumane treatment, are not within the UNCC's jurisdiction. *See* UNCC Decision No. 19, U.N. Doc. S/AC.26/Dec. 19 (1994) ("The Governing Council confirms that the costs of the Allied Coalition Forces, including those of military operations against Iraq, are not eligible for compensation.").

The UNCC was established to adjudicate claims against Iraq arising from any direct losses resulting from Iraq's invasion and occupation of Kuwait. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 1, U.N. Doc. S/RES/687 (1991), paras. 16 and 18. On April 6, 1991, Iraq accepted the conditions of the cease-fire.

U.N. Security Council Resolution 687 of April 3, 1991, which set out the conditions for the cease-fire in the Gulf War, states that:

> . . . without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, [Iraq] is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait. . . .

Security Council Resolution 692 of May 20, 1991, established the UNCC as a subsidiary organ of the U.N. Security Council to process and evaluate claims against Iraq and pay compensation for losses that arose as a direct result of Iraq's invasion and occupation of Kuwait.

On October 2, 1992, the U.N. Security Council passed Resolution 778, providing that if any agreement were reached allowing Iraq to sell oil, 30 percent of the proceeds from such sales would be placed in an escrow account to fund the UNCC and pay claims under its jurisdiction. S.C. Res. 778, U.N. SCOR, Res. Dec. at 72-74 (1992).

Over 2.6 million claims against Iraq have been filed with the UNCC, reportedly with a total value of $200 billion. By the end of 1997, the UNCC had processed over 2.4 million claims and awarded more than $6 billion in compensation. As of March 25, 1998, the UNCC had made more than $1.2 billion available for payment on these awards. *See* U.N. Press Release IK/249, "Compensation Commission Pays Out $497 Million to 17 Governments" (March 25, 1998); *see generally*, United Nations Compensation Commission, <http://www.unog.ch/uncc/theclaims.htm>. (visited Aug. 1, 1998); and *see also* Veijo Heiskanen and Robert O'Brien, "UN Compensation Commission Panel Sets Precedents on Government Claims," 92 *Am J. Int'l L.* 339 (1998).

As noted, the UNCC's jurisdiction is limited to claims involving direct losses resulting from Iraq's invasion and occupation of Kuwait. Res. 687, para. 16. The Governing Council, which is the policymaking organ of the UNCC, has published several decisions setting and explaining the criteria for "direct loss" for the purposes of UNCC jurisdiction. *See, e.g.*, UNCC Decision No. 1, "Criteria for Expedited Processing of Urgent Claims," U.N. Doc. S/AC.26/1991/1 (1991); UNCC Decision No. 7, "Criteria for Additional Categories of Claims," U.N. Doc. S/AC.26/1992/7 (1992); UNCC Decision No. 9, "Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation," U.N. Doc. S/AC.26/1992/9 (1992); UNCC Decision No. 11, "Eligibility for Compensation of Members of the Allied Coalition Armed Forces," U.N. Doc. S/AC.26/1992/11 (1992); UNCC Decision No. 15, "Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait Where the Trade Embargo and Related Measures Were also a Cause," U.N. Doc. S/AC.26/1992/15 (1992); UNCC Decision No. 19, "Military Costs," U.N. Doc. S/AC.26/Dec.19 (1994).

[2]Delissa A. Ridgway, former Chair of the FCSC, said in a May 31, 1996 letter sent to those parties that had registered or inquired about Iraqi claims that "at present there is no viable forum for the estimated $5 billion in outstanding claims against Iraq which fall outside the UNCC's jurisdiction ('non-UNCC claims')." *See also* R. Richard Newcomb, "Coping with U.S. Export Controls," 733 *PLI/Comm* 169, at 258 (1995) (stating that "[n]early 1,100 individuals, corporations, banks, and U.S. government agencies reported billions of dollars in claims against Iraq" and that the blocked Iraqi property in the U.S. is worth approximately $1.2 billion).

[3]With the effects of compound interest, the $1.2 billion in frozen Iraqi assets in the U.S. could now be worth in the neighborhood of $2 billion.

[4]*See* Neil E. McDonell, "Taking Iraq to Court," *Middle East Executive Reports (MEER)*, Sept. 1992, at 10.

[5]For an examination of UNCC and causation, *see* Arthur W. Rovine and Grant Hanessian, "Toward a Foreseeability Approach to the Causation Question at the United Nations Compensation Commission," in Richard B. Lillich, Ed., *The United Nations Compensation Commission*, Transnational Publications (1995).

[6]Since 1950, 42 settlement programs awarding $3 billion have been completed by the U.S. FCSC and its predecessors. FCSC is an independent quasi-judicial federal agency that evaluates claims of U.S. nationals for loss of property in foreign countries. As of June 1999, the U.S. Congress had not passed legislation authorizing FCSC to begin adjudicating U.S. claims against Iraq, although such legislation is likely. *See infra*, note 10 and accompanying text under heading "Foreign Claims Settlement Commission."

