

# Client Update

## Businesses Beware: JASTA's Expansion of Civil Liability for Terrorism

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On September 28, 2016, the U.S. Congress expanded civil liability for foreign countries and international businesses by enacting the Justice Against Sponsors of Terrorism Act ("JASTA"), overriding President Obama's veto for the first time in his Presidency. While Congress ostensibly directed JASTA at claims brought by victims of the September 11 attacks, the law's effect could be far broader and reach a wide array of actors. As a result, companies may wish to consider adding anti-terrorism screening to their regular due diligence and compliance procedures.

JASTA makes two major changes to existing federal law. It withdraws the sovereign immunity protection of foreign countries and country-owned enterprises for claims related to international terrorism. In particular, JASTA exposes foreign countries and their instrumentalities to civil liability under the U.S. Anti-Terrorism Act ("ATA"), which provides a cause of action for monetary damages to U.S. nationals injured by acts of international terrorism.

In addition, with respect to both sovereign entities and regular companies, JASTA creates two far-reaching categories of "secondary" liability under the ATA that were previously unavailable: aiding and abetting and civil conspiracy. These expanded provisions apply broadly to a host of enterprises, including financial institutions, social media companies, and government contractors that provide goods and services that may link to acts constituting international terrorism.

JASTA's secondary liability risks are serious and need to be managed carefully. No matter how courts interpret the requisite intent, a civil action against a business alleging support for international terrorism could impose substantial reputational and financial costs. Such costs may even seep into business relationships. Companies would be prudent to consider incorporating terrorism-risk screens into their broader due diligence processes.

## JASTA ABROGATES SOVEREIGN IMMUNITY

The principle of “sovereign immunity” is a long-standing tenet of international law that generally immunizes a sovereign from lawsuits in the courts of another sovereign. The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1604, reflects the United States’ recognition of the sovereign immunity of other countries and generally bars lawsuits in U.S. courts against foreign countries, including their political subdivisions, agencies, and instrumentalities. The United States has sought, however, to balance claims of immunity against its own countervailing interest to address any injuries committed by foreign countries. As a result, sovereign immunity in the United States is not absolute, and the FSIA contains a series of exceptions in 28 U.S.C. § 1605 that set forth when foreign nations will not be immune from U.S. courts. For example, a foreign country is not immune from civil actions based upon commercial activity it carries on in the United States.

JASTA broadens the FSIA’s existing “terrorism” exception under 28 U.S.C. § 1605A—which applies only to countries officially designated by the United States as state sponsors of terrorism—with amendment 28 U.S.C. § 1605B, which is not limited to designated state sponsors of terrorism. JASTA thus allows individual U.S. courts to determine which countries may be sued—many times in the context of uncontested default judgments where the foreign country does not appear—rather than leaving it to the judgment of the Executive Branch as a matter of its Constitutional foreign affairs power.

Since a foreign country’s political subdivisions, agencies and instrumentalities are entitled to the same immunity accorded the country under the FSIA, JASTA’s abrogation of immunity extends to these entities. Under the FSIA, an entity is an agent or instrumentality of a foreign country if it is (1) a separate legal person, corporate or otherwise; (2) that is an organ of a foreign country or political subdivision, or a majority of whose shares or other ownership interest is owned by a foreign country or political subdivision; and (3) neither a citizen of the United States nor created under the laws of any third country. 28 U.S.C. § 1603(b).

Previously under the FSIA, a foreign country could be sued for a noncommercial tort only if all of the countries’ tortious conduct took place in the United States (the “entire tort rule”). JASTA eliminates the FSIA’s “entire tort” rule in cases involving international terrorism, stripping immunity from foreign countries and instrumentalities for an “act of international terrorism...regardless [of] where the tortious act or acts of the foreign state occurred.” Notably, however,

foreign countries cannot be sued on the basis of an “omission or a tortious actor or acts that constitute mere negligence.”

The ATA permits a private right of action for treble damages to any U.S. national “injured in his or her person, property, or business by reason of an act of international terrorism.” 18 U.S.C. § 2333(a). After JASTA, U.S. citizens can sue foreign countries and their officials in U.S. courts under the ATA “in any case in which money damages are sought against [the] foreign state for physical injury to person or property or death occurring in the United States and caused by an act of international terrorism in the United States” and stems from the tortious acts of the foreign country (including its officials, agents or employees acting in an official capacity). 28 U.S.C. § 1605B(c).

