Broadening the Scope of the Foreign Sovereign Immunities Act: The Explicit Waiver Provision and Limited Foreign Submissions to Domestic Litigation in Aquamar S.A. v. Del Monte Fresh Produce, Inc.

Barry L. McCoy
BROADENING THE SCOPE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT: THE EXPLICIT WAIVER PROVISION AND LIMITED FOREIGN SUBMISSIONS TO DOMESTIC LITIGATION IN AQUAMAR S.A. v. DEL MONTE FRESH PRODUCE, INC.

I. Introduction

Prior to 1976, domestic courts of the United States generally did not have jurisdiction over foreign sovereigns hauled into their courtrooms.¹ This situation changed with the 1976 passage of the Foreign Sovereign Immunities Act ("FSIA").² The FSIA changed the jurisdictional analysis for foreign state defendants from a theory of absolute immunity to one of restrictive immunity, granting jurisdiction to domestic courts in certain circumstances.³

Under the theory of restrictive immunity, courts in the United States have subject matter jurisdiction over a legal issue if it falls within one of the FSIA's enumerated exceptions.⁴ These exceptions provide the sole

¹. See 28 U.S.C. § 1604 (1994) (noting that foreign states are immune from suit in United States unless enumerated statutory exception strips them of immunity). The statute states:
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state 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. Id.; see Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983) ("A foreign state is normally immune from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in §§ 1605 and 1607.").
³. See Verlinden, 461 U.S. at 486 ("The Schooner Exchange...opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns"); Schooner Exch. v. M'Fadden, 11 U.S. (7 Cranch) 116, 136-37 (1812) (noting for first time that jurisdictions of foreign sovereign were exclusive and absolute within their own countries). Schooner remains the seminal case in espousing the theory of absolute immunity. See DELLAPENNA, supra note 2, at 2-3. Under such a theory, a foreign sovereign is absolutely immune from suit in the courts of another country. See id. at 2-3. The theory of absolute immunity lasted well into the twentieth century, but slowly gave way to a theory of restricted immunity. See id. at 1-8 (tracing American change in legal thought and judicial process from theory of absolute immunity to one of restricted immunity). This change in American thought led to a codified version of restrictive immunity with the 1976 passage of the FSIA. See id. at 8 (noting that Departments of State and Justice proposed codifying restrictive sovereign immunity in order to turn responsibility for foreign sovereign litigation over to courts); see also Verlinden, 461 U.S. at 488 ("For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity.").
basis for obtaining jurisdiction over a foreign sovereign and its instrumentalities. The creation of the FSIA dramatically increased the frequency of suits involving foreign sovereigns. This frequent litigation caused the scope of several exceptions to broaden beyond their original purposes. One of these exceptions is the FSIA's waiver provision. If a foreign state has waived its immunity either explicitly or by implication, a domestic court will have subject matter jurisdiction over the issue.

5. See Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1993) ("The FSIA thus provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States."); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (noting that construction of statute demonstrates Congress' intent to maintain FSIA as only basis for obtaining jurisdiction over foreign sovereigns); Verlinden, 461 U.S. at 493-94 (stating that courts must apply federal law when dealing with foreign sovereigns and that courts must be certain that jurisdiction is appropriate by applying FSIA exceptions); Drexel Burnham Lambert Group, Inc. v. Galadari, 12 F.3d 317, 324 (2d Cir. 1993) (noting that FSIA exceptions provide sole basis for subject matter jurisdiction in domestic courts); Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061, 1064 (5th Cir. 1992) (stating that FSIA provides sole basis for obtaining jurisdiction over foreign sovereigns). When discussing the FSIA, it is necessary to understand that certain entities within a foreign state constitute the foreign sovereignty overall, and, as such, are amenable to suit. See 28 U.S.C. § 1603 (1994) (providing definition of entities that constitute "foreign state[s]" for purposes of FSIA). The FSIA states:

(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means 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.

Id. § 1603(a)-(b).

6. See DELLAPENNA, supra note 2, at v (discussing explosion of suits after creation of FSIA). Professor Dellapenna stated that "[w]ithin days of the Immunities Act's coming into effect, attorneys filed new suits under it . . . . Since then, federal trial and appellate courts have applied the Immunities Act to hundreds of cases . . . ." Id.

7. See id. at vii-viii (discussing suits brought under FSIA as series of subject-based "waves"). Professor Dellapenna stated, "Beginning as early as 1978, and slowly building in the shadow of the more dramatic waves, have been a number of smaller waves that continue to wash through the courts." Id.


(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

Id. There are also four other exceptions listed that allow a domestic court to find jurisdiction over a foreign sovereign. See id. §§ 1605 (a)(2)-(5) (listing exceptions). This Note only addresses the waiver provision listed above.

9. See id. § 1605(a)(1) (stating that foreign sovereigns can waive immunity either explicitly or implicitly).
The law surrounding the waiver provision is well-developed in the area of implicit waiver, and courts have held that certain submissions to litigation by foreign sovereigns constitute implied waivers of immunity. Waivers can be implied either from documents filed or from the sovereign’s actions in the litigation. The law surrounding explicit waivers, however, is now in danger of an expansion in scope. In Aquamar S.A. v. Del Monte Fresh Produce, Inc., the United States Court of Appeals for the Eleventh Circuit faced a foreign state that intended to limit its explicit waiver of immunity. In Aquamar, the Republic of Ecuador consciously intended to waive immunity, but with equal force intended to limit this waiver solely for the purpose of arguing a forum non conveniens motion.


11. See Eckert, 32 F.3d at 80 (finding that choice of law provisions in contracts constitute implied waivers); Siderman de Blake, 965 F.2d at 722 (finding implied waiver based on foreign state’s action in enlisting California domestic court to serve process on plaintiffs for criminal actions in Argentina); Phoenix Consulting, 35 F. Supp. 2d at 19 (finding implied waiver based on contract provisions); Crawford Enterprises, 643 F. Supp. at 378-79 (finding that failure to assert immunity after responding to motions, or expressly reserving right to assert immunity later, constitutes implicit waiver of immunity); Marlowe, 604 F. Supp. at 708 (finding implied waiver when contract stipulation allowed for jurisdiction in America); Sea Lift, 601 F. Supp. at 466 (finding implied waiver when foreign sovereign submits responsive pleading to court); Aboujdid, 494 N.E.2d at 1057-59 (finding implied waiver when defendant files answer and asserts counterclaims).

12. See generally Aquamar S.A. v. Del Monte Fresh Produce, Inc., 179 F.3d 1279 (11th Cir. 1999) (holding that attempted limited waivers of sovereign immunity grant to courts subject matter jurisdiction).

13. 179 F.3d 1279 (11th Cir. 1999).

14. See id. at 1283 (holding that waiver statement was explicit, but “limited”).

15. See id. (holding that waiver statement only waived immunity on “the following limited basis”). The court ultimately held this waiver as complete and total, thus granting the court jurisdiction over the suit. See id. at 1293. It should be noted that there have been previous cases under the FSIA involving limited waivers; these cases, however, involved an explicit limitation on the forum for suit. See Dellapenna, supra note 2, at 103 (discussing how most limited waivers deal with limitations on forum and that these types of limited waivers occur frequently). In
Instead of finding the waiver invalid, the Eleventh Circuit held that such an attempt at limitation constitutes a complete and total waiver of sovereign immunity.16

In recent years, three explicit waiver cases involved foreign states attempting to limit their waivers in this manner.17 From the standpoint of a foreign litigant, such a limited waiver seems potentially permissible.18

the case at hand, the foreign sovereign limited its waiver to a specific submission to litigation. See Aquamar, 179 F.3d at 1283. The waiver was only initiated for the purpose of arguing a forum non conveniens motion. See id. at 1293 (discussing waiver limitation). Therefore, the subject matter that the waiver purported to limit is different. Compare Dellapenna, supra note 2, at 103 (discussing waivers limited to specific fora), with Aquamar, 179 F.3d at 1283 (discussing waiver limited to specific litigation).

16. See Aquamar, 179 F.3d at 1293 (holding that waiver by foreign sovereign was complete). Previous cases simply found that such limited waivers were invalid. See Aguinda v. Texaco, Inc., 175 F.R.D. 50, 52 (S.D.N.Y. 1997) (holding that limited waiver of sovereign immunity does not constitute explicit waiver), vacated on other grounds sub nom., Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Didi v. Destra Shipping Co., Ltd., 1994 A.M.C. 852, 1993 U.S. Dist. LEXIS 16675, at *7-8 (E.D. La. Nov. 19, 1993) (holding that explicit but limited waiver does not grant court jurisdiction). By finding that a waiver had occurred, Ecuador became fully amenable to suit on the entire claim. See Aquamar, 179 F.3d at 1289 (holding that waiver was valid and that foreign sovereign was not immune from suit under FSIA).

17. See Aquamar, 179 F.3d at 1293 (holding explicit but limited waiver as granting court jurisdiction); Aguinda, 175 F.R.D. at 52 (holding that limited waiver of sovereign immunity does not constitute explicit waiver); Didi, 1993 U.S. Dist. LEXIS 16675, at *7-8 (holding that explicit but limited waiver does not grant court jurisdiction).

18. See 28 U.S.C. § 1605(a)(1) (1994) (listing statutory requirements for explicit waiver and potential withdrawal of waiver). The effect of the § 1605 statement, “notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver,” means that a subsequent withdrawal by a foreign sovereign will not entitle the foreign sovereign to reinstate immunity unless the withdrawal has been provided for in the terms of the waiver itself. See Jing-wei Lu, Implied or Constructive Waiver? Effect of Participation in Litigation Under the Foreign Sovereign Immunities Act of 1976, 6 J. INT’L L. & PRAC. 63, 67 (1997) (discussing subsequent withdrawal of waiver by foreign sovereigns); Rebecca Simmons, Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act, 90 COLUM. L. REV. 2278, 2287 n.48 (1990) (“Any attempt to withdraw a waiver will be ineffective unless the withdrawal is made in accordance with the terms of the original waiver.”). Therefore, if the withdrawal has been provided by the waiver itself, the foreign state can effectively withdraw the waiver and regain immunity. See id. The “notwithstanding” language of the statute demonstrates that a foreign sovereign can withdraw its waiver, possibly leading to a belief that waivers can be limited. See id., supra, at 67. There also have been several cases where foreign sovereigns have successfully limited their waivers to specific fora. See Dellapenna, supra note 2, at 103 (discussing waivers limited to specific fora). Additionally, there is precedent demonstrating that the sovereign’s intent plays a role in determining whether a waiver has occurred. See, e.g., Castro v. Saudi Arabia, 510 F. Supp. 309, 312 (W.D. Tex. 1980) (stating that waiver will not be found unless foreign state “intentionally and knowingly” waives immunity). This possibly leads foreign sovereigns to believe that they can initiate limitations, as long as that is what is intended. See id. (stating that no waiver can occur unless intended). For a discussion of the intentionality requirement, see infra notes 87-93 and accompanying text.
Such incongruities in the waiver provision raise interesting issues regarding a foreign sovereign's ability to limit waivers and could have serious consequences for future foreign litigants. The question ultimately becomes whether such a waiver should remain limited, be found invalid or be held as a complete and total waiver of sovereign immunity.

This Note discusses various decisions involving the FSIA's waiver provision. Part II brings together the various concepts and elements examined by courts when addressing explicit waivers. Part III discusses the factual underpinnings of the *Aquamar* decision. Part IV addresses the reasoning of the *Aquamar* court, suggests a conceptual framework for determining explicit waivers and examines the *Aquamar* decision in light of this framework. Part V discusses the implications of the *Aquamar* decision for future submissions to litigation by foreign sovereigns.