[7]*See infra* notes 20-33 and accompanying text.

[8]*See generally*, Arthur W. Rovine and Grant Hanessian, "Enforcing Contract Claims Against Iraq in U.S. Courts: The Statute of Limitations," *MEER*, May 1996, at 9.

[9]Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1602-1611.

[10]The FCSC was created on July 1, 1954, by Reorganization Plan No. 1 of 1954, effective July 1, 1954; 19 Fed. Reg. 3985, 68 Stat. 1279. The War Claims Commission and the International Claims Commission were abolished with the establishment of the FCSC. *See id.* §4. The functions of the abolished commissions were transferred to the FCSC when it was established. In 1980, the FCSC was transferred to the Department of Justice as a separate agency within the Department. *See* 22 U.S.C. § 1622 (b), Pub. L. 96-209, Title I, § 102 (Mar. 14, 1980).

[11]*Foreign Claims Settlement Commission of the United States, 1995 Yearbook* (hereafter *1995 FCSC Ann. Rep.*), at 1-3.

[12]*Id.* at 2.

[13]*Id.* at 3.

[14]*Id.*

[15]*See* 22 U.S.C. § 1622(g), which provides in part that "[t]he decisions of the Commission with respect to claims shall be final and conclusive on all questions of law and fact, and shall not be subject to review by the Attorney General or any other official of the United States or by any court by mandamus or otherwise."

[16]*1995 FCSC Ann. Rep.*, at 4.

[17]*Id.*

[18]*Id.*

[19]Gregory D. DiMeglio (Reporter), "Claims Against Iraq: The U.N. Compensation Commission and other Remedies," 86 *Am. Soc'y Int'l L. Proc.* 477 (1992). Stanley J. Glod, former chairman of the FCSC, noted that "[i]n most programs, however, the amount of funds available to pay the Commission's awards has been limited, often resulting in pro rata payment of such awards." *Id.* at 493. For an estimate of $5 billion for total outstanding claims against Iraq that fall outside UNCC jurisdiction, *see*, Delissa A. Ridgway, letter dated May 31, 1996, *supra* note 2. The available frozen Iraqi assets in the U.S. were estimated at $1.2 billion, but could now be higher; *see* note 3 *supra*. Unless other Iraqi funds are found, payment on U.S. claims adjudicated by FCSC will be on a pro rata basis.

[20]The Iraqi Claims Act of 1994, H.R. 3221, 103d Congress, 2d Session (1994). H.R. 3221 would have authorized the FCSC to begin adjudicating U.S. claims against Iraq that are outside UNCC jurisdiction and U.S. claims under UNCC jurisdiction referred to the FCSC by the U.S. Secretary of State for which the United States has received lump-sum payments from the UNCC. It would have authorized the FCSC to "receive and determine the validity and amounts of any claims by nationals of the United States against the Government of Iraq that are determined by the Secretary of State to be outside the jurisdiction of the United Nations [Compensation] Commission." (§ 2(b)). The Act would have granted priority in adjudication to "non-commercial claims of members of the United States Armed Forces and other individuals arising out of Iraq's invasion and occupation of Kuwait or out of the 1987 attack on the *USS Stark*." (§ 2(d)). The Act would have established an Iraq claims fund for paying awards of U.S. claims against the Iraqi government, funded by the Iraqi assets in the U.S., which the President would vest and liquidate. The Act passed the House, but Con-

gress adjourned before the Senate took any action on it.

Another bill introduced in the 103d Congress died because the Congress adjourned before any action was taken on it. Proposed Senate bill S. 1119, the Secured Payment Act of 1993, was introduced on June 15, 1993, by Sen. Chuck Robb (D-VA) on behalf of himself and several other Senators, including Sen. Jesse Helms (R-NC). S. 1119, 103d Cong., 1st Sess. (1993). Had it passed, S. 1119 would have amended the International Emergency Economic Powers Act; its sole purpose was to unblock frozen Iraqi assets to pay several U.S. corporations and their foreign subsidiaries that were holding irrevocable letters of credit and had shipped the goods to Iraq, or performed their obligations under an underlying contract, before President Bush froze Iraq's assets in the United States. *Id.* at § 3(a)(D). S. 1119 essentially would have granted advised LCs the same payment priority as confirmed LCs. Such a result would have been contrary to U.S. law and letter of credit jurisprudence. With the Clinton Administration and the banking industry opposing S. 1119, no floor action was taken on it, as noted above, before Congress adjourned.

[21]The Foreign Relations Revitalization Act, Fiscal Years 1996 and 1997, H.R. 1561, 104th Congress, 2d Session (1996), was vetoed by President Clinton on April 12, 1996, and the House failed to override the veto on April 30, 1996, by a vote of 234-188 (Roll Call No. 136). The Act would have authorized the FCSC "to receive and determine, in accordance with substantive law, including international law, the validity and amounts of private claims." (§ 1614(e)). It would have authorized the President to vest and liquidate all nondiplomatic accounts of the government of Iraq frozen in the U.S. and to transfer them into an Iraq claims fund (§ 1614(e)), and would have granted priority in the distribution of the fund assets to private U.S. claimants, commercial and noncommercial.

