

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAH D. PETERSON,
Plaintiff-Appellant,

v.

ISLAMIC REPUBLIC OF IRAN,
Defendant,

v.

WORLD BANK,
Movant,

v.

CMA CGM,
Third-party-defendant-Appellee,

and

JAPAN BANK FOR INTERNATIONAL COOPERATION; A.P. MOLLER-
MAERSK A/S; MEDITERRANEAN SHIPPING COMPANY,
Third-party-defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE

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INTRODUCTION AND SUMMARY OF ARGUMENT

The United States submits this brief supporting affirmance of the judgment
of dismissal pursuant to Fed. R. App. P. 29(a).

The plaintiffs in this litigation have a default judgment against the Islamic Republic of Iran, which they obtained under the Foreign Sovereign Immunities Act's "terrorism exception" to foreign sovereign immunity. The United States emphatically condemns the acts of terrorism that grievously injured the plaintiffs, and has deep sympathy for their suffering. The United States remains committed to disrupting terrorist financing and to aggressively pursuing those responsible for committing terrorist acts against U.S. nationals.

In supporting affirmance of the district court's judgment, the United States in no way condones the failure of a foreign state to satisfy a judgment properly entered against it. Rather, the United States files this brief because of its significant interest in ensuring that courts correctly construe the laws relating to foreign sovereign immunity, including the enforcement of judgments against the property of foreign states. The issues in this appeal relating to execution and assignment apply to judgments entered under any of the exceptions to foreign sovereign immunity. Issues such as these, which could affect all litigation against foreign sovereigns in U.S. courts, can have significant, detrimental impact on our foreign relations, as well as on the reciprocal treatment of the United States and its extensive overseas property holdings. In order to protect its vital interests, the United States is participating in this appeal as *amicus curiae*.

The district court properly considered whether the assignment order sought by the plaintiffs is barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* (FSIA), notwithstanding that the foreign state did not appear to assert immunity as a defense. The FSIA establishes a default presumption that foreign state property is immune, and sets out the exclusive circumstances in which execution or attachment is permissible. A district court must ensure that its coercive authority is brought to bear only within the limits prescribed by the political branches, in order to minimize the risk of harm to our foreign relations and disadvantageous treatment of the United States in foreign courts.

In addition, the district court properly refused to issue the assignment order that the plaintiffs sought, which would have purported to order the assignment of foreign state property located outside the United States and thus immune from attachment. A court should not allow a judgment creditor to make an end-run around the FSIA's careful limits on execution merely by seeking an order of assignment rather than an order of execution.

Finally, the district court correctly recognized that a judgment creditor must provide adequate notice before ordering enforcement against a foreign state's property. Although 28 U.S.C. § 1608(a) is not directly applicable to enforcement efforts, it provides a guide to what constitutes adequate notice to a foreign state.

Crucially, § 1608(a) requires that, unless a foreign state has otherwise agreed, it must be served through its ministry of foreign affairs or other appropriate diplomatic contact with papers translated into its official language, accompanied by a translated “notice of suit” explaining the documents’ significance and the steps necessary to defend against the action. The service provided by the plaintiffs falls far short of this model, and was therefore inadequate.

STATEMENT

1. The United States has long recognized the principle that foreign sovereigns are generally immune from civil suits in our courts. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). For much of this nation’s history, the Executive followed a theory of absolute foreign sovereign immunity, “under which ‘a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.’” *Permanent Mission of India to the U.S. v. City of New York*, 551 U.S. 193, 199 (2007) (quotation marks and citation omitted). The immunity of foreign sovereigns was understood to extend to sovereign property being used for public purposes. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 144.

In 1952, the State Department adopted the ‘restrictive’ theory of foreign sovereign immunity, under which foreign states would be granted immunity only

for their sovereign or public acts, and not for their commercial acts. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976). However, the “traditional view” continued to be that “the property of foreign states is absolutely immune from execution.” H.R. Rep. No. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

Under both absolute and restrictive theories of immunity, the recognition of foreign sovereign immunity prior to enactment of the FSIA was “the case-by-case prerogative of the Executive Branch.” *Republic of Iraq v. Beaty*, ___ S. Ct. ___, 2009 WL 1576569, *6 (June 8, 2009). Although district courts had subject matter jurisdiction over suits against foreign states, *see* Pub. L. No. 94-583, § 3, 90 Stat. 2891 (1976), courts “deferred to the decisions of the political branches — in particular those of the Executive Branch” on whether to exercise that jurisdiction. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In many cases, the Executive filed a “suggestion of immunity” that a foreign sovereign was immune from suit, or its property was immune from attachment for purposes of obtaining jurisdiction *in rem*, which was treated as dispositive. *See, e.g., Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); *Ex parte Peru*, 318 U.S. 578, 587-589 (1943). Where the Executive made no specific recommendation, courts

decided immunity questions “in conformity to the principles” previously expressed by the Executive. *Hoffman*, 324 U.S. at 35.