### II. BACKGROUND

#### A. Exterior Principles: Presumed Immunity and Court Discretion

A close look at the general body of FSIA cases uncovers two principles relevant to an examination of the explicit waiver provision. The FSIA...

19. See *Dellapenna*, supra note 2, at 201 (stating that limited waivers may be held as limited to some or all claims in suit). Foreign sovereigns who simply wish to make an appearance will be in danger of being stripped of their immunity. See *id.* at 321-23 (discussing procedure and appearances by foreign sovereigns). One commentator stated that “[v]irtually any ordinary procedural problem can arise under the Foreign Sovereign Immunities Act . . . . The Immunities Act has no express provision governing how a foreign state makes an appearance.” *Id.* at 320-21. For future foreign litigants, the danger of waiver is even stronger. For a discussion of the danger to future foreign litigants, see infra notes 206-214 and accompanying text.

20. For a discussion of the options available to a court confronted with an explicit but limited waiver, see infra notes 194-205 and accompanying text.

21. For a discussion of the various concepts and elements courts look to when addressing explicit waivers, see infra notes 25-93 and accompanying text.

22. For a discussion of the facts in *Aquamar*, see infra notes 94-113 and accompanying text.

23. For a discussion of the court's reasoning in *Aquamar*, and a suggested conceptual framework for viewing explicit waivers, see infra notes 138-204 and accompanying text.

24. For a discussion of the implications of a total waiver of immunity when the foreign sovereign intends to limit its waiver, see infra notes 206-14 and accompanying text.

25. See generally *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (noting that foreign states are presumptively immune unless any of FSIA’s specified exceptions apply to grant subject matter jurisdiction). The first and most important principle is that foreign states are presumptively immune. See generally *Mendenhall v. Saudi Aramco*, 991 F. Supp. 856 (S.D. Tex. 1998) (stating that foreign states are presumably entitled to immunity under FSIA); *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982) (noting that foreign instrumentalities of foreign states are presumably immune under FSIA). The second principle is that courts have the discretion to determine when participation in litigation has crossed the line into waiver. See *Canadian Overseas Ores v. Compania de Acero del Pacifico*, 727
waiver cases can be placed within these overarching principles to form a comprehensive analytical framework.\textsuperscript{26} The first principle is the presumption that the foreign sovereign is immune.\textsuperscript{27} This presumption makes it difficult for a court to find that a limited waiver constitutes a renunciation of immunity.\textsuperscript{28} The second principle is that courts have the discretion to determine when the foreign state's conduct and participation in the litigation process constitutes a waiver of immunity.\textsuperscript{29} When the issue is an explicit but limited waiver, these two principles come into competition.\textsuperscript{30}

Subsection B highlights the decisions of two courts dealing with an issue identical to the one presented in Aquamar.\textsuperscript{31} Subsection C discusses

F.2d 274, 278 (2d Cir. 1984) (stating that courts are able to determine when foreign sovereigns have waived their immunity based on their conduct).

26. For a discussion of the framework for analyzing waivers, see infra notes 138-205 and accompanying text.

27. See 28 U.S.C. § 1604 (1994) (describing limited manner in which foreign sovereigns may be found to have waived immunity and that foreign sovereigns are immune unless FSIA applies). This section of the Act has come to be interpreted as a presumption for sovereign immunity. See DELLAPENNA, supra note 2, at 145 n.9 (“While this section does not actually use the term 'presumption,' that is a proper characterization of the structure of this and the following sections.”); see also Nelson, 507 U.S. at 355 (noting that foreign states are presumptively immune unless any of FSIA's specified exceptions apply to grant subject matter jurisdiction); Mendenhall, 991 F. Supp. at 858 (stating that foreign states are presumably entitled to immunity under FSIA); Gibbons, 549 F. Supp. at 1106 (noting that foreign instrumentalities of foreign states are also presumably immune under FSIA).

28. See 28 U.S.C. § 1604 (discussing limited manner in which foreign sovereigns may not be found immune and that foreign sovereigns are immune unless FSIA applies). The FSIA states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States except as provided in sections 1605 to 1607 of this chapter.

Id. (emphasis added). This restrictive statutory language counsels that a borderline waiver should not subject the foreign state to domestic jurisdiction. See Nelson, 507 U.S. at 355-56 (discussing presumptive immunity and holding that no waiver had occurred).

29. See Canadian Overseas, 727 F.2d at 278 (“[C]ourts have discretion to determine that the conduct of a party in litigation does constitute a waiver of foreign sovereign immunity in light of the circumstances of a particular case.”); see also Aboujdid v. Singapore Airlines, 494 N.E.2d 1055, 1057-58 (N.Y. 1986) (discussing ability of courts to use their discretionary power to determine when participation in litigation by foreign sovereigns constitutes explicit waiver) (citing Canadian Overseas, 727 F.2d at 278).

30. For a discussion of the principles, see supra notes 26-29 and accompanying text. When a foreign sovereign initiates an explicit but limited waiver, the intrusiveness of its conduct in the litigation comes into play. The court must balance this intrusive conduct against the presumption of immunity.

the judicial approach and various elements used in discerning explicit waivers.32

B. The Didia and Aguinda Decisions: Limited Waivers Are Not Explicit

There are two decisions on point regarding explicit but limited waivers of sovereign immunity.33 In Aguinda v. Texaco,34 a motion for reconsideration was filed by Ecuadorian plaintiffs alleging that Texaco had destroyed their land.35 The case was previously dismissed due to plaintiffs' failure to join Ecuador as an indispensable party.36 Ecuador was not joined because it was held to be immune under the FSIA.37 The motion

32. For a discussion of the judicial approach and elements utilized in discerning explicit waivers, see infra notes 52-93 and accompanying text.
33. See generally Aguinda, 175 F.R.D. 50 (holding that limited waivers are not explicit); Didia, 1993 U.S. Dist. LEXIS 16675 (holding that limited conditional waiver is not explicit).
34. 175 F.R.D. 50 (S.D.N.Y. 1997). There is relevant subsequent history in this case. See Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998) (vacating Aguinda on other grounds). There is also relevant prior history in this case. See Aguinda v. Texaco, Inc., 945 F. Supp. 625, 628 (S.D.N.Y. 1997) (dismissing action against Texaco on three grounds). In this case, the first ruling by the district court, the action against defendant Texaco was dismissed on three grounds: forum non conveniens, international comity and failure to join an indispensable party. See id. The indispensable party was the Republic of Ecuador, and it was not joined because it would not waive sovereign immunity. See id. at 627. Shortly after the district court's first decision in 1996, plaintiffs (Ecuadorian citizens claiming that Texaco had dumped oil on their lands) filed a motion for reconsideration. See Aguinda, 175 F.R.D. at 50. The court allowed the reconsideration motion because the Republic of Ecuador was purportedly willing to now intervene in the litigation and waive its sovereign immunity. See id. at id. After the motion for reconsideration was filed, the district court went on to address the issue of whether the Republic of Ecuador could now intervene as plaintiffs after the dismissal of the case and whether they had indeed waived sovereign immunity. See id. at 50-52. The Second Circuit decision overruled the district court's first ruling on the issues of dismissal. See Jota, 157 F.3d at 155. As to the district court's second ruling, that the Republic of Ecuador could not intervene because their waiver was not explicit, the circuit court agreed. See id. at 163. The Second Circuit stated:

The District Court also held that the Republic's intervention motion was insufficient because it did not include a full waiver of sovereign immunity. In particular, the Court found that "the Republic attaches limitations and conditions to its proposed waiver of sovereign immunity such that it would retain all the benefits of a proper party plaintiff while not being required to assume all the correlative burdens." We agree. Id. (quoting Aguinda, 175 F.R.D. at 51). The Second Circuit agreed with the district court's second ruling, and vacated and remanded the case on the issues involved in the district court's first determination of the issue. See id. The Second Circuit did imply, however, that even if Ecuador did not waive its immunity, the court should allow the plaintiffs to carry on their case. See id.

35. See Aguinda, 945 F. Supp. at 626 (stating that plaintiffs' reason for suit was "decades of oil exploration and extraction activities").
36. See id. at 627 (finding that another reason for dismissal was plaintiffs' failure to join Ecuador and Petroecuador as indispensable parties).
37. See id. at 627-28 (noting that when necessary parties are immune from suit, that alone is sufficient reason for dismissal of case).
for reconsideration was premised on the basis that Ecuador was ready to waive its immunity and to join the case as an indispensable party. Before considering the motion, the District Court for the Southern District of New York had to rule on Ecuador's limited waiver. Specifically, Ecuador wanted to join as a proper party plaintiff, but also wanted to retain its immunity for any claims leveled against them.

The document of waiver from Ecuador's Consul General stated, "As a consequence, the State which I represent does not participate or assume any responsibility in any other trial which might be initiated by or against the Texaco Company . . . ." The court's response to this limited waiver was to find that Ecuador's requested intervention was not permissible. The court stated that "[o]n its face, this response not only fails to provide the requested assurances but also states . . . a variety of limitations and qualifications on any waiver . . . . These equivocations are fatal, for it is well-settled that a waiver of sovereign immunity must be clear . . . in order to be effective." Essentially, the court held that a waiver limited to a specific role in litigation is, by its very nature, not explicit.

In Didi v. Destra Shipping Co., Ltd., the plaintiff, a Maldivian seaman, brought suit against his employer Destra Shipping. The defendant, in turn, filed a third party complaint against the Republic of Maldives. Upon the defendants' motion for forum non conveniens, the District Court for the Eastern District of Louisiana undertook an analysis to determine whether subject matter jurisdiction was present. The Republic of Maldives subsequently filed a stipulation that attempted to waive immunity on a limited basis. The court stated that "[s]ection 1605 requires a clear and unequivocal statement of the foreign state's intention to waive its im-

38. See Aguinda, 175 F.R.D. at 50 (noting that "reconsideration was premised on the allegation that the Republic of Ecuador . . . which had hitherto strenuously objected to the Court's exercise of jurisdiction . . . was now prepared . . . to seek to intervene in the case").

39. See id. at 51 (noting that Ecuador wanted to retain plaintiff party benefits, but not take on any "correlative burdens"). After both motions were fully briefed, the court asked Ecuador to provide further clarification on its position of waiver. See id.

40. See id. (discussing limited nature of Ecuador's waiver).

41. Id. at 52.

42. See id. (stating that unless Ecuador or its instrumentality files waiver statements, neither will qualify for intervention as plaintiffs).

43. Id.

44. See id. (noting generally that limited waivers, because they are not clear, cannot be explicit).


46. See id. at *1 (noting facts of case).

47. See id. (noting third-party complaint).

48. See id. at *3-4 (discussing requirement that court have subject matter jurisdiction before addressing forum non conveniens motions).

49. See id. at *7 (noting that Maldives was attempting to waive immunity on "a limited basis").
munity . . . . There is no such express language of waiver here." The
Didi court ultimately came to the same conclusion as the Aguinda court—a
waiver that is limited cannot be explicit.