[22]Section 1601 would have provided that all nondiplomatic accounts of the Government of Iraq in the United States that have been frozen would be vested in the President. H.R. 1757, 105th Cong., 2d Session, § 1601(a) (1998) (Payment of Iraqi Claims). After liquidation, the Iraq Claims Fund would have been established (§ 1601(b)), and the FCSC would have been authorized to determine the validity of any private claims, while the President would have determined the validity of any U.S. Government claims against the Government of Iraq (§ 1601(c)(1) & (2)). Payment of any private claims that fall outside the UNCC's jurisdiction would have been distributed out of the Fund in "ratable proportions" (§ 1601(c)(1)). This Act would have granted all private claims, commercial and non-commercial, priority over U.S. Government claims.

[23]H.R. 1757, 105th Cong., 2d Session (1998), vetoed by President Clinton on Oct. 21, 1998 (H. Doc. 105-329). The original House bill did not include any provision regarding claims against Iraq. However, Senate bill S. 903, § 1601, Payment of Iraqi Claims, introduced by Sen. Jesse Helms (R-N.C.), Chairman of the Foreign Relations Committee, on June 13, 1997, was incorporated in H.R. 1757; the amendment survived the conference committee report with minor changes.

[24]Colin MacKinnon, "U.S. Companies Collect $100 Million From Frozen Funds," *MEER*, November 1992, at 4.

[25]*See* U.C.C. § 5-107(a) ("A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation.").

[26]*See* discussion in Part II of this article (to be published in next month's issue).

[27]*See* § 5-107(c) of the U.C.C., which provides that "[a]n adviser that is not a confirmer is not obligated to honor or give value for a presentation."

[28]*See generally*, John F. Dolan, *The Law of Letters of Credit: Commercial and Standby Credits*, Warren, Gorham & Lamont (1996), Glossary, Para. 1.03.

[29]On the Congressional debate regarding advised letters of credit, *see generally*, H.R. Rep. No. 396, 103d Cong. 1st Sess. (1993).

[30]The Senate version of the Foreign Relations Revitalization Act provided that "[i]n addition to licenses required to be issued under section 575.510 of title 31 . . . the Secretary of the Treasury shall direct that licenses be issued to permit payment, as certified under subsection (b), from blocked Iraqi accounts involving an irrevocable letter of credit issued or confirmed by a foreign bank for the benefit of a United States person of amounts owed to such person with respect to goods or services lawfully exported to Iraq before August 2, 1990, whether or not such letter was confirmed by a United States bank" (§ 603).

[31]*See, e.g.*, Scott Shepard, "Helms Thwarts Efforts to Process War Claims," *The New Orleans Times-Picayune*, Jun. 27, 1996, p. A17; "Sen. Helms And Gulf War Claims," *The New Orleans Times-Picayune*, Jun. 29, 1996, p. B6; Harvey Berkman, "Iraq Owe You Money? Line Up!," *The National Law Journal*, Jan. 29, 1996, p. A14.

[32]H.R. 3484, § 2(c); S. 1794, § 2(c).

[33]In a June 4, 1999 memo sent to the author, Congressman Doggett caught some of the flavor of the debate in Congress:

> Our veterans' claims on this Iraqi money have languished for 8 years because Congress has not passed a plan to authorize its distribution. With Sen. Jesse Helms (R-NC) as chair of the Senate Foreign Relations Committee, a bill that puts the interests of individual veterans above the interests of big tobacco won't pass anytime soon.
>
> Helms would give first priority to big tobacco and other corporations in having their claims settled. I believe our veterans should come first. We should stand with G.I. Joe and G.I. Jane who defend our democracy, not Joe Camel who poisons our children.

[34]Executive Order (EO) No. 12,722, 55 Fed. Reg. 31803 (Aug. 2, 1990), § 1. The President has the authority to issue Executive Orders under the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. § 1601 *et seq.*) and § 301 of Title 3 of the U.S.C. The President's broad power to freeze a foreign government's property and interests in property in the U.S. is based mainly on the IEEPA. *See Consarc Corporation v. Iraq*, 1992 WL 415256 (D.D.C. 1992) at 5 (asserting that the court "does not question the President's broad authority under the IEEPA, to freeze foreign assets in the United States in response to, and for negotiating the resolution of, national emergencies").

