

Brokering a Difficult Marriage: Substantive
Defenses under Rule 60(b)(4) Relief from
Default Judgments in Foreign Sovereign
Immunities Act Proceedings

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Abstract

This Note argues that U.S. courts should allow foreign states to raise substantive defenses when using Rule 60(b)(4) to challenge the courts' jurisdiction to enter a default judgment. Part I of this Note analyzes the FSIA and relief from judgment under Rule 60(b). Part II analyzes the conflicting views on whether to consider substantive defenses in determining subject matter jurisdiction. Part III argues that in the context of FSIA actions the use of substantive defenses under Rule 60(b)(4) is not only workable, but more desirable than the use of Rule 60(b)(6) judicial discretion. This Note concludes that the consideration of substantive defenses under Rule 60(b)(4) is necessary to fulfill the congressional intent behind the FSIA.

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INTRODUCTION

The Foreign Sovereign Immunities Act (the "FSIA" or the "Act")¹ provides foreign states² with broad immunity from suit brought in the United States.³ The FSIA encompasses both procedural and substantive provisions.⁴ While the FSIA is primarily a procedural act that grants U.S. courts subject matter jurisdiction over foreign states under limited circumstances, it also contains provisions that require analysis of substantive legal principles.⁵ Because the procedural and substantive provisions of the FSIA are intertwined, at times U.S. courts may be required to consider the merits of the underlying action to determine whether to exercise jurisdiction.⁶

Foreign states frequently challenge the exercise of subject matter jurisdiction by a U.S. court by failing to appear.⁷ When this occurs, the court enters a default judgment against the for-

1. 28 U.S.C. §§ 1602-1611 (1988).

2. The Foreign Sovereign Immunities Act (the "FSIA") defines a foreign state as including a political subdivision of a foreign state or an agency or instrumentality of a foreign state. *Id.* § 1603(a).

3. *Id.* § 1605; *see infra* note 20 (containing text of section 1605). A foreign state is not immune from jurisdiction, however, if its action is a "commercial activity" carried on in the United States or if the activity violates international law. *See* 28 U.S.C. § 1605(a)(2) (1988).

4. *See infra* notes 14-32 and accompanying text (discussing history and framework of FSIA).

5. 28 U.S.C. § 1605 (1988).

6. *See, e.g.*, *Bowers v. Transportes Navieros Ecuatorianos*, 719 F. Supp. 166 (S.D.N.Y. 1989) (determining whether steamship carrier may be considered agent or instrumentality of foreign state); *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987) (vacating lower court's holding that Argentina's 100 percent ownership of national airline's stock was sufficient to overcome presumption of separate juridical existence); *see infra* note 13 (discussing recurring issues involving laws of agency, alter ego, and juridical identity).

7. *See, e.g.*, *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323, 328-29 (S.D.N.Y. 1987) (Soviet Union deliberately failed to appear in court after having received notice and service), *aff'd*, 841 F.2d 26 (2d Cir. 1988), *cert. denied*, 487 U.S. 1219 (1988); *Gregorian v. Izvestia*, 658 F. Supp. 1224 (C.D. Cal. 1987) (Soviet Union's foreign ministry rejected service while stating its intent not to appear in court), *aff'd in part, rev'd in part*, 871 F.2d 1515 (9th Cir. 1988); *Meadows v. Domini-*

eign state.⁸ A problem arises, however, when a foreign state challenges the validity of the default judgment under Federal Rule of Civil Procedure 60(b)(4).⁹ Under this rule, a court may neither exercise discretion nor consider substantive defenses when determining the validity of a default judgment.¹⁰ Accordingly, some federal courts have denied the use of substantive defenses under Rule 60(b)(4) to foreign states in challenging courts' jurisdiction to enter a default judgment.¹¹ Instead they look to Rule 60(b)(6),¹² which permits the use of equitable discretion, in cases involving foreign states. Other federal courts, however, permit the use of substantive defenses to challenge a default judgment based upon the courts' lack of subject matter jurisdiction.¹³

can Republic, 628 F. Supp. 599, 602 (N.D. Cal. 1986) (Dominican Republic failed to answer or appear), *aff'd*, 817 F.2d 517 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987).

8. See *Carl Marks*, 665 F. Supp. at 330 (ordering default judgment because of deliberate default by defendant).

9. FED. R. CIV. P. 60(b)(4), 28 U.S.C. app. (1988). Rule 60(b)(4) provides:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void.

Id.

10. See *infra* note 38 (discussing cases supporting judicial parameters of Rule 60(b)(4)).

11. See, e.g., *Meadows v. Dominican Republic*, 817 F.2d 517, 524 (9th Cir.) (stating that foreign state may not rely on existence of meritorious defense as basis for voiding judgment), *cert. denied*, 484 U.S. 976 (1987); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 (D.C. Cir. 1987) (though court concluded that contract fell within "commercial activity" exception and therefore it could have analyzed case under Rule 60(b)(4), it instead relieved Bolivia from default judgment based on Rule 60(b)(6)); *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1236 (C.D. Cal. 1987) (stating that issues of agency, alter ego, and juridical separateness are not open for consideration after judgment has been entered), *aff'd in part, rev'd in part*, 871 F.2d 1515 (9th Cir. 1988); see *infra* notes 78-106 and accompanying text (discussing *Bancec* approach).

12. FED. R. CIV. P. 60(b)(6), 28 U.S.C. app. (1988). Rule 60(b)(6) provides that [o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

Id.

13. See, e.g., *First Fidelity Bank v. Government of Antigua & Barbuda*, 877 F.2d 189, 196 (2d Cir. 1989) (noting impossibility of making decision concerning subject matter jurisdiction without considering substantive law of apparent authority); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir. 1989) (holding that Nigerian corporation was not agent or alter ego of Nigeria and hence court did not have subject matter jurisdiction over Nigeria); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323 (S.D.N.Y. 1987) (stating that

This Note argues that U.S. courts should allow foreign states to raise substantive defenses when using Rule 60(b)(4) to challenge the courts' jurisdiction to enter a default judgment. Part I of this Note analyzes the FSIA and relief from judgment under Rule 60(b). Part II analyzes the conflicting views on whether to consider substantive defenses in determining subject matter jurisdiction. Part III argues that in the context of FSIA actions the use of substantive defenses under Rule 60(b)(4) is not only workable, but more desirable than the use of Rule 60(b)(6) judicial discretion. This Note concludes that the consideration of substantive defenses under Rule 60(b)(4) is necessary to fulfill the congressional intent behind the FSIA.

I. *RELIEF FROM A JUDGMENT IN THE CONTEXT OF THE FOREIGN SOVEREIGN IMMUNITIES ACT*

A. *The Foreign Sovereign Immunities Act*

1. History of the Act

In the United States the doctrine of sovereign immunity has undergone a gradual evolution from absolute immunity to a more restricted form of immunity.¹⁴ Prior to the passage of the FSIA, the practice of U.S. courts was to rely on the policies

even though court must consider merits before determining jurisdiction, dismissal is for want of jurisdiction, not on merits); see *infra* notes 107-23 and accompanying text (discussing *Verlinden* approach).

14. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976); Note, *Prejudgment Attachment of Foreign Sovereign Assets under the Proposed Amendments to the Foreign Sovereign Immunities Act*, 9 *FORDHAM INT'L L.J.* 295, 302 (1986). For broad discussions of foreign sovereign immunity, see C. SCHREUER, *STATE IMMUNITY: SOME RECENT DEVELOPMENTS* (1988); J. SWEENEY, *THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY* (1963).

The current U.S. view of sovereign immunity, embodied in the FSIA, reflects the view of the "Tate Letter" issued by the U.S. Department of State. See *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Government*, Letter from Jack B. Tate, Acting Legal Advisor of the U.S. Department of State, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952) [hereinafter *Tate Letter*], reprinted in *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 54-55 (1976) [hereinafter *Hearings*]. The Tate Letter was written with a view to conform the U.S. practice of sovereign immunity with the international legal principle of "restrictive theory" which restricts foreign states' immunity to cases based on public acts and not private or commercial acts. *Id.*; see *Hearings, supra*, at 26 (statement of Monroe Leigh, Legal Advisor to U.S. Department of State).

and official opinions of the U.S. Department of State in determining their jurisdiction over foreign states.¹⁵ The FSIA was intended to eliminate this practice by giving the judicial branch the power to determine sovereign immunity, thereby assuring that such determinations were made on purely legal grounds.¹⁶ Hence, the broad purposes of the FSIA are to “facilitate and depoliticize litigation against foreign states in order to minimize tension in foreign relations arising out of such litigation.”¹⁷ The Act sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity.¹⁸

2. The Framework of the FSIA

The FSIA begins with a presumption of general immunity from lawsuits in U.S. courts for foreign states and their agents or instrumentalities.¹⁹ This presumption may be overcome only if claimants allege acts by foreign states that fall under one of the enumerated exceptions in the Act.²⁰ Thus, if one of the specified exceptions to sovereign immunity applies, a court

15. Prior to the FSIA, a foreign state defendant could have either litigated a sovereign immunity defense entirely in court or it could have made a formal diplomatic request to have the State Department decide the issue. *Hearings, supra* note 14, at 26. If it chose the latter, the U.S. Department of Justice, in consultation with the State Department, would then file with the court a “suggestion of immunity” to which all U.S. courts deferred. *Id.*

16. See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6605-06. The transfer of power from the executive branch to the judicial branch also reduces any foreign policy implication of sovereign immunity. *Id.*

17. Letter of Transmittal from the Department of State and the Department of Justice to the Speaker of the House of Representatives (Oct. 31, 1975), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6634 [hereinafter State Department Letter].

18. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433-35 (1989) (stating that text and structure of FSIA reflect Congress’ intention that FSIA be sole basis of U.S. courts’ jurisdiction); see also *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323, 333 (S.D.N.Y. 1987) (“Act is the sole basis for federal court subject matter and personal jurisdiction over a foreign sovereign”).

19. 28 U.S.C. § 1604 (1988). Section 1604 reads:

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.

20. *Id.* § 1605. Section 1605 provides:

has subject matter jurisdiction over a foreign state.²¹

(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;

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

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Id.

21. *Id.* § 1330(a). Section 1330(a) states:

The district courts shall have original jurisdiction without regard to amount in controversy of any non jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Id.

In addition, under the FSIA a court has personal jurisdiction over a foreign state where subject matter jurisdiction exists and service of process has been made. *Id.* § 1330(b). Section 1330(b) reads:

Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

Id. Section 1330(b) provides, in effect, a federal long-arm statute over foreign states. See generally George, *A Practical and Theoretical Analysis of Service of Process under the For-*

One of the main purposes of the FSIA is to codify a “commercial activity” exception to sovereign acts.²² Many disputes that have been decided under the Act involve the so-called “direct effect” clause of the commercial activity exception.²³ This clause provides that an act of a foreign state made in connection with a commercial activity occurring outside of the United States which causes a direct effect in the United States confers subject matter jurisdiction on U.S. courts.²⁴

Sovereign immunity is an affirmative defense²⁵ that must be specially pleaded, and the foreign state retains the burden of proof to produce evidence in support of its claim of immunity.²⁶ The foreign state must show that the exceptions to sovereign immunity are not applicable and the court therefore lacks jurisdiction.²⁷ The burden on the foreign state is height-

ign Sovereign Immunities Act, 19 INT’L LAW. 49 (1985) (containing broad discussion of service of process under FSIA).

22. See H.R. REP. No. 1487, 94th Cong., 2d Sess. 7 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6605.

23. See, e.g., *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980); *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979).

24. 28 U.S.C. § 1605(a)(2) (1988). For the various approaches which courts have used in determining the jurisdictional scope of the commercial activity exception, see *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 200-01 (5th Cir. 1984). For a broad discussion of courts’ approaches, see Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L. REV. 474 (1980) [hereinafter Note, *Effects Jurisdiction*].

25. Federal Rule of Civil Procedure 8(c) lists some of the grounds for affirmative defense, e.g., accord and satisfaction, assumption of risk, contributory negligence, duress, and failure of consideration. FED. R. CIV. P. 8(c), 28 U.S.C. app. (1988). An affirmative defense is one which serves as a basis for proving some new facts. In such a defense, the defendant does not simply deny a charge, but offers new evidence to avoid judgment against him. The defendant must raise the defense in his answer and he has the burden of proof on defense. See BLACK’S LAW DICTIONARY 60 (6th ed. 1990).

26. See H.R. REP. No. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6616.

27. See *id.* The foreign state must produce evidence to establish that it, or one of its instrumentalities, is the defendant in the suit. *Id.* Further, it must show that the plaintiff’s claim relates to a public act. *Id.* A public act is one that is not within the exceptions of sections 1605-1607. *Id.* If the foreign state makes a prima facie showing of immunity, the burden shifts to the plaintiff to establish that the foreign state is not immune. *Id.* The foreign state bears the ultimate burden of proving that it is immune from suit. *Id.*

ened by the fact that there is no specific provision in the Act that permits a court to dismiss even the most frivolous complaints *sua sponte*.²⁸

Several courts have commented on the unusual framework of the FSIA.²⁹ One of the most distinctive features of the FSIA

28. The foreign state is thus limited to two options: either appear in court and assert a sovereign immunity defense or risk a default judgment. See 28 U.S.C. § 1608(e) (1988) (allowing court to enter default judgment if claimant establishes his claim or right to relief by evidence satisfactory to court); Note, *The Right of Foreign Sovereigns to Contest Federal Court Jurisdiction Pro Se*, 11 *FORDHAM INT'L L.J.* 549, 553 (1988). With respect to the default judgment, the U.S. Supreme Court has held that even if a foreign state does not enter an appearance, a court must still determine that immunity is unavailable under the Act. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983).