C. Judicially Formulated Waiver Concepts

Congress gave discretion to the federal courts to formulate their own
standards for determining waivers. Further, the legislative history with
regard to explicit waivers has proven unhelpful to a court looking for gui-
dance. As a result, explicit waiver jurisprudence is derived from various
sources. This situation makes the application of clear concepts difficult

50. Id. at *7-8.
51. See id. (noting generally that limited waivers, because their language is not
"clear and unequivocal," cannot be explicit).
52. See Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1106 (S.D.N.Y.
1982) (noting ambiguousness of FSIA exceptions and lack of congressional gui-
dance). The court in Gibbons stated that "[p]ractically speaking, then, the FSIA did
little more than produce a statutory skeleton from which the federal judiciary has
been left to create, through a case-by-case decisional process, a fully developed
body of sovereign immunity law." Id.
6604, 6617 (discussing FSIA's explicit waiver provision). The legislative history
reads:

(a) (1) Waivers.—Section 1605(a) (1) treats explicit and implied waivers by
foreign states of sovereign immunity. With respect to explicit waivers, a
foreign state may renounce its immunity by treaty, as has been done by
the United States with respect to commercial and other activities in a
series of treaties of friendship, commerce, and navigation, or a foreign
state may waive its immunity in a contract with a private party. Since the
sovereign immunity of a political sub-division, agency or instrumentality
of a foreign state derives from the foreign state itself, the foreign state
may waive the immunity of its political subdivisions, agencies or
instrumentalities.

Id. The legislative history only addresses explicit waivers through contract provi-
sions. See id. It does not discuss when a foreign sovereign simply wishes to waive its
immunity. See id. (discussing only contractual waivers). This lack of guidance has
driven courts to create their own solutions for dealing with waivers. See Gibbons,
549 F. Supp. at 1106 (discussing lack of congressional guidance for determining
foreign sovereign immunity).
that explicit waivers are to be narrowly construed) (citing Shapiro v. Republic of
Bolivia, 950 F.2d 1013, 1017 (2d Cir. 1991); O'Connell Mach. Co. v. M.V. America,
734 F.2d 115, 116 (2d Cir. 1984); S & S Mach. Co. v. Masinexportimport, 706 F.2d
411, 417 (2d Cir. 1983)). In its holding, the Fickling court relied on case law deal-
ing with other aspects of the FSIA, most notably the sections on prejudgment at-
tachment and implied waivers. See Shapiro, 950 F.2d at 1017 (discussing implied
waiver provision); O'Connell, 734 F.2d at 116-17 (discussing prejudgment attach-
ment under FSIA); S & S Machinery, 706 F.2d at 416 (discussing FSIA prejudgment
attachment provisions). Courts often analyze these areas in attempting to discern
explicit waivers. See, e.g., Libra Bank v. Banco Nacional de Costa Rica, 676 F.2d 47,
50 n.4 (2d Cir. 1982) (discussing explicit and implicit waiver clauses as they pertain
to prejudgment attachments); Eaglet Co. v. Banco Cent. de Nicaragua, 839 F.
Supp. 232, 234 (S.D.N.Y. 1993) (finding no explicit waiver based on contract
clauses in debt restructuring agreement) (citing Shapiro, 950 F.2d at 1017), aff'd,
25 F.3d 641 (2d Cir. 1994). The statutes involved in each of the provisions are also
for any court facing an explicit but limited waiver. The end result of this difficulty is the inconsistent judicial application of these concepts.


Courts are virtually unanimous in their approaches to potential waivers of sovereign immunity. There is a general consensus among courts that these waivers are to be narrowly construed. The lead case exemplifying this approach is *Frolova v. U.S.S.R.*


(a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

*Id.* (emphasis added). Implicit and explicit waivers are both described in § 1605(a)(1). See *id.* The prejudgment attachment provision is also expressly related to the explicit waiver provision. See 28 U.S.C. § 1610(a) (1994) (listing FSIA exceptions to immunity for prejudgment attachments). The statute states:

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter . . . shall not be immune from attachment . . . if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver.

*Id.* Not only is the language of the two statutes similar, but the legislative history for prejudgment attachments expressly refers back to the waiver provision under § 1605(a)(1) for guidance. See H.R. REP. NO. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617. Section 1605(a)(1) waivers are expressly discussed as applicable to § 1610(a)(1). See *id.* at 28. A foray into these areas of the FSIA is necessary because courts enter these areas when attempting to discern the elements of an explicit waiver under § 1605(a)(1). See *Dellapenna,* supra note 2, at 392 ("In most other respects sections 1605(a)(1) and 1610(a)(1) are virtually identical.").

55. See generally *Aquamar S.A. v. Del Monte Fresh Produce, Inc.,* 179 F.3d 1279, 1291-93 (11th Cir. 1999) (applying proper precedent to one set of waiver statements, but ignoring same precedent for second set of waiver statements).

56. See, e.g., *Joseph v. Office of the Consulate Gen. of Nigeria,* 830 F.2d 1018, 1022-23 (9th Cir. 1987) (discussing approach of narrowly construing waivers as well as issue of actual intent, but ignoring element of clear manifestation of intent to waive).

57. See *Shapiro,* 930 F.3d at 1017 ("Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly.") (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 458, 444 (D.C. Cir. 1990); *Joseph,* 830 F.2d at 1022 (9th Cir. 1987); *Frolova v. U.S.S.R.,* 761 F.2d 370, 377 (7th Cir. 1985); *L'Europeene de Banque v. La Republica de Venezuela,* 700 F. Supp. 114, 123 (S.D.N.Y. 1988)).

58. See *Dellapenna,* supra note 2, at 201 ("Perhaps because of the sensitive issues of language and authority that arise in interpreting such [explicit] waivers, courts have tended to interpret them literally and narrowly.").

59. 761 F.2d 370 (7th Cir. 1985). Lois Becker-Frolova was married to Andrei Frolova in Moscow while there on a student visa. See *id.* at 371. Lois Frolova
In *Frolova*, the United States Court of Appeals for the Seventh Circuit attempted to determine whether treaty agreements constitute implicit waivers of immunity under the FSIA. Although it held that the Soviet Union had not waived immunity, the court listed three reasons why the FSIA waiver provision is to be narrowly construed.

First, the legislative history only gave three examples of actions by a foreign sovereign that constitute implied waivers. The court noted that since the FSIA was enacted, courts have demonstrated a reluctance to expand the examples given by Congress for implicit waiver. Second, cases involving arbitration clauses demonstrate that "provisions allegedly waiving immunity are to be narrowly construed." Third, the court cited a line of cases that held a contractual waiver of immunity does not apply to third parties not privy to the contract. In *Shapiro v. Republic of Bolivia*, the United States Court of Appeals for the Second Circuit reiterated the position of the *Frolova* court that implicit waivers are to be narrowly construed. This judicial approach has also developed for explicit waivers.

In *Ficking v. Australia*, the issue was whether an acceptance of caveat on property by a third party constituted an explicit waiver of immunity brought suit against the Soviet Union based on the country's hesitance to allow her husband to immigrate to America. See id.

60. See id. at 377 (noting plaintiff's argument that Soviet Union had implicitly waived immunity by signing United Nations Charter and Helsinki Accords).

61. See id. at 377-78 (discussing reasons why FSIA waiver provision should be narrowly construed).

62. See id. (noting reluctance of courts to carve out new reasons for implicit waivers); see also H.R. Rep. No. 1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617 (discussing implied waiver provision). The report gave three circumstances under which an implied waiver may be found: 1) a foreign state has agreed to arbitration in another country; 2) a foreign state has agreed that a contract is governed by the law of a particular country; and 3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity. See id.

63. See *Frolova*, 761 F.2d at 377 (discussing court reluctance to "stray beyond congressional examples of implicit waiver).


66. 930 F.2d 1013 (2d Cir. 1991).

67. See id. at 1017 (noting that waiver provision is to be narrowly construed).


The District Court for the Eastern District of New York articulated that "[i]n fact, as case law in [the Second] circuit demonstrates, even explicit waivers of immunity are to be narrowly construed." Fickling and Frolova clearly state that the judicial approach to FSIA waivers should be to interpret them narrowly. This same judicial approach has been used in several circuits as well as in two district court decisions.

2. An Explicit Waiver Must Give a Clear, Complete, Unambiguous and Unmistakable Manifestation of Sovereign's Intent to Waive Immunity

To discern whether an explicit waiver exists or not, the first element is to determine whether a purported waiver of sovereign immunity is a clear, unambiguous and unmistakable manifestation of the sovereign's intent to

70. See id. at 68 (determining that issue is whether caveats placed on property, which "preclude[ ] the sale, transfer, hypothecation, mortgage, pledge, etc.,” of such property constitute violations of international law and waivers of immunity). Fickling and his wife were in the middle of dissolving their marriage in Australian family court. See id. The court action in the United States stemmed from their divorce action in Australia. See id. Fickling alleged that his ex-wife had caused the caveats to be lodged on the properties owned by Fickling in Australia. See id.

71. Id. at 70.

72. See Frolova v. U.S.S.R., 761 F.2d 370, 377 (7th Cir. 1985) (noting that waivers are to be narrowly construed); see also Fickling, 775 F. Supp. at 70 (noting that explicit waivers are to be narrowly construed).

73. See Drexel Burnham Lambert Group, Inc. v. Galadari, 12 F.3d 317, 326 (2d Cir. 1993) (noting that FSIA's implied waiver provision must be narrowly construed); Cargill Int'l S.A. v. Dybenko, 991 F.2d 1012, 1017 (2d Cir. 1993) (noting that courts have interpreted FSIA waiver provision narrowly) (citing Zernicek v. Petroleos Mexicanos, 614 F. Supp. 407, 411 (S.D. Tex. 1985), aff'd sub nom. Zernicek v. Brown & Root, Inc., 826 F.2d 415 (5th Cir. 1987)); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990) (stating that there is substantial FSIA precedent that construes waivers narrowly and that applying FSIA waiver provision in instant case would be inconsistent with that case law); Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987) (finding that FSIA waiver provision is to be narrowly construed); Frolova, 761 F.2d at 377 (noting that waiver provision is to be narrowly construed); O'Connell Mach. Co. v. M.V. Americana, 734 F.2d 115, 117 (2d Cir. 1984) (dismissing defendant's argument that broad reading of purported waivers is necessary and would grant jurisdiction); S & S Mach. Co. v. Masinexportimport, 706 F.2d 411, 416 (2d Cir. 1983) (noting that to maintain congressional intent, explicit waivers under FSIA's pre-judgment attachment section must not be diluted by judicial indiscretion); Fickling, 775 F. Supp. at 70 (stating that explicit waiver provision of FSIA is to be narrowly construed); L'Europeene de Banque v. La Republica de Venezuela, 700 F. Supp. 114, 123 n.9 (S.D.N.Y. 1988) (noting that public policy demands narrow readings of § 1605(a)(1)). But see Ashkir v. United Nations, 1998 U.S. Dist. LEXIS 3814, at *4 (D.D.C. Mar. 19, 1998) (stating that waivers of immunity are not to be construed narrowly) (citing Shaw v. Library of Congress, 747 F.2d 1469, 1478-79 (D.C. Cir. 1984)). The Shaw decision is distinguishable. The Shaw court never stated that waivers are not to be read narrowly; the Ashkir court seemed to extrapolate such a view from the reading the circuit court gave to a Title VII provision. See Shaw, 747 F.2d at 1478-79. In fact, the Shaw court stated that "[t]he scope of such a waiver is to be strictly construed." Id. at 1475.
waive immunity. This requirement extends to both implicit and explicit waivers; a common sense look at the meaning of "explicit," however, demonstrates that this requirement is more stringent for explicit waivers. In *Libra Bank v. Banco Nacional De Costa Rica,* the Second Circuit noted the difficulty in drawing such a line: "The word 'explicit' has been defined as follows: 'Not obscure or ambiguous, having no disguised meaning or reservation. Clear in understanding.' Interpreting 'explicit,' however, in its natural sense of 'clear,' as we have, does not eviscerate the contrast between 'explicit' and 'implicit.'"