[35]EO No. 12,722, *supra* note 34, § 1. *See also* Office of Foreign Assets Control (OFAC), "Humanitarian Exports to Iraq," <http://fedbbs.acces.gpo.gov/library/FAC_MISC/iraqhun.txt> (visited Aug. 1, 1998). "Food and medical supplies-medicine intended for Iraq require licensing by [OFAC]" and will be considered on a case-by-case basis. OFAC further states that it will consider licenses for "commercial exports to Iraq of food and medical supplies-medicine." *Id.* Despite the humanitarian exception, a 1996 report estimated that over 500,000 children under the age of five died due to the U.S.-led U.N. embargo against Iraq. *See* "U.N. Sanctioned Suffering: A Human Rights Assessment of United Nations Sanctions on Iraq," Center for Economic and Social Rights, New York, May 1996. Since the publication of that report, estimates by the Center for Economic and Social Rights of the number of deaths of children under the age of five in Iraq caused by the U.N. embargo have risen to 750,000.

[36]EO No. 12,722, *supra* note 34, §§ 2(a)-(h).

[37]*Id.* §4.

[38]*Id.*

[39]EO No. 12,724, 55 Fed. Reg. 33089 (Aug. 9, 1990).

[40]*Id.* § 4 ("Executive Order No. 12,722 . . . is hereby revoked to the extent inconsistent with [Executive Order No. 12,724]."). Actions under EO 12,722 during the period in which it was effective continue unless revoked administratively. EO 12,724. Although the changes EO 12,724 made to EO 12,722 are minor, EO 12,724 is more stringent and better written than the earlier EO. For example, unlike EO 12,722, which allowed "publications and other informational materials" to be exported to and imported from Iraq, EO 12,724 banned them.

[41]Res. 661, U.N. SCOR, 2933d mtg., U.N. Doc. S/RES/661 (1990). Resolution 661 prohibited all U.N. member states from importing, exporting, and transacting in any commodities, products, and the like, with Iraq.

[42]When President Clinton continued the U.S. sanctions against Iraq on July 28, 1998, he stated that "because the Government of Iraq has continued its activities hostile to the United States interests in the Middle East, the national emergency declared on August 2, 1990, and the measures adopted on August 2 and August 9, 1990, to deal with that emergency must continue in effect beyond August 2, 1998." Notice of the President, 63 Fed. Reg. 41173 (July 28, 1998).

[43]R. Richard Newcomb, "The U.S. Office of Foreign Assets Control: Implementing Economic Freezes and Embargoes," *MEER*, April 1992, p. 20; *see also* R. Richard Newcomb, *supra* note 2. *See Consarc Corp. v. U.S. Treasury Dept., Office of Foreign Assets Control*, 871 F.Supp. 1463 (D.D.C. 1994), *rev'd*, 71 F.3d 909 (D.C. Cir., 1995) (noting that OFAC is "the government agency charged with maintaining assets of Iraq within the United States in order to assure a fair distribution of this property among parties with claims against the Iraqi government").

OFAC's responsibility for promulgating regulations regarding economic sanctions and administering such sanctions is based on the following statutory provisions: Trading With the Enemy Act (TWEA), 50 U.S.C. App. §§ 1-44; Iraqi Sanctions Act, Pub. L. 101-513, 104 Stat 2047-55; United Nations Participation Act (UNPA), 22 U.S.C. § 287c; International Security and Development Cooperation Act, 22 U.S.C. 2349 aa-9; and the Criminal Code at 18 U.S.C. § 1001. Under the IEEPA, *supra* note 34, the President is granted most of his national emergency powers. For a brief background on the IEEPA, TWEA, and UNPA , *see generally*, Preston Brown, "Background and Implementation," 562 *PLI/Comm* 7 (1991).

[44]EO No. 12,724, *supra* note 39, § 5, provides that "[t]he Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this order."

[45]Iraqi Sanctions Regulations (ISR), 31 C.F.R. § 575 (1991), effective January 18, 1991.

[46]The headings of the eight parts of the ISR illustrate the broad scope of the regulations: (A) Relation of this Part with other Laws and Regulations; (B) Prohibitions; (C) General Definitions; (D) Interpretations; (E) Licenses, Authorizations, and Statements of Licensing Policy; (F) Reports; (G) Penalties; (H) Procedures.

[47]*See* ISR *supra* note 45, §§ 575.204-211.

[48]*See* "Foreign Assets Control Regulations for the Financial Community," reprinted in *Annual Survey of Letter of Credit Law and Practice* (1996), at 370.

