

Wait, JASTA Second... What About Sovereign Immunity? An Overview of the Controversial Justice Against Sponsors of Terror Act (“JASTA”) from a Middle East Perspective

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JASTA limits the applicability of “foreign sovereign immunity” under the federal judicial code, restricting its use in the US courts. Specifically, it gives federal courts jurisdiction over civil claims against a foreign state for physical injuries, death or damaged property that has occurred in the US on or after 11 September 2001 and which have been caused by:

1. an act of international terrorism in the United States, and
2. a tort committed anywhere by an official, agent, or employee of a foreign state acting within the scope of employment.

Furthermore, the law also allows claims to be filed against a Foreign State for loss and damage arising from acts of international terrorism committed by a designated terrorist organization. Section 4 of JASTA amends the federal criminal code to impose civil liability on a person who “*conspires to commit or aids and abets by knowingly providing substantial assistance*” for an act of international terrorism committed, planned, or authorized by a designated terrorist organization.

JASTA establishes exclusive jurisdiction to US federal courts over civil claims, but as per Section 5, it also authorizes “*the US Department of Justice (“DOJ”) to intervene in these proceedings to seek a stay. A stay will be granted if the Department of State certifies that the US is engaged in good-faith discussions with the Foreign State to resolve the civil claims*”.

JASTA had an unconventional route through the legislative stages. It was passed by the Senate unanimously in May 2016^[i] and by the House of Representatives unanimously in September 2016^[ii]. The erstwhile President Obama vetoed the bill, however, on 23 September 2016^[iii]. The US Congress then overrode that presidential veto through a Congress resolution (i.e. a constitutional provision that permits Congress to override a presidential veto if it receives a two thirds majority vote in both houses). This was the first and only override of a presidential veto during the Obama presidency^[iv]. JASTA, consequently, became law on 28 September 2016^[v].

So, what about sovereign immunity?

Sovereign Immunity (also referred to as State Immunity) is the principle in international customary law that protects a State from liability and enforcement of judgments made against it by another State. It is a principle that confirms the equality and independence of States.

The International Court of Justice described State Immunity as follows^[vi]:

“The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2,

paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."

What is the effect of JASTA on sovereign immunity?

JASTA is considered by many to undermine and weaken the fundamental doctrine of sovereign immunity and there has been widespread criticism of JASTA, both within the US and internationally.

In exercising his veto powers^[vii], Obama acknowledged that *"JASTA departs from longstanding standards and practice under our Foreign Sovereign Immunities Act and threatens to strip all foreign governments of immunity from judicial process in the United States based solely upon allegations by private litigants"*^[viii].

In November 2016, following the 10th Session of the Gulf Cooperation Council's Shoura, the UAE's Federal National Council's (FNC) speaker, Dr. Amal Al Qubaisi, expressed great concern with regards to JASTA, stating that: *"The law undermines the foundations of international relations"*. Furthermore, she stressed the fact that all governmental and non-governmental entities need to cooperate in dealing with the challenges that JASTA imposes on the Nation, focusing primarily on the weakening of sovereign immunity.

Fundamentally, the introduction of JASTA will most probably allow various actions against a foreign state's assets and interests within the US. Although JASTA makes no reference to enforcement, we are yet to see what powers this will confer in practice. This may include, but not be limited to, specific enforcement, pre-judgment attachment, injunctions, freezing orders and orders for discovery.

Just a law directed at Saudi Arabia or a more global dilemma?

The passing of a bill impacting sovereign immunity will have myriad implications but may have the most immediate impact upon Saudi Arabia. JASTA, inflammatorily referred to as the '9/11 Bill'^[ix] or 'Sue the Saudis Bill'^[x], is perceived to provide the opportunity for economic redress in relation to the terrorist atrocities that occurred in New York. The Courts in the US have already received the first actions brought by plaintiffs against Saudi. The widow of a naval officer killed at the Pentagon on 9/11 filed the first action to apply JASTA in the District of Columbia, in which she alleges that Saudi provided material support to Osama bin Laden and Al Qaeda. Latterly another action has been filed in New York by the daughters of a man killed in the World Trade Center, in which it is alleged that Saudi Arabia knowingly and willingly provided material support to Al Qaeda. In this case, the plaintiffs seek judgment in excess of USD \$20 million and treble damages. Due to the timescales involved, there has been no substantive action taken on these cases to date ^[xi].

On 22nd November 2016, His Excellency Abdulrahman S. Alahmed, Saudi's Ambassador to Belgium, Luxembourg and head of KSA's mission to the European Union, voiced Saudi concern in relation to JASTA: *"We must ask ourselves whether we are willing to open up this Pandora's Box at the risk of destabilizing international cooperation in the fight against terrorism... It is our hope that wisdom will prevail and that Congress will take the necessary steps to correct this legislation to mitigate its scope and avoid the serious unintended consequences that may ensue."*

Prior to JASTA, tensions between both countries had increased following President Obama's nuclear deal with Iran despite KSA's objections to it and the restrictions that remain under the Joint Comprehensive Plan

of Action (“JCPOA”). It must be noted, however, that the law does not specifically mention Saudi Arabia, it applies to all states.