29. See, e.g., *Texas Trading & Milling, Inc. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981). The court stated:

In structure, the FSIA is a marvel of compression. Within the bounds of a few tersely-worded sections, it purports to provide answers to three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant. Through a series of intricately coordinated provisions, the FSIA seems at first glance to make the answer to one of the questions, subject matter jurisdiction, dispositive of all three.

Id. at 306 (citation omitted).

In *Texas Trading*, Nigeria repudiated its contracts with cement suppliers by invoking sovereign immunity. *Id.* at 303-06. The court first analyzed the meaning of "commercial activity" by using sources from the legislative history, case law prior to the passage of the Act, and current international law concerning sovereign immunity. See *id.* at 307-08. The court turned to the analysis of subject matter and personal jurisdictions after having determined that Nigeria's activity constituted commercial activity. See *id.* at 308. The court then reversed the lower court's dismissal for lack of jurisdiction based on section 1605(a)(2). *Id.* at 313.

One court has criticized harshly the structure of the FSIA as being poorly conceived and drafted. See *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982). The U.S. District Court for the Southern District of New York stated that the FSIA is a

statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary.

Id. In *Gibbons*, the Republic of Ireland was sued for breach of contract, fraud, and tortious interference with contractual relations. *Id.* at 1104. The court found subject matter and personal jurisdiction over Ireland. *Id.* at 1125; see *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) ("The FSIA presents a peculiarly twisted exercise in statutory draftsmanship."); *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985) ("The problem, as the drafters of the FSIA themselves admitted, is that the statute is vaguely worded and offers little guidance to courts construing its terms."). In *Vencedora*, the court held that the commercial activity ex-

is the coalescence of jurisdictional and substantive issues.³⁰ In order to reach a decision on subject matter jurisdiction, a court may need to interpret the immunity law issues as well as the substantive law of agency, juridical identity, or alter ego.³¹ Moreover, certain definitions under the FSIA are so laden with substantive principles that the court may be required to examine the underlying substantive meanings.³²

B. Relief From Judgment Under Rule 60(b)

Rule 60(b)³³ represents the balancing of two counter-

ception did not apply due to a lack of connection between the activity and the United States. *Vencedora*, 730 F.2d at 200-02. The court proceeded by surveying approaches utilized by various courts. *Id.* See generally *Hearings, supra* note 14.

30. See 28 U.S.C. §§ 1330(a)-(b) & 1603(b) (1988); see also *Upton v. Empire of Iran*, 459 F. Supp. 264, 265 (D.D.C. 1978) (stating that FSIA "creates an identity of substance and procedure"), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979); *Hearings, supra* note 14, at 86 (comment by Cecil Olmstead that limitations on sovereign immunity constitute substantive matter); *infra* notes 107-23 and accompanying text (discussing *Verlinden* approach).

31. See, e.g., *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790-91 n.4 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Statement of Interest to Set Aside Default Judgment Against China Filed in the Jackson v. People's Republic of China Case in the U.S. District Court for the Northern District of Alabama*, 22 I.L.M. 1077 (1983) [hereinafter *Statement of United States*]; see *infra* notes 56-123 (discussing U.S. courts' approaches).

32. See, e.g., *Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y. 1988) (determining that FSIA, and definitions thereunder, "apply to individual defendants when they are sued in their official capacity"); *Republic of Phillipines v. Marcos*, 665 F. Supp. 793, 797 (N.D. Cal. 1987) (holding that terms "agency," "instrumentality," "entity," or "organ" were not intended to apply to natural persons).

33. FED. R. CIV. P. 60(b), 28 U.S.C. app. (1988). Rule 60(b) reads:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Id.

The present Rule 60(b) has undergone several changes. The original Rule 60(b) stated only one ground for relief from judgment. In 1945, two new grounds were

vailing policies: the desire to achieve finality in litigation and the desire to achieve justice through full consideration of the merits.³⁴ Rule 60(b) grants courts broad power to set aside a judgment and to deny or grant relief in light of the particular circumstances of the case.³⁵ The courts, moreover, tend to apply the rule even more liberally than usual when a default judgment is involved.³⁶

1. Rule 60(b)(4): Challenging the Validity of the Judgment

Rule 60(b)(4) authorizes courts to grant relief from void judgments.³⁷ A motion under Rule 60(b)(4) differs markedly from motions under other clauses of Rule 60(b): courts may not exercise discretion to deny a motion under Rule 60(b)(4) when voidness is established, and the moving party need not

added (reasons (2) and (3)). Finally, in 1946 the last three grounds were added. *See generally* 7 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* §§ 60.18, 60.25, 60.27 (2d ed. 1987); Note, *Federal Rule 60(b): Relief From Civil Judgments*, 61 *YALE L.J.* 76 (1952); Commentary, *Effect of Rule 60(b) on the Other Methods of Relief From Judgment*, 4 *Fed. R. Serv.* (Callaghan) 942 (1941).

34. *See, e.g.*, *Spann v. Commissioners of D.C.*, 443 F.2d 715, 716 n.1 (D.C. Cir. 1970) ("Although relief under Rule 60(b) is discretionary . . . we think that the liberal spirit of the rule, together with the basic policy favoring resolution of litigation on the merits requires us to review closely the exercise of that discretion . . . where denial of the motion has precluded consideration of the merits . . ."); *Russell v. Cunningham*, 279 F.2d 797, 804 (9th Cir. 1960) ("policy of the law is to favor a hearing of a litigant's claim on the merits"); *see also* 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2857, at 159-60, §§ 2862-64, at 197-221 (1973).

35. *FED. R. CIV. P.* 60(b), 28 U.S.C. app. (1988); *see Klapprott v. United States*, 335 U.S. 601, 609 (1949) (stating that "in some respects, the amended rule grants courts a broader power to set aside judgments than did the old rule").

36. *See Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974). In that case, the court noted that discretion to vacate a default judgment is limited by three important policy considerations: first, Rule 60(b) is remedial in nature and must be liberally applied; second, default judgments are generally disfavored and whenever it is reasonably possible, cases should be decided on their merits; and third, where a defendant seeks timely relief from the judgment and has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment. *Id.*; *Gregorian v. Izvestia*, 871 F.2d 1515, 1523 (9th Cir. 1989); *RESTATEMENT (SECOND) OF JUDGMENTS* tit. A & § 65 (1986); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 459 comment c (1986); E. SMITH, *CYCLOPEDIA OF FEDERAL PROCEDURE* ch. 30 (3d ed. 1988).