In 1976, Congress enacted the FSIA, which, “[f]or the most part, * * * codifies, as a matter of federal law, the restrictive theory of sovereign immunity.” *Verlinden*, 480 U.S. at 488. The FSIA freed the Executive from case-by-case diplomatic pressure to support claims of foreign sovereign immunity, and clarified the governing standards for immunity. *See id.* The FSIA thus marks the current expression of the foreign policy of the political branches as it relates to foreign sovereign immunity, which must be applied by a U.S. court to determine questions of immunity. *See Republic of Austria v. Altmann*, 541 U.S. 677, 695-696 (2004).

The FSIA provides that a foreign state is presumptively immune from suit, and requires a district court to determine at the outset of an action whether it falls within an exception to immunity under 28 U.S.C. § 1605(a). *See Verlinden*, 480 U.S. at 493 n.20 (1983). In 1996, Congress created a new exception to immunity for claims brought against certain foreign states and arising out of their provision of material support to acts of terrorism, *see* 28 U.S.C. § 1605(a)(7), which was the basis for the district court’s exercise of subject matter jurisdiction in the underlying merits action against Iran. *See Peterson v. Islamic Republic of Iran*, 264 F. Supp.2d 46, 51-58, 61 (D.D.C. 2003).

In any suit brought in a U.S. court against a foreign state, initial service of a summons and complaint must be made pursuant to 28 U.S.C. § 1608(a). That provision establishes a hierarchy of methods of service, requiring: (1) delivery in accordance with any special arrangement for service between the plaintiff and the foreign state; or (2) if no special arrangement exists, delivery in accordance with an applicable international covenant on the service of judicial documents; or (3) if neither of those methods is possible, sending a copy of the summons and complaint and a notice of suit, translated into the official language of the foreign state, to the head of the ministry of foreign affairs of that state; or (4) as a last option, sending the summons and complaint and a notice of suit, translated into the foreign state's official language, to the U.S. Secretary of State for transmittal through diplomatic channels. *Id.*

Even where a foreign state has been properly served, no default judgment may be entered against it unless the district court determines that an exception to immunity applies and “the claimant establishes his claim or right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e). Notice of a default judgment must be provided to the foreign state in the same manner as provided for initial service. *See id.* Once a judgment has been entered against a foreign state,

the plaintiff may register the judgment in other district courts and seek enforcement pursuant to 28 U.S.C. § 1963.

The FSIA also “prescribes * * * [the] circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment.” *See* H.R. Rep. No. 94-1487, at 12. The FSIA modifies “in part” the prior rule of absolute immunity of foreign state property. *Id.* at 8. The FSIA creates a presumption of immunity in 28 U.S.C. § 1609, which provides that foreign state-owned property is “immune from attachment arrest and execution except as provided in” 28 U.S.C. §§ 1610 and 1611. Section 1610(a) provides enumerated exceptions to that immunity (which are further limited in § 1611), but limits the exceptions to foreign state property “in the United States” and “used for a commercial activity” in the United States. 28 U.S.C. § 1610(a).¹

As Congress recognized at the time it enacted the FSIA, “enforcement [of] judgments against foreign state property remains a somewhat controversial subject

¹ In 2008, Congress enacted Pub. L. No. 110-181, which creates an additional exception to immunity from execution for “the property of a foreign state against which a judgment is entered under [newly enacted 28 U.S.C. § 1605A] * * *.” 122 Stat. 3, 341. However, the new execution provision applies only to actions that are brought under § 1605A or, *inter alia*, were pending when the provision was enacted. *See* 122 Stat. at 342. The district court held that this provision is inapplicable, ER 2-3 n.1, and the plaintiffs have not challenged its ruling on appeal.

in international law.” H.R. Rep. No. 94-1487, at 27. Accordingly, the provisions allowing execution against foreign state property seek “to limit as much as possible disrupting the ‘public acts’ or ‘*jure imperii*’ of sovereigns,” by permitting execution only against property used “in the United States” for commercial purposes. *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 253 (5th Cir. 2002); *see also Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088-1089 (9th Cir. 2007).

