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## Chapter 10 Privileges and Immunities

### A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1602–1611, governs immunity from suits for foreign states in U.S. courts. The FSIA’s various statutory exceptions, set forth at 28 U.S.C. §§ 1605(a)(1)–(6) and 1605A, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following items describe a selection of the significant proceedings that occurred during 2011 in which the United States intervened or participated as *amicus curiae*.

#### 1. Definition of “foreign state” in the FSIA

On October 4, 2011, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit in a case brought by the European Union (“EU,” formerly “EC”) and 26 of its member states against RJR Nabisco and related companies (“RJR”). *European Community v. RJR Nabisco*, No. 11-2475 (2d Cir. 2011). The lower court had dismissed the EU’s tort law claims against RJR on the basis that the EU did not qualify as a “foreign state” or an “agency or instrumentality” of a foreign state as defined in the FSIA, and therefore was essentially a nonentity for purposes of jurisdiction based on diversity of parties. The U.S. *amicus* brief, excerpted below (with most footnotes and citations to the record omitted), took the position that the EU, while not a foreign state, qualifies as an agency or instrumentality of a foreign state as defined in the FSIA, and therefore the lower court should not have dismissed for lack of diversity jurisdiction. In a separate section not included below, the United States brief also argued that the lower court improperly dismissed the EU’s federal claims under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act. The United States *amicus* brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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The district court dismissed the EC’s common law claims because it determined that the EC is not a “foreign state” within the meaning of the FSIA and the diversity jurisdiction statute. While the district court correctly determined that the EC is not recognized by the United States as a foreign state in its own right, the court erred in holding that the EC is not an agency or instrumentality of its member states. Because the FSIA defines “foreign state” to include such agencies or instrumentalities, the EC qualifies as a “foreign state” for purposes of the diversity

statute. Accordingly, the district court should not have dismissed the EC's state common law claims for lack of diversity jurisdiction.

A. The district court correctly concluded that the EC is not a "foreign state" in its own right. The FSIA does not define "foreign state" except to say that the term includes political subdivisions and agencies or instrumentalities. 28 U.S.C. § 1603(a). That is not surprising, because the Constitution gives the President the exclusive authority to recognize foreign states and their governments. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign government] is exclusively a function of the Executive."); *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009) (holding that the Constitution gives the President exclusive power to recognize foreign sovereigns), *cert. granted* 131 S. Ct. 2897 (2011). For this reason this Court looks to the Executive Branch to determine a foreign person's citizenship for purposes of alienage jurisdiction. *Matimak Trading Co.*, 118 F.3d at 80–81. The district court here thus correctly concluded that, because the President has not recognized the EC as a foreign state, the EC does not qualify as a foreign state in the basic sense of that term.

On appeal, the EC seeks a remand to have the district court consider whether the EC is a "foreign state" under what the EC describes as the Supreme Court's "definition" of that term in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). EC Br. 44–47. A remand on that issue is unnecessary. In *Samantar*, the Supreme Court held that the FSIA does not govern the immunity of individual foreign officials. *Samantar*, 130 S. Ct. at 2282. The Court held that Congress codified standards for foreign state immunity in the FSIA, but left foreign official immunity determinations to the State Department. *Id.* at 2291. In reaching that conclusion, the Supreme Court considered whether foreign officials come within the FSIA's definition of "foreign state." *Id.* at 2286. The Court observed that "[t]he term 'foreign state' on its face indicates a body politic that governs a particular territory." *Ibid.* But Congress gave the term a "broader meaning, by mandating the inclusion of the state's political subdivisions, agencies, and instrumentalities." *Ibid.* (citing 28 U.S.C. § 1603(a)). The Court concluded, however, that Congress did not intend to include individual foreign officials even within this "broader meaning" of "foreign state." *Id.* at 2286–89.

The EC argues that it qualifies as a "foreign state" under what it characterizes as the Supreme Court's "definition" of that term as "'a body politic that governs a particular territory.'" (quoting *Samantar*, 130 S. Ct. at 2286). But *Samantar* nowhere addresses which branch of the United States Government determines which body politic governs what particular foreign territory. In light of the FSIA's silence on that question, courts cannot properly conclude that Congress intended to diminish the President's constitutional authority to recognize foreign states or assign that authority to the courts. *See Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear.").

B. Although the President has not recognized the EC as a foreign state, the FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). To qualify as an agency or instrumentality of a foreign state, an entity must be a separate legal person, an organ of a foreign state, and not created under the laws of a third country. *Id.* § 1603(b). The district court concluded that the EC has independent legal status and is not created under the laws of a third country (*i.e.*, under the laws of a non-member state). These conclusions are correct. At the time it brought suit, the EC had separate legal personality. Consolidated Version of the Treaty Establishing the European Community (EC Treaty), art. 281,

Oct. 11, 1997, 1997 O.J. (C340) 293 (“The Community shall have legal personality.”). And because each member state ratified within its own legal system the treaty creating the EC, the EC was created under the laws of the member states. EC Treaty, art. 313, 1997 O.J. (C340) 302; *see In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 938 (7th Cir. 1996) (an entity created under the laws of a member state to an international agreement is not created under the laws of a third country).

Considering the EC’s status as an organ of its member states, the district court correctly concluded that an entity can qualify as an “organ” under the FSIA if it is an organ of multiple states. As used in the FSIA, an “organ of a foreign state” is an entity created by the state to carry out a public function. *See, e.g., Patrickson v. Dole Food Company*, 251 F.3d 795, 807 (9th Cir. 2001), *aff’d on other grounds* 538 U.S. 468 (2003). A foreign state acting alone can create an entity to carry out a public function, such as management of the state’s natural resources or the provision of basic needs such as water or electricity to remote parts of the country. Similarly, when foreign states jointly create an entity to carry out a public function, in some circumstances that entity can qualify as an “organ” under the FSIA.

Having concluded that the multi-national character of the EC is not a bar to the EC’s status as an organ, the district court next considered whether the EC qualifies as an organ under this Court’s *Filler* decision. *Filler* identified five factors as “relevant” to consideration of whether an entity is an organ of a foreign state:

1. “whether the foreign state created the entity for a national purpose”;
2. “whether the foreign state actively supervises the entity”;
3. “whether the foreign state requires the hiring of public employees and pays their salaries”;
4. “whether the entity holds exclusive rights to some right in the [foreign] country”; and
5. “how the entity is treated under foreign state law.”

*Filler*, 378 F.3d at 217. Considering these factors, the district court determined that the EC is not an organ of its member states. However, that conclusion resulted from a flawed application of the *Filler* factors. ...

The district court recognized that the member states formed the EC for quintessential national purposes: to establish a common market and monetary union, and to coordinate economic activities and policies throughout the member states. For the reasons given by the EC, that determination is correct. The United States has consistently taken the view that the public purpose factor is the most important consideration in determining an entity’s organ status. Brief for the United States as Amicus Curiae, *Powerex Corp. v. Reliant Energy Servs., Inc.*, at 6, 21–22, No. 05-85 (Sup. Ct. Mar. 2007). The district court paid little attention to this factor, other than to acknowledge that the EC satisfies it.

The remaining *Filler* factors support the conclusion that the EC is an organ of its member states, especially when considered in reference to the public purposes for which the EC was created. The treaty establishing the EC delegates from the member states to the EC the authority to exercise specified sovereign powers. *See, e.g., EC Treaty*, art. 3, 1997 O.J. (C340) 181. The district court believed that this implies that the member states do not actively supervise the EC. However, this Court has held a state’s exercise of significant control over an entity supports organ status. *See, e.g., Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire Co., Ltd.*, 476 F.3d 140, 143 (2d Cir. 2007) (finding active supervision of entity by state through “(1) appointing its governor and auditor; (2) acting through a related agency \* \* \*; and (3) regulating

the inspection fees that [the entity] can collect”). The member states have extensive and ultimate control over the EC, defining its areas of authority and limiting its power to act outside those areas. EC Treaty, art. 5, 1997 O.J. (C340) 182 (“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. \* \* \* Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”). That is sufficient to qualify as active supervision under *Peninsula Asset Management*.

The district court recognized that EC officials are “public employees” in that they exercise “powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities.” (quoting Case 149/79, *Commission of the European Communities v. Kingdom of Belgium*, 1980 E.C.R. 3881, ¶ 10). The district court thought that the third *Filler* factor did not support the EC’s organ status because EC officials are not public employees of the EC’s member states. But the third *Filler* factor asks whether the state “requires the hiring of public employees and pays their salaries,” not whether the state itself is the employer. *Filler*, 378 F.3d at 217. As the district court recognized, the treaty establishing the EC itself required the creation of certain positions, to be filled by public officials. And the EC member states funded much of the EC’s operations, including the pay of EC employees. . . .

The EC satisfies the fourth *Filler* factor, as the district court concluded, because the EC member states delegated to the EC exclusive authority over certain sovereign functions. The EC, for example, “has exclusive competence \* \* \* to conclude the Multilateral Agreements on Trade and Goods.” Opinion 1/94, *Competence to Conclude International Agreements Concerning Services and the Protection of Intellectual Property — Art. 228(6) of the EC Treaty*, 1994 E.C.R. I-5267, ¶ 34.

Finally, the district court erred in concluding that there was no evidence that any of the member states considered the EC to be their “organ.” In *Peninsula Asset Management*, this Court determined that the fifth *Filler* factor was satisfied because “the Korean government informed the State Department and the district court that it treats [the Financial Supervisory Service of the Republic of Korea] as a government entity.” 476 F.3d at 143. Here, every member of the EC but one is a plaintiff in this suit. Through their briefing, these member states informed the district court that they consider the EC to be a governmental entity. Because the State Department accepts the EC member states’ representation, that representation should be conclusive.

In sum, the factors this Court considers when evaluating an entity’s status as an organ of a foreign state compel the conclusion that the EC is an organ of its member states, especially when considered in reference to the clear governmental purposes the EC was established to further. Because the EC is an organ of its member states, and because it satisfies the other requirements under 28 U.S.C. § 1603(b), the EC is an “agency or instrumentality” of its member states. Accordingly, the EC is a “foreign state” within the meaning of the FSIA, and the district court erred in concluding that it lacked subject matter jurisdiction over the EC’s state law claims under the diversity statute.

\* \* \* \*

## **2. Exceptions to immunity**

### **a. Commercial activity**

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case “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.”

(1) *Immunity from attachment of multinational research satellite*

On May 3, 2011, the United States filed a statement of interest in the U.S. District Court for the Central District of California opposing the efforts by NML Capital, Ltd. to collect on debts owed by the government of Argentina by attaching its interests in a satellite, the Aquarius/SAC-D. *NML Capital, Ltd. v. Spaceport Systems Int'l.*, Case No. 11-03507-SJO-RZ. The Aquarius/SAC-D was designed to make sea surface salinity measurements from space, providing a previously unavailable volume of data for use in studying global ocean circulation. Excerpts of the U.S. statement of interest are set forth below (with footnotes and citations to the record omitted), arguing that the FSIA prohibits attachment of the satellite and that enjoining the launch of the satellite would severely disserve the public interest. The U.S. statement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

The Aquarius/SAC-D represents the latest initiative in an established partnership between NASA and CONAE, the national space agency of Argentina, as part of a CONAE project known as the Satélite de Aplicaciones Científicas (Scientific Applications Satellite, or SAC). With respect to this particular mission, the NASA/CONAE partnership is governed by an international Memorandum of Understanding (MOU), signed by representatives of NASA and CONAE in March 2004. Pursuant to the MOU, CONAE has provided the spacecraft bus (i.e., the satellite’s infrastructure), while NASA has contributed the main scientific instrument, known as Aquarius, and the rocket that will serve as the satellite’s launch vehicle. The various components are critical to the Aquarius/SAC-D; in particular, the Aquarius instrument cannot fly without the SAC-D spacecraft. CONAE has also partnered with Italy, France, and Canada, each of which has contributed other scientific instruments to the satellite.

This multinational partnership allows the United States, and the global scientific community, to benefit from the expertise of many different national space programs. To date, NASA has invested approximately \$250,000,000 in the Aquarius/SAC-D program, and currently maintains a program workforce of approximately 50 full-time employees. Its international partners have similarly invested heavily in the Aquarius mission.

\* \* \* \*

## ARGUMENT

### I. The FSIA Prohibits Attachment of the Satellite

If the court determines that CONAE is an “agency or instrumentality” of Argentina, then CONAE’s property would be treated as distinct from that of Argentina, and would not be able to be used to satisfy NML’s judgment against the Republic. *See Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1069-74 (9th Cir. 2002). But if the court determines that CONAE is part of Argentina, as asserted by Plaintiff, then the FSIA makes property of a foreign state exempt from attachment and execution unless an exception to immunity applies. *See* 28 U.S.C. §§ 1609, 1610(a), (c). Because Plaintiff cannot show that the Argentina/SAC-D is being “used for a

commercial activity in the United States,” it cannot satisfy a threshold requirement for an exception to immunity. ...

\* \* \* \*

...[I]t is important to note that Plaintiff cannot, of course, use this proceeding to attach the property of the United States. Plaintiff dismisses this concern by contending that it seeks only the property of Argentina.... Even if the Court were to determine that Defendant’s interest in the Aquarius/SAC-D were otherwise subject to attachment, as a practical matter that interest could not be severed without doing substantial damage to the property of the United States. In any event, Plaintiff has failed to show that property of Defendant is subject to attachment.

\* \* \* \*

Here, the Aquarius/SAC-D is not used, and will not be used, for commercial activity. The nature of its activity is public, not commercial in nature. The satellite will be used to collect scientific data concerning ocean salinity levels on a scale never before seen by the scientific community, and will have profound impacts on our understanding of the effects of ocean salinity on ocean circulation and the climate. The operation of Aquarius/SAC-D is not an action of “trade and traffic or commerce,” *Weltover, Inc.*, 504 U.S. at 614, and Argentina is not acting as one player in a market through its operation of the satellite. There simply is no commercial “market” for the Aquarius/SAC-D to operate in.

Notably, the information obtained by Aquarius/SAC-D will be analyzed by NASA and then disseminated at no cost to the public, to benefit the global scientific community. Such a public dissemination underscores the public-spirited, non-commercial nature of the mission. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 92 (2d Cir. 2008) (charitable donations are not commercial activities because they “are not part of the trade and commerce engaged in by a ‘merchant in the marketplace’”); *De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) (considering “whether the activity is of the type an individual would customarily carry on for profit”); *United States v. County of Arlington, Va.*, 702 F.2d 485, 488 (4th Cir. 1983) (same). Rather than engaging in trade and commerce by contracting out the use of the satellite or selling the data obtained by the mission, NASA and CONAE will instead use the Aquarius/SAC-D to obtain scientific data for free public consumption and analysis, to contribute to our collective understanding of ocean salinity in order to improve climate modeling throughout the world.

That the purpose of the Aquarius/SAC-D is not commercial in nature is further underscored by the fact that the observatory’s components were contributed by national space agencies. Intergovernmental initiatives and cooperation are inherently the province of sovereigns. *See, e.g., EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 482 (2d Cir. 2007) (nation’s borrowing relationship with the International Monetary Fund is not “commercial” because membership in the international institution is limited to sovereigns). The assembled satellite is the combination of instruments and infrastructure from the space agencies of the United States, Argentina, France, Italy, and Canada, rather than private companies. NASA and CONAE have entered into a memorandum of understanding as to their respective obligations...