In *Drexel Burnham Lambert Group, Inc. v. Galadari,* the Second Circuit defined the standard for implicit waivers. The court stated that "[w]e must bear in mind that 'the implied waiver provision of Section 1605(a)(1) must be construed narrowly, and that any waiver must accordingly be 'unmistakable' and 'unambiguous.'" Explicit waiver cases have used this standard in a more stringent manner. In *Aguinda,* the district court noted that "it is well-settled that a waiver of sovereign immunity must be clear, complete, unambiguous, and unmistakable in order to be effec-

---


75. See Libra Bank v. Banco Nacional de Costa Rica, 676 F.2d 47, 49 (2d Cir. 1982) (defining "explicit" for purposes of FSIA and holding that foreign state explicitly waived immunity through contract language on bank note).

76. 676 F.2d 47 (2d Cir. 1982).


78. 12 F.3d 317 (2d Cir. 1993).

79. See id. at 326 (stating that implied waiver provision must be read narrowly); see also Shapiro, 930 F.2d at 1017 (noting that implied waivers must be clear and unambiguous); Frolova, 761 F.2d at 378 (noting that courts require convincing evidence of waiver).

80. Drexel, 12 F.3d at 326.

tive." The Aguinda court added the word "complete," a word that none of the courts it cited for support had ever used. This stricter standard is in line with the higher bar demanded by the definition of explicit. The difficulty of determining how narrowly to construe a waiver, as enunciated by the Libra court, has led some courts to examine closely the sovereign's actual intent. Overall, a number of cases demonstrate that a waiver of sovereign immunity must be clear, unambiguous and unmistakable.

3. The Growing Role of Actual Intent in Waiver

The actual intent of the sovereign is a natural sub-element to whether there has been a clear manifestation of that intent. The leading case on

82. Id.

83. See id. at 52-53 (discussing applicable standard for waivers). The court cited to several cases, and added an additional requirement of completeness. See Drexel, 12 F.3d at 325-26 (stating that waiver must be "unmistakable" and "unambiguous"); Shapiro, 930 F.2d at 1017 (noting that FSIA's legislative history indicates that waivers must be unmistakable and unambiguous); Eaglet Corp. v. Banco Cent. de Nicaragua, 839 F. Supp. 232, 234 (S.D.N.Y. 1993) (noting that language purporting to constitute waiver of sovereign immunity must be clear) (emphasis added), aff'd, 23 F.3d 641 (2d Cir. 1994).

84. See Libra Bank v. Banco Nacional de Costa Rica, 676 F.2d 47, 49 (2d Cir. 1982) (defining explicit). The court defines explicit as "[n]ot obscure or ambiguous, having no disguised meaning. Clear in understanding." Id. The standard for implicit waivers is "unmistakable and unambiguous." Drexel, 12 F.3d at 317 (discussing standard by which to judge waiver statements). As the Libra Bank definition demonstrates, an explicit waiver requires a stricter standard. Compare Libra Bank, 676 F.2d at 49 (noting that explicit waivers cannot be obscure or ambiguous), with Drexel, 12 F.3d at 317 (noting that implicit waivers must be unambiguous and unmistakable, implying that explicit waivers require even less ambiguity).

85. See generally Cargill Int'l S.A. v. Dybenko, 991 F.2d 1012 (2d Cir. 1993) (discussing requirement that there be significant evidence of sovereign's intent to waive); Commercial Corp. Sovrybflot v. Corporacion de Fomento de La Produccion, 980 F. Supp. 710 (S.D.N.Y. 1997) (clarifying that explicit waivers should only be found when contract language waiving immunity is clear and unambiguous and thus demonstrating foreign sovereign's intent); Marshall v. Abb Lummus Inc., 888 F. Supp. 1388 (S.D. Tex. 1995) (noting that courts should not find waiver without ample evidence of sovereign's intent).


87. See, e.g., Commercial Corp. Sovrybflot, 980 F. Supp. at 713 (demonstrating manner in which actual intent coincides with clear manifestations of that intent).
the role of intent in finding waiver is *Castro v. Saudi Arabia*. In concluding that there was no waiver by the foreign sovereign, the District Court for the Western District of Texas stated that “[t]here must be an intentional and knowing relinquishment of the legal right.” The Second Circuit reiterated the same opinion in *Cargill v. Dybenko*. The court, holding that no waiver had occurred, relied heavily on the lack of evidence as to the foreign sovereign’s intent in signing an arbitration agreement. In *Fickling*, the court also noted that there must be strong evidence of a foreign sovereign’s intent before finding an implied waiver.

Finding the actual intent of the sovereign more important than the sovereign’s manifested intent, several courts have deemed this element increasingly important.
III. FACTS IN AQUAMAR S.A. V. DEL MONTE FRESH PRODUCE, INC.

In 1995, a group of Ecuadorian commercial shrimp farmers claimed in a series of Florida state actions that Del Monte Produce had manufactured and supplied fungicides for use on Ecuadorian banana farms.94 The result of this use was the alleged destruction of the plaintiff's shrimp supply.95 The defendants subsequently filed third, fourth and fifth party complaints against Programa Nacional De Banano ("PNB"), a department within the Ecuadorian Ministry of Agriculture and Livestock.96 With the foreign sovereign involved in the litigation, the case was removed to federal court.97 After removal, PNB joined Del Monte's motion to dismiss for forum non conveniens.98

PNB attempted to waive its immunity to argue the motion, but also sought to limit the waiver for that singular purpose.99 The District Court for the Southern District of Florida ultimately dismissed the case and remanded it back to state court without ruling on the forum non conveniens motion.100 The district court held that PNB's statement of waiver was too limited to constitute an explicit waiver of immunity.101 As a result, the

---

94. See Aquamar S.A. v. Del Monte Fresh Produce Inc., 179 F.3d 1279, 1282 (11th Cir. 1999) (noting underlying facts).

95. See id. (noting allegation that defendant's fungicides and herbicides had killed plaintiff's shrimp).

96. See id. (discussing third, fourth and fifth party complaints filed by defendants against Programa Nacional De Banano). It should be noted that as a department within the Republic of Ecuador, PNB qualified as an instrumentality of the foreign sovereign. See 28 U.S.C. § 1603(a) (1994) (defining foreign states). The statute states:

   (a) A "foreign state, [sic]" except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

   Id. The statute continues in subsection (b) to define an agency or instrumentality as any entity that is a separate legal person or corporation, or any organ of the foreign state or its political subdivisions. See id. § 1603(b)(1)-(2).

97. See Aquamar, 179 F.3d at 1282 (noting removal). Removal was proper with a sovereign entity as a party pursuant to 28 U.S.C. § 1441(d) (1994). See id. The only basis for removal to federal court in this instance was the presence of PNB. See id. at 1282-83.

98. See id. at 1282 (noting that PNB joined defendants motion to dismiss for forum non conveniens).

99. See id. at 1283 (noting affidavit from PNB's counsel stating that "PNB hereby, and for purposes of this litigation and this litigation only . . . explicitly waives immunity from the jurisdiction of this Court").

100. See id. at 1284 (noting dismissal and remand by district court). The district court ruled, based on the limited waiver, that it did not have subject matter jurisdiction to rule on the forum non conveniens motion. See id. This also meant that the court could no longer hear the matter in federal court. See id. As a result, the case was remanded to state court without PNB as a party. See id. (noting district court remand to Florida state court).

101. See id. (noting district court's holding that waiver statement was "expressly limited to litigation of the forum non conveniens motion now pending").
court no longer had subject matter jurisdiction to hear the motion. After a subsequent series of Florida state court actions, Del Monte appealed the district court's holding of limited waiver to the Eleventh Circuit. On appeal, the circuit court addressed the issue of explicit waiver by PNB. Whereas PNB had argued for waiver in district court (albeit on a limited basis), on appeal it claimed that it had not completely waived its immunity.

To determine whether PNB had waived its immunity, the Eleventh Circuit examined a number of communications between PNB and the district court. The first set of statements to the court were made by PNB's lawyers in May 1995. The first statement from the lawyers read, "PNB hereby, and for purposes of this litigation and this litigation only, ... explicitly waives its immunity from the jurisdiction of this Court," but the statement continued stating that the waiver did not apply to the Republic of Ecuador as a whole. PNB's lawyers submitted a subsequent statement to clarify their previous position. Ultimately, the Eleventh Circuit

102. See id. at 1282 (noting that without PNB, subject matter jurisdiction was no longer proper in district court).

103. See id. (noting lengthy series of state and federal actions in case). Overall, the case has a somewhat complex procedural history. See id. (discussing series of trial by plaintiffs). Plaintiffs initially brought suit only against Del Monte in Florida state court. See id. at 1282-83. After Del Monte joined PNB as a third party defendant, the case was removed to federal court pursuant to 28 U.S.C. § 1441(d). See id. at 1282. After PNB joined the defendants in their motion to dismiss based on forum non conveniens, the district court ruled on the issue of PNB's purported waiver. See id. Interestingly, the plaintiffs filed a motion to strike the complaints against PNB. See id. Plaintiffs argued that PNB had not waived its immunity, seemingly to keep the action in state court against Del Monte alone. See id. at 1283. In turn, PNB attempted to argue that it had waived immunity for purposes of litigating the forum non conveniens motion. See id. After the district court ruled that the waiver left them without subject matter jurisdiction, the case was remanded to state court. See id. at 1284. After the return of the cases to Florida state court, Del Monte again moved for a forum non conveniens dismissal. See id. A Florida trial court denied the motion for dismissal, but a Florida appeals court found that the courts of Ecuador were a better forum, and remanded to the trial court for dismissal. See id. Currently, the issue may not be dead in the Florida courts as the Ecuadorian court system has refused to hear the cases and provide a forum. See id. at 1285.

104. See id. at 1289 (evaluating whether Ecuador explicitly waived immunity).

105. See id. at 1283 n.2 (stating that on appeal, PNB is arguing that it never waived sovereign immunity).

106. See id. at 1291-94 (examining series of communications between PNB and district court).

107. See id. at 1291 (discussing May 1995 statements).

108. Id. at 1283. A later portion of the statement read, "[t]his waiver of immunity and consent to jurisdiction is made solely on behalf of Programa Nacional de Banano and shall not be deemed to be a waiver of any immunities, rights or defenses applicable to other governmental departments of the Republic of Ecuador or the Republic of Ecuador itself." Id. at 1292 (citations omitted).

109. See id. at 1283 (noting second statement by PNB's lawyers). This second set of statements read:
held that neither of these statements constituted an explicit waiver of sovereign immunity.\footnote{10}

The next statement examined by the court was made in June 1995 by Ecuador's Ambassador to the United States, Dr. Edgar Teran.\footnote{11} The Eleventh Circuit held that this statement by Teran, which expressly limited the waiver to litigating a motion, constituted a complete and total waiver of immunity.\footnote{12} Based on this holding, the Eleventh Circuit reversed and remanded the action to the district court for further proceedings in line with its opinion.\footnote{13}

IV. ANALYSIS

A. Narrative Analysis: Parsing Statements and the Holding of Total Waiver

The Eleventh Circuit first held that it had appellate jurisdiction to hear the appeal.\footnote{14} Next, the court held that the June 1995 statements by

The Republic of Ecuador, acting through its Ambassador to the United States and the undersigned counsel, ha[s] made it clear that any immunity from jurisdiction has been waived with respect to the allegations over the use of fungicides in Ecuador which have been made against PNB, and by extension against the Ministry and the Republic . . . . PNB hereby affirms that it is the intention of the Republic to waive sovereign immunity from jurisdiction with respect to the subject matter of this litigation.