Under § 1610(c), no attachment or execution under § 1610(a) is permitted until the district court has “determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice [of a default judgment] required under section 1608(e).” No provision of the FSIA specifically addresses what form of notice must be provided to a foreign state where execution is sought against foreign state property.

2. The plaintiffs in this action are U.S. servicemen injured in, and the family members of servicemen killed in, the 1983 terrorist bombing by Hezbollah of a U.S. Marine Corps barracks in Beirut, Lebanon. The plaintiffs filed suit in U.S. District Court for the District of Columbia against the Islamic Republic of Iran and the Iranian Ministry of Information and Security, which were alleged to have provided support, training, explosives, and direction to the Hezbollah

terrorists who carried out the attack. Although Iran did not appear, the district court held that it had subject matter jurisdiction, *Peterson*, 264 F. Supp.2d at 51-58, 61, and subsequently entered a default judgment for \$2.66 billion against Iran and its Ministry of Information and Security. 515 F. Supp.2d 25, 60 (D.D.C. 2007).

The plaintiffs instituted proceedings to enforce the judgment in several district courts, including in the Northern District of California, where they registered their default judgment on March 11, 2008. *See Peterson v. Islamic Republic of Iran*, No. 08-80030-Misc-JSW, Dkt. 1 (N.D. Cal.). The plaintiffs then moved for orders in aid of enforcement of the judgment, including an order compelling Iran to assign to the plaintiffs all rights to payment of money and accounts receivable from CMA CGM.

CMA CGM is a French shipping company that allegedly utilizes maritime facilities in Iran and purchases bunkered oil and fuel at those facilities, for which it is allegedly obligated to pay fees to Iran. *See* E.R. 124, 174-176. The plaintiffs sought an order compelling Iran to assign to them in satisfaction of their judgment “all rights to payment of money, and accounts, accounts receivable, due and payable, or in the future, or conditional upon some future events, from and owing

by” CMA CGM to Iran, and arising out of CMA CGM’s alleged use of Iranian harbor facilities. ER 162-163.

The district court denied the plaintiffs’ motion for assignment. ER 2-4. Because the FSIA limits the ability of litigants to execute against foreign state property, the district court held, it had an independent obligation to consider whether immunity bars an assignment order regardless of whether the foreign state had raised immunity as a defense. ER 2. The court held that, under 28 U.S.C. § 1610(a), only property of the foreign state that is located in the United States and used for commercial purposes is subject to attachment or execution. *See id.* The district court held that the plaintiffs could overcome the presumption of immunity for foreign state property only if they could “demonstrate that specific property of the [judgment] debtor that is or was used for commercial purposes exists in the United States.” ER 3. The district court concluded that the plaintiffs had failed to meet this burden. ER 4.

The district court also held that the plaintiffs failed to serve Iran utilizing the procedures set forth in 28 U.S.C. § 1608, and that inadequacy of service “provides an independent reason to deny Plaintiffs’ motion for an order compelling assignment of rights involving CMA CGM.” ER 4.

ARGUMENT

I. A DISTRICT COURT MUST CONSIDER WHETHER FOREIGN STATE PROPERTY IS IMMUNE FROM EXECUTION BEFORE ALLOWING ENFORCEMENT AGAINST THAT PROPERTY.

The plaintiffs argue that the district court erred in recognizing the immunity of the foreign state property they sought to have assigned, because the foreign state did not appear in the district court to assert immunity as a defense and, according to the plaintiffs, CGM CMA lacks standing to assert immunity for that property. In the view of the United States, a district court must consider whether an exception to the presumption of immunity applies to foreign state property before permitting coercive measures against that property.

A. As noted above, foreign sovereign immunity was traditionally recognized on a case-by-case basis in accordance with the view of the Executive Branch. In codifying in the FSIA the principles of immunity previously applied by the Executive, Congress gave no indication that it intended to modify the practice of deciding immunity by reference to those principles, without regard for whether a foreign sovereign appears to invoke them. To the contrary, the FSIA's text and structure make clear that a district court must consider *sua sponte* whether foreign state property is immune before permitting enforcement measures against that property.

First, and as noted, the statute creates a presumption of immunity from execution for foreign state property, and also requires judicial review, before permitting an order of attachment or execution. *See* 28 U.S.C. §§ 1609, 1610(a), (c). This approach evinces Congress’ intent to protect foreign state property absent a judicial finding that an exception to immunity applies.