Plaintiff points to the fact that some commercial entities operate satellites, but that does not compel or even necessarily support the conclusion that the Aquarius/SAC-D is being used for a commercial activity. While a “commercial activity” must be something that a private individual can perform, that factor alone is not sufficient. The conduct that triggers an exception to immunity “must itself take place *in a commercial context.*” *Mwani v. bin Laden*, 417 F.3d 7, 17 (D.C. Cir. 2005) (emphasis added). The examples of “commercial activity” provided in the House and Senate reports on the FSIA demonstrate that active participation in the marketplace is

required to satisfy the statutory definition: “a foreign government’s sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation.” H.R. Rep. No. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615; S. Rep. No. 94-1310, at 16 (1976). The Aquarius/SAC-D is not being used for any such activities; instead, the use of the Aquarius/SAC-D is limited to its use as a functioning satellite, gathering scientific information to be analyzed by NASA and CONAE scientists and then disseminated to the public.

\* \* \* \*

If the use of the satellite to collect scientific data could be seen as use for a commercial activity, the satellite would still be immune from attachment because Defendant is not performing such use in the United States. Plaintiff contends that Defendant is “‘using’ the [satellite] in the United States by testing and launching it from Vandenberg Air Force Base,” and that “satellite launches themselves are a commercial activity.” But a satellite is not “used” for testing and launching, and it is NASA, not Argentina, that will be responsible for the launch of the Aquarius/SAC-D. Any use of the satellite for commercial activities will be limited to its use *as a satellite*, which will necessarily occur after NASA has completed the launch on June 9 and the satellite is in orbit around the earth.

\* \* \* \*

Moreover, it is not sufficient that the property *will* be used for commercial activity; such use must be done now. *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) (“the property that is subject to attachment and execution . . . must have been ‘used for a commercial activity’ *at the time* the writ of attachment or execution is issued”) (emphasis in original); *id.* (“Section § 1610(a) does not say that the property in the United States of a foreign state that ‘*will* be used’ or ‘*could potentially* be used’ for a commercial activity in the United States is not immune from attachment or execution. More is required: the property . . . must be used.”) (emphasis in original).

As another court recently recognized, components of a satellite are not being used for commercial activity while they are still being constructed. *See NML Capital, Ltd. v. Republic of Argentina*, Case No. 03-cv-8845, 2011 WL 1533072, at \*6 (S.D.N.Y. Apr. 22, 2011). Moreover, such use must be done by the foreign state, while the property is in the possession of the foreign state. *See id.* at 131 (plaintiff must show that the property *in the hands of the Republic* [of Argentina] must have been ‘used for a commercial activity’) (emphasis in original); *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 234 (D. Mass. 2006) (“the ‘commercial use’ exception of § 1610(a) applies only where it is the foreign sovereign who engages in the commercial activity”).

Plaintiff’s contention that “satellite launches themselves are commercial activity,” thus misses the mark, because future use does not support an exception to immunity. Even if the Aquarius/SAC-D’s use as a functioning satellite could be regarded as use for a commercial activity, the cases discussed above make clear that the proper inquiry is whether the property is being used for a commercial activity now, at the time of its possible attachment and execution. To the extent that the use of Aquarius/SAC-D as a functioning satellite constitutes being “put into action, put into service, availed or employed” for a commercial activity, *see Af-Cap, Inc.*, 475 F.3d at 1091, that use will not occur until the satellite has been launched into orbit. At that

point, the satellite will be outside the United States, and thus not subject to attachment. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) (“It is true that section 1610 does not empower United States courts to levy on assets located outside the United States.”).

\* \* \* \*

Accordingly, the satellite is not presently being “used for a commercial activity in the United States” because it is being tested and prepared for launch by NASA. And once the satellite is launched and is operating as a functioning satellite, it will not be “used for a commercial activity in the United States,” because it will be in orbit, outside the United States. Plaintiff thus cannot show that the satellite falls within the FSIA’s exception from immunity.

## **II. Enjoining the Launch of Aquarius/SAC-D Will Severely Disserve the Public Interest**

Even if the Court determines that the Aquarius/SAC-D is subject to attachment, in considering whether to grant Plaintiff’s request for injunctive relief, the court must also “consider whether the public interest favors issuance of the injunction.” *Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc). *See also Winter*, 129 S. Ct. at 374 (“A plaintiff seeking a preliminary injunction must establish . . . that an injunction is in the public interest.”).

In its application, Plaintiff pays little attention to the public interest, arguing only that the public has an interest in facilitating the enforcement of judgments. In its reply, Plaintiff makes the remarkable assertion that “[t]he relief sought will have no effect on the satellite mission other than to impose a lien on Argentina’s interest in it.” Plaintiff’s statement betrays a complete misunderstanding of the property at issue in this case. Seeking an injunction only weeks before the satellite’s launch, Plaintiff ignores the direct and concrete harms that will result to NASA and the United States, against whom Plaintiff has no legal grievance. The Aquarius instrument cannot fly without the SAC-D spacecraft, and removal of the spacecraft itself would thus have a remarkably detrimental impact on parties beyond Argentina. The United States and its other foreign space partners simply should not be made to pay on account of a dispute between Plaintiff and Defendant—a dispute wholly unrelated to the Aquarius/SAC-D satellite and mission. The public interest would be severely disserved by an order enjoining the launch of the Aquarius-SAC/D.

Congress has recognized that the public interest is served by missions such as the Aquarius/SAC-D. *See* 11A Fed. Prac. & Proc. Civ. § 2948.4 (2d ed.) (“The public interest may be declared in the form of a statute.”) (quoted in *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009)). Congress has declared “that the general welfare and security of the United States require that adequate provision be made for aeronautical and space activities.” 42 U.S.C. § 2451(b) (2005). Moreover, it is the policy of the United States to undertake aeronautical and space activities to contribute to “[t]he expansion of human knowledge of the Earth,” *id.* § 2451(d)(1), and to engage in “[c]ooperation by the United States with other nations and groups of nations” in pursuit of that goal, *id.* § 2451(d)(7).

\* \* \* \*

Despite Plaintiff’s unsupportable assertion that a temporary restraining order “will have no effect on the satellite mission other than to impose a lien on Argentina’s interest in it,” the fact is that NASA could not substitute for the satellite bus just weeks before launch. Custom-designed and manufactured for the specifications of this mission, the Aquarius/SAC-D “has now been fully assembled, and removal of any of the instruments (including Aquarius) could

significantly (and potentially permanently) damage the observatory.” Even replacing a relatively minor instrument at this stage would invalidate the extensive testing performed thus far. Of course, losing the spacecraft bus—the infrastructure of the satellite itself—would have far more significant consequences.

\* \* \* \*

Finally, an injunction also could have consequences for the treatment of the United States abroad under principles of reciprocity. This is particularly so in the context of the attachment and execution of property because, as discussed above, “some foreign states base their sovereign immunity decisions on reciprocity.” See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). NASA also contributes to missions based in foreign nations, and has a substantial interest in ensuring that those missions can go forward under similar circumstances. A U.S. court’s decision to enjoin the launch at this stage could encourage foreign courts to issue similar orders against United States interests abroad.

The severe consequences that an injunction would have for NASA and the United States strongly militate against this Court’s enjoining the launch of the Aquarius/SAC-D.

\* \* \* \*

(2) *McKesson v. Iran*: whether the commercial activity exception creates a cause of action

As discussed in Chapter 5, the United States filed an *amicus* brief in the U.S. Court of Appeals for the District of Columbia Circuit on July 27, 2011 in *McKesson Corp. v. Islamic Republic of Iran*, No. 10-7174. Excerpts below are from the section of the brief arguing that the commercial activity exception does not authorize a court to create a federal common law cause of action founded in customary international law (footnotes and citations to the record have been omitted). The section of the brief discussing the act of state doctrine is excerpted in Chapter 5. The brief also contained a section on the Treaty of Amity between the U.S. and Iran. The brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).\*

\* \* \* \*

A. *McKesson* brought this action against Iran by invoking the jurisdiction of the FSIA, specifically the commercial activity exception to immunity under that statute, 28 U.S.C. § 1605(a)(2). See *McKesson V*, 539 F.3d at 491 (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449-451, 453 (D.C. Cir. 1990) (*McKesson I*); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350-351 (D.C. Cir. 1995) (*McKesson II*), cert. denied, 516 U.S. 1045 (1996)). In the most recent appeal, this Court directed the district court on remand to reconsider whether customary international law can be construed to provide a cause of action against Iran “in light of, *inter alia*, the Supreme Court’s intervening decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).” *McKesson V*, 539 F.3d at 491.

The district court here erroneously held that the FSIA commercial activity exception authorizes a United States court to create a federal common law cause of action for expropriation

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\* Editor’s note: On February 28, 2012, the Court of Appeals issued its decision in the case, agreeing with the argument presented in the United States brief that the FSIA does not create a cause of action for alleged violation of customary international law.

under customary international law. Neither the text of the commercial activity exception nor its legislative history in any way refers to claims founded in customary international law. ...

The FSIA commercial activity exception does not constitute the kind of exceptional grant of jurisdiction permitting federal courts to exercise residual judicial authority to fashion federal “common law claims derived from the law of nations.” *Sosa*, 542 U.S. at 731 n.19. In particular, there is no basis to conclude—as the district court did here—that the commercial activity exception permits a federal court to create a federal common law cause of action for expropriation by reference to international law.

The Supreme Court in *Sosa* made clear that the Alien Tort Statute, 28 U.S.C. § 1350, is unusual in its contemplation that federal courts could create a federal common law cause of action based on customary international law in certain limited circumstances. The text of that statute explicitly contemplates a “civil action [brought] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. That language stands in sharp contrast to the FSIA commercial activity exception (quoted above), which refers to the commercial activity of foreign governments as a reason why the defense of foreign sovereign immunity is unavailable, but notably makes no mention of either causes of action or customary international law.

The majority in *Sosa* took pains to distinguish the Alien Tort Statute from the general grant of federal-question jurisdiction in 28 U.S.C. § 1331, which the Court determined did not permit courts to look to customary international law for the creation of a new federal common law cause of action. See *Sosa*, 542 U.S. at 731 n.19. The *Sosa* Court’s extensive and careful scrutiny of the Alien Tort Statute demonstrates the unusual circumstances necessary to find that a jurisdictional statute authorizes federal courts to derive new causes of action from customary international law. See *id.* at 712-731. We are aware of no case in which a federal court has applied *Sosa* to find such an authorization in any other statute, including the FSIA.

**B.** The district court failed to acknowledge this essential point of *Sosa*. The decision below too quickly concluded that the FSIA commercial activity exception, “like the [Alien Tort Statute],” permits courts to “apply causes of action based on international law.” 2009 Op. 8. Courts can generally look to international law when interpreting the terms of the FSIA. See *ibid.* (citing *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1294-1295 (11th Cir. 1999)). But that general proposition does not support the quite different determination that the FSIA commercial activity exception authorizes creation of a federal common law cause of action derived from customary international law. *Aquamar* did not involve any claimed reliance on a cause of action based on customary international law; nor did that case involve claims under the FSIA commercial activity exception. Neither *Aquamar* nor any other case of which we are aware applied the analysis of *Sosa* to the FSIA commercial activity exception.

The district court quoted *Sosa* to suggest that a cause of action under the law of nations is generally available if Congress has not precluded it. But the quoted passages are not part of the Supreme Court’s analysis of the particular reasons to read the Alien Tort Statute differently from other grants of federal jurisdiction, see *Sosa*, 542 U.S. at 714-724. Thus, the Supreme Court in *Sosa* “affirmed that the domestic law of the United States recognizes the law of nations” in “appropriate circumstances.” *Id.* at 729-730 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). And Congress had not expressly precluded the *Sosa* Court’s interpretation of the Alien Tort Statute. *Ibid.* But those factors by themselves did not dictate the Court’s interpretation of the statute. Indeed, the observations quoted by the district court here

would apply equally to any grant of federal jurisdiction, including the federal question statute, 28 U.S.C. § 1331, which the Court in *Sosa* specifically said does not authorize courts to create a federal common law cause of action founded in customary international law, see *Sosa*, 542 U.S. at 731 n.19.

The district court also pointed to a different provision of law: the FSIA expropriation exception, 28 U.S.C. § 1605(a)(3). But the expropriation exception is not at issue in this case. Even if the FSIA expropriation exception, like the Alien Tort Statute, could be read to permit a court to fashion a cause of action as a matter of federal common law by reference to customary international law, that result would not support the district court's erroneous determination that the commercial activity exception should be read to do the same.

C. McKesson does not argue that the FSIA commercial activity exception, 28 U.S.C. § 1605(a)(2), itself bears any indicia of congressional intent to permit federal courts to create a federal common law cause of action founded in customary international law. Instead, McKesson's brief relies on other statutes, pointing to the language of the FSIA expropriation exception, 28 U.S.C. § 1605(a)(3), and to a statutory provision that antedates the FSIA altogether, 22 U.S.C. § 2370(e)(1)-(2) (the Hickenlooper Amendment, which contains some language similar to the FSIA expropriation exception). But those statutes are not the basis for the district court's jurisdiction in this case, and they do not answer the question of Congress' intent in enacting the FSIA commercial activity exception.

McKesson also suggests that the distinction between the FSIA commercial activity and expropriation exceptions should be disregarded for these purposes. By seeking to isolate the FSIA's grant of federal jurisdiction in 28 U.S.C. § 1330(a) from the statute's enumerated immunity exceptions in 28 U.S.C. § 1605, McKesson improperly disregards the significance of the precise limitations Congress imposed in each of the separate statutory exceptions to foreign sovereign immunity, as set forth in § 1605(a)(1)-(6). The FSIA is not an atomized collection of disparate provisions, and the statute's jurisdictional grant—which explicitly refers to and requires a “claim for relief \* \* \* with respect to which the foreign state is not entitled to immunity \* \* \* under sections 1605-1607 of this title,” 28 U.S.C. § 1330(a)—cannot be so readily divorced from the exceptions to immunity that themselves define and determine the scope of the jurisdiction over any such claim. Thus, Congress made clear that the FSIA expropriation exception applies only when specific conditions are satisfied, such as the requirement that the property taken (or property exchanged for the property taken) be present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or alternatively that the property be owned by a foreign state agency or instrumentality engaged in commercial activity in the United States. See, e.g., *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010) (en banc), cert. denied, \_\_\_ U.S. \_\_\_ (No. 10-786 June 27, 2011).

By contrast, the premise of the FSIA's commercial activity exception is that, under the “restrictive” theory of sovereign immunity, a foreign nation may fairly be held liable for conduct that is “private or commercial in character” when it acts “in the manner of a private player within the market.” *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (internal quotation marks omitted). Congress would have had little reason to expect that, in deciding whether a foreign state was liable for such private conduct, federal courts would have any need to create federal common law causes of action or otherwise look beyond the ordinary rules of commercial law that govern “private player[s] within the market.” *Ibid.* The legislative history of the FSIA confirms that the statute was “not intended to affect the substantive law of liability.” H.R. Rep.

No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610; see also, e.g., *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (D.C. Cir. 2003) (courts “have no free-wheeling commission to construct common law as we see fit” because the FSIA “instructs us to find the law, not to make it”).