37. *FED. R. CIV. P.* 60 (b)(4), 28 U.S.C. app. (1988). For the text of Rule 60(b)(4), *see supra* note 9. A void judgment differs from a valid judgment in that a void judgment is not legally binding. *See Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) ("action of the . . . [c]ourt was . . . beyond its power, [is] void, and subject to collateral attack"); *Jordon v. Gilligan*, 500 F.2d 701, 704 (6th Cir. 1974) ("void judgment is a legal nullity"); *see also* J. MOORE & J. LUCAS, *supra* note 33, at 223.

show a meritorious defense.³⁸ The courts have narrowly construed the concept of void judgment.³⁹ Typically, a judgment is void if the court that rendered it lacked personal or subject matter jurisdiction, or violated a party's due process rights.⁴⁰ A defendant who believes the court lacks either subject matter jurisdiction or personal jurisdiction may refrain from appearing in court.⁴¹ If the court enters a default judgment, a foreign defendant may make a 60(b)(4) motion; if the motion is denied, the foreign state would ordinarily be deemed to forfeit its right to defend on the merits.⁴² Accordingly, a default judg-

38. See *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1229 (C.D. Cal. 1987) (stating that subsection (4) of Rule 60(b) does not give court discretion since validity of decision hinges on legal determination); see also *Hicklin v. Edwards*, 226 F.2d 410, 414 (8th Cir. 1955) ("if [plaintiff] can sustain the claim she has presented by strong and convincing evidence that the default judgment against her is void on the ground asserted, section 60(b) requires the court to accord her relief from it"); *Schwarz v. Thomas*, 222 F.2d 305, 309 (D.C. Cir. 1955) (quoting *Wise v. Herzog*, 114 F.2d 486, 492 (D.C. Cir. 1940)) ("No showing of merits is necessary in support of a motion to vacate a void judgment."); J. MOORE & J. LUCAS, *supra* note 33, at 224-25; C. WRIGHT & A. MILLER, *supra* note 34, at 197-98.

39. See J. MOORE & J. LUCAS, *supra* note 33, at 225. But see *Hicklin*, 226 F.2d at 413 (noting that "mandate the rule imposes on the court to relieve a party from a judgment 'for the reason the judgment is void' is broad and unqualified and contains no restrictions in respect to any of the reasons that may be shown to render the judgment void").

40. See, e.g., *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938). The Supreme Court stated that

a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.

Id. (footnotes omitted); *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980) ("Absence of subject matter jurisdiction may, in certain cases, render a judgment void."); *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949) (stating that judgment is void for violation of due process where defendant did not know case had been called for trial). A judgment is not void, however, merely because it is an erroneous exercise of jurisdiction. A total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. See *Stoll*, 305 U.S. at 171-72; *Lubben v. Selective Serv. Sys.*, 453 F.2d 645, 649 (1st Cir. 1972).

41. This exposes the defendant to the risk of a default judgment. See *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987). However, when enforcement of the default judgment is attempted, the defendant may assert his jurisdictional objection. *Id.*; see *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.").

42. See *Practical Concepts*, 811 F.2d at 1547. The court's determination that it has jurisdiction over the subject matter is *res judicata* if the jurisdictional question was

ment, which by definition is a judgment rendered without any appearance in court by the defendant,⁴³ presents an unusual problem for the court in deciding a jurisdictional issue in the context of a Rule 60(b)(4) motion.⁴⁴ In the final analysis, foreign states in FSIA actions may attempt to void a default judgment for a court's lack of subject matter jurisdiction even when they fail to appear.

2. Rule 60(b)(6): The Grand Reservoir of Equitable Power

Rule 60(b)(6) grants courts discretion to relieve a party from a final judgment, order or proceeding for "[a]ny other reason justifying relief from the operation of the judgment."⁴⁵ Because the motion is addressed solely to the discretion of the court, the rule has been called the "grand reservoir of equitable power."⁴⁶ The rule thus broadens the grounds for relief from judgment by giving courts more flexibility and power to vacate judgments whenever necessary to accomplish justice.⁴⁷

The discretion of a court to grant relief under Rule 60(b)(6) is not, however, unlimited.⁴⁸ The motion for relief

actually litigated and decided or if the defendant had an opportunity to contest subject matter jurisdiction but failed to do so. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940) ("[parties] had full opportunity to present any objections to the proceeding . . . [but] [a]pparently no question of validity was raised"). See generally *Boskey & Braucher, Jurisdiction and Collateral Attack*, 40 *COLUM. L. REV.* 1006 (1940).

43. When a party against whom a judgment for affirmative relief is sought has failed to plead, answer, or otherwise defend, that party is in default and a judgment by default may be entered. See *BLACK'S LAW DICTIONARY* 417-18 (6th ed. 1990).

44. See *supra* note 36 (discussing vacating default judgments).

45. *FED. R. CIV. P.* 60(b)(6), 28 U.S.C. app. (1988).

46. *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963).

47. See *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). In this case, the U.S. Supreme Court held:

[Rule] 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

Id.; *Menier v. United States*, 405 F.2d 245, 248 (5th Cir. 1968) ("The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.").

48. See *William Skillings & Assocs. v. Cunard Transp., Ltd.*, 594 F.2d 1078, 1081 (5th Cir. 1979) (stating that Rule 60(b)(6) is unavailable when relief sought is within coverage of some other provision of Rule 60(b)); *De Filippis v. United States*, 567

must be based upon some grounds other than those grounds stated in the rest of Rule 60(b).⁴⁹ Furthermore, Rule 60(b)(6) applies only to extraordinary circumstances.⁵⁰ Courts have defined extraordinary circumstances on a case-by-case basis.⁵¹

In light of the nature of Rule 60(b)(6) as an extraordinary remedy, the courts must exercise due discretion in applying the rule.⁵² Because courts analyze the circumstances of each case individually, the courts are faced with the problem of developing standards to define extraordinary circumstances.⁵³ Moreover, the U.S. Supreme Court has provided no clear guidance as to when a party may avail itself of Rule 60(b)(6).⁵⁴ A

F.2d 341, 343 (7th Cir. 1977) (stating that government is precluded from simultaneously invoking subsections (b)(5) and (b)(6)); *see also* J. MOORE & J. LUCAS, *supra* note 33, at 266. In addition, even though there is no time limit for relief under Rule 60(b)(6), the motion must be made within a reasonable time. *Id.* at 268.

49. *See Carr v. District of Columbia*, 543 F.2d 917, 926 (D.C. Cir. 1976). Rule 60(b)(6) and the other clauses are mutually exclusive; Rule 60(b)(6) relief cannot be had if it would have been available under the other grounds. *See C. WRIGHT & A. MILLER, supra* note 34, at 217.

50. *See Klapprott*, 335 U.S. at 613-14; *see also Ackermann v. United States*, 340 U.S. 193, 202 (1950); *Federal Deposit Ins. Co. v. Alker*, 234 F.2d 113, 116-17 (3d Cir. 1956) ("It is clear that . . . an application for extraordinary relief must be fully substantiated by adequate proof and its exceptional character must be clearly established.").

51. *See, e.g., United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977) (stating that failure of defendant's counsel to oppose motion for summary judgment due to mental disorder was sufficient to warrant relief under Rule 60(b)(6)). *But see Ben Sager Chems. Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 810 (7th Cir. 1977) (stating that gross negligence of freely chosen counsel is negligence of client and therefore Rule 60(b)(6) is not applicable).

52. This is especially true since the district court's power is buttressed by the fact that appellate review is limited to the abuse of discretion standard. *See Seven Elves v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) (stating that review is limited to "whether the district court's refusal to tap that reservoir in the present case was so unwarranted as to justify reversal"). On appeal, factual findings of the district court under Rule 60(b)(6) are reviewed for abuse of discretion. *See Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 173 (5th Cir. 1989); *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987).