Furthermore, one of the exceptions to immunity for foreign state property applies where a foreign state waives immunity, § 1610(a)(1). There would seem to be no need for this provision if, as the plaintiffs argue, a foreign state waives immunity from execution unless it appears to raise the claim. Section § 1610(a)’s waiver provision “is governed by the same principles that apply to waivers of immunity from jurisdiction,” H.R. Rep. 94-1487, at 28, and Congress “anticipated, at a minimum,” that waiver from jurisdictional immunity “would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so.” *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985).²

² Furthermore, even where a foreign state has waived immunity from execution for its property, a court must consider whether the property is used for a commercial activity in the United States before permitting execution. *See Af-Cap*, 475 F.3d at 1087-1091.

Similarly, under the jurisdictional provisions of the FSIA, §§ 1604-1605, a court must consider *sua sponte* whether an exception to foreign state immunity from suit applies. *See Verlinden*, 461 U.S. at 494 n.20. The FSIA’s execution provisions are modeled on the jurisdictional provisions, *see* H.R. Rep. 94-1487, at 8, 27, and the practice of *sua sponte* consideration of immunity from suit also supports *sua sponte* consideration of immunity from execution.

Taken together, these provisions strongly support the conclusion that, as the Fifth Circuit recognized in *Walker v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004), arguments about who has standing to raise a claim that foreign state property is immune from attachment are “irrelevant” under the FSIA.³

Although the Court stated in *Wilmington Trust v. U.S. District Court*, 934 F.2d 1026, 1033 (9th Cir. 1991), that “Congress intended requests for protection under the FSIA to originate from the foreign state party,” the case is clearly distinguishable. *Wilmington Trust* rejects a private litigant’s assertion that, because the foreclosure proceedings before the court might implicate a letter of

³ The plaintiffs rely heavily on *Rubin v. Islamic Republic of Iran*, 436 F. Supp.2d 938 (N.D. Ill. 2006), *appeal filed*, No. 08-2805 (7th Cir.), for the proposition that immunity from execution is an affirmative defense that may only be raised by a foreign state. In the view of the United States, the district court’s holding in *Rubin* is wrong, and the United States is participating in the court of appeals in that litigation as *amicus curiae* in support of reversal.

credit issued by a foreign state bank, the litigant could assert the “right” of a foreign sovereign not to be subject to a jury trial. The private litigant invoking the FSIA provided no record evidence that the claims at issue, which were brought against a private party, were in fact against a foreign state agency or instrumentality, and thus that the FSIA even applied. *See id.* at 1032 & n.9. Furthermore, the right invoked was that of a foreign state not to be subject to a jury trial. *See* 28 U.S.C. § 1441(d) (providing that civil action in state court against foreign state “may be removed by the foreign state” to federal court, where it “shall be tried by the court without jury”). Even if that discretionary right must be invoked by a foreign state, or supported by admissible evidence, before being applied in an action between two private litigants, it would not follow that a court could disregard the mandatory prohibitions on execution in 28 U.S.C. §§ 1609-1611.

B. As the Supreme Court recently recognized in *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008), judicial seizure of the property of a foreign state “may be regarded as an affront to its dignity and may affect our relations with it.” *Sua sponte* review of the statutory exceptions to immunity from execution protects against unjustified exercises of judicial power that could harm our foreign relations, potentially place the United States in violation of its

international obligations, and lead to disadvantageous treatment of the United States in foreign courts.

The Department of State and the Department of Justice explained in a joint section-by-section analysis of the proposed legislation ultimately enacted as the FSIA that “[i]t would be inappropriate, and probably in violation of international law, to allow the successful litigant to levy on any assets of a foreign state because these may be used for strictly governmental and sovereign purposes.” Hearing on H.R. 3493 before Subcomm. on Claims and Government Relations of House Judiciary Committee, 93d Cong., 1st Sess. 45 (Jun. 7, 1973). The concern about inappropriate enforcement measures is not merely hypothetical. In *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006), for example, the district court entered a default judgment on a motion seeking execution against the diplomatic property of a foreign state, which was entitled to immunity under the Vienna Convention on Diplomatic Relations. An assignment order by a U.S. court also could lead to friction in our foreign relations by purporting to impose obligations on foreign corporations with possession of

foreign state assets, which might have inconsistent obligations with regard to those assets as a matter of domestic law or by contract.⁴

An order by a U.S. Court authorizing execution against foreign state property also could have consequences for the treatment of the United States abroad under principles of reciprocity. As the D.C. Circuit recognized in *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), because “some foreign states base their sovereign immunity decisions on reciprocity,” a U.S. court’s decision to exercise jurisdiction over a foreign state can “subject the United States to suits abroad” in like circumstances. Similarly, a U.S. court’s order permitting execution or attachment of foreign state property used for a public, governmental purposes could encourage foreign courts to issue like orders against United States property abroad. These considerations all militate heavily in favor of a court’s *sua sponte* consideration of immunity prior to ordering execution or attachment.