[49]The titles of these 13 licenses shed some light on OFAC's objectives: General Licenses (No. 1) re: Completion of Certain Securities Transactions, dated 8/15/90; (No. 2) re: Oil Under Contract Entered into Prior to August 2, 1990 and En Route to the United States, dated 8/8/90; (No. 3) re: Investment of Government of Kuwait Funds Held in Blocked Accounts, dated 8/8/90; (No. 4) re: Transactions by US Entities Owned or Controlled by the Government of Kuwait, dated 8/8/90; (No. 5) re: Completion of Certain Foreign Exchange and Commodities Transactions, dated 8/13/90; (No. 6) re: Telecommunications Payments, dated 8/15/90; (No. 7) re: Payment for Goods or Services Exported Prior to Effective Date to Iraq or Kuwait or the Government of Iraq or Government of Kuwait, dated 8/15/90; (No. 8) re: Transactions Related to Mail Service, dated 8/23/90; (No. 9) re: Export Transactions Initiated Prior to Effective Date, dated 8/27/90; (No. 10) re: Completion of Certain Transactions Involving Bankers Acceptances and Other Irrevocable Undertakings, dated 8/30/90; (No. 11) re: Importation of Household and Personal Effects from Iraq and Kuwait, dated 9/1/90; (No. 12) re: Donations of Foods to Relieve Human Suffering, dated 9/26/90; and (No. 13) re: Certain Standby Letters of Credit and Performance Bonds, dated 10/13/90. These licenses were the foundation for the ISR, codified in 31 U.S.C. 575 (1991). The texts of the 13 licenses are reprinted in Barry R. Campbell and Danforth Newcomb, Eds., *The Impact of the Freeze of Kuwaiti and Iraqi Assets on Financial Institutions and Financial Transactions*, Graham & Trotman (1991).

[50]Since 1991, General License No. 4 has been revoked and License Nos. 3 and 7 have been amended. License Nos. 1, 3 and 4 are not included in the ISR. License No. 13 is codified in § 575.518 of the ISR. *See generally*, "Iraqi Sanctions Regulations," 562 *PLI/Comm* 117 (1991).

[51]*Id.*

[52]ISR, *supra* note 45, §§ 575.501(a), (b), and (c) provide that OFAC may issue licenses to authorize transactions that are otherwise prohibited under the ISR. Section 575.501(c) provides: "Any regulation, ruling, introduction, or license authorizing any transaction otherwise prohibited under this part has the effect of removing a prohibition or prohibitions contained in Subpart B from the transaction, but only to the extent specifically stated by its terms." *See also* § 575.502 of the ISR, which provides, in part, that the Director of OFAC "reserves the right to exclude any person, property, or transaction from the operation of any license, or from the privileges therein conferred . . . ." *See also, Hoang Ngoc CAN v. United States*, 820 F.Supp. 106, 109 (S.D.N.Y. 1993) (stating that OFAC, "acting on behalf of the Secretary of the Treasury, has the authority to provide for specific or general licenses or exceptions to a blocking order").

[53]Section 575.202(e) of the ISR provides in part that "[u]nless licensed or authorized pursuant to this part, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which, on or since the effective date, there existed an interest of the Government of Iraq." While OFAC's requirement of a license to unfreeze Iraqi assets may pass Constitutional muster, the license requirement to initiate suit against Iraq, some commentators argue, is an "unconstitutional intrusion on the U.S. courts' jurisdiction." Neil E. McDonell, *supra* note 4, at 10.

[54]*Hoang Ngoc CAN v. U.S., supra* note 52, at 110.

[55]*See* Administrative Procedure Act 5 U.S.C. § 706 (1996). This Act provides, in part, that a court must set aside agency findings and conclusions of law that are determined to be: "(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 5 U.S.C. § 706(2). Regarding judicial review of OFAC decisions, *see generally*, John L. Ellicott, Franklin D. Cordell, Peter L. Flanagan, Camille M. Caesar, "Coping with US Export Controls: 1995," 733 *PLI/Comm* 633 (1995).

[56]It is estimated that from August 1990 through July 1997, OFAC issued over 700 specific licenses regarding transactions pertaining to Iraq or the frozen Iraqi assets in the U.S. The licenses have been issued for transactions ranging from filing claims against Iraqi government entities, and legal representations of Iraq, to exports of food and medicine for humanitarian relief.

[57]In 1990 and 1991, OFAC issued specific licenses authorizing over $100 million to be paid from Iraqi blocked accounts to U.S. companies (primarily banks). The names of the companies were not released. The payments outraged many U.S. companies with claims against Iraq; the main criticism was that OFAC favored banks over other U.S. businesses. According to OFAC, when a U.S. bank confirmed a letter of credit, the beneficiary had complied with the conditions of the L/C, the shipment was made prior to the invasion, and the U.S. bank collateralized the LC from Iraqi funds, the U.S. bank should get reimbursed. *See* Colin MacKinnon, "U.S. Companies Collect $100 Million From Frozen Funds," *MEER*, Nov. 1992, at 4. An OFAC official pointed out that as a general rule, OFAC has not unblocked Iraqi assets except in letter-of-credit cases where the L/Cs were confirmed and collateralized. Telephone interview with OFAC official in Washington, D.C. (Nov. 27, 1996). *See also Consarc v.*

Iraq, 27 F.3d 695, 698 (D.C. Cir. 1991) (noting that OFAC granted the plaintiff a license to sue Iraq for breach of contract and that the license specified that it did not authorize "the transfer of blocked [frozen] funds, or entry or execution of any judgment").