The FSIA’s carefully delineated exceptions must be read as an integral part of the comprehensive statutory scheme Congress adopted. That scheme does not merely grant subject-matter jurisdiction over a specified category of cases, but addresses a wide variety of related and carefully linked subjects concerning claims against foreign sovereigns. Thus, the FSIA prohibits state as well as federal courts from exercising jurisdiction over any claim against a foreign state unless it comes within an exception to foreign sovereign immunity, and the statute also specifies rules for personal jurisdiction, venue, removal, and attachment and execution for cases that come within an exception.

The Supreme Court has emphasized that “subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), quoted in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 (1989). While the Court did not specifically address the question raised in this case, the emphatic and repeated references to the FSIA’s “comprehensive [statutory] scheme,” e.g., *Amerada Hess*, 488 U.S. at 435 n.3; *Verlinden*, 461 U.S. at 496, refute McKesson’s efforts to elide the significant differences between the FSIA commercial activity and expropriation exceptions.

McKesson also suggests that the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), can be read to create a cause of action. But that statute is not a grant of jurisdiction, like the Alien Tort Statute or the FSIA, and it does not purport to enact or codify any cause of action. The Hickenlooper Amendment was intended to limit the Supreme Court’s decision in *Sabbatino* concerning the applicability of the act of state doctrine to litigation concerning certain claims for expropriation. See, e.g., *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1293-1294 (11th Cir. 2001). It says nothing about the source of any right to bring such claims in the first instance.

Moreover, the Supreme Court’s decisions in *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Cort v. Ash*, 422 U.S. 66 (1975), demonstrate the error of trying to find an implied right of action in the Hickenlooper Amendment. *Cort* and its progeny make clear that the Supreme Court has “sworn off the habit of venturing beyond Congress’s intent” concerning implied private rights of action. *Alexander*, 532 U.S. at 287, cited in *McKesson V*, 539 F.3d at 490.

Like the district court, McKesson fails to understand the principal lesson of *Sosa*. McKesson’s brief disregards the significance of the inquiry into whether a particular jurisdictional statute can be read to authorize federal courts to create new federal common law causes of action founded in customary international law. That inquiry in this case properly focuses on the FSIA commercial activity exception, and there is no indication that Congress imbued that provision with the same attributes as the Alien Tort Statute, which *Sosa* interpreted to give federal courts that authority in certain circumstances.

This Court recently reiterated the Supreme Court’s call for “caution” in *Sosa*. See *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1093 (D.C. Cir. 2011); see also *id.* at 1098 (Rogers, J., concurring) (citing “traditional principles of judicial restraint, especially in light of *Sosa*’s specific grounds for caution in the ATS context”). The Court’s recognition of the need for circumspection in the creation of federal common law causes of action properly extends as well to the first step of the *Sosa* analysis: whether the jurisdictional statute at issue contemplates such judicial lawmaking at all. Here, there is no occasion to reach the question whether a particular

cause of action should be recognized (the issue in *Ali Shafi*), as the commercial activity exception to the FSIA does not contemplate such an inquiry at all.

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### (3) “Direct effect” requirement

In December 2011, the United States filed a brief as *amicus curiae* in the Supreme Court of the United States advocating denial of the petition for certiorari in *Republica Bolivariana de Venezuela v. DRFP L.L.C., d/b/a Skye Ventures*, No. 10-1144. Petitioner Venezuela sought certiorari after the lower court denied its motion to dismiss the case and the Court of Appeals for the Sixth Circuit affirmed that decision as to Venezuela’s claim that the conduct at issue did not cause “a direct effect in the United States” as required under the FSIA. Respondent Skye Ventures originally filed suit against Venezuela after seeking payment on bearer promissory notes issued by a Venezuelan bank (“Bandagro”) and backed by the government of Venezuela. Skye Ventures asserted that the notes were governed by the laws of Switzerland and the Uniform Rules for Collections set out in an International Chamber of Commerce (“ICC”) publication and therefore entitled the bearer to demand payment anywhere the notes were held. Excerpts of the United States brief below discuss the application of the FSIA (with footnotes and citations to the record omitted). The full text of the United States brief is available at [www.justice.gov/osq/briefs/2011/2pet/6invit/2010-1144.pet.ami.inv.pdf](http://www.justice.gov/osq/briefs/2011/2pet/6invit/2010-1144.pet.ami.inv.pdf).<sup>\*\*</sup>

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#### A. The Sixth Circuit’s Application Of The FSIA Is Correct And Is Consistent With The Decisions Of Other Courts Of Appeals

1. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), this Court examined the commercial-activity exception of the FSIA that permits the exercise of jurisdiction where an act occurring outside the United States has a “direct effect” within the United States. The Court explained that “an effect is direct if it follows as an immediate consequence of the defendant’s \* \* \* activity,” and that Section 1605(a)(2) does not contain “any unexpressed requirement of substantiality or foreseeability.” *Id.* at 618 (citation and internal quotation marks omitted). The Court then applied that standard to government bonds issued by Argentina, which provided for payment “through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor.” *Id.* at 609-610. Because the bondholder had chosen New York as the place of payment, the Court concluded that “New York was thus the place of performance for Argentina’s ultimate contractual obligations.” *Id.* at 619. The sovereign’s nonpayment therefore “necessarily” created the requisite direct effect under Section 1605(a)(2) because “[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming.” *Ibid.*

The court of appeals’ decision is a straightforward application of *Weltover*. The court of appeals first addressed whether the provisions of the Bandagro notes gave respondent the right to

<sup>\*\*</sup> Editor’s note: The Supreme Court issued its decision denying certiorari in the case in January 2012.

designate the United States as the place of payment. The court concluded that, by providing that the notes are governed by Swiss law and ICC rules, the parties had agreed that respondent “had the right to designate the United States as a place of payment of the notes,” which respondent had done. Having so answered that antecedent question, the court correctly viewed the circumstances as analogous to those presented in *Weltover*: as in that case, the notes at issue gave the holder the right to choose the place of payment on the notes, and the holder chose the United States. The court therefore concluded, consistent with *Weltover*, that when petitioners failed to pay on the bonds, “money that was supposed to have been delivered to [respondent] at its office in Columbus was not forthcoming, causing a direct effect in the United States” under Section 1605(a)(2).

Petitioners argue that the Sixth Circuit erroneously found a “direct effect” in the United States “simply because [the notes] do not specifically *preclude* payment in the United States.” The premise of petitioners’ argument is incorrect, however, because the court did not construe the notes as silent regarding place of payment. Rather, the court held that the notes’ terms reflected an affirmative agreement that permitted the holder to choose to demand payment in the United States. The question whether *Weltover* would permit a court to find a “direct effect” under Section 1605(a)(2) based on notes that are altogether silent as to the place of payment is thus not presented here. And, as discussed further below, whether the court correctly construed the notes’ provisions as addressing the place of payment is not a question that independently warrants this Court’s review.

2. Petitioners contend that the courts of appeals are “irreconcilably fractured” regarding when, under *Weltover*, a foreign state’s refusal to make payment at a United States location causes a direct effect in the United States. Petitioners are incorrect.

Applying *Weltover*, the courts of appeals that have addressed the issue have unanimously concluded that a foreign sovereign’s nonpayment in the United States on a debt instrument or contract that permits the payee to designate a United States locale as the place of payment, when the payee has made such a designation, creates a “direct effect” in the United States under Section 1605(a)(2). See *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 129-130, 132 (2d Cir. 1998) (where the instrument authorized the plaintiff to choose any location as the place of payment, including the chosen locale of New York, defendant’s failure to pay caused a direct effect under *Weltover*, and there was no need for the instrument expressly to designate the United States); *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997) (an agreement requiring only that the plaintiff utilize a “non-Nigerian bank” permitted the plaintiff to elect a bank in New York as the place of payment, and Nigeria’s failure to satisfy contractual obligations in New York “necessarily had a direct effect in the United States” under *Weltover*); see also *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002) (agreeing with courts that “found a direct effect when a defendant agrees to pay funds to an account in the United States and then fails to do so”), abrogated on other grounds by *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

The courts of appeals also generally agree that if a contract or debt instrument does not contemplate that the noteholder may specify a place of payment within the United States, or the noteholder designates a location outside the United States, there is *not* the requisite direct effect within the United States. See, e.g., *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232, 1237-1238 (10th Cir. 1994) (finding no direct effect where a contract specified Paris as the place of payment and did not contemplate that either party would perform any part of the contract in the United States, even though the contract’s provision that payment be made in

U.S. dollars meant that a U.S. bank might be incidentally involved in converting payment to dollars), cert. denied, 513 U.S. 1112 (1995); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146-1147 (D.C. Cir. 1994) (no direct effect when the only connection to the United States was that some of the payments were made *from* U.S. bank accounts, and “[n]either New York nor any other United States location was designated as the ‘place of performance’ where money was ‘supposed’ to have been paid”), cert. denied, 513 U.S. 1079 (1995). But see *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 889, 896 (5th Cir.) (*Voest-Alpine*) (finding a direct effect caused by nonpayment in the United States on a contract that was silent as to the place of payment, when the foreign sovereign acknowledged a practice of sending the funds to the location designated by debtholder), cert. denied, 525 U.S. 1041 (1998).

Here, because the Sixth Circuit concluded that the Bandagro notes permitted respondent to designate the United States as the place of payment, the court’s ruling that petitioners’ nonpayment after respondent chose the United States caused a direct effect in the United States is consistent with the decisions addressing similar agreements. See, e.g., *Hanil Bank*, 148 F.3d at 132.

Nonetheless, petitioners urge that review is warranted because a conflict exists between those courts that require a plaintiff to show that the foreign sovereign performed a “legally significant act” within the United States in order to establish a direct effect within the meaning of Section 1605(a)(2), and those courts, like the Sixth Circuit, that eschew such a requirement. Although petitioners are correct that the courts of appeals have disagreed as to whether a “legally significant act” is necessary after this Court’s *Weltover* decision, that disagreement is not implicated here because the outcome in this case would be the same under either approach. The Second and Ninth Circuits, which require a legally significant act in the United States, have held that such an act occurs when—as the courts below found—a sovereign fails to make payments on a debt instrument that permits the holder to designate any place of payment and the holder has chosen the United States. See *Hanil Bank*, 148 F.3d at 129-130, 133 (when plaintiff could choose any place of payment and chose the United States, the “most legally significant act—the breach of contract—occurred in the United States”); *Adler*, 107 F.3d at 727 (finding that nonpayment to U.S. bank, when agreement provided that payment would be made to a “non-Nigerian bank,” was a legally significant act).

Finally, petitioners argue that contrary to the Sixth Circuit’s decision, some courts of appeals have held that the debt instrument must “*expressly* specify the United States as a place of payment or authorize the plaintiff to designate the place.” None of the cases on which petitioners rely, however, suggests that an agreement must expressly name the United States as the place of payment. See, e.g., *Guevara v. Republic of Peru*, 608 F.3d 1297, 1309-1310 (11th Cir.) (concluding that plaintiff’s failed attempt, from the United States, to claim a reward offered and administered in Peru did not create a direct effect), cert. denied, 131 S. Ct. 651 (2010); *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 239 (2d Cir. 2002) (noting that in a previous case, “[s]atisfaction of the geographical jurisdictional nexus \* \* \* depended on the fact that the contract stipulated performance in New York,” but not suggesting that such an express stipulation was the only way to create the necessary direct effect).

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#### **b. Expropriation exception**

Section 1605(a)(3) of the FSIA provides an exception for immunity in cases of alleged expropriation:

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.

In May 2011, the United States submitted a brief as *amicus curiae* in the Supreme Court of the United States at the invitation of the court which addressed the meaning of the expropriation exception in the FSIA. *Kingdom of Spain v. Estate of Claude Cassirer*, No. 10-786. As discussed in Chapter 8, the case was brought by the estate of the descendant of a former owner of a painting that was confiscated by Nazi Germany and later came to be owned by an agency of the Spanish government. The United States brief is available at [www.justice.gov/osq/briefs/2010/2pet/6invit/2010-0786.pet.ami.inv.pdf](http://www.justice.gov/osq/briefs/2010/2pet/6invit/2010-0786.pet.ami.inv.pdf). Excerpts below address the applicability of the expropriation exception (with citations to the record and most footnotes omitted). See Chapter 8 for discussion of the section in the brief addressing whether there is an exhaustion requirement prior to seeking relief for expropriation under the FSIA in U.S. courts. The Supreme Court denied *certiorari*, allowing the case to proceed at the district court level.

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1. The court of appeals correctly concluded that the exception to foreign sovereign immunity in Section 1605(a)(3) applies in this case and permits the exercise of subject-matter jurisdiction over the Foundation. The statute contains two jurisdictional prerequisites, and respondent's complaint satisfies both of them. *First*, Section 1605(a)(3) requires that a plaintiff's suit be one "in which rights in property taken in violation of international law are in issue." In his complaint, respondent alleges—and petitioners do not challenge before this Court—that the Foundation owns a Pissarro painting taken from respondent's grandmother by the Nazi government in violation of international law. Respondent's "rights in property taken in violation of international law" are therefore very much "in issue" in this case.

*Second*, Section 1605(a)(3) requires either that the property be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or that the property be "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." Here, respondent does not allege that the Pissarro painting is "present in the United States" in connection with any commercial activity carried on by Spain. But respondent does allege—and petitioners again do not challenge before this Court—that the Foundation is an instrumentality of Spain engaged in commercial activity in the United States. Respondent's complaint therefore satisfies Section 1605(a)(3)'s express requirements with respect to the Foundation.

2. a. Petitioners argue that the expropriation exception is ambiguous because "[it] does not expressly say" whether the property at issue must have been taken "by the [defendant] foreign state" or "by *any* foreign state," and they contend that this supposed ambiguity should be

resolved by requiring that the defendant foreign state have been the wrongdoer. But the absence of any reference to the responsible foreign state indicates that Congress was interested in the fact of the unlawful expropriation, not the identity of the expropriator. Congress drafted the exception to govern all cases “in which rights in property taken in violation of international law are in issue” (if the requisite nexus to commercial activity is also present), without regard to whether the defendant foreign state took the property or subsequently came into possession of it. As the court of appeals explained, “[t]he text is written in the passive voice, which ‘focuses on an event that occurs without respect to a specific actor.’” (quoting *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009)). “Thus, the text already connotes ‘any foreign state,’” and the court interpreted the statute in accord with its most natural meaning.

The FSIA’s emphasis on the fact of a taking carries over to its provision governing attachment of a foreign state’s property in the United States, 28 U.S.C. 1610 (2006 & Supp. III 2009). Section 1610(a)(3) parallels Section 1605(a)(3): it provides that certain property is not immune from attachment to execute “a judgment establishing rights in property which has been taken in violation of international law.” But elsewhere in the FSIA’s attachment provision, Congress concentrated on the identity of the expropriator. Section 1610(f)(1) permits the attachment of certain property owned by a foreign state found liable for terrorism, and refers to property “expropriated or seized *by* the foreign state.” 28 U.S.C. 1610(f)(1)(B) (emphasis added). That is because the parallel jurisdictional exception permits suits for monetary damages “against a foreign state” for terrorist acts committed by agents “of such foreign state.” 28 U.S.C. 1605A(a)(1) (Supp. III 2009). Where Congress has chosen to make an exception to foreign sovereign immunity turn not simply on the fact of expropriation but the identity of the expropriating state, it has said so in the FSIA. Congress has not so provided in Section 1605(a)(3).

b. Petitioners also assert that the expropriation exception was “intended to apply to foreign states that have committed a jurisdictionally-significant act.” That assertion begs the question of what act by a foreign state should be considered jurisdictionally significant. The text of the FSIA supplies the answer: If the case is one “in which rights in property taken in violation of international law are in issue,” then the conduct that gives rise to jurisdiction is commercial activity in the United States by the foreign state or instrumentality: either (i) the expropriated property is “present in the United States in connection with a commercial activity carried on in the United States by the foreign state” or (ii) the 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.” 28 U.S.C. 1605(a)(3). Section 1605(a)(3)’s reliance on commercial activity in the United States by the foreign state or instrumentality as the jurisdictionally significant act is consistent with the general practice under the restrictive theory of immunity of abrogating such immunity based on commercial activities conducted by a foreign state in the forum state. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487, 488-489 (1983).