⁴ Furthermore, the United Nations Convention on Jurisdictional Immunities of States and Their Property, *reprinted at* http://untreaty.un.org/ilc/texts/4_1.htm, provides that a state party “shall give effect to state immunity” as it relates to the foreign state and its property, and “shall ensure that its courts determine on their own initiative that the immunity of that other State * * * is respected.” Art. 6(1), Art. 5. That instrument, although not yet in force, is consistent with other foreign state immunity acts and applicable conventions and reflects a recognition of the necessity of a court’s *sua sponte* consideration of immunity of foreign state property.

Finally, even if this Court rejects the proposition that a district court must consider *sua sponte* whether foreign state property falls within an exception to the default rule of immunity from execution, the Court at a minimum should require consideration of the issue if raised by the United States as amicus curiae or a third party that would be subject to an assignment order. As explained, a determination that foreign state property is subject to execution or assignment could have significant ramifications for the United States, both in its relations with foreign states and also in litigation in foreign courts. *Cf. Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233-234 (D.C. Cir. 2003) (holding that United States has standing to intervene to challenge default judgment against foreign sovereign, where judgment potentially violates the United States' obligations under the Algiers Accord). An order of execution or assignment might also subject a private party in possession of foreign state assets to competing legal obligations with regard to those assets. *Cf. Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1348 (9th Cir. 1997). This Court should reject the proposition that only the foreign state has standing to assert immunity from execution.

II. A U.S. COURT CANNOT ORDER A FOREIGN STATE TO ASSIGN ASSETS TO A JUDGMENT CREDITOR, WHERE THOSE ASSETS ARE NOT SUBJECT TO EXECUTION UNDER THE FSIA.

The district court correctly refused to order the foreign state defendant to assign to the plaintiffs in satisfaction of their judgment certain rights to payment from CMA CGM. The plaintiffs have conceded that the property held by CMA CGM is located outside the United States, and thus is immune from execution under the FSIA. The district court's authority to execute against foreign state property is restricted to the circumstances set forth in 28 U.S.C. §§ 1609-1611. There is no indication in the statutory text or history that Congress intended for litigants to be able to sidestep these restrictions simply by seeking an order of assignment purporting to transfer ownership of immune assets, rather than by seeking an order of execution against those same assets.

The plaintiffs argue that the assignment order they seek is appropriate notwithstanding the limitations on execution under the FSIA because the order would not itself effectuate transfer of possession of foreign state property, but would require enforcement by a foreign court. Of course, a third party obligor may choose to comply with a U.S. court's assignment order and transfer possession of foreign state property that is immune from direct execution, rather than seek to challenge that order in court, making foreign enforcement

unnecessary (and making the practical effect of the assignment order identical to execution). Furthermore, it is entirely likely that judgment creditors would seek enforcement of a U.S. Court's assignment order without regard to any limits that would otherwise apply in a foreign court to efforts to execute against foreign state property. In theory, an assignment order of this type might be used to circumvent the immunity requirements of both the U.S. and the foreign court.

In any event, the plaintiffs' distinction does not demonstrate that an assignment order directed at foreign state property abroad is appropriate. Such an order would purport to effectuate a change in ownership of foreign state property that is outside the Court's jurisdiction and immune from execution under the FSIA. Such an assignment order, transferring property interests in order to satisfy a judgment against a foreign state, is in every meaningful sense an order of execution. This Court should not permit this blatant end-run around the careful limits in §§ 1610 and 1611.

"The FSIA did not purport to authorize execution against a foreign state's property * * * wherever that property is located around the world." *Autotech Technologies LP v. Integral Research & Devel. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1451 (2008). Such a judicial act would constitute a "breathtaking assertion of extraterritorial jurisdiction," 499 F.3d at 750, and is

contrary to normal principles of territorial jurisdiction, which recognize the primacy of a foreign court's authority over property located within its own territory.