[58]On February 8, 1991, OFAC issued regulations requiring all U.S. persons with claims against Iraq to file claims with OFAC by March 1991. *See* ISR, *supra* note 45, §§ 575.604-605 (1991). *See also* R. Richard Newcomb, *supra* note 2, at 258 (stating that close to 1,100 individuals, corporations, banks, and U.S. government agencies reported billions of dollars in claims against Iraq).

[59]Neil E. McDonell, *supra* note 4, at 10. In this article, McDonell points out that the State Department and OFAC discourage lawsuits against Iraq, and that through the Justice Department, "they have attempted to intervene in virtually all of the existing U.S. lawsuits against Iraq by filing so-called Statements of Interest." He points out two reasons for such opposition through 1992: the Bush Administration's "desire to avoid exposure of its own embarrassing support of business with Iraq prior to August 1990," and that the fact that the U.S. government is itself an unsecured creditor of Iraq, owed about $2 billion because of the U.S. Agriculture Department's Commodity Credit Corporation guarantees on agricultural sales to Iraq. *See also* Neil E. McDonell, "Collecting on Iraqi Claims," *MEER*, June 1993, at 8.

[60]Although this article does not deal with standby letters of credit issued in favor of Iraqi beneficiaries, it is appropriate to briefly discuss the ISR regulations regarding standby letters of credit. A standby letter of credit is a credit "that is designed to be payable in the event of default or other nonperformance by a party obliged to the beneficiary, said event to be satisfied by the presentation of documents." J. Dolan, *supra* note 28. The ISR established procedures for standby letters of credit in favor of Iraq different from those for irrevocable letters of credit. Section 575.518 provides that when an issuing or confirming bank receives a request to honor a standby letter of credit, it "shall promptly notify the account party." 31 U.S.C. § 575.518(b). After this notification is made, the account party has five business days in which to apply to OFAC for a specific license "to prevent payment of the standby letter of credit into a blocked account." *Id; see also* R. Richard Newcomb, *supra* note 2, at 257. However, if the account party fails to obtain an OFAC specific license within 10 days after notification, a bank may make payment into a blocked account on behalf of an Iraqi beneficiary. 31 U.S.C. § 575.518(b). If granted the specific license from OFAC, the account party may "establish a blocked account on its books in the name of the Iraqi beneficiary in the amount payable under the credit, in lieu of payment by the issuing or confirming bank into a blocked account and reimbursement therefor by the account party." *Id.* This provision simplifies the standby letter of credit situation. The account party establishes a "set-aside" of funds in favor of the Iraqi party instead of paying the bank. R. Richard Newcomb, *supra* note 2, at 257-258. The account party must certify to OFAC "that such a set-aside account has been established on its corporate books. The issuing bank must continue to maintain its contingent liability booking despite the establishment of any corporate set-aside account." *Id.*

[61]Article 5 of the U.C.C. defines a letter of credit as an "undertaking . . . to honor a documentary presentation by payment or delivery of an item of value." U.C.C. § 5-102(a)(10) (1995). For an authoritative treatise on letter of credit jurisprudence, *see* J. Dolan, *supra* note 28. According to Dolan, a letter of credit "is an original undertaking by one party (the issuer) to substitute its financial strength for that of another (the applicant), with that undertaking to be conditioned on the presentation of a draft or a demand for payment and usually other documents." *Id*, Para. 2.02. The letter of credit device substitutes the bank's creditworthiness for the creditworthiness of the applicant. *See id.*, Para. 1.10. Unlike an irrevocable letter of credit, a revocable letter of credit may be terminated at any time, even after conforming documents have been presented by the beneficiary. Under the U.C.C. and the Uniform Customs and Practice for Documentary Credits, Pub. No. 500, Int'l Chamber of Commerce (1993) (hereafter U.C.P. 500), letters of credit are presumed irrevocable unless otherwise agreed. *See* U.C.P. 500 § 6(c) (1993) and U.C.C. § 5-106(a) (1995). A basic letter of credit involves three parties: the applicant (buyer); the beneficiary (seller); and the issuer (bank).

[62]R. Richard Newcomb, *supra* note 2 at 258. On several occasions, OFAC refused to grant a license to unfreeze Iraqi assets taken by banks as collateral for confirming letters of credit. In *Semetex v. UBAF*, 853 F.Supp. 759 (S.D.N.Y. 1994), the defendant, UBAF, specifically took collateral from the Iraqi bank in order to confirm a letter of credit. OFAC denied it a license to honor the letter of credit from its blocked Iraqi assets. OFAC's decision may have rested on the fact that the equipment at issue in *Semetex* was not exported to Iraq as required by the ISR.

[63]Richards & O'Neil of New York appeared on behalf of the Central Bank of Iraq and Rafidain Bank, and the firm continues to represent these two clients on some actions. Interview with an attorney from Richards & O'Neil in New York (Aug. 10, 1998).

[64]"Iraq Begins to Mount A Defense to Lawsuits by U.S. Companies," *Washington Post*, Aug. 2, 1992, at A8.