53. *See infra* notes 54-55 (discussing leading cases on extraordinary circumstances).

54. *See Klapprott v. United States*, 335 U.S. 601 (1949); *see also Ackermann v. United States*, 340 U.S. 193 (1950). One commentator has observed that "[a]s with so much of procedural law, any discussion of the limits of the authority of the district court to vacate a final judgment on motion made under Rule 60(b)(6) must proceed with relatively little guidance from authoritative decisions of the Supreme Court." J. MOORE & J. LUCAS, *supra* note 33, at 274.

In *Klapprott v. United States*, the situation involved a denaturalization proceeding depriving the petitioner of his citizenship which had taken more than four years prior

general consensus, however, is that Rule 60(b)(6) should be invoked only to prevent extreme hardship or injustice.⁵⁵ In the final analysis, the use of Rule 60(b)(6) has been somewhat inconsistent because of doubt about when and how it applies.

II. APPROACHES ADOPTED BY COURTS IN DETERMINING RELIEF FROM DEFAULT JUDGMENTS IN FSIA ACTIONS

The lower federal courts have been divided on whether substantive defenses should be considered in a Rule 60(b)(4) motion.⁵⁶ The disagreement results from the lower courts' readings of the Supreme Court's interpretations of substantive law issues under the FSIA.⁵⁷ In *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("Bancec"),⁵⁸ the Supreme Court ruled that the FSIA was primarily a jurisdictional instrument and therefore was not intended to affect the substantive law determining the liability of a foreign state or the attribution of liability among instrumentalities of a foreign state.⁵⁹

In *Bancec*, the assets of First National City Bank ("Citibank") were seized and nationalized during the Cuban Revolution.⁶⁰ Prior to the Revolution, Bancec had sought to

to the Rule 60(b)(6) motion. The Court, in rejecting the government's contention that the petitioner's act was nothing more than "excusable neglect," held that the fact that during the course of the denaturalization proceedings petitioner was held continuously in federal prisons supported petitioner's claim that he was deprived of any reasonable opportunity to make a defense. *Klapprott*, 335 U.S. at 613-14.

In *Ackermann v. United States*, the Court, in denying the Rule 60(b)(6) relief, distinguished the facts of the case from those in *Klapprott* by pointing out that petitioner had made a free, calculated, and deliberate choice not to appeal, whereas Klapprott had had no choice whatsoever regarding his actions. *Ackermann*, 340 U.S. at 200.

55. See *Klapprott*, 335 U.S. 601; *Transit Casualty Co. v. Security Trust Co.*, 441 F.2d 788, 792 (5th Cir. 1971) (stating that courts can invoke Rule 60(b)(6) to prevent extreme hardship). One student commentator has remarked, however, that "[v]irtually all courts pay lip service to the 'extraordinary circumstances' doctrine." Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60(b)(6)*, 33 MO. L. REV. 427, 438 (1968); see Wham, *Federal District Court Rule 60(b): A Humane Rule Gone Wrong*, 49 A.B.A. J. 566 (1963).

56. See *infra* notes 78-123 and accompanying text (discussing two approaches to 60(b)(4) substantive defense analysis).

57. Compare *infra* notes 78-106 and accompanying text with notes 107-23 and accompanying text (discussing disagreement resulting from Supreme Court's inconsistent treatments of *Bancec* and *Verlinden*).

58. 462 U.S. 611 (1983).

59. *Id.* at 620.

60. *Id.* at 614-15.

collect on a letter of credit issued by Citibank in its favor.⁶¹ Subsequently Bancec brought suit on the letter of credit in a U.S. federal court against Citibank, which counterclaimed by asserting a right to set off the value of its seized assets.⁶² The district court dismissed the complaint by stating that Bancec was an alter ego of the Cuban government and thus immune from suit in a U.S. court.⁶³ The U.S. Court of Appeals for the Second Circuit reversed, holding that Bancec was not an alter ego for the purpose of Citibank's setoff counterclaim.⁶⁴ The court further stated that it would respect the independent identity of a governmental instrumentality created as "a separate and distinct juridical entity under the laws of the state that owns it."⁶⁵

The U.S. Supreme Court rejected Bancec's assertion that the FSIA substantively prohibits the Court from holding Bancec responsible for action taken by the Cuban government.⁶⁶ The Supreme Court held that the FSIA did not affect the determination of whether Citibank may set off against Bancec's claim.⁶⁷ The Court relied on international law and federal common law in holding against Bancec.⁶⁸ The Supreme Court in *Bancec* thus treated the issues of juridical separateness and alter ego as a matter of substantive law, not subject matter jurisdiction.⁶⁹

In *Verlinden B.V. v. Central Bank of Nigeria*,⁷⁰ the plaintiff, a Dutch corporation, sued an instrumentality of Nigeria by alleging breach of a letter of credit.⁷¹ The U.S. Court of Appeals for the Second Circuit held that neither the diversity clause nor the "arising under" clause of article III of the U.S. Constitu-

61. *Id.*

62. *Id.*

63. *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 428 (S.D.N.Y. 1980), *rev'd sub nom. Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 658 F.2d 913 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

64. *Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 658 F.2d 913, 920 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

65. *Id.*

66. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 619 (1983).

67. *Id.* at 620.

68. *Id.* at 621-34.

69. *Id.*

70. 461 U.S. 479 (1983).

71. *Id.* at 482-83.

tion is broad enough to support jurisdiction over actions by foreign plaintiffs against foreign states.⁷² The Supreme Court reversed, holding that the FSIA was not limited to actions brought by U.S. citizens.⁷³ The Court, in analyzing the scope of the FSIA, stated that federal courts, in determining their jurisdiction over foreign states, must apply the detailed federal law standards set forth in the Act.⁷⁴ However, because subject matter jurisdiction in an FSIA action depends on the existence of substantive exceptions to foreign sovereign immunity, suits against foreign states necessarily raise issues of substantive federal law.⁷⁵

Even though neither *Bancec* nor *Verlinden* involved Rule 60(b)(4),⁷⁶ they have had far-reaching effects on subsequent lower court decisions involving the issue of whether a foreign state may raise a substantive defense in seeking relief under Rule 60(b)(4).⁷⁷ The different approaches used by the lower courts may be analyzed in terms of which of the two approaches they follow, the *Bancec* approach or the *Verlinden* approach.

A. *The Bancec Approach*

The U.S. Court of Appeals for the Ninth Circuit in *Meadows v. Dominican Republic*,⁷⁸ closely following the Supreme

72. *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 325-28 (2d Cir. 1981), *rev'd*, 461 U.S. 479 (1983).

73. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 479, 489-91 (1983).

74. *Id.* at 493-94 (stating that "suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset [and] . . . [a]t the threshold of every action in a district court against a foreign state . . . the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act").

75. *Id.* at 493; *see Hester Int'l Corp. v. Federal Republic of Nigeria*, 681 F. Supp. 371, 376 (S.D.N.Y. 1988).