A judgment creditor in a U.S. action may seek enforcement against assets abroad, but it does not do so under any claim of right. Rather, the judgment creditor must “must rely on doctrines of comity in the foreign state.” *Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal. App.3d 1058, 1094 (Cal. Ct. App. 1990). The U.S. judgment creditor must “try to obtain recognition and enforcement of the U.S. judgment in the courts of that country,” which can then “use their powers to assure enforcement of the judgment.” *Autotech*, 499 F.3d at 751; *see also Marks v. United States*, 15 Cl. Ct. 609, 611-612 (Ct. Cl. 1988) (judgment creditor of foreign judgment does not have “a legally enforceable right,” but “must depend on the assistance of local courts for recognition and enforcement of the judgment”); *Credit Suisse*, 130 F.3d at 1348 (U.S. plaintiffs who seek an order compelling banks to turn over assets located in Switzerland “should do so via the Swiss judicial system”).

The decision whether to enforce a U.S. court order against foreign state property located abroad will thus be made by foreign courts under their own law, which may deem enforcement against foreign state-owned property impermissible

or allow such enforcement only subject to special rules. *See* European Convention on State Immunity, Explanatory Report, Point 76 (discussing Article 20), reprinted at <http://conventions.coe.int/treaty/en/Reports/Html/074.htm>; *see also* United Nations Convention on Jurisdictional Immunities of States and Their Properties, Article 19 (permitting only limited forms of post-judgment coercive measures against foreign state-owned property, and only against property located within the forum state). In this context, a district court order claiming to reach foreign state property abroad could be viewed as a substantial affront to the sovereignty not only of the defendant foreign state but also of the states in which property subject to the order is located.

The United States is aware of no decision by a U.S. court ordering assignment of a foreign state's worldwide assets to satisfy a judgment, and courts in very similar circumstances have refused to order assignment of property that is immune from execution under the FSIA.

Thus, in *Chuidian*, 218 Cal. App.3d at 1099-1100, the court rejected a judgment creditor's request for an order to a foreign state instrumentality to assign all debts owing or to become owing to it. The judgment creditor conceded that the foreign state instrumentality "has no assets in the United States," but argued that an assignment order applying to assets worldwide would be "a valid exercise of

the court’s personal jurisdiction” over the instrumentality. *Id.* at 1092, 1094. The court disagreed, holding that to order assignment of assets outside the United States would be “to ignore a long-standing immunity under international law and under the FSIA” and give the creditor what he could not achieve “through ordinary creditors’ remedies, namely, execution upon foreign property.” *Id.* at 1099.

Similarly, in *Quaestor Investments Inc. v. State of Chiapas*, No. CV-95-6723, 1997 WL 34618203, *6-*7 (C.D. Cal. Sep. 2, 1997), the court refused to enter an assignment order involving foreign state assets located outside the United States, and hence immune from direct execution under the FSIA. *See also Grant v. A.B. Leach & Co., Inc.*, 280 U.S. 351, 361 (1930) (noting “settled doctrine” that a receiver appointed by the court “has no extraterritorial power of official action” and cannot seek to recover property in the courts of a foreign jurisdiction).

In arguing that the district court should have ordered assignment of the foreign state’s worldwide assets, the plaintiffs rely on *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992), in which a panel of this Court held that a district court could order discovery regarding the overseas assets of a foreign state instrumentality, and could enforce that discovery order through the monetary contempt sanctions, notwithstanding that the assets in question were

immune from execution under the FSIA. Whatever the merits of the Court's holding,⁵ it does not control the issue presented here. The *Richmark* Court did not consider the propriety of a district court order compelling assignment of foreign state assets that are not subject to direct execution, and its holding should not be extended to this very different context.

⁵ The United States has explained elsewhere that a district court should not issue an order of monetary contempt sanctions against a foreign state, because such an order is unenforceable under the FSIA and “[a] court should not issue an unenforceable injunction’ against a foreign state.” *Af-Cap, Inc. v. Republic of Congo*, No. 05-51168, Brief of the United States as Amicus Curiae In Support of Defendant-Appellant 10-11 (5th Cir. filed Mar. 10, 2006) (quoting *In re Estate of Marcos Human Rights Litig.*, 94 F.3d 539, 545, 548 (9th Cir. 1996)); see *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428-429 (5th Cir. 2006) (holding that district court erred and abused its discretion by ordering monetary contempt sanctions against foreign state).