3. Petitioners ground their arguments in a number of policies and authorities outside the FSIA. None counsels in favor of a different interpretation of Section 1605(a)(3).

a. Petitioners argue that the decision below conflicts with the State Department’s espousal policy. Espousal is the process by which the “government of the United States, usually through diplomatic channels, makes [a private citizen’s claim] the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the

injury.” *Abraham-Youri v. United States*, 139 F.3d 1462, 1463 n.2 (Fed. Cir. 1997) (citation omitted). As petitioners note, the State Department will consider espousing a claim of expropriation against a foreign government only if certain conditions are satisfied, including that (i) the claimed violation of international law is attributable to that foreign government, and (ii) the claimant has exhausted local remedies in the relevant country or demonstrated that exhaustion would be futile.

The State Department’s espousal policy does not, and is not intended to, have any logical bearing on the proper interpretation of Section 1605(a)(3). The espousal policy governs when the United States will adopt the claim of one of its citizens for the purposes of state-to-state resolution; it does not govern whether the rights of U.S. citizens under international law have been violated in the first instance, let alone whether those citizens can satisfy the FSIA’s expropriation exception and invoke the jurisdiction of federal courts. Indeed, one purpose of the FSIA was to enable private parties to obtain—and, in some instances, to execute upon—judgments against foreign states or instrumentalities without the need for State Department espousal. Cf. 28 U.S.C. 1602; H.R. Rep. No. 1487, 94th Cong., 2d Sess., 8, 13, 27-29 (1976) (*1976 House Report*). There is no basis, then, for the State Department’s diplomatic policy governing resolution of claims with foreign nations to limit the FSIA’s exceptions to sovereign immunity for suits by private parties.

b. Petitioners contend that international law permits jurisdiction over a foreign state or instrumentality only for conduct that itself violates international law. Petitioners cite no authority for that proposition, and in any event the FSIA subjects foreign states to suit in a variety of circumstances that do not involve any violation of international law. See, e.g., 28 U.S.C. 1605(a)(2) (exception to foreign sovereign immunity for suits based on a foreign state’s commercial activity in the United States); 28 U.S.C. 1605(a)(4) (same; suits in which certain rights in property in the United States are at issue); 28 U.S.C. 1605(a)(5) (same; suits based on certain types of tortious conduct); see also Convention on Jurisdictional Immunities of States and Their Property Art. 10, U.N. Doc. A/59/508 (2004) (exception to foreign sovereign immunity for claims arising out of certain commercial transactions); *id.* Art. 11 (same; claims relating to certain employment contracts); *id.* Art. 13 (same; claims arising out of ownership, possession, or use of certain property in the forum state).

c. Petitioners point to the Restatement (Third) of Foreign Relations Law of the United States (1987) (Restatement). Section 455 of the Restatement addresses the immunity of foreign states from jurisdiction, and it appears to contemplate that immunity is withdrawn only for an expropriating state. See 1 Restatement § 455(3)(a) and (b) at 411; *id.* § 455 cmt. c at 412 (stating that jurisdiction is appropriate in part if “the property was taken by the foreign state in violation of international law”). But the Restatement was drafted in 1987, eleven years *after* the FSIA was enacted. And although the Restatement says that it “reflect[s] Section 1605(a)(3)” of the FSIA, *ibid.*, it adds a requirement—that the property at issue was “taken by the foreign state”—that is not present in Section 1605(a)(3), without indicating whether that choice of wording was meaningful, imprecise, or inadvertent. Even assuming that the drafters of the Restatement intended to address, *sub silentio*, jurisdiction over a nonexpropriating state, petitioners cite no authority for the proposition that the text of the Restatement (and its commentary) should control over the quite different and broad text of the FSIA itself.

d. Finally, petitioners rely on the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2). That provision was enacted following this Court’s decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which held that the act of state doctrine barred litigation of the ownership

of property that had been expropriated by the Cuban government. *Id.* at 436-437. The Hickenlooper Amendment overturns that result. It provides that United States courts shall not “decline on the ground of the federal act of state doctrine to make a determination on the merits” in a case “in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking \* \* \* by an act of that state in violation of the principles of international law.” 22 U.S.C. 2370(e)(2). Petitioners contend that the Hickenlooper Amendment abrogates the act of state doctrine only for expropriating states, and the FSIA’s waiver of foreign sovereign immunity should be interpreted in parallel fashion.

As an initial matter, it is not established that the Hickenlooper Amendment denies an act of state defense to a foreign state only if that state confiscated the property at issue, and petitioners cite no authority for that proposition. Senator Hickenlooper, when explaining the amendment, specifically noted that it would “discourage purchases of expropriated property since the purchasers would be unable to rely automatically on the act of state doctrine and would have to establish their lack of notice of the violation of international law that took place in the seizure.” 110 Cong. Rec. 19,557 (1964). Nothing in this statement suggests that it did not apply equally to a foreign state that purchased property that had been expropriated by another foreign state.

In any event, Congress “intended that the expropriation exception to foreign sovereign immunity operate independently from the Hickenlooper Amendment’s exception to the act of state doctrine.” *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 479 (D.C. Cir. 2007); see *1976 House Report 20* (explaining that the FSIA’s expropriation exception “deals solely with issues of immunity” and “in no way affects existing law on the extent to which, if at all, the ‘act of state’ doctrine may be applicable”). Although the FSIA authorizes United States courts to exercise subject-matter jurisdiction over a foreign state or instrumentality that possesses property that was unlawfully expropriated, the FSIA does not itself affect the substantive liability of those foreign entities. Thus, whether the plaintiff has a valid cause of action or whether the foreign state has a valid defense, including one based on the act of state doctrine, does not affect the jurisdiction of United States courts to adjudicate those questions.

4. Petitioners apparently assumed below that (and the court of appeals therefore did not address whether) if Section 1605(a)(3) permits jurisdiction over the Foundation, it also permits jurisdiction over the Kingdom of Spain. That assumption is erroneous. If an action is one “in which rights in property taken in violation of international law are in issue,” then Section 1605(a)(3) requires either of two types of commercial activity in the United States: (i) the expropriated property must be “present in the United States in connection with a commercial activity carried on in the United States *by the foreign state*,” or (ii) the property must be “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.” 28 U.S.C. 1605(a)(3) (emphasis added).

Whether jurisdiction exists over the foreign state depends on which prong of Section 1605(a)(3) the plaintiff invokes. Where a plaintiff alleges that the property at issue “is present in the United States in connection with a commercial activity carried on in the United States by the foreign state,” 28 U.S.C. 1605(a)(3), then there is jurisdiction over the foreign state itself based on its own commercial activities within this country. But where a plaintiff alleges that the property is “owned or operated by an agency or instrumentality of the foreign state \* \* \* engaged

in a commercial activity in the United States,” then there is jurisdiction over only the foreign agency or instrumentality that has availed itself of American markets, not the foreign state. *Ibid.*; cf. *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006).

Counsel for respondent has informed this Office that on remand before the district court respondent would not oppose a motion to dismiss the Kingdom of Spain from this case. Because the Foundation would still be subject to jurisdiction before the district court, and because the Foundation and Spain have a shared interest in opposing the relief that respondent seeks, it is conceivable that Spain would choose not to seek to be dismissed as a party. But the fact that Spain may not ultimately be subject to the district court’s jurisdiction— and in any event that other foreign states should not be subject to the jurisdiction of United States courts based on the possession of expropriated property by their agencies and instrumentalities—significantly diminishes the potential impact on foreign relations of the decision below.

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**c. Exception for suits to confirm an arbitral award**

Section 1605(a)(6) of the FSIA authorizes a suit to be brought “to confirm an award made pursuant to ... an agreement to arbitrate” that is “governed by a treaty ... in force for the United States calling for the recognition and enforcement of arbitral awards.” 28 U.S.C. § 1605(a)(6).

On February 12, 2011, at the invitation of the court, the United States submitted a brief as *amicus curiae* in a case before the U.S. Court of Appeals for the Second Circuit involving an attempt to enforce an arbitral award against the Republic of Peru, the Peruvian Ministry of Housing, Construction, and Sanitation (“the Ministry”) as well as a unit under the Ministry called the Water for Everyone Program (“the Program”). *Figueiredo v. Peru*, No. 10-0214(CON) (2d Cir. 2011). The case involved a project for drinking water and sanitation in Peru, funded by the Inter-American Development Bank (“IDB”) and administered by the Program. The plaintiff, Figueiredo, obtained an arbitral award of \$21,607,003 against the Program in a dispute over a consulting agreement. In the suit to enforce the award, Figueiredo named Peru and the Ministry, in addition to the Program, as defendants. The district court failed to expressly consider whether it had jurisdiction over Peru or the Ministry under the FSIA. Peru and the Ministry appealed the district court’s denial of their motion to dismiss.

In its *amicus* brief, the United States argued that the order denying the motion to dismiss should be vacated and the case should be remanded to the district court for a proper determination of subject matter jurisdiction over Figueiredo’s claims against Peru and the Ministry, in accordance with the FSIA. The U.S. brief explained that jurisdiction over those two defendants should be found lacking if the Program is a legally separate agency of the state. Excerpts follow from the section of the brief discussing the FSIA (with footnotes and citations to the record omitted). Chapter 15.B.1. and 15.B.4. address other sections of the U.S. brief regarding the court’s consideration of *forum non conveniens* and comity. The brief in its entirety is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). On December 14, 2011 the Second Circuit Court of Appeals decided the case, reversing the lower court’s decision on

other grounds without considering the question of jurisdiction under the FSIA. *Figueiredo v. Peru*, 665 F.3d 384, 389 (2d Cir. 2011) (the court explained that it was “exercising discretion to consider a [*forum non conveniens*] dismissal without first adjudicating issues of subject matter jurisdiction”).

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The only possible exception to immunity of any of the defendants in this case is § 1605(a)(6) of the FSIA, which authorizes suit “to confirm an award made pursuant to . . . an agreement to arbitrate” that is “governed by a treaty . . . in force for the United States calling for the recognition and enforcement of arbitral awards.” 28 U.S.C. § 1605(a)(6). Here, the parties agree that the award is governed by the Panama Convention. The exception in § 1605(a)(6) thus unquestionably confers subject matter jurisdiction on the district court to consider Figueiredo’s claims against the Program, which was a party to the arbitration agreement at issue in this case. However, because Peru and the Ministry were not parties to the arbitration agreement, the district court had jurisdiction over the claims against those defendants only if the Program is inseparable from the state of Peru and its Ministry. If, by contrast, the Program is a legally separate agency or instrumentality of the state, *see* 28 U.S.C. § 1603(b), there is no apparent jurisdictional basis for Figueiredo’s claims against Peru and the Ministry.

Under the FSIA, a foreign state includes a foreign state’s agencies or instrumentalities. *Id.* § 1603(a); *see id.* § 1603(b) (agency or instrumentality is a “separate legal person” that is “an organ of a foreign state” and neither “a citizen of a State of the United States . . . nor created under the laws of any third country”). However, for foreign sovereign immunity purposes, the distinction between the state itself and its agencies or instrumentalities is significant. *Garb v. Republic of Poland*, 440 F.3d 579, 590 (2d Cir. 2006) (distinction between the state and its agencies or instrumentalities “pervades the FSIA”). For example, the FSIA provides greater protections to the state itself than to a state’s agencies or instrumentalities, principally in the contexts of the availability of punitive damages and in attachment or execution proceedings. *Id.* (citing 28 U.S.C. §§ 1606, 1610(b)(2)); *see, e.g., Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) (assets of an agency or instrumentality generally cannot be used to satisfy the judgments against that state). The Supreme Court has instructed that “duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.” *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (“*Bancec*”), 462 U.S. 611, 627 (1983).

The district court here erred in its analysis of the Program’s status. In considering a motion to dismiss at the pleading stage, for either failure to state a claim (Rule 12(b)(6)) or for lack of subject matter jurisdiction (Rule 12(b)(1)), courts generally accept as true the factual allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor. *See Sharkey v. Quarantillo*, 541 F.3d 75, 82-83 (2d Cir. 2008) (Rule 12(b)(1)); *Warney v. Monroe County*, 587 F.3d 113 (2d Cir. 2009) (Rule 12(b)(6)). However, the plaintiff “bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists.” *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (quotation marks omitted). Accordingly, “[j]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.” *Id.* (quotation marks omitted). In determining their

jurisdiction, district courts “are permitted to look to materials outside the pleadings.” *Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2010).

The district court here does not appear to have placed the burden of establishing the court’s jurisdiction on the plaintiff. Instead, the district court considered whether the Program is an integral part of Peru and the Ministry under the “failure to state a claim” standard set forth in Rule 12(b)(6). Applying this erroneous standard, the district court analyzed the issue of whether the Program has a legal identity separate from Peru by “accept[ing] the material facts alleged in the complaint as true and constru[ing] all reasonable inferences in plaintiff’s favor.” The district court’s error was significant. Because it “constru[ed] all reasonable inferences in plaintiff’s favor,” the district court could well have resolved ambiguities under a Rule 12(b)(6) standard, and it may have given insufficient weight to evidence provided by Peru on critical issues such as the Program’s separate juridical status under Peruvian law, the Program’s financial independence from the Ministry, the Ministry’s obligation to pay the arbitral award, and the character of the functions performed by the Program. These are jurisdictional matters because if the Program is an agency or instrumentality of Peru rather than an inseparable part of the state, there is no apparent jurisdictional basis in the FSIA for Figueiredo’s claims against Peru or the Ministry, given that the arbitration award is against the Program alone.

This error also may have caused the district court to improperly limit the information it considered when determining whether Figueiredo’s claims against Peru and the Ministry fall within the FSIA’s arbitration exception in § 1605(a)(6). Although an analysis for failure to state a claim is limited to the pleadings and documents they incorporate by reference, *Int’l Audiotext Network v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 2002), an inquiry into subject matter jurisdiction requires a court to consider evidence outside the pleadings when necessary to resolve jurisdictional issues, *United States v. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998). If the district court had properly performed a subject matter jurisdiction analysis it may have required additional submissions from the parties on important factual issues regarding the function of the Program and its status as a possible agency or instrumentality.

The defendants provided some reason to believe that the Program is a separate “agency or instrumentality” of Peru under the FSIA. They showed, for example, that, as an “Executive Unit” pursuant to Peruvian law, the Program can assess and collect revenue, issue debt, incur expenses, make payments, and propose budgets, as well as enter into contracts without participation of any official outside of the Program. *See* 28 U.S.C. § 1603(b) (defining “agency or instrumentality of a foreign state” as an entity that, among other things, is “a separate legal person”)....