76. *Bancec* involved the nationalization of foreign assets by the Cuban government. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). *Verlinden*, on the other hand, involved the issue of whether the FSIA is broad enough to permit actions by foreign plaintiffs against foreign sovereigns. *See Verlinden*, 461 U.S. 479.

77. Since *Bancec* and *Verlinden*, lower federal courts have utilized the Supreme Court's analyses in those cases to support their opinions. *See, e.g., First Fidelity Bank v. Government of Antigua & Barbuda*, 877 F.2d 189 (2d Cir. 1989); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 666 (D.C. Mich. 1985); *infra* notes 107-15 and accompanying text.

78. 817 F.2d 517 (9th Cir. 1987).

Court's analysis in *Bancec*,⁷⁹ held that the issue of separate juridical entity was a question of substantive law.⁸⁰ The republic and its instrumentality therefore were precluded from relying on the existence of a meritorious defense as the basis for a motion to void the default judgment.⁸¹ In *Meadows*, the plaintiffs were retained to procure a loan for the Republic and the *Instituto de Auxilios y Viviendas* (the "*Instituto*"), a Dominican instrumentality, by an individual who was both secretary of the Republic and the administrator of the *Instituto*.⁸² The plaintiffs successfully procured the loan but were never paid a commission.⁸³ When the defendants failed to respond after several attempts were made to serve a summons and complaint, the court entered a default judgment.⁸⁴

The Ninth Circuit affirmed the district court's determination that it had jurisdiction over both the republic and the *Instituto*.⁸⁵ The court determined that the act of obtaining a loan commitment was within the commercial activity exception to the FSIA.⁸⁶ The defendants asserted, however, that because the *Instituto* was an autonomous juridical entity the republic could not be held liable for the *Instituto's* commercial activity.⁸⁷ The court rejected the defendants' argument that juridical separateness goes to subject matter jurisdiction as inconsistent with *Bancec*.⁸⁸

In *Gregorian v. Izvestia*,⁸⁹ the Ninth Circuit avoided the tasks of analyzing the substantive-jurisdictional issues.⁹⁰ In *Gregorian*, a U.S. exporter of medical equipment sued the defend-

79. *Id.* at 524.

80. *Id.* In denying the Dominican Republic's argument that juridical separateness goes to subject matter jurisdiction and thus may be raised at any time, the Ninth Circuit held that the argument was inconsistent with "settled legal principles" that may be found in *Bancec*. *Id.*

81. *Id.*

82. *Id.* at 519-20.

83. *Id.* at 519.

84. *Id.* at 520.

85. *Id.* at 522.

86. *Id.* at 522-23.

87. *Id.* at 524.

88. *Id.* The court reasoned that the issue of separate juridical identity is a question of substantive law, not subject matter jurisdiction. *Id.* The court defined substantive law as "the basic law of rights and duties," and the law of jurisdiction as procedural law. *Id.*

89. 871 F.2d 1515 (9th Cir. 1989).

90. *See id.* at 1526.

ants, Soviet foreign trading organizations, alleging breach of contract and libel.⁹¹ The plaintiff won a default judgment,⁹² and the defendants moved to set it aside.⁹³ The U.S. State Department, as *amicus curiae*, urged the court to consider the Soviets' defenses on the merits.⁹⁴ The Ninth Circuit, citing the Eleventh Circuit's opinion in *Jackson v. People's Republic of China*,⁹⁵ nevertheless held that the defendants were entitled to equitable relief under Rule 60(b)(6).⁹⁶ The court did not attempt to address the issue of a substantive defense raised in the defendant's Rule 60(b)(4) motion.⁹⁷ Instead, the court utilized Rule 60(b)(6) to reverse the district court's decision.⁹⁸ Because it reversed the lower court's Rule 60(b)(6) holding, the court ruled out the necessity of analyzing Rule 60(b)(4).⁹⁹

Unlike the court in *Jackson*, however, the Ninth Circuit in *Gregorian* contended that the existence of extraordinary circumstances was not the standard under Rule 60(b)(6).¹⁰⁰ Instead, the court used a three-part test formulated in *Meadows*.¹⁰¹ The court held that a foreign sovereign defendant's reasonable belief that it is immune from an FSIA suit may not be character-

91. *Id.* at 1516-17.

92. *Id.* at 1518.

93. *Id.*

94. *Id.* at 1524.

95. 794 F.2d 1490 (11th Cir. 1986).

96. *Gregorian v. Izvestia*, 871 F.2d 1515, 1525-26 (9th Cir. 1989). The Ninth Circuit misstated *Jackson* when it contended that *Jackson* provided authority against a finding of "culpable conduct" in that case. *Id.* The thrust of *Jackson* was the balancing of all interests, especially the personal involvement in the litigation by the head of state. See *Jackson*, 794 F.2d at 1495-96.

97. *Gregorian*, 871 F.2d at 1526.

98. *Id.* at 1522-26.

99. *Id.* at 1526. But see *supra* notes 45-55 and accompanying text (discussing principle that court should exhaust every other remedy before turning to Rule 60(b)(6)).

100. *Gregorian*, 871 F.2d at 1526; see *Jackson v. People's Republic of China*, 794 F.2d 1490, 1494-95 (11th Cir. 1986). Even though the Ninth Circuit in *Gregorian* cited *Jackson* for support, the standards used by the two courts were quite different. *Jackson* is the leading case on the use of the extraordinary circumstances standard in the context of FSIA actions; on the other hand, the Ninth Circuit in *Gregorian* supplanted the extraordinary circumstances analysis with a three-part test. See *Gregorian*, 871 F.2d at 1526.

101. *Gregorian*, 871 F.2d at 1523. In *Gregorian*, the Ninth Circuit held that a Rule 60(b) motion to vacate a default judgment will be denied if: (1) plaintiff would be prejudiced if judgment is set aside, (2) defendant has no meritorious defense, or (3) defendant's culpable conduct led to the default. *Id.*

ized as "culpable conduct."¹⁰²

Meadows, and to some extent *Gregorian*, exemplify the literal readings of *Bancec* that fail to take into account the language in *Verlinden*. The Ninth Circuit, by foregoing Rule 60(b)(4), avoided any analysis of substantive issues in *Gregorian*.¹⁰³ It preferred the equitable approach of Rule 60(b)(6) to a legal remedy under Rule 60(b)(4).¹⁰⁴ Ironically, because no inquiry as to substantive defenses is required under Rule 60(b)(4), the court's other alternative is to turn to the equitable reservoir of Rule 60(b)(6).¹⁰⁵ Other courts, however, are more amenable to the use of substantive defenses in Rule 60(b)(4).¹⁰⁶

B. *The Verlinden Approach*

Some courts that have considered Rule 60(b)(4) in the context of FSIA proceedings have expressed their discontent over an apparent mismatch between the FSIA and the rule.¹⁰⁷ In *First Fidelity Bank v. Government of Antigua & Barbuda*,¹⁰⁸ the U.S. Court of Appeals for the Second Circuit observed that it is impossible to make a decision concerning subject matter jurisdiction without considering the merits of the case in an FSIA action.¹⁰⁹ The Second Circuit thus recognized that in many FSIA cases a resolution of the substantive immunity law issues will be required to reach a decision on subject matter jurisdic-

102. *Id.* at 1525.