Furthermore, U.S. court orders permitting private litigants to take discovery from foreign states regarding their worldwide assets, even though those assets are not within the court's execution authority under the FSIA, could cause harm to our foreign relations. *Cf.* Restatement (Third) of Foreign Relations Law of United States, § 442, Reporters' Notes 1, at 354 (1987) (“No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.”). It is one thing for a U.S. court to order discovery for the purpose of enforcing U.S. regulatory norms that are intended by Congress to apply to conduct abroad, but quite another to order worldwide discovery in an effort to further the enforcement in a foreign court of a private litigant's civil judgment. *Cf. Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) (recognizing diminished U.S. interests in enforcing private judgment in the context of foreign blocking statute).

Furthermore, although the defendant in *Richmark* argued that, under the FSIA, it could not be forced to post a bond or to pay the judgment as a condition of appealing an order holding it in contempt, the defendant apparently did not invoke foreign sovereign immunity as a defense to the discovery order or the contempt sanctions themselves. And *Richmark* involved a defendant that was an instrumentality of a foreign state, engaged in commercial activities in the United States — *i.e.*, circumstances in which coercive measures are more accepted as a matter of international practice and pose a lesser threat to our foreign relations. *Cf.* United Nations Convention on Jurisdictional Immunities of States and Their Property, Art. 19(c) (establishing exception to immunity from attachment, arrest, or execution for foreign state property located in the forum state and used for “other than government non-commercial purposes”). In sum, *Richmark* lends no support to the plaintiffs’ position.

Finally, in addition to claiming that the assignment order they seek is proper under *Richmark*, the plaintiffs argue in the alternative that the district court should have ordered assignment of foreign state property located within the United States. *See* Appellants’ Opening Brief at 31-32. Courts have held that, because the property of a foreign state is presumptively immune from execution, a plaintiff has the burden to identify specific property that comes within an exception to

immunity before an order will issue. *See, e.g., Autotech*, 499 F.3d at 750 (“[I]n order to determine whether immunity from execution or attachment has been waived, the plaintiff must identify specific property upon which it is trying to act.”). A similar rule is appropriate in the context of an assignment order, given the potential irritation that such an order poses to a foreign state and the likelihood that a third party will simply comply with an order rather than challenge it in court. Here, the plaintiffs have not identified any foreign state property that is in the United States and subject to execution under § 1609(a) — to the contrary, they have conceded that the only property for which they seek assignment is located abroad. The district court correctly denied the plaintiff’s motion for an order of assignment.

III. A JUDGMENT CREDITOR SEEKING ENFORCEMENT AGAINST A FOREIGN STATE MUST PROVIDE ADEQUATE NOTICE, USING METHODS OF SERVICE COMPARABLE TO THOSE IN 28 U.S.C. § 1608(a).

In denying the plaintiffs’ motion for an assignment, the district court also relied on the fact that the plaintiffs did not provide service in accordance with 28 U.S.C. § 1608(a) in registering their judgment and moving for an assignment of assets. The United States agrees that a judgment creditor must provide adequate notice to a foreign state of proceedings seeking enforcement of a default judgment.

Although § 1608(a) is not directly applicable, it provides a helpful model for what constitutes adequate service. The plaintiffs' failure to provide adequate service provides an independent and sufficient basis for affirmance.

The FSIA “preserve[s] a distinction” between a foreign state’s jurisdictional immunity from an action brought in a U.S. court and its “immunity from having its property attached or executed upon.” *Ministry of Defense for Armed Forces of Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 385 F.3d 1206, 1218 (9th Cir. 2004), *vacated on other grounds*, 546 U.S. 450 (2006). Reflecting Congress’s recognition of the significant interests at stake in execution, the FSIA requires that attachment or execution must be ordered by “the court,” and only after a judicial determination “that a reasonable period of time has elapsed following the entry of judgment” or notice of default judgment. 28 U.S.C. § 1610(c). This is unlike the normal rule for private litigation, where execution can often be initiated by application to a court clerk or sheriff. By preventing execution except by court order, and by requiring the passage of a reasonable time following entry of default judgment, Congress clearly envisioned that there would be a meaningful opportunity for the foreign sovereign to be heard at the enforcement stage to assert immunity.