Id.

110. See id. at 1291 (holding that May 1995 statements by PNB's lawyers did not constitute explicit waivers of sovereign immunity on behalf of Ecuador).

111. See id. at 1283 (noting that in June 1995 Ecuador's Ambassador filed waiver statements). The June 1995 statement by Ambassador Teran read:

I respectfully waive PNB's Sovereign Immunity on behalf of PNB and the Government of Ecuador on the following limited basis. Without waiving any other defense of law or fact to the claims asserted against it in this litigation, PNB hereby and for the purposes of these litigations only and in connection with the pending forum non conveniens motions (1) explicitly waives its immunity from the jurisdiction of this Court pursuant to 28 U.S.C. 1605(a) (i) and (2) consents to the exercise of personal jurisdiction by this Court over PNB.

Id.

112. See id. at 1293 (holding that district court was in error over issue of waiver and that Teran's statement waived immunity "completely" and "unambiguously").

113. See id. at 1300 (holding that district court was in error, and thus reversing order of dismissal, remanding to district court for further proceedings and denying plaintiff's motion for attorney's fees and costs).

114. See id. at 1285 (holding that 28 U.S.C. § 1447(d) (1994) did not bar court from hearing plaintiff's appeal, that dismissal of PNB from district court proceedings was final and that issues on appeal were not moot). The court had to address three questions to determine whether it had jurisdiction to hear the ap-
Ambassador Teran constituted an explicit and total waiver of sovereign immunity.\textsuperscript{115} When confronted with the same issue, the district court had found that the language of Ambassador Teran's waiver was "expressly limited to litigation of the forum non conveniens motion now pending."\textsuperscript{116} The Eleventh Circuit separated the statements and examined each to determine whether they constituted a waiver of immunity.\textsuperscript{117}

1. \textit{The May 1995 Statements by PNB's Attorneys}

The Eleventh Circuit applied concepts enunciated in past waiver cases to find that the May 1995 statements did not constitute waivers of immunity.\textsuperscript{118} Applying the precedent from \textit{Aguinda}, the court stated that "an appeal. See \textit{id}. First, the court had to determine whether they were barred from hearing the appeal under 28 U.S.C. § 1447(d) because the case had been remanded to state court. See \textit{id}. The court determined the section did not bar their review of the issue. See \textit{id}. at 1285-86 (citing \textit{City of Waco v. United States Fidelity & Guar. Co.}, 293 U.S. 140 (1934)). In \textit{Waco}, the defendant removed the case from state court to district court on grounds of diversity. See \textit{id}. at 1286. The district court entered an order dismissing the claim and remanded the case back to state court. See \textit{id}. Because the dismissal by the district court changed the "shape of the lawsuit" in a manner that could not be reviewed in state court, the Supreme Court held that the dismissal was reviewable on appeal. \textit{Id}. The \textit{Aquamar} court concluded that the doctrine enunciated in \textit{Waco} allowed them to review the district court's order for dismissal. See \textit{id}. at 1287. The district court order remanded the case, but it also dismissed a party. See \textit{id}. at 1286. Therefore, the dismissal order, contained within the same order for remand, was reviewable because it altered the contours of the state action. See \textit{id}.

Second, the court addressed the issue of whether the district court's order was an appealable final order under 28 U.S.C. § 1291 (1994). See \textit{id}. at 1287. The court found that the collateral order doctrine allowed review of a decision that "(1) conclusively determines a disputed question that is (2) important and completely separate from the merits of the action and is (3) effectively unreviewable on appeal from a final judgement." \textit{Id}. (citing \textit{Cohen v. Beneficial Indus. Loan Corp.}, 337 U.S. 541, 546 (1949)). The court further determined that a dismissal of a party prior to remand was such an appealable collateral order. See \textit{id}. (holding that dismissal of party prior to remand constitutes appealable collateral order) (citing \textit{Katsaris v. United States}, 684 F.2d 758 (11th Cir. 1982)).

Third, the court had to determine if the issue was moot. See \textit{id}. In \textit{John Roe, Inc. v. United States}, the Eleventh Circuit stated, "A federal court has no authority to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." 142 F.3d 1416, 1421 (11th Cir. 1988). Based on \textit{County of Los Angeles v. Davis}, the determination of mootness depends on whether the parties had a legally cognizable interest in the outcome. See \textit{Aquamar}, 179 F.3d at 1287 (citing \textit{County of Los Angeles v. Davis}, 440 U.S. 625, 631 (1979)). The court determined that because they were able to grant "effectual relief," the issue in the case was not moot. See \textit{id}. at 1289.

115. \textit{See Aquamar}, 179 F.3d at 1293 (holding that June 1995 statements by Ambassador Teran constituted complete waivers of immunity).

116. \textit{Id}.

117. See \textit{id}. at 1291-93 (separating statements for purposes of determining waiver).

118. See \textit{id}. at 1292 (utilizing standards enunciated in past case law) (citing \textit{Aguinda v. Texaco, Inc.}, 175 F.R.D. 50, 52 (S.D.N.Y. 1997), vacated on other grounds sub nom., \textit{Jota v. Texaco, Inc.}, 157 F.3d 153 (2d Cir. 1998)). For the full text of the
express waiver under section 1605(a)(1) must give a 'clear, complete, un-
ambiguous, and unmistakable' manifestation of the sovereign's intent to
waive immunity." 119 The statement from PNB's lawyers limited the waiver
of immunity to PNB itself, stating that the Republic of Ecuador did not
waive as a whole. 120 Because the plaintiffs in the district court had
presented evidence that PNB was not a "juridical person" that could be
sued under Ecuadorian law, it would be required that Ecuador waive im-
munity as a whole for PNB to be amenable to suit. 121 The court held that
a waiver statement limited to PNB was not complete. 122

The second statement by PNB's lawyers, made in an attempt to clarify
their position, was also held incomplete. 123 The court stated that "[r]ead
literally, it does not purport to waive Ecuador's immunity, but merely
states the PNB lawyers' opinion that Ecuador either had filed an explicit
waiver of immunity or planned to file one at some point. An express
waiver must be more exact than this." 124 By interpreting these statements
as merely the opinion of PNB's lawyers, the court held that the statements
were incomplete. 125

2. The June 1995 Statement By Ecuador's Ambassador

The district court found that the language of the June 1995 statement
did not effect a valid waiver of immunity because it was incomplete. 126
Further, the court suggested that Teran may not have had the authority to
waive Ecuador's immunity. 127 The Eleventh Circuit, however, held that
first May 1995 statement made by PNB's lawyers, see supra note 108 and accompa-
nying text.

119. Aquamar, 179 F.3d at 1292 (quoting Aguinda, 175 F.R.D. at 52).
120. See id. at 1283 (noting that May statements limited waiver to PNB and
therefore did not waive for all of Ecuadorian Republic).
121. See id. at 1292 (noting that for PNB to be amenable to suit, Ecuador must
also waive their immunity). A "juridical link" is "[a] legal relationship between
members of a potential class action, sufficient to make a single suit more efficient
or effective than multiple suits, as when all members of the class have been simi-
larly affected by an allegedly illegal regulation," BLACK'S LAW DICTIONARY 854 (7th
ed. 1999). Because PNB was not a juridical person, Ecuador was required to con-
sent to suit on behalf of PNB through extension. See Aquamar, 179 F.3d at 1292
(noting that Ecuador must waive).
122. See Aquamar, 179 F.3d at 1292 ("This waiver, limited to PNB, was not
therefore, 'complete.'").
123. See id. (noting that second statement made by PNB's lawyers was not
complete). For the full text of the second May 1995 statement made by PNB's
lawyers, see supra note 109 and accompanying text.
124. Aquamar, 179 F.3d at 1292.
125. See id. (noting incompleteness of waiver statement based on its status as
opinion).
126. See id. (noting district court's holding as to June 1995 statement made by
Ecuadorean Ambassador). For the full text of the June 1995 statement, see supra
note 111 and accompanying text.
127. See Aquamar, 179 F.3d at 1292 (discussing district court's implication that
it was not convinced that Ambassador Teran had authority to waive immunity for
Ecuadorean Republic). The court stated, "After remanding the case, the court also
the June 1995 statement alone served as a complete and total waiver of
Ecuador’s immunity.\textsuperscript{128} The court cited the portion of Teran’s statement
that waived immunity “[w]ithout waiving any other defense of law or fact
to the claims asserted against it . . . for the purposes of these litigations
only and in connection with the pending forum non conveniens motions,”
as the basis for its holding.\textsuperscript{129} By parsing the waiver statement, the court
found it to be an effective, explicit and unlimited waiver.\textsuperscript{130} The court
stated that “[t]he word ‘only’ in the phrase ‘for purposes of these litigations
only and in connection with the pending forum non conveniens motion,’
modifies the expression ‘these litigations,’ but not the words ‘in

suggested that it was not convinced that Teran had the authority to waive Ecua-
don’s immunity before the courts of the United States.” \textit{Id.} The Eleventh Circuit
addressed this issue after it determined that an explicit waiver had occurred. \textit{See id.} at 1293. The court stated:

Our interpretation of the FSIA, the Congressional policies underlying
that statute, and other concerns that arise in cases relating to foreign
affairs lead us to conclude that when, as here, a duly accredited head of a
diplomatic mission (such as an ambassador) files a waiver of his or her
sovereign’s immunity in a judicial proceeding, the court should assume
that the sovereign has authorized the waiver absent extraordinary
circumstances. \textit{Id.} at 1294. The court had five reasons for coming to this determination. \textit{See id.} at
1293-99 (discussing five separate reasons why Ambassador Teran was able to bind
Ecuador). First, relying on the Vienna Convention for the Law of Treaties, the
court noted that ambassadors have broad powers to legally bind their countries. \textit{See id.} at 1295-96. Second, the court stated that some countries had codified regu-
lations allowing an ambassador to waive sovereign immunity. \textit{See id.} at 1296.
Third, international court holdings assumed that an ambassador had the power to
present his or her country’s position in front of a foreign court. \textit{See id.} Fourth, the
court cited congressional intent under the FSIA. \textit{See id.} at 1297-98. One of
the reasons that Congress passed the FSIA was to make federal law regarding foreign
litigation uniform and predictable. \textit{See id.} at 1298. To conform to this goal of
uniformity, the court stated that “[r]equiring the courts to look to a sovereign’s
local law to determine the authority of any agent who purports to waive sovereign
immunity, even if that agent is an ambassador, would hinder the goals of the FSIA
and its waiver provision.” \textit{Id.}

The court, however, did qualify its holding: “We do not hold that the courts
should deem an ambassador to be authorized to waive a sovereign’s immunity
under all circumstances; an ambassador may so clearly lack authority that his or
her representations to a court do not bind the sovereign.” \textit{Id.} at 1299. There was
no evidence that Teran did not have the authority to waive immunity, thus his
statements were binding upon Ecuador. \textit{See id.}

128. \textit{See id.} at 1293 (holding that although “Teran could have chosen his
words more carefully,” his affidavit waived Ecuador’s immunity “completely” and
“unambiguously”).