Ultimately, it is difficult to determine on this record whether the district court would have determined that the Program is a separate agency or instrumentality or instead an integral part of the state had it applied the correct legal standard. For that reason, the district court’s order should be vacated and the case remanded for reconsideration under the governing principles.

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...In considering whether a foreign governmental entity is a “separate legal person” under the FSIA, a court should consider the entity’s legal characteristics, such as its ability to litigate, contract, and hold property in its own name. ...

\* \* \* \*

Peru has presented reasons to believe that the Program is a separate legal person within Peru's political structure. Peru showed, for example, that its agreement with the IDB required it to establish the Program with technical, administrative, and financial independence. Peru also showed that as an "Executive Unit" pursuant to Peruvian law, the Program can assess and collect revenue, issue debt, incur expenses, and make payments, as well as enter into contracts without participation of any official outside of the Program. These are common characteristics of an "agency or instrumentality" under the FSIA rather than an inseparable part of the state, such as the role served by a military air force.

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In deciding whether the Program performs a core governmental function, the district court should consider that the Program's principal function—the provision of a basic public utility—is not invariably governmental. Nevertheless, the Program's apparently non-commercial nature is a relevant consideration. Under the core functions test, a commercial enterprise is more likely to be a separate agency or instrumentality, *see Garb*, 440 F.3d at 591, while a generally non-commercial body is more likely to be an integral part of the state. While relevant, however, the non-commercial nature of an entity is not itself determinative. Similarly, the nature of the specific activity that is the subject of suit should not be the court's primary focus in determining whether the entity being sued is the state or an agency or instrumentality of the state, as both are capable of engaging in commercial activity.

As described above, the "core functions" test is part of the determination of whether an entity is the agency or instrumentality of a state. In a separate context, the Supreme Court has applied an "alter ego" test to determine if an agency or instrumentality of a state can be liable for the state's acts, holding that it may when the entity is so controlled by the state as to create a principal-agent relationship, where corporate form has been abused, or when recognizing the putative separation between the state and the entity would work fraud or injustice. *Bancec*, 462 U.S. at 629; *Letelier*, 748 F.2d at 794. In *Bancec*, however, the governmental entity's status as an agency or instrumentality was not in dispute, and the issue was whether such an instrumentality could be held liable for the acts of its parent state, which was not a party to the litigation. Thus, as this Court has recognized, the alter ego test is "of little help" in determining "whether [an entity] is an instrumentality established as a juridical entity distinct and independent from the [state]." *Noga*, 361 F.3d at 685.

This Court and others have occasionally applied an alter ego test in the jurisdictional context to establish jurisdiction over one state entity based on the actions of a putatively separate entity. *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek*, 600 F.3d 171, 179-80 (2d Cir. 2010); *United States Fidelity & Guaranty Co. v. Braspetro Oil Servs Co.*, 199 F.3d 94, 98 (2d Cir. 1990); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989). Under this Court's precedent, *Bancec* may be relevant to the jurisdictional inquiry in extraordinary circumstances, where respecting the juridical independence of an agency would work fraud or injustice. However, nothing in the present record appears to approach the high barrier imposed by the *Bancec* test. In particular, the district court here erred in concluding that any presumption of separateness the Program enjoys is overcome under the considerations identified in *Bancec*. The factors cited by the district court—that "final payment" of the award is the Ministry's responsibility and that the Program's budget is subject to authorization by the

Ministry of Economy and Finance—are insufficient to establish a principal-agent relationship, abuse of the corporate form, or fraud. Therefore, absent additional evidence that recognizing the Program’s separate status (if any) would be inappropriate, the “core functions” test of *Garb* is sufficient to determine the jurisdictional issue in this case.

For these reasons, this Court should vacate the district court’s order denying the defendants’ motion to dismiss, and remand for further consideration of whether the Program is an agency or instrumentality, or instead an integral part of Peru and the Ministry. If the Program is a separate agency or instrumentality, the district court will need to consider whether it had subject matter jurisdiction over the claims against Peru and the Ministry, because Figueiredo’s arbitration award is against the Program alone.

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#### **d. Acts of terrorism**

Section 1083(b) of the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”), Pub. L. No. 110-181, 122 Stat. 343, repealed 28 U.S.C. § 1605(a)(7), and § 1083(a) of the NDAA replaced it with a new exception to immunity under the FSIA relating to support of terrorism, codified at 28 U.S.C. § 1605A. Section 1083(c) of that statute contained transition rules for applying the new terrorism exception to cases pending at the time of the NDAA’s enactment. For background on the legislation and related developments, see *Digest 2008* at 457–63. During 2011, as the examples below discuss, litigation in U.S. federal courts continued to raise issues concerning the interpretation of the terrorism exception.

##### **(1) *Roeder v. Iran***

On July 15, 2011, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court’s ruling dismissing claims against Iran brought by former hostages held at the U.S. Embassy in Tehran from 1979 to 1981. *Roeder v. Islamic Republic of Iran*, 646 F.3d 56 (D.C. Cir. 2011) (*reh’g en banc denied*, Sept. 12, 2011). As discussed in *Digest 2009* at 336–341, the United States had filed a motion to dismiss in the district court arguing that § 1083 of the NDAA did not create a cause of action for plaintiffs or expressly abrogate the Algiers Accords. For additional background on previous litigation involving the same plaintiffs (“*Roeder I*”), see *Digest 2002* at 523–27; *Digest 2003* at 537 and 547; and *Digest 2004* at 504 and 505.

The United States submitted a brief as intervenor-appellee in the court of appeals on March 9, 2011. *Roeder v. Islamic Republic of Iran*, 2011 WL 1193665 (C.A.D.C.). The U.S. brief repeated arguments, made at the district court level, that the claims were barred by the Algiers Accords and that Congress had not expressly abrogated the Algiers Accords in the 2008 NDAA. As stated in the brief’s section summarizing the argument:

*Roeder I* clearly identified the type of language Congress could use to unambiguously create a right of action for these plaintiffs. And Members of Congress proposed various provisions over five years that would have followed this Court’s guidance.

None were enacted. Instead, Congress recodified the terrorism exception to foreign sovereign immunity employing language nearly identical to that this Court found insufficient in *Roeder I*. It also enacted a general right of action for state sponsorship of terrorism that nowhere mentions the Algiers Accords, Iran's 1979 hostage taking, or plaintiffs' prior suits. Thus, just as in *Roeder I*, nothing in the statute Congress enacted clearly expresses Congress' intention to abrogate the Algiers Accords. In the absence of such a clear statement, this Court should affirm the district court's dismissal of plaintiffs' suit for failure to state a claim.

The Court of Appeals agreed with the United States. In its opinion, excerpted below (with most footnotes omitted), the Court affirmed the district court's dismissal, holding that Congress had not expressly abrogated the Algiers Accords, which presented a bar to plaintiffs' claims.<sup>\*\*\*</sup>

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Plaintiffs are Americans taken hostage in Iran in November 1979, and their families. The Iranians held the hostages for nearly 15 months. They were freed only when the United States and the Islamic Republic of Iran entered into the Algiers Accords. *See generally* Iran—United States: Settlement of the Hostage Crisis, 20 I.L.M. 223 (1981). In the Accords, the United States made promises to Iran in order to secure the hostages' release. One of these was a promise to bar the prosecution against Iran of any legal action by a U.S. national arising out of the hostage taking.

For the sake of clarity we will refer to plaintiffs collectively as “Roeder.” In Roeder's last action against Iran for damages, we held that the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94–583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.), and in particular, the 2002 amendments to the Act, did not abrogate the promise made by the United States in the Algiers Accords to bar actions such as Roeder's. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C.Cir.2003) (*Roeder I*).

Five years after we affirmed the dismissal of his suit, Roeder brought a new complaint in the district court, this time relying on Congress's 2008 amendments to the FSIA. As in the past case, Iran did not respond, the United States intervened and filed a motion to dismiss, and the district court granted the motion. The question in this appeal is whether the 2008 amendments to the FSIA reneged on the promise of the United States in the Accords to bar Roeder's suit.

“The FSIA provides generally that a foreign state is immune from the jurisdiction of the United States courts unless one of the exceptions listed in 28 U.S.C. § 1605(a) applies.” *Roeder I*, 333 F.3d at 235. A provision in effect when Roeder brought the last suit, but now repealed—28 U.S.C. § 1605(a)(7)(A) (2000)—stated that immunity did not apply if the foreign state had been designated a state sponsor of terrorism when the act in question occurred or as a result of the act. Iran did not meet that description. *See Roeder I*, 333 F.3d at 235. In 2001 and 2002, while *Roeder I* was pending in the district court, Congress amended the FSIA specifically to deprive Iran of immunity for acts related to Roeder's case. *See* Pub.L. No. 107–77, § 626(c), 115

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<sup>\*\*\*</sup> Editor's note: On May 29, 2012, the Supreme Court of the United States denied the petition for certiorari in the case.

Stat. 748, 803 (2001); Pub.L. No. 107–117, Div. B, § 208, 115 Stat. 2230, 2299 (2002) (correcting scrivener’s error); *Roeder I*, 333 F.3d at 235. Even so, the Algiers Accords remained a bar to Roeder’s suit. *Roeder I*, 333 F.3d at 237. The 2001 and 2002 amendments, we held, did not provide the “clear expression” of congressional intent necessary to abrogate an executive agreement. *Id.* at 237.<sup>2</sup>

After our decision in *Roeder I*, Congress again amended the FSIA. The 2008 amendments created a generally applicable private right of action against foreign states for state sponsorship of terrorism. See 28 U.S.C. § 1605A(c) (Supp. II 2008). The amendment was a response to *Cicippio–Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C.Cir.2004), which held that the FSIA itself did not create a right of action against foreign states and that plaintiffs had to identify some other source of law (such as state law) granting them a right to recover. The 2008 amendments also reenacted, with minor changes, the provision granting the district court jurisdiction over claims related to the acts involved in Roeder’s case. See 28 U.S.C. § 1605A(a)(2)(B) (Supp. II 2008).

Roeder argues that the 2008 FSIA amendments, by creating a federal cause of action against state sponsors of terrorism, rendered our country’s commitment to bar claims like Roeder’s a nullity. As the district court pointed out, during the five years between *Roeder I* and the 2008 amendments, in the 107th, 108th, 109th, and 110th sessions of Congress, legislators tried—and failed—“to enact legislation that would explicitly abrogate the provision of the Algiers Accords barring the hostages’ suit.” *Roeder v. Islamic Republic of Iran*, 742 F.Supp.2d 1, 5 (D.D.C.2010) (quoting JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERV., SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 31 (2008), available at <http://www.fas.org/sgp/crs/terror/RL31258.pdf>). Just as in *Roeder I*, the amendments that passed “do not, on their face, say anything about the Accords.” 333 F.3d at 236. In *Roeder I* we gave an example of language that might suffice to abrogate even without an express reference to the Accords, *id.* at 237, but the 2008 amendments contain no such language or anything comparable. Nevertheless, Roeder believes that the new, general, terrorism cause of action unambiguously conflicts with the prosecution bar contained in the Algiers Accords and that the latter must necessarily give way.

The premise of Roeder’s argument is that the 2008 amendments to the FSIA permitted

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<sup>2</sup> We explained this clear statement rule in *Roeder I*:

[N]either a treaty nor an executive agreement will be considered “ ‘abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.’ ” *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120, 53 S.Ct. 305, 77 L.Ed. 641 (1933)); see *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982); *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936–37 (D.C.Cir.1988). The way Congress expresses itself is through legislation.

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Executive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties. Congress (or the President acting alone) may abrogate an executive agreement, but legislation must be clear to ensure that Congress—and the President—have considered the consequences. The “requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Gregory v. Ashcroft*, 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

*Roeder I*, 333 F.3d at 237–38 (parallel citations omitted).

him to revive his dismissed claims and invoke the new federal cause of action in 28 U.S.C. § 1605A(c) against Iran. We do not think this is so clear. Section 1605A(c) created a statutory cause of action for terrorism-related injuries against a foreign state that is a “state sponsor of terrorism” as described by 28 U.S.C. § 1605A(a)(2)(A)(i). As relevant here, this includes nations the State Department had designated sponsors of terrorism at the time of the filing of a prior, “related action” in cases “filed under [§ 1605A] by reason of section 1083(c)(3) of [the National Defense Authorization Act for Fiscal Year 2008]....” 28 U.S.C. § 1605A(a)(2)(A)(i)(II). Iran had been so designated by the time Roeder brought the last suit. But the question remains whether *Roeder I* was a “related action” within the meaning of § 1083(c)(3).

Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008—titled “Application to Pending Cases”—determines if plaintiffs in cases filed before the addition of the federal terrorism cause of action can rely on the new cause of action when filing a new action under § 1605A that would otherwise be barred by the statute of limitations in 28 U.S.C. § 1605A(b). *See* Pub. L. No. 110–181, § 1083(c), 122 Stat. 3 (codified at 28 U.S.C. § 1605A note). Subsection (c)(3) provides, “If an action arising out of an act or incident has been timely commenced under [28 U.S.C. § 1605(a)(7) ], ... any other action arising out of the same act or incident may be brought under [28 U.S.C. § 1605A]” if it is commenced within 60 days of the entry of judgment in the original action or of the date of enactment of the amendments. Roeder contends that this provision, together with § 1605A(c), unambiguously gives him a cause of action to sue Iran.

*Roeder I* was filed under § 1605(a)(7), the prior terrorism exception to foreign sovereign immunity. Roeder’s new action duplicates the old one. Yet the related action provision of § 1083(c)(3) does not seem to contemplate that the later, related suit would be one that simply replicates the earlier action. The section speaks of “any *other* action,” and it turns on whether the new action “arises from” the same act or incident, not on whether it is identical to the prior suit or even brought by the same plaintiff. In addition, the refiling of duplicate actions is dealt with in § 1083(c)(2), but that is a provision Roeder cannot invoke because it expressly requires that the earlier action be pending at the time of the 2008 amendments. *See* National Defense Authorization Act for Fiscal Year 2008, § 1083(c)(2)(a)(iv). We mention this not because it is conclusive, but because it casts some doubt on whether § 1083(c) is as clear as Roeder makes it out to be.

The district court relied on other considerations in deciding that the 2008 amendments were not the sort of clear expression that would be needed to disregard the Accords’ bar against suit. We are content to place our decision on the district court’s analysis. The court found that § 1083(c)(3) was ambiguous regarding whether plaintiffs, such as Roeder, whose cases were not pending at the time of the 2008 amendments could rely on that provision to resurrect their actions long after they had been dismissed.

In arguing against this conclusion, Roeder points to the express pending-action requirement contained in § 1083(c)(2), which allows plaintiffs who had relied on § 1605(a)(7) as creating a cause of action to convert their claim to one under § 1605A(c). He contends that the absence of similar language in § 1083(c)(3) strongly suggests that subsection (c)(3) contains no such requirement. We do not deny the force of Roeder’s argument. In the end it may well represent the best reading of § 1083(c)(3). But our focus is not on the best reading. Legislation abrogating international agreements “must be clear to ensure that Congress—and the President—have considered the consequences.” *Roeder I*, 333 F.3d at 238. An ambiguous statute cannot supercede an international agreement if an alternative reading is fairly possible.

*Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C.Cir.2006). This clear statement requirement—common in other areas of federal law, *see Roeder I*, 333 F.3d at 238—“assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Gregory v. Ashcroft*, 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

With respect to whether Roeder’s current suit qualifies as a related action, § 1083(c)(3) is unclear. Section 1083(c)(3) refers to “an action” that “has been timely commenced” under the FSIA’s prior terrorism exception. Roeder contends that this unambiguously refers to every action brought before the enactment of § 1083 that was timely when filed. We think, however, that the language can fairly be read to refer only to those cases timely commenced under § 1605(a)(7) that were still pending when the Act was passed. If Congress had meant to embrace more than just pending cases, it might have used the past simple, “was timely commenced.” And it might have placed § 1083(c)(3) outside of a section entitled “Application to Pending Cases.” Instead, Congress chose language suggesting that the predicate action in § 1083(c)(3) is one that *has* been commenced but *is* still ongoing. It is thus unclear whether Roeder—whose prior case was not pending and whose new case would have been time barred—could sue under § 1605A(c).

Roeder’s resort to canons of construction does not render § 1083(c)(3) any more certain. For the reasons given by the district court, we are not convinced that a pending-action requirement would make any part of § 1083(c)(3) wholly superfluous. *See Roeder*, 742 F.Supp.2d at 16. And while “it is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute and omits it from another,” *BFP v. Resolution Trust Co.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994), the strength of that presumption varies with context, *see City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435–36, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Here, the relevant subsections were added at different times in the legislative process, serve different purposes and share little similar language. *Compare* H.R. 1585, 110th Cong., § 1087 (as passed by Senate, Oct. 1, 2007), *with* H.R. 1585, 110th Cong., § 1083 (as passed by Senate, Dec. 14, 2007). In these circumstances, the presumption is not of such power that it alone makes § 1083(c)(3) unambiguous.

Because of § 1083(c)(3)’s ambiguity regarding whether Roeder, whose case was not pending at the time of enactment, may file under the new terrorism cause of action, we are required again to conclude that Congress has not abrogated the Algiers Accords. We also reject Roeder’s alternative argument that the reenacted and partially revised jurisdictional provisions of the FSIA abrogate the Accords. These provisions are not meaningfully different than they were when presented to us in *Roeder I*. For the foregoing reasons, the order of the district court is *Affirmed*.

## (2) *Rux v. Sudan*

On February 3, 2011, the United States Court of Appeals for the Fourth Circuit affirmed the district court’s dismissal of certain claims and dismissed as moot other claims brought against the Republic of Sudan by relatives of U.S. sailors murdered in the attack on the U.S.S. Cole. *Rux v. Sudan*, 410 Fed.Appx. 581, 2011 WL 327275 (4<sup>th</sup> Cir. 2011). As discussed in *Digest 2010* at 366-73, the United States brief filed in the appeals court had urged the

court to affirm the district court's dismissal. Also, as discussed in *Digest 2010* at 372-73, after the plaintiffs in *Rux* filed a new, related action against Sudan, the U.S. filed a supplemental brief urging the court to dismiss the appeal for lack of jurisdiction. The court's decision of February 3, 2011, excerpted below, affirmed the district court's dismissal of maritime and state law claims and dismissed the constitutional challenge to § 1083(c)(2) of the NDAA as moot.

\* \* \* \*

This appeal arises from the district court's denial of Appellants' motion for leave to supplement their complaint in an action brought against the Republic of Sudan ("Sudan") by relatives of the American sailors killed in the October 2000 terrorist bombing of the U.S.S. Cole. On November 3, 2010, we issued an Order for Supplemental Briefing directing parties to address whether any of the issues pending before this Court on appeal are rendered moot by the Appellants' filing of a new, related action pursuant to 28 U.S.C. § 1605A in the Eastern District of Virginia. Having reviewed those submissions, we find that Appellants' constitutional challenge to § 1083(c)(2) of the National Defense Authorization Act ("NDAA") for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 342-43, Section 1083(a)(1) (codified at 28 U.S.C. § 1605A (Supp. II 2008)), is no longer viable given the filing of their new action. Further, in light of Appellants' argument that their state common law claims have been preempted, we affirm the district court's dismissal of those claims.

#### I.

##### A.

The facts giving rise to this action are set forth more fully in our previous opinion, *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006) ("*Rux I*"). We briefly summarize those facts and the procedural history pertinent to the instant order. This action arises out of the October 12, 2000, bombing of the U.S.S. Cole in the Port of Aden, Yemen. Seventeen U.S. Navy sailors were killed in the attack that day, and fifty-nine surviving family members (Appellants here) brought this action against Sudan to recover for damages resulting from the sailors' deaths. Appellants alleged that the Al Qaeda terrorist organization planned and executed the U.S.S. Cole bombing, and that Sudan provided material support to Al Qaeda in the years leading up to the attack.

After initially defaulting, Sudan appeared and sought dismissal on various grounds, including sovereign immunity. We affirmed the district court's determination that Appellants had alleged sufficient jurisdictional facts to bring their case within the Foreign Sovereign Immunities Act ("FSIA") terrorism exception. *Rux I*, 461 F.3d at 474. We declined to exercise pendent appellate jurisdiction and dismissed the remainder of Sudan's appeal. *Id.* at 476-77. On remand to the district court, Sudan made its final appearance in this case by informing the court it would "not defend or otherwise participate in this proceeding on the merits."

Appellants asserted claims under the Death on the High Seas Act ("DOHSA"), state law tort claims, and maritime wrongful death claims. ...[T]he district court found that DOHSA provided the exclusive remedy for Appellants' claims. ...

On July 25, 2007, the district court entered a final judgment, awarding eligible plaintiffs a total of \$7,956,344 plus post-judgment interest, under DOHSA. See *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 567-69 (E.D. Va. 2007) ("*Rux II*"); ... While the appeal was pending, Congress amended the FSIA through its passage of the NDAA, which created a new federal right

of action for injuries caused by acts of state-sponsored terrorism. See 28 U.S.C. § 1605A. The new right of action created by § 1605A provides for additional remedies not allowed under DOHSA, such as “economic damages, solatium, pain and suffering, and punitive damages.” *Id.* at 1605A(c).

While § 1605A allows plaintiffs to invoke the new right of action with regards to certain “pending” cases, the provision is not automatically retroactive. *Kirschenbaum v. Islamic Republic of Iran*, 572 F. Supp. 2d 200, 203 n.1 (D.D.C. 2008). Section 1083(c) of the NDAA governs the amendment’s retroactive application. Pursuant to § 1083(c)(2) (“Prior Actions”), a plaintiff whose action was pending before the courts when the NDAA became law is given sixty days within which to “refile” his suit based upon the new cause of action, provided he meets all the requirements. Under § 1083(c)(3) (“Related Actions”), a plaintiff who had “timely commenced” a “related action” under § 1605(a)(7) may bring a new action “arising out of the same act or incident,” provided it is commenced no later than sixty days after either the enactment of the NDAA or the entry of judgment in the original suit. *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev’d on other grounds sub nom. Republic of Iraq v. Beatty*, 129 S. Ct. 2183 (2009) (interpreting new NDAA provisions).

Before reaching the merits of Appellants’ claims, this Court granted Appellants’ motion to remand the case to the district court for consideration of whether Appellants could rely on the new right of action under § 1605A. See *Rux v. Republic of Sudan*, No. 07-1835 (4th Cir. order dated July 14, 2009). While the case was before the district court on remand, Appellants filed a motion for leave to supplement their complaint, pursuant to § 1083(c)(2), in order to add claims for non-pecuniary loss under the new right of action. On December 3, 2009, the district court entered an order denying Appellants’ motion. Appellants timely appealed the order, which is the subject of the current appeal.

## B.

\* \* \* \*

After the government filed its brief with the court, but before oral argument, Appellants filed a new, related action against Sudan under 28 U.S.C. § 1605A(c). See *Kumar v. The Republic of Sudan*, No. 10-cv-171 (E.D. Va. filed Apr. 15, 2010). The new action was brought by the same fifty-nine plaintiffs who are named in the case sub judice (plus two additional plaintiffs, Avinesh Kumar and Hugh Palmer, who are not parties to the action before this court). Additionally, the new action “seek[s] equivalent relief.” However, in their new action, Appellants do not rely on the conversion provision of § 1083(c)(2). In fact, Appellants expressly disavow any reliance on § 1083(c)(2) as a basis for their suit. ...

The case sub judice was argued on October 26, 2010. At argument, the government suggested that this appeal may be moot as a result of Appellants’ new action. We ordered supplemental briefing on the issue of mootness, directing the parties to address “whether any or all of the issues pending before this Court are rendered moot by the appellants’ filing of [*Kumar v. Republic of Sudan*] pursuant to 28 U.S.C. § 1605A.”

## II.

Appellants maintain in their supplemental brief that their constitutional challenge to § 1083(c)(2) continues to present a live controversy. They also argue, for the first time, that their state common law claims have been preempted by § 1605A. Proceeding from that assumption, Appellants reason that the preemption of their state law claims moots their appeal from the

district court's dismissal of those claims, and that we are therefore without jurisdiction to entertain them. Moreover, they argue "the district court's opinion is manifestly incorrect" and should be vacated. Appellants' position is untenable on all counts.

Appellants' constitutional claim is premised on the contention that § 1083(c)(2)'s requirements for conversion violate Appellants' equal protection rights "by precluding them from seeking relief pursuant to § 1605A." Appellants now insist in their new, related action, that they need not rely on § 1083(c)(2) to seek relief pursuant to § 1605A, because they have a valid claim, irrespective of § 1083(c)(2), which they have brought directly under § 1605A.

Although parties are free to make arguments in the alternative, here Appellants have effectively renounced their earlier position in a manner that requires us to entertain an abstract legal question. ... This is not a traditional case of mootness, abandonment, or waiver. Its distinctiveness stems from Appellants' unusual decision to initiate a suit anchored in an expressly contrary position while this matter was pending on appeal. By bringing a new action which they previously claimed was precluded by § 1083(c)(2), and expressly disclaiming reliance on this provision, Appellants have, in effect, caused the mootness of their constitutional challenge to that provision. ...

Appellants argue that if this Court finds that the instant appeal has been rendered moot, the district court's opinion should be vacated. The relief of vacatur, however, is not a foregone conclusion—it is an equitable remedy informed by whether parties played a role in causing the mootness. ... Under these circumstances, because Appellants by their voluntary actions have caused the mootness, we do not order vacatur of the district court's judgment in this case. ... Instead, we simply dismiss Appellants' claim as moot.

Finally, in light of Appellants' argument that their state law claims have been preempted by § 1605A, we assume, without deciding, the preemption of those claims and thus affirm the district court's dismissal of them.

\* \* \* \*

### **3. Execution of judgments and other post-judgment actions**

#### **a. Attachment under the Terrorism Risk Insurance Act: *Martinez v. Cuba***

On August 26, 2011, the U.S. District Court for the Southern District of Florida granted the U.S. motion for summary judgment and to quash the writs of garnishment that Ms. Martinez had obtained to garnish payments owed to the government of Cuba by certain air charter companies operating flights between the United States and Cuba. *Martinez v. Cuba*, No. 10-22095 (S.D. Fla. 2011). Ms. Martinez, the ex-wife of a Cuban spy, had obtained a default judgment against the government of Cuba in 2001 in state court in Florida pursuant to § 1605(a)(7) of the FSIA. The state court awarded Martinez over \$27 million in damages based on its determination that she had been subject to torture and sexual battery. In 2010, Martinez obtained writs of garnishment from the clerk of the Florida state court providing for the garnishment of payments owed by eight U.S. air charter companies to entities in Cuba in connection with flight services authorize by the United States. The United States intervened in the case, removed it to federal court, and filed a motion for summary judgment and to quash the writs of garnishment in December 2010.

The U.S. brief in support of the motion for summary judgment argued that Martinez had not obtained a license under the Cuban Assets Control Regulations (“CACR”) to permit garnishment of the payments owed by the air charter companies, and that neither the FSIA nor the Terrorism Risk Insurance Act of 2002 (“TRIA”), P.L. No. 107-297, 116 Stat. 2322 (28 U.S.C. § 1610 note) provided a basis for garnishing the payments. The U.S. position was supported by the foreign policy interests of the United States in permitting the flights between the United States and Cuba which the Office of Foreign Assets Control (“OFAC”) had licensed pursuant to the CACR. The U.S. reply brief in support of summary judgment, filed February 9, 2011, is excerpted below (with footnotes and references to the record in the case omitted) and available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm), where the U.S. brief in support of its motion for summary judgment filed in December 2010 is also available.

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## **II. NEITHER THE FSIA NOR THE TRIA AUTHORIZE GARNISHMENT HERE.**

There is no dispute that payments owed by the garnishees to an entity in Cuba constitute property in which Cuba or a Cuban national has an interest and are subject to the CACR. *See* 31 C.F.R. § 515.201(b). Nor can plaintiff dispute that the CACR requires a license to garnish such assets (without which the writs are null and void). *See id.* §§ 515.203(e); 515.310. The question presented is whether statutory law supplants this license requirement. Plaintiff relies on two statutory provisions in support of her garnishment action: Section 1610(f)(1)(A) of the FSIA and the TRIA. Neither statutory provision authorizes garnishment here.

### **A. FSIA Section 1610(f)(1)(A) Has Been Waived by the President.**

Plaintiff’s lengthy contention that Section 1610(f)(1)(A) of the FSIA permits garnishment here is clearly wrong because that provision has been waived by the President. By way of background, while the FSIA creates a presumption of immunity of foreign states from the jurisdiction of U.S. Courts, *see* 28 U.S.C. § 1605(a), Congress enacted an exception to such immunity in 1996 for cases in which money damages are sought against a foreign state for personal injury or death caused by, *inter alia*, acts of torture, *see id.* § 1605(a)(7). Plaintiff obtained her judgment against Cuba pursuant to that provision. As noted, the FSIA also creates a presumption against execution on the property of a foreign state to satisfy a judgment, subject to certain exceptions set forth in Section 1610 of the statute. *See id.* § 1609. The exception relied upon by plaintiff here—Section 1610(f)(1)(A)—permits the holder of a Section 1605(a)(7) judgment to execute on “any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act.” *Id.* § 1610(f)(1)(A).

But, as plaintiff acknowledges, when Section 1610(f) was originally enacted, Congress also enacted a non-code provision that allowed the President to waive it, and Section 1610(f) was waived upon enactment by the President. *See* Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). After a dispute arose as to the scope of the President’s original waiver of Section 1610(f), Congress added language to the FSIA which clearly provides that the President “may waive any provision of paragraph (1) [of Section 1610(f)] in the interests of national security.” *See* 28 U.S.C. § 1610(g). The President again waived Section 1610(f)(1). Presidential Determination No. 2001-03, 65 Fed. Reg. 66, 483 (Oct. 28, 2000).

Plaintiff’s contention that the President’s action contravened views expressed in a committee report as to how the President should exercise his waiver authority is beside the point:

the statute clearly authorizes the President to waive Section 1610(f)(1), and that waiver forecloses plaintiff's reliance on that provision to garnish assets to satisfy her judgment. See *Young v. West Publishing Co.*, 724 F. Supp. 2d 1268, 1278 (S.D. Fl. 2010) (Moreno, C.J. affirming Torres, M.J.) ("In our circuit, '[w]hen the import of the words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language.'") (quoting *United States v. Weaver*, 275 F.3d 1320, 1331 (11th Cir. 2001) and *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc)); see also *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir. 2002).