Since the September 11 attacks, numerous litigants have tried to sue the government of Saudi Arabia on claims that the Saudi government was complicit in the 9/11 attacks, based largely on the nationalities of the attackers. This is notwithstanding the conclusion of the bipartisan U.S. 9/11 Commission Report that “they were not able to find any evidence that the Saudi government as an institution or that any senior Saudi government official were knowingly supportive of the 9/11 plotters.” These lawsuits have failed primarily on sovereign immunity grounds, and JASTA was widely seen as a means by Congress to resuscitate those suits. On September 30, 2016, the widow of a September 11 victim filed the first lawsuit in D.C. district court against Saudi Arabia under the new law. It remains to be seen how broadly U.S. courts will construe JASTA’s abrogation of sovereign immunity.

JASTA has sparked widespread debate that it will open a Pandora’s Box rife with foreign policy issues, and specifically raises the question of reciprocity, where foreign countries will alter their own laws to permit lawsuits against the United States in foreign courts. Most recently, Sens. Lindsey Graham and John McCain unveiled a “fix” intended to narrow the law’s scope and lessen the likelihood that it would produce retaliatory suits against the United States in foreign courts. Under their proposal, foreign governments would be held liable only if they “knowingly engage with a terrorist organization directly or indirectly, including financing.” However, passing any Congressional “fix” to the law in the near term may be a tall order.

### **JASTA ALSO EXPANDS CIVIL LIABILITY UNDER THE ATA FOR COMPANIES**

JASTA also amends the ATA to expand civil liability for organizations. Prior to JASTA, U.S. courts repeatedly held that the ATA did not permit aiding and abetting or civil conspiracy liability, also known as “secondary liability.” JASTA

specifically authorizes civil suits against any “person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.” The definition of a “person” subject to liability encompasses “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” JASTA’s expanded civil liability applies to “international terrorism” that was committed by a “foreign terrorist organization” (“FTO”) specifically designated as such by the Secretary of State.

With respect to the requisite intent, JASTA explicitly and approvingly cites to the decision of the U.S. Court of Appeals for the D.C. Circuit in *Halberstram v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). In *Halberstram*, the D.C. Circuit set forth the elements for aiding and abetting liability, including that a defendant “must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance,” and “must knowingly and substantially assist the principal violation.” Liability for civil conspiracy requires an agreement to participate in an unlawful act and an overt act causing injury that was done to further that common scheme.

Whether Congress’s recognition of *Halberstram* controls ATA suits going forward will likely be the subject of litigation in the coming years. Likewise, the law’s purported retroactive application to any civil action “arising out of an injury to a person, property, or business on or after September 11, 2001,” will also likely be contested in courts.

### COMPANY RISK SCREENING MECHANISMS

As noted, JASTA’s secondary liability risks are serious and need to be managed carefully by companies. In the wake of JASTA, it would be prudent for companies to establish risk-based screening mechanisms for transactions and business relationships to avoid being implicated, directly or indirectly, in a secondary liability suit. Such screening can be practically integrated with corruption or money-laundering due diligence and should consider similar metrics: (1) corporate governance; (2) disputes and investigation history; (3) sector risk; and (4) regional/geographic risk.

A sophisticated and practical risk screen would follow a tiered approach to due diligence, increasing rigor progressively based on red flags. Such a screen should also account for the interplay between the risk metrics. For instance, an oil and gas company operating in Syria or Iraq may be at risk of supporting ISIS by virtue of sector and geography; that risk, however, may be largely mitigated by a strong governance regime. Similarly, a U.S. financial technology firm may be

considered low risk based on its operating region; its sector, however, is arguably high risk given that money laundering and proceeds of crime are central to terrorism finance (see, e.g., [National Terrorism Financing Risk Assessment 2015](#)). Governance may then be the decisive factor.

Companies should ensure that any terrorism-risk screen is sufficiently rigorous to integrate material risk indicators while being flexible enough to account for the particular operating context.

As the limits of the law are tested in coming years, a robust terrorism risk screen could help businesses avoid and navigate the legal, reputational, and financial fallout of JASTA claims efficiently.

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Please do not hesitate to contact us at any time with questions that you may have about how JASTA's changes to the FSIA and ATA may affect you.