Because of the important interests at stake when a judgment creditor seeks to execute against a foreign state’s property, and because the foreign state might not have participated in the underlying litigation addressing liability, it is critically important that a foreign state have notice that its property is subject to enforcement efforts and an opportunity to appear and to assert immunity from execution. *See, e.g., Connecticut Bank of Commerce*, 309 F.3d at 251. Courts have “stressed a foreign sovereign’s interest—and our interest in protecting that interest—in being able to assert defenses based on its sovereign status.” *FG Hemisphere*, 447 F.3d at 838.

Furthermore, the FSIA itself makes clear that Congress intended for foreign states to be notified not only of the initiation of a lawsuit, but also of the entry of a subsequent default judgment that might be the basis for enforcement proceedings. Section 1608(e) provides that a foreign state must receive notice of a default judgment using the same methods of service required for the summons and complaint, and § 1609(c) provides that no attachment or execution shall be permitted until the district court “determine[s] that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e).” Notably, notice of the default judgment in the underlying merits action in this case does not appear to have been made in compliance with

these requirements. *See Peterson v. Islamic Republic of Iran*, Civ. 1:01-cv-2094-RCL, Affidavit of Service of Process of Judgment Pursuant to 28 U.S.C. § 1608(e), Dkt. 352 (filed June 23, 2008) (stating that copy of default judgment was mailed by plaintiff’s counsel to Iranian Ministry of Foreign Affairs).

Even following a default judgment, any pleading “asserting new or additional claims” against a foreign state must be served in conformance with § 1608(a). *See* Fed. R. Civ. P. 5(a), 4(j)(1). In light of the distinct rights and interests implicated for the first time where a judgment against a foreign state is sought to be enforced, a motion seeking an order of enforcement against foreign state property can be viewed as analogous to a pleading asserting a new claim for relief.

More generally, all of these provisions and rules reflect an intent that a foreign state be provided with meaningful notice of critical developments in the litigation, typically in accordance with the methods for service identified in § 1608(a). Although § 1608(a) is not directly applicable to efforts to execute against foreign sovereign property, it nevertheless serves as a model for what constitutes effective notice to the foreign state. *Cf.* H.R. Rep. No. 94-1487, at 13-14 (explaining that Section 1608 “satisfies the due process requirement of adequate notice”).

Except where the foreign state has made a special arrangement for service or entered into an international convention on the subject, § 1608(a) requires that a summons and complaint must be translated into the official language of the foreign state, accompanied by a “notice of suit” in that language that “advise[s] a foreign state of the legal proceeding,” “explain[s] the legal significance of the summons, complaint and service,” and “indicate[s] what steps are available under or required by U.S. law in order to defend the action.” H.R. Rep. No. 94-1487, at 24-25 (explaining that the “notice of suit” “provide[s] an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures”). Furthermore, service must be sent to the “head of the ministry of foreign affairs of the foreign state” or through diplomatic channels by the Secretary of State, 28 U.S.C. § 1608(a), *i.e.*, to representatives of the foreign state who are the most likely to be able to respond in a timely and effective manner to the U.S. proceedings.

These statutory requirements for notice help to ensure that a foreign state has meaningful notice of the litigation, through contact with individuals who are well-placed to retain counsel or otherwise act to defend the foreign state’s interests. They also ensure that the foreign state will have a basic understanding

of the significance of the proceedings and the necessary procedures in U.S. litigation.

The service at issue in this case was dramatically different from the procedures described in § 1608(a). It appears that *no* service of any sort was made to the foreign state of the registration of judgment. The motion seeking assignment of rights from CMA CGM was served by regular U.S. mail, apparently without delivery confirmation, to a variety of high-level officials of the Iran Government, including the President of Iran, many of whom appear to have no obvious relationship to the litigation. *See* ER 268-270. The motion does not appear to have been translated into the official language of the foreign state, although the translation requirement in § 1608(a) is an important component of meaningful notice to the foreign state. *Cf. FG Hemisphere*, 447 F.3d at 840-841 (noting that litigant’s “use of English rather than French virtually guaranteed” that foreign state defendant would be unable to file a timely response). Nor is there any indication that a “notice of suit” or its equivalent was included as part of the service. Scattershot mailing of foreign-language pleadings to the President of a foreign state and the heads of various departments and state agencies is not reasonably calculated to give actual notice of enforcement proceedings directed at foreign state property. In the face of this clearly inadequate notice to a foreign

state judgment debtor, the district court correctly denied the judgment creditor's motion for an order under Section 1610(c) authorizing execution.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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JUNE 2009

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 32-1 that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,991 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief Of The United States As Amicus Curiae In Support Of Affirmance with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2009.

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