[65]Neil E. McDonell, *supra* note 4.

[66]*See Bank of China v. Central Bank of Iraq*, 219 N.Y.L.J. 28 (col. 5) (Jan. 15, 1998) (letter of credit case).

[67]*See supra* note 57.

[68]On September 15, 1992, R. Richard Newcomb, Director of OFAC, revealed that by that date, between 50 and 100 U.S. companies, with claims totaling around $300 million and stuck with advised rather than confirmed letters of credit had made themselves known to OFAC. Colin MacKinnon, *supra* note 57.

[69]U.S. Foreign Sovereign Immunities Act of 1976 (FSIA), *supra* note 9.

[70]For a brief history of the evolution of the concept of foreign sovereign immunity in the United States, *see* Danny Abir, "Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations," 32 *Stan. J. Int'l L.* 159, 162-167.

[71]*McFaddon v. The Schooner Exchange*, 16 F.Cas. 85 (1811), *rev'd, The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

[72]*Id.* at 117.

[73]*Id.* at 136-138.

[74]*Republic of Argentina v. Weltover*, 504 U.S. 607, 612 (1992) ("The FSIA largely codifies the so called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952."). *See generally*, Thomas H. Hill, "A Policy Analysis of the American Law of Foreign State Immunity," 50 *Fordham L. Rev.* 155, 168-173 (1981) (discussing the trend toward acceptance of a restrictive doctrine and the doctrine's function); Danny Abir, *supra* note 70, at 162-163 (sketching a brief history of the evolution of the doctrine of absolute immunity to that of restrictive immunity); *see also* Paul H. Vishny, "Litigating with Foreign Governments: Sovereign Immunity and the Act of State Doctrine," SB04 ALI-ABA 603, 605 (1996).

[75]*See, e.g., Republic of Argentina v. Weltover*, *supra* note 74, at 611; *Goar v. Compania Peruana de Vapore*, 688 F.2d 417 (5th Cir. 1981); *First National Bank of Mobile v. Kaufman*, 593 F.Supp. 1189 (1984).

[76]FSIA, *supra* note 9, §1603(a) states that a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ."; § 1603(b) defines an agency or instrumentality of a foreign state to mean any entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a state of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws

of any third country."

[77]*Id.* § 1604.

[78]*Id.* § 1605(a)(5). Section 1605(a)(5) shall not apply to: "(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* § 1605(a)(5)(A) and (B).

[79]*Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1120 (2d Cir. 1991) (noting that under the FSIA "personal jurisdiction equals subject matter jurisdiction plus valid service of process" and acknowledging that "[t]here is of course a constitutional constraint on the assertion of personal jurisdiction"). *See also Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985) (explaining that where FSIA applies, the federal courts have subject matter jurisdiction and "[w]here subject matter jurisdiction exists and where service of process is made pursuant to 28 U.S.C. 1608, then personal jurisdiction exists but it must comply with the due process clause").

[80]28 U.S.C. 1330(a) (1993).

[81]Section 1608 of the FSIA provides several methods for service of process on the foreign state, such as by arrangement with the foreign state, by following an applicable international convention, or by mail with return receipt required.

[82]28 U.S.C. 1330(b) (1993).

[83]Although 28 U.S.C. §§ 1330(a) and (b) and the FSIA do not explicitly require that a U.S. court's assertion of personal jurisdiction under the FSIA comport with due process (*i.e.*, sufficient contacts), most exceptions to sovereign immunity tend to require some sort of relationship or contact with the forum. In other words, while the court determines whether the FSIA exceptions apply, the court is, at the same time, to a certain extent determining whether there were sufficient contacts. Some commentators argue that even if the foreign state is not afforded due process, the due process guarantees are embodied in the exceptions. *See* Victoria A. Carter, "God Save The King: Unconstitutional Assertions of Personal Jurisdiction Over Foreign States in U.S. Courts," 82 *Va. L. Rev.* 357, 358 (1996) (demonstrating that the only exception that may indicate a violation of due process is § 1605(a)—the waiver exception). Carter points out that courts "that construe a waiver of sovereign immunity as consent to personal jurisdiction will not inquire whether a defendant foreign state has minimum contacts with the United States." *Id.* at 358. Unless courts "independently assess" personal jurisdiction and due process issues, assertion of personal jurisdiction based on the waiver exception, according to Carter, is unconstitutional. *Id.* at 360. In *Republic of Argentina v. Weltover, supra* note 74, the Supreme Court left the issue open as to whether a foreign state has a right to due process. Nonetheless, the Court seemed to imply that there is an assumption that personal jurisdiction over a foreign state defendant must pass constitutional muster. The Court stated: "Assuming, without deciding, that a foreign state is a 'person' for purposes of the due process clause, . . . , we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test." *Id.* at 619. *See also Leney v. Plum Grove Bank*, 670 F.2d 878, 880 (10th Cir. 1982) (holding in a letter of credit case that the due process clause "requires that before a court can exercise personal jurisdiction over a nonresident defendant, the defendant must have had such 'minimum contact' with the forum state that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'"; *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 500 F.Supp. 320 (S.D.N.Y. 1980) *rev'd*, 647 F.2d 300, 308 (2d Cir. 1981) (stating that "each finding of personal jurisdiction under the FSIA requires . . . a due process scrutiny of the court's power to exercise its authority over a particular defendant"); *Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu*, 660 F.Supp. 1536, 1540-41 (S.D. Tex. 1987) (questioning, in a letter of credit case, the plain meaning of 28 U.S.C. 1330(b), which suggests that subject matter jurisdiction and personal jurisdiction are merged in FSIA cases, and holding that FSIA statutory jurisdiction is governed by due process). *See generally*, J. Dolan, *supra* note 28, Para. 9.06(4)(c) ("The contours of the Foreign Sovereign Immunities Act are governed by the Act itself and by the due process clause of the Constitution.").