129. \textit{Id.} (quoting June 1995 statement by Ecuadorian Ambassador). A com-
mon sense reading of this statement demonstrates that the waiver was intended to
be limited to litigation of the \textit{forum non conveniens} motion. \textit{See id.} at 1283. Further
evidence of this interpretation can be found in the opening portion of the state-
ment. \textit{See id.} The first sentence of the statement, which the Eleventh Circuit did
not cite, reads, “I respectfully waive PNB’s Sovereign Immunity on behalf of PNB
and the Government of Ecuador on the following limited basis.” \textit{Id.}

130. \textit{See id.} at 1293 (parsing waiver statement by Ambassador Teran in order
to determine meaning).
connection.'"\(^{131}\) The court found this statement alone sufficient; however, it cited Teran's August 1995 affidavit stating that he intended to waive Ecuador's immunity as further evidence that the waiver was explicit.\(^{132}\)

The Eleventh Circuit articulated one additional reason for overruling the district court.\(^{133}\) The court stated, "Teran's phrase 'in connection with the pending forum non conveniens motions,' which the district court read as a limitation on the waiver of immunity, actually shed light on his reasons for filing the waiver."\(^{134}\) Based on Teran's August 1995 statement, the court noted that his purpose was to keep the case in federal court where a forum non conveniens motion was more likely.\(^{135}\) The court implicitly reasoned that such an action should not protect the foreign sovereign and stated, "[t]he fact that the waiver may have been a tactical move does not alter our analysis . . . . The courts need not approve the reasons underlying a foreign state's waiver of its immunity . . . ."\(^{136}\) Based on the June 1995 statement, with further evidence from the August 1995 affidavit, the court found that Ecuador was no longer entitled to sovereign immunity.\(^{137}\)

\(^{131}\) Id.

\(^{132}\) See id. (relying on Teran's June 1995 affidavit to find complete waiver, but noting that Teran's August 1995 affidavit, stating that he intended to waive Ecuador's immunity, was further evidence that his June 1995 statement was designed to effectively waive Ecuador's immunity). For the full text of Teran's August 1995 affidavit, see supra note 111 and accompanying text.

\(^{133}\) See Aquamar, 179 F.3d at 1293 (discussing strategic and tactical nature of June 1995 waiver statement).

\(^{134}\) Id.

\(^{135}\) See id. (noting that statement by Teran was designed to keep proceedings in federal court for purposes of litigating forum non conveniens motion).

\(^{136}\) Id.

\(^{137}\) See id. (holding that based on both of Teran's statements, Ecuador was no longer entitled to sovereign immunity). There may be another implicit reason why the court found that Ecuador was not entitled to sovereign immunity. When discussing the statements by PNB's lawyers, the court quoted Aguinda for the proposition that an explicit waiver must be "clear, complete, unambiguous and unmistakable." Id. at 1292 (quoting Aguinda v. Texaco, Inc., 175 F.R.D. 50, 52 (S.D.N.Y. 1997), vacated on other grounds sub nom. Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)). In Aguinda, the foreign sovereign at issue was, as in Aquamar, Ecuador. See Aguinda, 175 F.R.D. at 50 (noting facts of case). In Aguinda, the issue was also whether an explicit but limited waiver constituted a total waiver to the court's jurisdiction. See Jota, 157 F.3d at 163 (discussing explicit but limited waiver). In Aguinda, Ambassador Teran took a legal stance similar to the one he took in Aquamar. See id. at 156 (noting presence of Teran in proceedings). The court may have felt that Teran was attempting to find a loophole in the FSIA as a matter of strategy. As the court in Aquamar held counter to the court in Aguinda, the Aquamar court may have felt that Teran was attempting to abuse the protections of the act based on his previous actions. Compare generally Aquamar, 179 F.3d 1279 (holding that Ecuador, through Ambassador Edgar Teran, had waived immunity), with Aguinda, 175 F.R.D. 50 (holding that Ecuadorian Ambassador Edgar Teran had not waived immunity).
B. Critical Analysis: A Conceptual Analytical Framework and the Aquamar Decision

Specific elements and a specific judicial approach are used by courts attempting to discern an explicit waiver. These elements suggest a three-prong conceptual framework for the analysis of explicit waivers. First, waivers are to be construed narrowly and literally. Second, explicit waivers require a clear, complete, unambiguous and unmistakable manifestation of the intent to waive. Third, the actual intent of the foreign sovereign plays a role in determining waiver. In addition, a fourth prong should be considered in this conceptual framework—the ability of the foreign sovereign to withdraw its waiver.

1. Waivers are to be Construed Narrowly and Literally

There is substantial FSIA precedent stating that waivers are to be interpreted narrowly and literally. In Fickling, the court stated that "even explicit waivers of immunity are to be narrowly construed." In Aquamar, the court never mentioned this widely utilized judicial approach.

138. For a discussion of the specific elements and judicial approach used to determine explicit waivers, see supra notes 52-93 and accompanying text.
139. For a discussion of each of the prongs, see infra notes 144-193 and accompanying text.
140. For a discussion of the judicial approach to construe waivers narrowly and literally, see supra notes 57-73 and accompanying text.
141. For a discussion of clear, complete, unambiguous and unmistakable manifestations of intent to waive, see supra notes 74-86 and accompanying text.
142. For a discussion of the role of actual intent in determining an explicit waiver of immunity, see supra notes 87-93 and accompanying text.
143. For a discussion of the fourth prong, see infra notes 183-193 and accompanying text.
144. See Drexel Burnham Lambert Group, Inc. v. Galadari, 12 F.3d 317, 326 (2d Cir. 1993) (noting that implied waivers are to be construed narrowly); Cargill Int'l S.A. v. Dybenko, 991 F.2d 1012, 1017 (2d Cir. 1993) (noting that FSIA waiver provision in general has been construed narrowly) (citing Zernicek v. Petroleos Mexicanos, 614 F. Supp. 407, 411 (S.D. Tex. 1985), aff'd sub nom. Zernicek v. Brown & Root, Inc., 826 F.2d 415 (5th Cir. 1987)); Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991) (noting that federal courts have ruled in virtual unanimity that FSIA implied waivers are to be construed narrowly); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990) (holding that reading waiver statements broadly to find implied waiver would be inconsistent with precedent stating that implied waivers are to be narrowly construed); Joseph v. Office of Consulate Gen. of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987) ("The waiver provision is narrowly construed."); O'Connell Mach. Co. v. M.V. Americana, 734 F.2d 115, 117 (2d Cir. 1984) (dismissing defendant's argument that broad reading of waiver provision was allowable); S & S Mach. Co. v. Masinexportimport, 706 F.2d 411, 416 (2d Cir. 1983) (noting that FSIA prejudgment attachments must not be diluted by judicial indiscretion); L'Europeene de Banque v. La Republica de Venezuela, 700 F. Supp. 114, 123 n.9 (S.D.N.Y. 1988) (noting that public policy demands that FSIA waiver provisions be read narrowly).
If read narrowly and literally, the statement by Ambassador Teran may not have constituted a waiver of sovereign immunity. In Aguinda and Didi, the respective statements of each foreign sovereign constituted explicit but limited waivers; however, the statements themselves never included the word "limited," as did Teran's statements. The courts in Aguinda and Didi nevertheless extrapolated from the waiver that too many conditions had been placed upon the statements for them to constitute explicit waivers. In Aquamar, the waiver statement itself expressed that the waiver was on a limited basis. A narrow and literal reading of the statement would have taken into consideration the conditional aspect of the waiver. To hold there was an explicit waiver, the court seemed to read the statement by Teran broadly. This is counter to the approach taken by several other circuits. Indeed, a nar-

---

146. See Aquamar S.A. v. Del Monte Fresh Produce, Inc., 179 F.3d 1279, 1293 (11th Cir. 1999) (discussing clear and complete manifestation standard but never mentioning that waivers are to be construed narrowly).
147. See id. at 1284 (noting district court holding that Teran's waiver statement "was expressly limited to litigation of the forum non-conveniens motion").
148. See id. at 1283 (waiving immunity for Ecuador, Ambassador Teran stated "I respectfully waive... on the following limited basis"). In Aguinda, the court found that the waiver was limited, but not because the waiver itself expressed such a position. See Aguinda v. Texaco, Inc., 175 F.R.D. 50, 52 (S.D.N.Y. 1997) (demonstrating that waiver was limited not by its own terms, but because Ecuador would not open itself to suit), vacated on other grounds sub nom. Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). Instead, the court stated, "Specifically, the Republic attaches limitations and conditions to its proposed waiver of sovereign immunity such that it would retain all the benefits of a proper party plaintiff while not being required to assume all the correlative burdens." Id. at 51. The court found this waiver to be limited not because it stated so, but because of the attached conditions. See id. In Didi, the court found that the waiver at issue was limited because the foreign sovereign had reserved the right to assert the defense of sovereign immunity at a later point. See Didi v. Destra Shipping Co., Ltd., 1994 A.M.C. 852, 1993 U.S. Dist. LEXIS 16675, at *7 (E.D. La. Nov. 19, 1993) (discussing waiver limitations). The waiver in Didi, like the waiver in Aguinda, did not expressly state that the waiver was limited. See Aguinda, 175 F.R.D. at 52; Didi, 1993 U.S. Dist. LEXIS 16675, at *7. The waiver in Aquamar, however, was expressly limited based on the terms of the waiver itself. See Aquamar, 179 F.3d at 1283.
149. See Aguinda, 175 F.R.D. at 51 (noting that waiver by Ecuador was limited and conditional); Didi, 1993 U.S. Dist. LEXIS 16675, at *7 (noting that sovereign immunity had not been explicitly waived because stipulation of waiver was limited).
150. See Aquamar, 179 F.3d at 1283 (quoting waiver statement by Teran, which stated that Ecuador's waiver was limited).
151. See id. The waiver stated that it was only on a limited basis. See id. A literal and narrow reading would have noted the limited nature of the waiver. See id. at 1293. By parsing the waiver statement, the court expressly removed the limitation from the statement. See id. Removing a vital portion of the statement does not constitute a narrow and literal reading of the waiver.
152. See Drexel Burnham Lambert Group, Inc. v. Galadari, 12 F.3d 317, 326 (2d Cir. 1993) (noting that implied waivers are to be construed narrowly); Cargill Int'l S.A. v. Dybenko, 991 F.2d 1012, 1017 (2d Cir. 1993) (noting that FSIA waiver provision in general has been narrowly construed) (citing Zernicek v. Petroleos Mexicanos, 614 F. Supp. 407, 411 (S.D. Tex. 1985), aff'd sub nom. Zernicek v. Brown &
row and literal reading would have led the court to a decision similar to the holdings in \textit{Aguinda} and \textit{Didi}—a waiver that is limited cannot be explicit.$^{153}$ In so ruling, the Eleventh Circuit disagreed with the approach of the Seventh Circuit's \textit{Frolova} decision, the Second Circuit's \textit{Shapiro} decision and the Eastern District of New York's \textit{Fickling} decision.$^{154}$

2. Explicit Waivers Must Constitute a Clear, Complete, Unambiguous and Unmistakable Manifestation of the Intent of the Foreign Sovereign: Raising the Bar on Court Discretion

In \textit{Aquamar}, the Eleventh Circuit quoted the standard enunciated in \textit{Aguinda} that a waiver under 28 U.S.C. § 1605(a)(1) must be "clear, complete, unambiguous, and unmistakable."$^{155}$ The court cited this proposition when examining the May 1995 statements by PNB's lawyers.$^{156}$

$^{153}$ For a discussion of the decisions and court's analyses in \textit{Didi} and \textit{Aguinda}, see \textit{supra} notes 33-51 and accompanying text.

$^{154}$ For a discussion of the \textit{Frolova}, \textit{Shapiro} and \textit{Fickling} decisions, see \textit{supra} notes 57-73 and accompanying text.