At the Gulf Cooperation Council on 27th October 2016, US Treasury Department Secretary, Jacob J. Lew, stated that “(JASTA) would enact broad changes in long standing international law regarding sovereign immunity that, if applied globally, could have serious implications for (US/GCC) shared interests”^[xii]. Indeed, President Trump will now have to assure all the GCC States that the United States will remain a safe zone for their investments, an assurance that may be viewed with scepticism following recent executive orders.

Ironically however, the US may be the State most affected by this legislation. According to Obama’s presidential memoranda^[xiii]: “enactment of JASTA could encourage foreign governments to act reciprocally and allow their domestic courts to exercise jurisdiction over the United States or U.S. officials — including our men and women in uniform — for allegedly causing injuries overseas via U.S. support to third parties.”

Indeed, as reported in the press, Pierre Lellouche, a Member of the Foreign Affairs Committee in the French National Assembly stated that he would pursue legislation that would permit French citizens to sue the United States with cause should JASTA enter into force^[xiv].

Reciprocal arrangements could lead to untold consequences for the US. Prior to the introduction of JASTA, Argentina had already made a successful application before the ICJ against the US for violating its sovereignty over decisions in the US courts over the restructuring of Argentine debt^[xv].

Any challenges caused by JASTA that the US government faces may influence the conduct of US foreign policy, including in the Middle East, as the spheres of politics, diplomacy, trade and domestic litigation become more entwined through the use of JASTA and any foreign parallel legislation. The most profound consequence may be that a US administration may lack confidence to act overseas when it otherwise would have done so.

This concern is not simply legal or political, it is also shared by US business interests internationally. It has been reported that the US-UAE Business Council sent a letter in November 2016, supported by numerous major US companies, to US senators, urging them to reconsider amending the act to avoid the destabilization of the global economy.

Within the US, their economy may also be destabilized as a result of foreign countries withdrawal of assets from fear of liability. According to statistics published by the US Treasury Department, Saudi Arabia had \$116.8 billion in securities in the US in March 2016, but this has now been reduced to \$100.1 billion in November 2016^[xvi]. This may be the start of Saudi Arabia selling some of its large portfolio of US Treasury bills in volumes that could then impact the attraction of holding US government debt for other investors. This domino effect could then influence the ability of the US government to raise debt to fund its activities^[xvii].

What Next?

The implementation of JASTA appears to be fraught with problems and unexpected consequences, irrespective of whether this law may be considered attractive on the face of it (in ensuring governments do not act by proxy to conduct terrorism).

Although we are starting to see the first cases filed, JASTA is still in its infancy and it is not possible to predict all the possible risks and scenarios associated with it. The future will provide answers to difficult questions that are raised by JASTA. Will countries retaliate to JASTA and introduce their own legislation to protect themselves? Will they introduce reciprocal legislation as threatened? Is it prudent to impose a law

that can cause disruption to international relations (particularly between the US and KSA), as well as the global economy?

Whilst the best step may be for the US to repeal the legislation, JASTA must now also be considered in the context of a Trump presidency as highlighted above. The Trump administration has entered office knowing that the future of US-Saudi relations will almost inevitably be affected by JASTA.

As the JASTA lawsuits progress we will see whether this legislation can make America great again, or whether it is just another stumbling block to improved US-Middle East relations.

For any query or follow up on this significant topic, please contact Ibtissem Lassoued, Partner, Financial Crime, at i.lassoued@tamimi.com.

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[i] <https://www.congress.gov/bill/114th-congress/senate-bill/2040/all-info>

[ii] Ibid.

[iii] Ibid.

[iv] Article 1 Section 7 US Constitution. See also E Rybicki, 'Veto Override Procedure in the House and the Senate', Congressional Research Service
<http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BP%2CC%3E%23P%20%20%0A>

[v] <https://www.congress.gov/bill/114th-congress/senate-bill/2040/all-info>

[vi] Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening), Judgment, I.C.J. Reports 2012, p. 123-124

[vii] Important note: Donald Trump will be inaugurated on 20 January 2017, this article was written end of December 2016.

[viii] <https://www.whitehouse.gov/the-press-office/2016/09/23/veto-message-president-s2040>

[ix] <http://www.bbc.com/news/world-us-canada-37504158>

[x] <https://www.rt.com/usa/360975-senate-overrides-veto-jasta/>

[xi] Correct as of 21 February 2017

[xii] <https://treasury.gov/press-center/press-releases/Pages/jl0597.aspx>

[xiii] <https://www.whitehouse.gov/the-press-office/2016/09/23/veto-message-president-s2040>

[xiv] http://www.nytimes.com/2016/09/10/us/politics/house-911-victims-saudi-arabia.html?_r=0

[xv] <http://www.icj-cij.org/presscom/files/4/18354.pdf>

[xvi]<http://ticdata.treasury.gov/Publish/mfh.txt>

[xvii] New York Times article dated 19 April 2016 'Saudi Threat to Sell U.S. Assets Could Hurt, but Mostly the Saudis', http://www.nytimes.com/2016/04/20/business/international/saudi-threat-to-sell-us-assetscould-hurt-but-mostly-the-saudis.html?_r=0