[84]The Federal Rules of Civil Procedure provide that "[a] defense of lack of jurisdiction over the person . . . is waived" if the defendant fails to object to jurisdiction in the answer or in an initial motion. Fed. R. Civ. P. 12(h)(1).

[85]*International Shoe Co. v. Washington*, 154 P.2d 801 (1945), *aff'd*, 326 U.S. 310 (1945). This case established the modern test for personal jurisdiction. The court held that "[d]ue process requires only that in order to subject defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) the court held that the minimum contacts stated to be required under the International Shoe case are satisfied if the defendant "purposely avails itself of the privilege of conducting activities within the forum state." Since the Supreme Court's plurality opinion in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), "minimum contacts" must pass a reasonableness test. It is important to note that the Ninth Circuit, in *Meadows v. Dominican Republic*, 817 F.2d 517 (1987), *cert. denied* 484 U.S. 976 (1987), held that where service of process is made on a foreign state pursuant to the FSIA, the sufficient minimum contacts for determining personal jurisdiction were those in the United States, not just limited to the foreign state's relevant contacts with the forum state.

[86]*Republic of Argentina v. Weltover, supra* note 74.

[87]28 U.S.C. § 1605(a)(2) (1991). "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

[88]*Weltover, Inc. v. Republic of Argentina*, 753 F.Supp. 1201 (S.D.N.Y. 1991) *aff'd*, 941 F.2d 145 (2d Cir. 1991), *aff'd, Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

[89]*Id.* at 608.

[90]*Id.* at 610.

[91]*Id.* at 611.

[92]*Id.* at 614.

[93]*Id.* at 615.

[94]*Id.* at 619.

[95]One commentator expressed his disappointment with the decision, stating that it was "too broad, so that nearly any activity of a business nature that a private party may engage in, whether typical or atypical, for profit or not for profit, would fall within the definition." Stephen J. Leacock, "The Joy of Access to the Zone of Inhibition: Republic of Argentina v. Weltover, Inc. and the Commercial Activity Exception Under the Foreign Sovereign Immunities Act 1976," 5 *Minn. J. Global Trade* 81, 120 (1996). Leacock further complains that the court discarded the "substantial foreseeability" requirement in determining "direct effect" in the United States, "thereby effectively reducing the circumstances in which a sovereign state may invoke sovereign immunity." *Id.* at 121.

[96]*See* Iraqi Law No. 100 of 1964, Nationalization of Banks, 975 *Official Gazette*, July 14, 1964. Article 1 provides that "[a]ll non-Government banks operating in Iraq, including branches of foreign banks, shall be nationalized and their property transferred to the state . . . ." Moreover, establishing that the Iraqi party is a subdivision or an agency or instrumentality of the Iraqi government is very simple: in Iraq, the government controls all major commercial activities. For example, oil and gas, mining, banking, insurance, and foreign trade are all nationalized. *See also*, "How Contracting Works in Iraq," *MEER*, Aug. 1986, at 8 ("The Iraqi government purchases 90 percent of all the country's

imports and controls most foreign trade. The Ministry of Trade administers state organizations and their subsidiaries, which are called state enterprises, establishments and general or specialized bodies. The private sector accounts for less than 10 percent of total imports and has been involved in only a few large agricultural, irrigation or industrial projects. Clearly, the government is the entity to deal with.").

[97]1994 WL 376037 (S.D.N.Y.).

[98]*Id.* at *1.

[99]*Id.* at *6-8.

[100]1994 WL 324331 (D.D.C.).

[101]*Id.* at *1-2.

[102]1993 WL 597380 (S.D.N.Y. 1993) *aff'd*, 15 F.3d 238 (2d Cir. 1994).

[103]15 F.3d at 241 (2d Cir. 1994).

[104]*Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994).

[105]*Id.*

[106]*Id.* at 1146.

[107]The court pointed out that "Rafidain might well have paid them from funds in United States banks but it might just as well have done so from accounts located outside of the United States, as it had apparently done before."