Plaintiff also contends that, in response to the President's waiver of Section 1610(f)(1), Congress enacted the TRIA, which "expressly made the President's waiver power exercisable only on an asset-by-asset basis," (citing TRIA Section 201(b)(1)), and that Congress thereby expressly stated its intent to eliminate any prior blanket waiver," (citing H.R. 107-779 at 27). This, too, is incorrect. While Section 201(b)(1) of the TRIA authorizes the President to waive attachment under the TRIA on an asset-by-asset basis, this provision does not amend Section 1610 of the FSIA, nor the President's authority to waive Section 1610(f)(1) (codified at 28 U.S.C. § 1610(g)). See TRIA, § 201(b)(1). That is, TRIA does not reinstate Section 1610(f)(1)(A)'s authorization to attach certain assets; it establishes a distinct waiver authority applicable solely to attachments governed by the TRIA itself. FSIA Section 1610(f)(1)(A) remains a "nullity" and is unavailable to authorize attachment. See *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 160-161 (D. D.C. 2009). Moreover, the Government does not rely here on a Presidential waiver of assets under the TRIA, but on the fact that the assets at issue do not fall under TRIA's definition of "blocked asset."

#### **B. The Assets at Issue Are Not "Blocked Assets" Subject to TRIA.**

Plaintiff's contention—that *all* property interests governed by the CACR are subject to a prohibition on transfer absent a license from the Office of Foreign Assets Control (OFAC) and, thus, should be considered "seized or frozen" as defined in the TRIA—was addressed and disposed of in *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 75 (S.D.N.Y. 2004). To briefly reiterate, the TRIA provides that persons who obtain judgments under FSIA Section 1605(a)(7) may execute or attach "blocked assets" of a terrorist party—defined in part as any asset "seized or frozen by the United States" pursuant to (*inter alia*) Section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. § 5(b))—the statute under which the CACR is promulgated. See TRIA § 201(d)(2)(A). Section 5(b) of the TWEA authorizes the President to do more than seize or freeze assets; it also grants authority to regulate any transfers, transactions, or dealings in the property interests of a foreign country. See 50 U.S.C. App. §5(b)(1)(B). Transactions subject to regulation under the CACR include those incident to the provision of travel and carrier services to Cuba. See 31 C.F.R. § 515.572. While the garnishees are prohibited from providing flight services to Cuba absent authorization from OFAC, the mere regulation of such services does not mean the assets plaintiff now seeks to garnish are "seized or frozen" under the TRIA. To the contrary, as OFAC has explained, the assets at issue—payments owed to a Cuban entity—came into being after their transfer was authorized, and they have not been subject to an across-the-board prohibition on transfer.

Congress has recognized the distinction between the attachment of assets that are "*seized or frozen*" (TRIA, § 201(d)(2)(A)) and the attachment of "property with respect to which financial transactions are prohibited or *regulated*" pursuant to the TWEA (FSIA Section 1610(f)(1)(A) waived by the President). See *Weinstein*, 299 F. Supp. 2d at 74, 75. This distinction is critical here because regulation of the garnishees' carrier services and related

financial transactions to pay Cuban entities implements U.S. foreign policy to permit direct flights from the United States to Cuba for certain purposes. Under plaintiff's theory, once the transfers at issue were authorized by OFAC, they could simultaneously be halted through garnishment—foreclosing the Government's policy goals and rendering OFAC's action a nullity. Plaintiff's assertion that her garnishment action would not jeopardize authorized flights is not her judgment to make and cannot be credited. Plaintiff ultimately seeks over \$50 million to satisfy her judgment and, if her arguments are accepted, future debts owed by the garnishees would be subject to garnishment by plaintiff or other judgment creditors of Cuba—threatening the continuation of authorized flights and the destruction of the policy interests they serve.\*\*\*\* OFAC's determination that the authorized transfers here are not "seized or frozen" under TRIA serves significant governmental interests, is well supported by existing authority, and is entitled to deference.

\* \* \* \*

The district court judge referred the garnishment action to a magistrate judge, who issued his report and recommendation granting summary judgment and dissolving the writs of garnishment on June 27, 2011. The magistrate judge concluded that there was no dispute that the CACR required a license to garnish the assets at issue. "Absent a license from OFAC or some other statutory basis for attachment of the Garnishees' assets that supplants the CACR license requirement, Plaintiff's writs of garnishment are null and void and must be dissolved." The magistrate's report proceeded to find, in accordance with the U.S. arguments, that the repeated presidential waiver of § 1610(f)(1) rendered the FSIA unavailable as a basis for garnishment. And the magistrate agreed with the U.S. view that the payments at issue here did not meet the definition of a "blocked asset" under the TRIA. The district court judge later adopted this reasoning by the magistrate, granted the U.S. motion for summary judgment and to quash the writs of garnishment, holding that:

Plaintiff cannot satisfy the default judgment that she obtained against the Government of Cuba by garnishing payments owed by the listed air charter companies. Since Plaintiff does not have the required license from the United States Department of Treasury's Office of Foreign Assets Control, the writs of garnishment are null and void. Furthermore, in this case, neither the Foreign Sovereign Immunity Act nor the Terrorism Risk Insurance Act authorizes garnishment.

Martinez appealed the district court's decision to the U.S. Court of Appeals for the Eleventh Circuit. But she subsequently voluntarily dismissed her appeal.

### ***b. Attachment under the FSIA***

#### ***(1) NML Capital v. Spaceport Systems***

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\*\*\*\* Editor's note: See Chapter 16.A.6.e(1) for a discussion of revisions to the Cuban Asset Control Regulations in 2011 that expanded opportunities for travel to Cuba.

See Section A.2.a.(1), *supra*, for discussion of this case considering whether Argentina’s contribution to a satellite for measuring ocean salinity was immune from attachment because the satellite was not being used for commercial purposes, among other reasons.

(2) Presumption of immunity for foreign state property: *Rubin v. Iran*

On March 29, 2011, the U.S. Court of Appeals for the Seventh Circuit reversed the district court and agreed with the views of the United States government in its 2009 *amicus* brief, holding that property of the Islamic Republic of Iran was presumed immune under the FSIA. *Rubin v. Islamic Republic of Iran*, 637 F.3d. 783 (7<sup>th</sup> Cir. 2011) (reh’g denied June 6, 2011). The U.S. brief in the case is discussed in *Digest 2009* at 352-53, 361-62. The plaintiffs in the case had attempted to attach Iranian-owned art and artifacts held by Chicago museums. The attachment proceedings were an effort to satisfy default judgments plaintiffs had obtained against Iran awarding compensation for injuries from a 1997 terrorist attack by Hamas—an attack carried out with Iranian material support. The district court held that immunity from attachment was an affirmative defense that had to be pleaded by defendant. When Iran appeared to assert attachment immunity, the plaintiffs made a broad discovery request against Iran to identify additional property for attachment. The district court granted the request. The Seventh Circuit reversed both the district court order granting discovery and the order requiring Iran to appear and affirmatively plead attachment immunity. The court’s opinion is excerpted below with most footnotes omitted.

\* \* \* \*

**1. The general-asset discovery order**

\* \* \* \*

Th[e district court’s] approach is inconsistent with the presumptive immunity of foreign-state property under § 1609. As a historical matter, “[p]rior to the enactment of the FSIA, the United States gave absolute immunity to foreign sovereigns from the execution of judgments. This rule required plaintiffs who successfully obtained a judgment against a foreign sovereign to rely on voluntary repayment by that State.” *Autotech [Techs. LP v. Integral Research & Dev. Corp.]*, 499 F.3d 737, 749 (7<sup>th</sup> Cir. 2007). The FSIA “codified this practice by establishing a general principle of immunity for foreign sovereigns from execution of judgments,” subject to certain limited exceptions. *Id.* The statutory scheme thus “modified the rule barring execution against a foreign state’s property by ‘partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity.’ ” *Id.* (second emphasis omitted) (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5<sup>th</sup> Cir.2002)).

Importantly here, the exceptions to attachment immunity are narrower than the exceptions to jurisdictional immunity: “Although there is some overlap between the exceptions to jurisdictional immunity and those for immunity from execution and attachment, there is no escaping the fact that the latter are more narrowly drawn.” *Id.* We noted in *Autotech* that “[t]he FSIA says that immunity from execution is waived only for specific ‘property.’ As a result, in 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.” *Id.* at 750. Under the

FSIA “[t]he only way the court can decide whether it is proper to issue the writ [of attachment or execution] is if it knows which property is targeted.” *Id.* In other words, “[a] court cannot give a party a blank check when a foreign sovereign is involved.” *Id.*

\* \* \* \*

There is no question that the attachment immunity codified in § 1609 of the FSIA has a cost, and that cost is borne primarily by Americans who have been injured in tort or contract by foreign states or their agencies or instrumentalities. The FSIA embodies a judgment that our nation’s foreign-policy interests justify this particular allocation of legal burdens and benefits. Accordingly, we conclude that under the FSIA a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject to attachment and plausibly allege that an exception to § 1609 attachment immunity applies. If the plaintiff does so, discovery in aid of execution is limited to the specific property the plaintiff has identified. The general-asset discovery order issued in this case is incompatible with the FSIA.<sup>14</sup>

## 2. *The appearance order*

The foregoing discussion also highlights the flaws in the district court’s earlier order in which the court held that attachment immunity under § 1609 is an affirmative defense that can only be asserted by the foreign state itself. This ruling fails to give effect to the statutory text: “[T]he property in the United States of a foreign state *shall* be immune from attachment arrest and execution *except* as provided in sections 1610 and 1611 of this chapter.” 28 U.S.C. § 1609 (emphasis added). As we have explained, the statute cloaks the foreign sovereign’s property with a presumption of immunity from attachment and execution unless an exception applies; under § 1609 *the property* is protected by immunity and may not be attached absent proof of an exception. It follows from this language that the immunity does not depend on the foreign state’s appearance in the case. The immunity inheres in the property itself, and the court must address it regardless of whether the foreign state appears and asserts it.

Again, we can find helpful analogous principles in the operation of § 1604 jurisdictional immunity. The Supreme Court has confirmed that the FSIA’s immunity from suit arises presumptively, and “even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act.” *Verlinden* [*Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983)], 461 U.S. at 493–94 & n. 20, 103 S.Ct. 1962. This conclusion is unsurprising; the immunity conferred by § 1604 is jurisdictional. The Court in *Verlinden* read § 1604 together with a separate provision of the FSIA, codified at 28 U.S.C. § 1330(a), which provides:

The district courts shall have original jurisdiction ... of any ... action against a foreign state as defined in section 1603(a) of this title as to any claim for relief ... to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or any applicable international agreement.

28 U.S.C. § 1330(a); *Verlinden*, 461 U.S. at 493–94, 103 S.Ct. 1962.

Though not jurisdictional, the immunity conferred by § 1609 is similarly a default presumption, one that inheres in the property of the foreign state. When a judgment creditor seeks to attach property to satisfy a judgment obtained under the FSIA, the district court is

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<sup>14</sup> In light of this holding, we need not consider Iran’s alternative argument that the general-asset discovery order violates the Algiers Accords, 20 I.L.M. 224 (1981).

immediately on notice that the immunity protections of § 1609 are in play. In particular, where the plaintiff seeks to attach property of the foreign state *itself*, immunity is presumed and the court must find an exception—with or without an appearance by the foreign state—not as a jurisdictional matter but to give effect to the statutory scheme. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 460 cmt. b (explaining the distinction in the FSIA between the property of foreign states and the property of foreign-state instrumentalities).

This reading of § 1609 is confirmed by several provisions in § 1610 governing exceptions to attachment immunity. For example, § 1610(a)(1) states that § 1609 immunity does not apply where “the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication.” This strongly suggests that immunity from execution is presumed and waiver of immunity is the exception. Section 1610(c) is even more telling. That provision governs the issuance of an attachment order under either § 1610(a) or (b) when the foreign state is in default:

No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter [governing service, time to answer, and default].

28 U.S.C. § 1610(c). The waiting period required by § 1610(c) ensures that a defaulting foreign state is provided adequate notice before an attachment order issued under either § 1610(a) or (b)—the “commercial” exceptions to § 1609 immunity—will take effect. This provision makes it clear that even when the foreign state fails to appear in the execution proceeding, the court must determine that the property sought to be attached is excepted from immunity under § 1610(a) or (b) before it can order attachment or execution.

Our conclusion that the court must address § 1609 immunity even in the absence of an appearance by the foreign state is also consistent with the common-law practice that the FSIA codified. As we have explained, the attachment immunity of foreign-state property, like the jurisdictional immunity of foreign states, was historically determined without regard to the foreign state’s appearance in the case. The court either deferred to the State Department’s suggestion of immunity or made the immunity determination itself, by reference to the State Department’s established policy regarding foreign-sovereign immunity. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (common-law doctrine of foreign-sovereign immunity required judicial deference to executive determinations of immunity because “[t]he 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”). This practice continued after the issuance of the Tate Letter and the State Department’s shift to the restrictive theory of foreign-sovereign immunity.

To date, two circuits have addressed whether the foreign state must appear and assert § 1609 attachment immunity, and both have concluded that the answer is “no.” In the most recent case, the Peterson plaintiffs (who have intervened here) sought to execute their judgment against certain Iranian receivables; the Ninth Circuit concluded that the district court must independently raise and decide whether the property is immune from attachment under § 1609. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1126–28 (9th Cir.2010). Similarly, the Fifth Circuit has held that “the [foreign state’s] presence is irrelevant” to the question whether the property the plaintiff seeks to attach is excepted from § 1609’s presumptive immunity.

*Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir.2004). A district court in Massachusetts also agrees. See *Rubin v. Islamic Republic of Iran*, 456 F.Supp.2d 228, 231-32 (D.Mass.2006) (execution proceeding brought by the Rubin plaintiffs to attach property in the possession of a museum at Harvard University but alleged to belong to Iran).

We now join these courts in concluding that under § 1609 of the FSIA, the property of a foreign state in the United States is presumed immune from attachment and execution. The immunity inheres in the property and does not depend on an appearance and special pleading by the foreign state itself. The party in possession of the property may raise the immunity or the court may address it sua sponte. Either way, the court must independently satisfy itself that an exception to § 1609 immunity applies before ordering attachment or other execution on foreign-state property in the United States.

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(3) Bank accounts and premises of permanent mission to the UN

In August of 2011, the United States filed a statement of interest in a case against the Republic of Congo's Permanent Mission to the UN ("the Mission") and other defendants in the U.S. District Court for the Eastern District of New York. *Avelar v. J. Cotoia Construction Inc.* 11-02172 (E.D.N.Y.). This case had been removed to federal court after a New York state court had entered a default judgment against the Mission for injuries allegedly sustained by a construction worker who had been working on the ambassador's residence. The plaintiff had secured a freeze on the Mission's bank accounts and liens on the Mission premises and the ambassador's property. In the section of the statement of interest excerpted below, the United States asserted immunity from execution for the Mission's property (footnotes and citations to the record have been omitted). The section of the statement of interest relating to service of process is excerpted in section 5.a. *infra*. The statement of interest in its entirety is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

**C. Under the United States' International Agreements, the Diplomatic Property of the Congo's U.N. Mission Is Immune From Attachment or Execution.**

Plaintiff, through counsel, has represented to the Court that he has filed liens against the Mission's office and the official residence of Ambassador Balé as part of his efforts to enforce the default judgment he obtained against the Congo's U.N. Mission. The Vienna Convention provides that the premises of diplomatic missions "shall be immune from . . . attachment or execution." Vienna Convention art. 22.3. As such, Plaintiff is foreclosed from attempting to execute on or enforce any liens that he has filed against the Mission's office or Ambassador Balé's official residence, both of which are clearly part of the premises of the Congo's U.N. Mission that enjoy immunity from attachment and execution under the Headquarters Agreement and the U.N. Convention, which render the provisions of the Vienna Convention applicable to permanent missions to the United Nations. See *id.* art. 1(i); cf. *767 Third Avenue Assocs.*, 988 F.2d at 297-98.