$^{156}$ \textit{See Aquamar}, 179 F.3d at 1292 (holding that PNB lawyers' statements did not constitute waivers of immunity). The court stated, "Assuming that PNB's attorneys could waive sovereign immunity on behalf of Ecuador, they did not do so in the May 1995 statements. An express waiver under section 1605(a)(1) must give a 'clear, complete, unambiguous, and unmistakable' manifestation of the [foreign] sovereign's intent to waive its immunity." \textit{Id.} (quoting \textit{Aguinda}, 175 F.R.D. at 52).
court ultimately found that these statements could not constitute a waiver because "[a]n express waiver of immunity must be more exact than this."157

The court used the Aguinda standard when it addressed the June 1995 statements that were found to be total waivers of immunity, but the court failed to apply the standard with any analysis.158 The court simply stated that the statement waived immunity completely and unambiguously, if somewhat "awkwardly."159 The court mentioned that the waiver was complete and unambiguous; however, the court never mentioned whether the waiver was unmistakable or clear, as they did with the May 1995 statements.160 By acknowledging both that Teran "could have chosen his words more carefully," and that the statement waived immunity "awkwardly," the court did not demonstrate how the statements could constitute a total waiver in line with the standard enunciated in Aguinda.161 An awkward statement is not clear, complete, unambiguous and unmistakable.

Within the element of manifested intent, the principle that the foreign sovereign is presumed immune must be addressed.162 When a statement of waiver is expressly limited, as in this case, the court should strictly adhere to this presumption.163 With a borderline case, the court should note the presumption and accordingly raise the bar on its discretionary power because this will alleviate the chance that an incomplete or unclear waiver will subject a foreign sovereign to the court's jurisdiction against its will.164 The Aquamar court acknowledged that the waiver in this case was awkward; thus, the presumption that the foreign sovereign is immune should have counseled that such a borderline waiver was not explicit.165 By ignoring this element as it related to Teran's statement, the Aquamar

157. Id.
158. See id. at 1293 (stating that Teran's waiver was complete and unambiguous, but offering no analysis as done with lawyers' May 1995 statements).
159. Id.
160. See id. (stating that Teran's June 1995 waiver was complete and unambiguous, but never mentioning whether it was also unmistakable or clear). The court never mentioned the entire standard when discussing the June 1995 waiver; however, in the May 1995 waiver, the entire standard was spelled out. See id. at 1291-94.
161. Id. at 1293.
162. For a discussion of the principle that a foreign sovereign is presumed immune, see supra notes 25-30 and accompanying text.
163. See Aquamar, 179 F.3d at 1283 (quoting waiver as being limited).
164. See Dellapenna, supra note 2, at 142. The author notes that, especially when dealing with a forum non conveniens motion, courts must be careful not to interfere with executive branch functions involving foreign states. See id.; see also Regan v. Wald, 468 U.S. 222, 242 (1984) (discussing power distribution among branches of government). The Regan court stated that "the conduct of foreign relations... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Id. (quoting Harisides v. Shaughnessy, 342 U.S. 580, 589 (1952)).
165. See Aquamar, 179 F.3d at 1293 (noting that Teran's waiver of immunity was constructed "awkwardly").
3. The Actual Intent of the Sovereign: Lowering the Bar on Court Discretion

It may seem odd to address the actual intent of the sovereign as well as the manifested intent, but such a distinction is beneficial for a thorough analysis of explicit waivers. The court in Aquamar did not effectively address the foreign sovereign’s actual intent. There is evidence that the court knew of Ecuador’s actual intent, but chose to ignore it. The court stated that “Teran could have chosen his words more carefully . . .” This implies that the court knew Teran was attempting to induce a limited waiver. Further, the fact that the court mentioned the strategic nature of the waiver also demonstrates that it understood the actual intent of Ecuador was to limit expressly the waiver. By considering the actual intent of the sovereign, the court may have been hard pressed to find a waiver. Nonetheless, the issue of actual intent in waiver is by no means this uncomplicated. For a foreign sovereign attempting to initiate an explicit but limited waiver, the element of actual intent should act as a double-edged sword.

Within this element, a court must consider the principle that it has the discretion to determine when participation and conduct in litigation constitutes a waiver. A strong argument can be advanced that allowing a foreign sovereign to initiate a limited waiver would give the foreign sovereign...

166. For a discussion of the Drexel and Aguinda decisions as they relate to the requirement for a clear statement of waiver, see supra notes 74-86 and accompanying text.

167. For a discussion of cases that analyze the intentionality requirement, see supra notes 87-93 and accompanying text.

168. See Aquamar, 179 F.3d at 1293 (noting actual intent but never expressly discussing Ecuador’s intent).

169. See id. (demonstrating knowledge of Ecuador’s intent by stating that Ecuador’s waiver was initiated for strategic purposes).

170. Id.

171. See id. (discussing manner in which Teran chose to waive immunity).

172. See id. (stating that attempted waiver by Teran was done for tactical reasons).

173. See Aguinda v. Texaco, Inc., 175 F.R.D. 50, 51 (S.D.N.Y. 1997) (noting that Ecuador’s waiver was limited because Ecuador’s intent was to remain unamenable to suit), vacated on other grounds sub nom. Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). The court went on to find that such a limited waiver was not explicit. See id. at 52.

174. See generally Lu, supra note 18 (noting that courts have used different standards to determine waivers). The author also uses a series of hypotheticals to demonstrate how the waiver provision should operate. See id. at 87.

175. For a discussion of the principle that courts have the discretion to determine when participation and conduct in litigation constitutes a waiver, see supra notes 25-30 and accompanying text.
ereign undue protection. In effect, the foreign sovereign could hop in and out of litigation at its own behest. Here, the element of actual intent, if discernable, should come to the forefront. If the actual intent of the foreign sovereign is to abusively participate by entering litigation and then withdrawing, then this should lower the court’s discretionary bar in finding an explicit waiver.

In Aquamar, the court stated that Ecuador was attempting a strategic maneuver with its limited waiver. This alone cannot be dispositive; however, the court did cite Aguinda—another action in which Ambassador Teran had attempted to initiate a limited waiver. If the court felt that Ecuador was attempting to run the gamut in terms of conditioning its waiver, then the ruling by the court is more plausible. Nonetheless, the court never entered a discussion of actual intent, making it impossible to ascertain the court’s reasoning in light of this principle. By ignoring the actual intent of the sovereign, the court disagreed with the approach of the Second Circuit’s Cargill decision and the Western District of Texas’ Castro decision.

4. Withdrawal of Waiver

The fourth prong of this framework should address whether the explicit but limited waiver is sufficiently limited by its terms to allow a withdrawal of immunity. Based on the “notwithstanding” language of the

176. See, e.g., Aguinda, 175 F.R.D. at 51 (stating that “permitting such maneuvers to succeed would severely prejudice” other parties and would re-commence “expensive and time-consuming litigation”).

177. See id. (noting how such limitations would allow “re-opening” of litigation).

178. See Aquamar S.A. v. Del Monte Fresh Produce, Inc., 179 F.3d 1279, 1293 (11th Cir. 1999) (“The fact that the waiver may have been a tactical move does not alter our analysis.”).


180. See Aguinda, 175 F.R.D. at 51 (noting that one reason for not allowing limited waivers is that prejudice may occur towards one party).

181. See Aquamar, 179 F.3d at 1293 (discussing waiver, but not Ecuador’s actual intent).

182. For a discussion of the Cargill and Castro decisions, see supra notes 87-93 and accompanying text.


(a) A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

Id. (emphasis added).
waiver provision of the FSIA, a foreign sovereign can withdraw its waiver if the terms of the waiver itself allow for such a withdrawal.\textsuperscript{184}

When confronted with an explicit but limited waiver, the court could find, if the waiver expressly states by its terms that the waiver is limited, that such a construction allows the sovereign to withdraw its waiver.\textsuperscript{185} Such an outcome would allow a court to find no waiver and would be completely in line with the black letter law of the statute.\textsuperscript{186} The only condition required for this option to be available is that the waiver must be sufficiently limited by its own terms.\textsuperscript{187} Therefore, in instances where a court extrapolates that a waiver is limited, this prong of the framework would not be available.\textsuperscript{188} On the contrary, a waiver that states it is limited

\begin{itemize}
\item \textsuperscript{184} See id. The effect of the statement, “notwithstanding any withdrawal of the waiver which a foreign state may purport to effect except in accordance with the terms of the waiver,” means that a subsequent withdrawal by a foreign sovereign will not entitle the foreign sovereign to reinstate immunity unless the withdrawal has been provided for in the terms of the waiver itself. See \textit{Lu}, \textit{supra} note 18, at 67. Therefore, only if the withdrawal has been provided by the waiver itself can the foreign state effectively withdraw the waiver and regain immunity. See \textit{Simmons}, \textit{supra} note 18, at 2287 n.48 (1990) (“Any attempt to withdraw a waiver will be ineffective unless the withdrawal is made in accordance with the terms of the original waiver.”).
\item \textsuperscript{185} See \textit{Lu}, \textit{supra} note 18, at 67 (stating that foreign sovereign can withdraw previous waiver under proper circumstances).
\item \textsuperscript{186} See 28 U.S.C. § 1605(a)(1) (listing requirements for withdrawal of waiver). For a discussion of the black letter law of the statute, see \textit{supra} note 183 and accompanying text.
\item \textsuperscript{187} See \textit{Lu}, \textit{supra} note 18, at 67 (stating that waivers can be withdrawn if done so in accordance with terms enunciated in original waiver).
\item \textsuperscript{188} See \textit{Aguinda} v. Texaco, Inc., 175 F.R.D. 50, 51 (S.D.N.Y. 1997) (finding limited waiver based on conditions and limitations enunciated in waiver statement), \textit{vacated on other grounds sub nom.} \textit{Jota} v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). In \textit{Aguinda}, the waiver was found to be limited, but not because the waiver itself expressed such a position. See \textit{id}. Instead, the court stated, “Specifically, the Republic attaches limitations and conditions to its proposed waiver of sovereign immunity such that it would retain all the benefits of a proper party plaintiff while not being required to assume all the correlative burdens.” \textit{id}. The court found this waiver to be limited not because it stated so, but because of the attached conditions. See \textit{id}. In \textit{Didi}, the court found that the waiver at issue was limited because the foreign sovereign had reserved the right to assert the defense of sovereign immunity at a later point. See \textit{Didi} v. Destra Shipping Co., 1994 A.M.C. 852, 1993 U.S. Dist. LEXIS 16675, at *7-8 (E.D. La. Nov. 19, 1993). The waiver in \textit{Didi}, like the waiver in \textit{Aguinda}, did not expressly state that the waiver was limited. See \textit{Aguinda}, 175 F.R.D. at 52 (demonstrating that waiver was not limited by its terms); \textit{Didi}, 1993 U.S. Dist. LEXIS 16675, at *7 (same). Allowing a withdrawal of waiver in these instances would not be in accord with the “notwithstanding” language of the waiver provision. See \textit{Lu}, \textit{supra} note 18, at 67. For a possible withdrawal to take place, there must be express terms in the waiver itself. See 28 U.S.C. § 1605(a)(1). Thus, for these two cases, the withdrawal clause would not work. Compare \textit{Aguinda}, 175 F.R.D. at 52 (demonstrating that waiver was not limited by its terms), \textit{and Didi}, 1993 U.S. Dist. LEXIS 16675, at *7 (demonstrating that waiver was not limited by its terms), \textit{with} 28 U.S.C. § 1605(a)(1) (stating that waiver must be limited by its terms for withdrawal).
may, by its terms, allow either the foreign sovereign to withdraw or the court to find that a withdrawal has occurred.\footnote{189}

