# Foreign State Waives Immunity from Suit under the FSIA for Failing to Raise It as a Defense in its Initial Answer

Earlier this month, the U.S. Court of Appeals for the Fourth Circuit joined two other circuits in holding that a foreign state implicitly and irrevocably waives its immunity from suit under the Foreign Sovereign Immunities Act (FSIA) by failing to raise it as an affirmative defense in its initial responsive pleading.[1]

The FSIA grants foreign states and their agencies and instrumentalities blanket immunity from the jurisdiction of U.S. courts except in a few enumerated cases, such as when "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."[2] That provision is known as the waiver exception to sovereign immunity.

The issue arose out of a foreign military sales transaction involving a preliminary agreement between South Korea and its Defense Acquisition Program Administration, on one side, and a U.S. defense contractor, BAE, on the other. Following certain negotiations, South Korea contended that BAE breached the preliminary agreement. BAE then sued South Korea in federal court, seeking a declaration that BAE had not breached any obligation. South Korea moved to dismiss the action on several grounds but did not raise its sovereign immunity. After the court denied the motion, South Korea filed an answer and counter-claims but again omitted any assertion of immunity.[3]

More than a year later, South Korea filed an amended answer in which it denied that it had engaged in any commercial activities within the scope of the FSIA but did not invoke its sovereign immunity as an affirmative defense. It also sued BAE in a South Korean court. The defense contractor asked the U.S. district court for an injunction to stop the South Korean proceedings. In opposing the request, South Korea raised its

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[1] *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, No. 17-1041, 2018 WL 1161795, at *7 (4th Cir. Mar. 6, 2018) (citing *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000) ("If a sovereign files a responsive pleading without raising the defense of sovereign immunity, then the immunity defense is waived."); *Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 326 (2d Cir. 1993) ("[T]he filing of a responsive pleading is the last chance to assert FSIA immunity if the defense has not been previously asserted."); *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (describing a responsive pleading as "the point of no return for asserting foreign sovereign immunity")). *But see Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442-44 (D.C. Cir. 1990) (rejecting claims of implicit waiver when Iran failed to assert immunity in its initial answer but then asserted immunity in a subsequent answer.).

[2] 28 U.S.C. § 1605(a)(1).

[3] *BAE*, 2018 WL 1161795, at *2-*3, *6.

immunity for the first time and argued that the court lacked jurisdiction under the FSIA to issue the anti-suit injunction. The court disagreed and found that South Korea had implicitly waived its immunity by failing to raise it as an affirmative defense in its initial answer.[4] The court ultimately denied an anti-suit injunction, but entered a declaratory judgment in BAE's favor. South Korea appealed on various grounds, including sovereign immunity.[5]

The Fourth Circuit affirmed the district court's immunity determination. It observed that waivers by implication are rare and should be construed narrowly. But it found examples of "unmistakable" implicit waivers in the FSIA's legislative history, including instances when "a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity."[6] Because South Korea had moved to dismiss the action and then filed an answer and counter-claims without asserting its immunity from suit, it implicitly waived that immunity. South Korea argued that only the latest amended answer should count for purposes of asserting FSIA immunity. The court of appeals rejected the argument. It first found that simply denying any commercial activities under the FSIA, as South Korea had done in the amended answer, did not amount to an affirmative defense. But even if it did, the amended answer did not change the analysis because "a court cannot ignore the original answer for FSIA waiver purposes."[7] Allowing a foreign state to revive its immunity by filing an amended answer would be at odds "with the statutory text, which states that a foreign state cannot withdraw an implied waiver once it is made."[8] Thus, South Korea had accepted the U.S. court's jurisdiction by failing to assert its immunity from suit in its initial answer.

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[4] *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, No. 14-3551, 2016 WL 6167914, at *1, *4 (D. Md. Oct. 24, 2016).

[5] *BAE*, 2018 WL 1161795, at *1.

[6] *Id.* at *6 (citing H.R. Rep. No. 94-1487, at 18 (1976)).

[7] *Id.* at *7.

[8] *Id.*

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