103. *Id.*

104. The Ninth Circuit disregarded the extensive analysis of Rule 60(b)(4) by the district court in formulating its own interpretation of Rule 60(b)(6). *See id.* at 1523. For the district court's analysis of Rule 60(b)(4), see *Gregorian v. Izvestia*, 658 F. Supp. 1224, 1229-36 (C.D. Cal. 1987).

105. *See supra* notes 78-99 and accompanying text (discussing courts that follow *Bancec*).

106. *See infra* note 107-23 and accompanying text (discussing other jurisdictions that permit use of substantive defenses under Rule 60(b)(4)).

107. *See, e.g.*, *First Fidelity Bank v. Government of Antigua & Barbuda*, 877 F.2d 189, 195-96 (2d Cir. 1989); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323, 332-33 (S.D.N.Y. 1987).

108. 877 F.2d 189 (2d Cir. 1989).

109. *Id.* at 196. In *First Fidelity Bank*, the Second Circuit vacated the default judgment and remanded to the district court, holding that Antigua should have an opportunity to defend the case on the merits. *Id.* The Second Circuit, after being unable to resolve the issue based on Rule 60(b)(4), turned to Rule 60(b)(6) but to no avail since the fusion of substantive and jurisdictional issues "also militates in favor of setting aside the default judgment under Rule 60(b)(6)." *Id.*

tion.¹¹⁰

In *First Fidelity Bank*, Jacobs, an ambassador of Antigua, borrowed money from the plaintiffs, allegedly on behalf of the Government of Antigua, and later failed to repay the loan.¹¹¹ Subsequently, he agreed to settle and signed a consent order, again purportedly on Antigua's behalf, waiving Antigua's sovereign immunity.¹¹² In its motion to dismiss the complaint for lack of subject matter jurisdiction, Antigua argued that it was not bound by Jacobs' actions because he had acted without authority in borrowing the money and in consenting to the settlement.¹¹³ The issue became whether Jacobs, as Antigua's ambassador, possessed the apparent authority to borrow the loan and to waive Antigua's sovereign immunity under the circumstances.¹¹⁴ The Second Circuit remarked that in order for the FSIA's commercial activity exception to apply, it must first decide whether an agency relationship existed between Jacobs and Antigua.¹¹⁵ In effect, if Antigua had simply tried to disown its agent the exception would apply and the court could exercise subject matter jurisdiction.¹¹⁶ If Antigua, on the other hand, was merely an innocent victim of its ambassador's fraud, then it would be immune from suit.¹¹⁷

Similarly, the U.S. Court of Appeals for the Fifth Circuit in *Hester International Corp. v. Federal Republic of Nigeria*¹¹⁸ was faced with the question of whether or not NGPC, a government-created Nigerian corporation, was an agent or alter ego of Nigeria.¹¹⁹ In *Hester*, the plaintiff entered into a contract with a Nigerian political unit and NGPC to establish a rice farm in Nigeria.¹²⁰ The project failed and the plaintiff sued Nigeria for breach of contract.¹²¹ The Fifth Circuit, in upholding the district court's holding that NGPC was not an agent of Nigeria,

110. *Id.* at 195-96.

111. *Id.* at 191.

112. *Id.*

113. *Id.*

114. *Id.* at 193.

115. *Id.* at 194-95.

116. *Id.* at 195-96.

117. *Id.* at 195.

118. 879 F.2d 170 (5th Cir. 1989).

119. *Id.* at 175-81.

120. *Id.* at 171-72.

121. *Id.*

affirmed the dismissal for lack of subject matter jurisdiction.¹²² In the process, the court engaged in a detailed analysis of the law of agency as a possible substantive defense to the district court's jurisdiction.¹²³ Both approaches attempt to overcome the complexity of the "jurisdictional" provisions in the FSIA. Whereas the Ninth Circuit adheres closely to *Bancec*'s teaching, the Second Circuit follows a broader *Verlinden* approach.

III. THE USE OF SUBSTANTIVE DEFENSES IS PROPER AND DESIRABLE

A. The Need to Deemphasize Rule 60(b)(6)

The current state of the law with respect to the applicability of Rule 60(b)(4) and (6) to the FSIA is afflicted by a lack of uniformity and clarity. While many courts recognize that consideration of substantive defenses under Rule 60(b)(4) is inevitable, some courts have relied almost exclusively on Rule 60(b)(6) in setting aside default judgments.¹²⁴ In spite of the suitability of Rule 60(b)(4) as to foreign states' jurisdictional defenses, the courts prefer to approach the problem through equitable discretion under Rule 60(b)(6).¹²⁵

For example, in *Gregorian*, the causes of action involved libel and breach of contract that arose when a Soviet newspaper published a libelous article against the plaintiff, a U.S. corporation.¹²⁶ Rather than deciding the case on the basis of the district court's finding of subject matter jurisdiction based on the "direct effect" clause, the Ninth Circuit instead relied on the defendant's lack of culpability under the rubric of Rule 60(b)(6).¹²⁷

122. *Id.* at 181.

123. *Id.* at 176-81.

124. See *supra* notes 78-106 and accompanying text (discussing cases that follow *Bancec* approach). The courts, in considering equitable discretion under Rule 60(b)(6), point to one of the underlying policies under the FSIA that disputes be resolved on the basis of all relevant legal arguments. Consequently, the courts read Rule 60(b)(6) and the policy together in justifying their holdings while overlooking jurisdictional arguments under Rule 60(b)(4). See *Gregorian v. Izvestia*, 871 F.2d 1515, 1523-26 (9th Cir. 1989); *supra* notes 89-99 and accompanying text (discussing *Gregorian*).

125. *Gregorian*, 871 F.2d at 1523-26.

126. *Id.* at 1516.

127. *Id.* at 1523-26.

In *Practical Concepts v. Republic of Bolivia*,¹²⁸ the U.S. Court of Appeals for the District of Columbia Circuit set aside the default judgment under Rule 60(b)(6).¹²⁹ The court relied on Rule 60(b)(6) in spite of earlier having found the contract between the plaintiffs and the Republic of Bolivia to fall within the commercial activity exception.¹³⁰ The court did not elaborate on how it had reached its conclusion other than stating that it had found "compelling reasons" to relieve Bolivia from the default judgment.¹³¹ In the same vein, the Eleventh Circuit in *Jackson* did not address the jurisdictional issues raised in setting aside the default judgment on the grounds of extraordinary circumstances.¹³²

This approach emphasizes the application of Rule 60(b)(6), with its elusive standard of extraordinary circumstances, to foreign states in FSIA actions.¹³³ In light of the uncertainty involved, equitable discretion should not become the focus of judicial inquiry and determination in an FSIA action.