In *Aquamar*, the terms of the waiver itself stated that the waiver of immunity was on a limited basis.\footnote{190} This allowed the court to find Ecuador's reluctance to participate in the suit on appeal as constituting a withdrawal of its previous waiver in accordance with the waiver's specifically limited terms.\footnote{191} The court briefly addressed the issue of withdrawal, but dismissed any reasoning associated with a potential waiver in a footnote.\footnote{192} The expressly limited nature of the waiver in *Aquamar* granted the court the option of finding that a withdrawal had occurred.\footnote{193}

C. Judicial Options and the *Aquamar* Decision

Courts confronted with explicit but limited waivers have three options when operating within the above framework.\footnote{194} First, courts may hold the waiver as limited and allow the foreign sovereign to submit to jurisdiction on a limited basis.\footnote{195} This option would be fully in line with the intent of

\footnote{189. See *Lu*, supra note 18, at 67 (noting that waivers can be withdrawn if original waiver provides terms for withdrawal).}

\footnote{190. See *Aquamar* S.A. v. Del Monte Fresh Produce, Inc., 179 F.3d 1279, 1283 (11th Cir. 1999) (repeating June 1995 waiver statement by Ambassador Teran). The waiver by the Ambassador expressly states, "I respectfully waive PNB's Sovereign Immunity on behalf of PNB and the Government of Ecuador on the following limited basis." *Id.* Because this waiver was limited, the withdrawal provisions of § 1605 arguably apply. See 28 U.S.C. § 1605(a)(1).}


\footnote{192. See *Aquamar*, 179 F.3d at 1287 n.18 (discussing withdrawal provision of FSIA). The court stated, "PNB now states that it intends to invoke sovereign immunity. If it did waive its sovereign immunity before the district court, however, that waiver remains effective: sovereign immunity, once waived, cannot be reasserted." *Id.* First, the court cited the "notwithstanding" language of the waiver provision as evidence that a waiver cannot be withdrawn. See *id.* This is error because the language of the provision clearly establishes that a waiver can be withdrawn if the terms of the waiver itself allow for a later withdrawal. See 28 U.S.C. § 1605(a)(1) (stating that foreign sovereign immunity remains waived "notwithstanding any withdrawal of the waiver that the foreign sovereign may purport to effect except in accordance with the terms of the waiver") (emphasis added). Second, the court cited a Restatement stating that withdrawals are not permitted. See *Restatement Third of Foreign Relations Law of the United States* § 456(3) (1986) ("Under the law of the United States, a waiver of immunity . . . may not be withdrawn, except by consent of all parties to whom (or for whose benefit or protection) the waiver was made.").}

\footnote{193. See *Aquamar*, 179 F.3d at 1283 (stating that waiver was only on "limited basis").}

\footnote{194. For a discussion of the framework established by explicit waiver case law, see *supra* notes 138-193 and accompanying text.}

the foreign sovereign. Second, courts may hold that the waiver is not explicit because it is limited.\textsuperscript{196} This option is a stalemate between the court and the sovereign and is consistent with the \textit{Didi} and \textit{Aguinda} decisions.\textsuperscript{197} Third, courts may hold that the attempted limited waiver constitutes a total waiver of sovereign immunity.\textsuperscript{198} This option would be counter to the sovereign’s intent, and it is the option chosen by the court in \textit{Aquamar}.\textsuperscript{199} Determining which of these options to take requires a balancing and evaluation of the four concepts and the related principles discussed above.\textsuperscript{200} In making such an important decision as whether to subject a foreign sovereign to the jurisdiction of a domestic court, a court should seriously consider the above concepts.\textsuperscript{201}

The court in \textit{Aquamar} did not observe these concepts to the necessary degree—they ignored portions of this framework to establish total waiver.\textsuperscript{202} The court also ignored substantial precedent.\textsuperscript{203} In light of the

\textsuperscript{196} See \textit{id.} (stating generally that such limited waivers cannot be explicit); \textit{Didi} v. \textit{Destra Shipping}, 1994 A.M.C. 852, 1993 U.S. Dist. LEXIS 16675, at *7 (E.D. La. Nov. 19, 1993) (stating generally that such limited waivers are not explicit).

\textsuperscript{197} For a discussion of the decisions in \textit{Aguinda} and \textit{Didi}, see \textit{supra} notes 33-51 and accompanying text.

\textsuperscript{198} See \textit{Aquamar}, 179 F.3d at 1293 (holding that limited waiver completely waived Ecuador’s immunity).

\textsuperscript{199} See \textit{id.} (holding that Ecuador’s limited waiver was explicit).

\textsuperscript{200} For a discussion of the required balancing and evaluation of the four concepts and principles for analyzing explicit waivers, see \textit{supra} notes 138-193 and accompanying text.

\textsuperscript{201} See \textit{Regan} v. \textit{Wald}, 468 U.S. 222, 242 (1984) (discussing power distribution among branches of government). The Supreme Court stated that “the conduct of foreign relations are . . . so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” \textit{Id.} (quoting \textit{Harisiades v. Shaughnessy}, 342 U.S. 580, 589 (1952)). The FSIA obviously negates this standard somewhat, as Congress intended to turn this power over to the judiciary. See \textit{DELLAPENNA}, \textit{supra} note 2, at 8 (discussing congressional intent); see also \textit{Baker v. Cart}, 369 U.S. 186, 211 (1962) (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”). Nonetheless, courts should realize that their actions may potentially have serious foreign policy ramifications, making the tasks of the political branches more difficult. See \textit{Regan}, 468 U.S. at 242 (demonstrating that foreign relations powers are primarily “entrusted” to political branches of government).

\textsuperscript{202} For a discussion of the \textit{Aquamar} court’s ruling in regard to the elements outlined by the case law, see \textit{supra} notes 144-182 and accompanying text.

\textsuperscript{203} See, e.g., \textit{Drexel Burnham Lambert Group v. Galadari}, 12 F.3d 317, 326 (2d Cir. 1993) (noting that waivers must be unambiguous and unmistakable); \textit{Cargill Int’l S.A. v. Dybenko}, 991 F.2d 1012, 1017 (2d Cir. 1993) (noting that waiver should not be found absent strong evidence of sovereign’s intent); \textit{Shapiro v. Republic of Bolivia}, 930 F.2d 1013, 1017 (2d Cir. 1991) (discussing requirement for narrowly construing waivers). All of these Second Circuit cases addressed at least one of the specific elements necessary for an explicit waiver analysis. See \textit{Drexel}, 12 F.3d at 326 (requiring that waivers be unambiguous and unmistakable); \textit{Cargill}, 991 F.2d at 1017 (requiring strong evidence of intent to waive); \textit{Shapiro}, 930 F.2d at 1017 (requiring waivers be construed narrowly). Although the \textit{Aquamar} court cited \textit{Shapiro}, it did so only to buttress its conclusion that Ecuador had not waived its immunity implicitly. See \textit{Aquamar}, 179 F.3d at 1291 n.24.
Aguinda and Didi decisions, the court's decision was improper. Further, the Cargill, Shapiro and Drexel decisions indicate that the ruling would have been different in the Second Circuit.

V. Impact for Future Foreign Submissions to Domestic Litigation

The body of case law regarding the FSIA is vast, complex and daunting. Nonetheless, the body of FSIA waiver cases demonstrates that there is a conceptual framework to operate from when attempting to discern an explicit waiver. After Aquamar, foreign sovereigns who wish to submit to litigation in a limited fashion must make sure that the language they use to waive explicitly their immunity contains language that purports with equal force to limit simultaneously the waiver and reserve the defense of sovereign immunity. If not, they may find themselves in an unwanted litigation stance.

The Aquamar decision also contains implications for two portions of the conceptual framework—actual intent and withdrawal of waiver. In terms of actual intent, the case demonstrates that the element may play a

---

204. For a discussion of the holdings in Aguinda and Didi, see supra notes 33-51 and accompanying text. The cases essentially held that a limited waiver cannot be explicit. See Aguinda v. Texaco, Inc., 175 F.R.D. 50, 51 (S.D.N.Y. 1997) (noting generally that such limited waivers are not explicit), vacated on other grounds sub nom. Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Didi, 1994 A.M.C. 852, 1993 U.S. Dist. LEXIS 16675, at *7 (noting generally that such limited waivers are not explicit). Counter to this idea, the court in Aquamar held that a limited waiver instead constituted a total waiver of sovereign immunity, granting the court subject matter jurisdiction over the issue. See Aquamar, 179 F.3d at 1293.

205. For a discussion of the Cargill decision, see supra notes 87-93 and accompanying text. For a discussion of the Shapiro decision, see supra notes 57-73 and accompanying text. For a discussion of the Drexel decision, see supra notes 74-86 and accompanying text.


The availability of sovereign immunity as a defense requires consideration of a laundry list of purposefullyambiguous "exceptions," several of which were apparently drafted without any regard for the jurisdictional consequences that would flow, or would purport to flow, from their applicability, and all of which present interpretive problems of varying degrees of difficulty.

Id.

207. For a discussion of the conceptual framework outlined by the case law, see supra notes 138-205 and accompanying text.

208. See Aquamar, 179 F.3d at 1293 (demonstrating willingness to parse waiver statements).

209. See generally id. (ignoring element of actual intent in finding waiver and not allowing withdrawal of waiver when such waiver was limited by its terms).
less prevalent role in future waiver cases.\textsuperscript{210} For the withdrawal of waiver clause, the case has ramifications in terms of how syntactically secure a waiver statement must be.\textsuperscript{211} If a waiver statement is not constructed correctly, courts now have a justification to find total waiver, and thus pursue the third option (as was done in \textit{Aquamar}).\textsuperscript{212} If such a trend continues, the explicit and implicit waiver provisions will begin to blur into a single category, attempted limited submissions by foreign sovereigns will become dangerous even if for good reason and the waiver provision will become somewhat dubious in terms of its jurisdictional implications.

The conceptual framework—established by FSIA precedent should guide a court’s discretionary power. If a court applies all the elements thoroughly instead of in a piecemeal fashion, the resulting decision will be well analyzed and justifiable. In a hypothetical case on this issue, the perfect rule of law would be, “Limitations for specific submissions to litigation by foreign sovereigns should be allowed if for good reason, disallowed when unclear and never allowed when offering an abusive foreign sovereign undue protection.” Guiding the court’s already sound discretion with enunciated concepts could prove to be a difficult task, but one worth the endeavor considering the complexity of the FSIA.\textsuperscript{213} As Aristotle aptly stated, “It is best, we may observe, where the laws are enacted upon right principles, that everything should, as far as possible, be determined absolutely by the laws, and as little as possible left to the discretion of the judges.”\textsuperscript{214}

\textit{Barry L. McCoy}

\textsuperscript{210} For a discussion of the actual intent requirement, see \textit{supra} notes 87-93 and accompanying text.

\textsuperscript{211} For a discussion of the withdrawal of waiver provision, see \textit{supra} notes 183-193 and accompanying text.

\textsuperscript{212} \textit{See Aquamar}, 179 F.3d at 1293 (holding that waiver limited by its terms constitutes explicit waiver). For a discussion of judicial options when a court is faced with an explicit but limited waiver, see \textit{supra} notes 194-205 and accompanying text.


\textsuperscript{214} A \textsc{Dictionary Of Legal Quotations} 63 (1987) (quoting \textsc{Aristotle}, \textsc{The Rhetoric} Book I, ch. I).