B. *Rule 60(b)(4) and the FSIA: A Proposal*

The use of substantive defenses by foreign states to challenge a default judgment under Rule 60(b)(4) should be encouraged. First, due to the structural complexity of the FSIA, the courts must be able to effectuate a workable jurisdictional instrument by adapting Rule 60(b)(4) to the unique jurisdictional framework of the FSIA.¹³⁴ Second, in light of congressional desire to encourage foreign states to appear in court,¹³⁵ Rule 60(b)(4) is preferable to Rule 60(b)(6) because Rule 60(b)(4)'s well-defined parameters assure foreign states some degree of predictability and consistency in the outcome of

128. 811 F.2d 1543 (D.C. Cir. 1987).

129. *Id.* at 1548.

130. *Id.*

131. *Id.*

132. See *Jackson v. People's Republic of China*, 794 F.2d 1490, 1496 (11th Cir. 1986).

133. See *supra* notes 45-55 and accompanying text (discussing operation of Rule 60(b)(6)).

134. One court has called the manner in which the FSIA deals with jurisdictional issues as "remarkably obtuse." *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982); see *supra* notes 29-30 and accompanying text (discussing unusual framework of FSIA).

135. See *Hearings*, *supra* note 14, at 29 (discussing congressional intent).

FSIA litigations.¹³⁶ Furthermore, the congressional intent of depoliticizing legal disputes in FSIA actions would be realized by the use of Rule 60(b)(4).¹³⁷

The Second Circuit in *First Fidelity Bank* recognized the problems caused by the FSIA's inherent inconsistency by refusing to dismiss the complaint under Rule 60(b)(4).¹³⁸ Instead, it remanded the case to the lower court for consideration of the defendant's yet unexplored substantive defenses.¹³⁹ The Fifth Circuit, in *Hester*, similarly reviewed Nigeria's substantive defenses before reversing the district court's finding of subject matter jurisdiction.¹⁴⁰ Both cases thus emphasized using Rule 60(b)(4) to implement the FSIA.¹⁴¹ Because the answer to the crucial question of the availability of sovereign immunity as a defense hinges upon the finding of subject matter jurisdiction, the task of proving that subject matter jurisdiction exists becomes the linchpin of every FSIA action.¹⁴²

Congress, however, intended the FSIA to be merely a statutory skeleton on which the courts are to develop a body of sovereign immunity law.¹⁴³ Accordingly, in view of the FSIA's vagueness¹⁴⁴ and the absence of clear guidance by the Supreme Court,¹⁴⁵ courts should allow substantive defenses to be raised in determining subject matter jurisdiction for the

136. See *supra* note 38 and accompanying text (discussing Rule 60(b)(4)).

137. See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6606; see also *Hearings*, *supra* note 14, at 29; State Department Letter, *supra* note 17.

138. *First Fidelity Bank v. Government of Antigua & Barbuda*, 877 F.2d 189, 196 (2d Cir. 1989).

139. See *supra* notes 107-23 and accompanying text (discussing cases that follow *Verlinden* approach).

140. *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir. 1989); *supra* notes 118-23 and accompanying text (discussing analysis in *Hester*).

141. See *First Fidelity Bank*, 877 F.2d at 195; *Hester*, 879 F.2d at 175-76; *supra* notes 107-23 and accompanying text (discussing cases that follow *Verlinden* approach).

142. See *supra* notes 70-77 and accompanying text (discussing *Verlinden*). The confusion that arises from the fusion of personal jurisdiction, subject matter jurisdiction, and the availability of sovereign immunity as a defense apparently has not yet been addressed by the Supreme Court since the issue was first raised in *Texas Trading*. See *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982).

143. See *Gibbons*, 549 F. Supp. at 1106. See generally *Hearings*, *supra* note 14.

144. See *supra* notes 19-32 and accompanying text (discussing framework of FSIA).

145. See *supra* notes 58-75 and accompanying text (discussing conflicting Supreme Court cases).

purpose of Rule 60(b)(4).¹⁴⁶ As the Fifth Circuit has shown in *Hester*, courts could hear substantive arguments from foreign states at the jurisdictional juncture of the FSIA proceeding without reaching the ultimate issue on the merits.¹⁴⁷

Furthermore, the drafters of the FSIA, having placed on the courts a heavy burden of developing a body of law from a vaguely drafted statute,¹⁴⁸ may not have foreseen the jurisdictional consequences that would result from courts' applying the FSIA exceptions.¹⁴⁹ Thus the courts, armed with the inherent power to interpret a jurisdictional instrument,¹⁵⁰ must devise a means to interpret the FSIA so that the underlying congressional intent of encouraging foreign states to appear in U.S. courts will not be defeated. Moreover, in light of foreign states' burdens of proving sovereign immunity,¹⁵¹ and the frequency with which foreign states are subject to default judgments,¹⁵² a judicial disallowance of substantive defenses under Rule 60(b)(4) would place foreign states at an unfair disadvantage and, in effect, penalize them for nonappearance.

Finally, Rule 60(b)(4) would depoliticize legal determinations in FSIA actions. The *Bancec* approach, because it rejects substantive defenses, often looks to political factors such as foreign relations as part of its methodology.¹⁵³ Thus, the courts that follow *Bancec* do not adhere to the congressional

146. See *supra* notes 37-44 and accompanying text (discussing Rule 60(b)(4)).

147. See *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 & 180 n.9 (5th Cir. 1989); *supra* notes 118-23 and accompanying text (discussing *Hester*).

148. See *Hearings*, *supra* note 14, at 27.

149. See *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982) (stating that exceptions "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 degree of difficulty").

150. See *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) (stating that courts have power to interpret their jurisdiction); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) ("[i]n the absence of statutory direction, the district court has considerable discretion in devising the procedure to inquire into the existence of jurisdiction . . . [i]f the question of jurisdiction is intertwined with the merits").

151. See *supra* notes 25-28 and accompanying text (discussing sovereign immunity as affirmative defense).

152. See *supra* notes 7 & 8 (citing cases in which foreign states were subject to default judgment).

153. See *supra* notes 78-106 and accompanying text (discussing *Bancec* approach).

mandate that sovereign immunity questions are to be decided solely on legal grounds.¹⁵⁴ This mandate was affected to assure legal consistency and reduce foreign policy influence.¹⁵⁵ A careful review of foreign states' substantive defenses not only would assure the predictability of the outcome of FSIA decisions but also reduce the significance of foreign relations as a factor in judicial determinations of legal disputes.

CONCLUSION

In the interest of encouraging foreign states to make an appearance in court to defend themselves even after a default judgment has been entered, it is important that the foreign states' substantive defenses be reviewed by U.S. courts. In considering the defenses, moreover, the courts should bear in mind the overall intent of Congress in transferring the decision-making process from the executive branch to the judicial branch. The courts thus should emphasize the legal grounds under Rule 60(b)(4) over the discretionary grounds of Rule 60(b)(6) because the latter are too prone to influences from extra-judicial factors such as foreign policy and political environment. By allowing foreign states to raise substantive defenses in challenging the validity of jurisdiction, the courts, in the process, will promote uniformity, consistency, and predictability of FSIA decisions and carry out Congress' intent.

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154. See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6606.

155. *Id.*

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