In addition, bank accounts belonging to the Congo's U.N. Mission that are used for Mission purposes are also protected from attachment and execution. The United States is obligated under the U.N. Charter to provide U.N. diplomatic missions with "such privileges and immunities as are necessary for the independent exercise of [its] functions in connection with the [United Nations]." U.N. Charter art. 105, para. 2. The Vienna Convention also obligates the United States to accord diplomatic missions with "full facilities for the performance of the functions of the mission." Vienna Convention art. 25.

Courts have drawn on these international agreements to recognize that diplomatic missions' bank accounts that are used for purposes of the mission are immune from attachment. In *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987), the court relied on Article 25 of the Vienna Convention to grant Liberia's motion to quash the writs of attachment seizing its embassy's bank accounts. The court found that "[t]he Liberian Embassy [would] lack[] the 'full facilities' the Government of the United States has agreed to accord if, to satisfy a civil judgment, the Court permits a writ of attachment to seize official bank accounts used or intended to be used for purposes of the diplomatic mission." Similarly, in *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761 (S.D.N.Y. 1992), a personal-injury plaintiff obtained a default judgment against Uganda's U.N. Mission, which she sought to satisfy by a writ of execution against that mission's bank account. Granting Uganda's motion to vacate the writ of execution, the court held that "attachment of defendant's bank account is in violation of the United Nations Charter and the Vienna Convention because it would force defendant to cease operations." *Id.* at 763. See also *Sales v. Republic of Uganda*, No. 90 Civ. 3972, 1993 WL 437762, at \*1 (S.D.N.Y. Oct. 23, 1993) ("It is well settled that a foreign state's bank account cannot be attached if the funds are used for diplomatic purposes." (citing *Foxworth*, 796 F. Supp. 761, and *Liberian Eastern Timber Corp.*, 659 F. Supp. 606)).

In each of the cases cited above, the head of the diplomatic mission submitted an affidavit stating that the bank accounts at issue were used for the functioning of the mission. Here, too, Ambassador Balé has filed with this Court a signed declaration stating that the Mission's bank accounts that have been attached "are used for embassy-related and diplomatic purposes." Such a declaration has been held to be a sufficient basis for a court to find that bank accounts are "official bank accounts used or intended to be used for purposes of the diplomatic mission." *Liberian Eastern Timber Corp.*, 659 F. Supp. at 608. For the United States to be in compliance with its obligations under these international agreements, such bank accounts must be accorded diplomatic immunity from attachment.

The attachment of foreign mission property implicates important foreign policy interests of the United States. In view of the vital governmental functions of foreign missions, it is imperative that they have the means to sustain their operations in the United States, which requires access to official bank accounts used for mission purposes. The attachment of a mission's bank account or execution on the premises of the mission may adversely affect the United States' relationships with foreign states. Furthermore, such actions may make it more difficult for the United States to enlist the assistance of the foreign government when private parties attempt to attach U.S. bank accounts and other assets abroad. In order to vindicate the United States' interests in maintaining relationships with foreign governments, the Court should ensure that the Congo's U.N. Mission and its bank accounts are accorded the full protections to which they are entitled under international agreements.

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The court issued its opinion in November, dismissing the case in its entirety and finding that the attachments were prohibited by the FSIA. *Avelar v. Cotoia Construction*, 2011 WL 5245206 (E.D.N.Y. 2011). Excerpts follow from the section of the court’s opinion discussing immunity of mission premises and bank accounts. The court’s discussion of propriety of service under the FSIA is excerpted in section 5.a. *infra*.

\* \* \* \*

... [T]he Court nonetheless is constrained to vacate plaintiff’s execution of the default judgment against Congo Mission premises and bank accounts, because those assets are immune from execution and levy. The Vienna Convention on Diplomatic Relations (“Vienna Convention”) applies with equal force to missions accredited to the United Nations and the United States, with respect to immunity against execution and levy of mission assets. *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire*, 988 F.2d 295, 297 (2d Cir.1993); *see* Vienna Convention, arts. 22, 25, Apr. 18, 1961, 23 U.S.T. 3227; *see also* U.N. Charter art. 105, para. 2; Agreement Regarding the Headquarters of the United Nations, U.S.-U.N., art. V para. 4, June 26, 1947—Nov. 21, 1947, T.I.A. S. No. 1676; Convention on Privileges and Immunities of the United Nations, art. IV § 11, Feb. 13, 1946, 21 U.S.T. 1418.

Pursuant to Article 22 of the Vienna Convention, mission premises are “inviolable,” and “[t]he premises of the mission, their furnishings and other property thereon ... shall be immune from search, requisition, attachment or execution.” Vienna Convention, *supra*, art. 22 §§ 1, 3. The “premises of the mission” means “buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.” *Id.* art. 1(i); *see 767 Third Ave. Assocs.*, 988 F.2d at 298. Moreover, under Article 25 of the Vienna Convention, the United States is to “accord full facilities for the performance of the functions of the mission.” Bank accounts used by the mission for diplomatic purposes are immune from execution under this provision, as facilities necessary for the mission to function. *Sales v. Republic of Uganda*, No. 90–CV–3972 (CSH), 1993 WL 437762, at \*2 (S.D.N.Y. Oct.23, 1993); *Foxworth v. Permanent Mission of Republic of Uganda*, 796 F.Supp. 761, 763 (S.D.N.Y.1992); *Liber. E. Timber Corp. v. Gov’t of Republic of Liber.*, 659 F.Supp. 606, 608 (D.D.C.1987). A sworn statement from the head of mission is sufficient to establish that a bank account is used for diplomatic purposes. *See Sales*, 1993 WL 437762, at \*2 (noting also that, to remain consistent with principles of sovereign immunity, reliance on the mission head’s affidavit is necessary to avoid “painstaking examination of the Mission’s budget and books of account”); *Foxworth*, 796 F.Supp. at 762; *Liber. E. Timber Corp.*, 659 F.Supp. at 610.

In the case at bar, plaintiff has levied and executed against Congo Mission bank accounts at Citibank, as well as Congo Mission premises and the home of Ambassador Balé. Ambassador Balé has submitted sworn affidavits stating that the bank accounts and properties are vital to operation of the Congo Mission, describing the specific mission-related uses to which the accounts and properties are put, and detailing the fruitless steps the Congo Mission has taken to arrange alternate financing through its country’s department of finance. ... Ambassador Balé’s sworn statements are sufficient to establish that the assets against which plaintiff has enforced

the state court default judgment are used for diplomatic purposes, and necessary for Congo Mission to function, and the Court therefore finds that they are immune from levy and attachment. *See Sales*, 1993 WL 437762, at \*2; *Foxworth*, 796 F.Supp. at 762; *Liber. E. Timber Corp.*, 659 F.Supp. at 610. For these reasons, Congo Mission's motion to vacate all liens, levies, restraints, attachments, and similar enforcement mechanisms plaintiff has undertaken to enforce his default judgment, is GRANTED.

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#### (4) Assets of foreign central banks

On July 5, 2011, the U.S. Court of Appeals for the Second Circuit decided the case, *NML Capital Ltd. v. Republic of Argentina*, 652 F.3d 172 (2d Cir. 2011), discussed in *Digest 2010* at 384-91 (presenting excerpts of the U.S. *amicus* brief). See also *Digest 2007* at 494-504 for discussion of an earlier case involving prior efforts by the same plaintiffs to attach funds held by the same defendants. The court again held that the funds of Banco Central de la República ("BCRA") at the Federal Reserve Bank of New York ("FRBNY") were immune from attachment under the FSIA, this time interpreting Section 1611(b)(1) of the FSIA, which provides:

Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.

Plaintiffs' second attempt to attach the funds was premised on the theory, based on *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), that if a foreign central bank was acting as the "alter ego" of the foreign government, its assets could be attached as if they were assets of the government. After the initial determination that the more recent case brought by the plaintiffs was not barred by the doctrines of claim preclusion or issue preclusion because it presented different legal and factual issues, the court turned to an analysis of the claim under § 1611(b)(1). Most footnotes and citations have been omitted from the excerpts of the court's opinion that follow.

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\* \* \* \*

The District Court's holding was predicated on the conclusion that immunity under § 1611(b)(1) is dependent on a central bank's independence. That is, if a central bank lacks sufficient independence to preserve the presumption of juridical separateness under *Bancec*, our analysis

under the FSIA must, according to plaintiffs, “stop at [§] 1610,” ... because the property of the Republic in the present matter is not entitled to the immunity conferred in § 1611(b)(1). As a result, after “disregarding the formal separateness of the Republic and BCRA and treating the [FRBNY Funds] in the hands of BCRA . . . as the funds of the Republic,” *EM Ltd.*, 720 F. Supp. 2d at 302, the District Court determined under § 1610 that (1) the Republic had “made the requisite waivers of immunity as to *its* property . . . [which] includ[es] the [FRBNY Funds],” *id.* at 302 (emphasis supplied); and (2) the FRBNY Funds should be considered “property [of the Republic] used for commercial activity in the United States,” *id.* at 303. The District Court declined to conduct an analysis of the FRBNY Funds’ immunity under § 1611 because “the [FRBNY Funds were] in fact not the property of BCRA held for its own account, but [were] the property of the Republic.” *Id.* at 304.

We think that the District Court misread the FSIA when it concluded that a court facing the question of whether the assets of a central bank are attachable property under the FSIA must first decide whether the central bank is entitled to the presumption of independence from its parent state under *Bancec*. We hold that the plain language, history, and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state pursuant to *Bancec*. If foreign central bank property is immune from attachment under § 1611(b)(1), the fact that “a relationship of principal and agent [has been] created” between the foreign state and its central bank under *Bancec* is irrelevant, *see Bancec*, 462 U.S. at 629. As discussed below, foreign central banks are not treated as generic “agencies and instrumentalities” of a foreign state under the FSIA; they are given “special protections” befitting the particular sovereign interest in preventing the attachment and execution of central bank property. *EM I*, 473 F.3d at 485. Plaintiffs cannot evade this statutory requirement by using *Bancec* to turn assets that would otherwise be considered property of a central bank held for its own account into property of the Republic that is not entitled to immunity.

\* \* \* \*

First, the text of the statute provides that the only qualification for immunity under § 1611(b)(1) is whether the property of the central bank is “held for its own account.” We are mindful that in interpreting the statute we must “give effect to Congress’s choice of words, and understand that the text, as written,” does not create an independence requirement for the immunity of central bank assets under the FSIA. *United States v. Wilson*, 503 U.S. 329, 342, 112 S. Ct. 1351, 117 L. Ed. 2d 593 (1992)....

Second, the plain language of the statute suggests that Congress recognized that the property of a central bank, immune under § 1611, might *also* be the property of that central bank’s parent state. As the United States, appearing as *amicus curiae*, observes, “if Congress had intended to limit § 1611(b)(1) to independent central banks, one would have expected the introductory language of the subsection—‘Notwithstanding the provisions of section 1610 of this chapter’—to refer only to § 1610(b), which provides for execution or attachment of the property of state agencies and instrumentalities, rather than to § 1610 as a whole.” *United States Amicus Br.* 6-7. But § 1611(b)(1) refers to § 1610 in its entirety—including those provisions of § 1610 applicable only to foreign states. Therefore, the statute seems to anticipate the possibility that property held by the central bank may also be property of the sovereign state.

... In the House Report on the FSIA, upon which we relied in *EM I*, Congress explained that

*Section 1611(b)(1)* provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and “held” for the bank’s or authority’s “own account”—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems. FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. 6604 at 6630. ...

The FSIA House Report reflects Congress’s understanding that while the “funds of [ ] foreign central banks” are managed through those banks’ accounts in the United States, those funds are, in fact, “the reserves of [the] foreign state[s]” themselves. FSIA House Report 31, *as reprinted in* 1976 U.S.C.C.A.N. 6604 at 6630. In other words, the property of central banks deserves protection notwithstanding the fact that central banks may not have separate legal personhood. “By referring to the property of a foreign state and the property of a central bank interchangeably, Congress indicated its understanding that central bank property could be viewed as the property of a foreign state, and nonetheless be immune from attachment.” *See* United States *Amicus* Br. 8.

#### **(b) Historical Context**

Perhaps most convincingly, the historical backdrop against which the FSIA was passed forecloses the argument that a determination of agency liability under *Bancec* can render property attachable that is otherwise immune under § 1611(b)(1). As *plaintiffs’* expert observes, “[t]wenty years ago . . . most central banks in the world functioned as departments of ministries of finance[,]” in which “the level of actual independence . . . was usually lower than indicated in the law.” ...

Accordingly, when Congress passed the FSIA, it had no reason to believe that foreign central banks and monetary authorities would be independent of their parent states because, at that time, most were not. Moreover, Congress had reason to suspect that, as appears to be the case with Argentina, a central bank’s actual degree of autonomy may not be entirely predictable based on its degree of juridical independence. In an environment in which Congress was worried that execution against foreign central bank deposits might “discourage[]” foreign states from depositing their reserves in the United States, *see* FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. 6604 at 6630; *see also EM I*, 473 F.3d at 473, it makes no sense to assume that Congress would enact a statute designed to prevent “significant foreign relations problems” which failed to immunize a significant portion of the central bank reserves in the United States at that time. *Id.*

\* \* \* \*

We therefore conclude that § 1611(b)(1) immunizes foreign central bank property “held for its own account” without regard to the central bank’s independence from its parent state; that is, we hold that the analysis of the immunity of a foreign central bank’s property *begins* with §1611(b)(1). There is no indication in the text, history, or structure of the FSIA that Congress intended to make the immunity of a central bank’s property contingent on the independence of

the central bank. The statute makes no reference to the independence or autonomy of a central bank or monetary authority. Moreover, the history of the FSIA and of the independence of central banks suggests that Congress understood the property of a foreign central bank to be deserving of immunity regardless of that bank's independence. Plaintiffs fail to convince us that an independence requirement can be fairly read into the statute.

(iv)

Having concluded that the immunity of the FRBNY Funds under the FSIA turns not on whether the BCRA is entitled to a presumption of independence from the Republic under *Bancec*, but on whether the funds are property of the BCRA "held for its own account" under § 1611(b)(1), we must now decide whether the FRBNY Funds meet that test.

The definition of the phrase "held for its own account" in § 1611(b)(1) is a matter of first impression in this Circuit. *See EMI*, 473 F.3d at 485 (declining to "decide which interpretation of § 1611(b)(1)'s 'held for its own account' language is correct"). The parties and *amici* propose three competing definitions.

First, BCRA argues that central bank property is "held for its own account" if that property is used for "traditional central banking activities." ... This appears to be the test adopted by Congress in the FSIA, *see* FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. at 6630 ... and apparently is the only test ever to be applied by a federal court in this country. *See, e.g., Ministry of Def. & Support for Armed Forces of Islamic Repub. of Iran v. Cubic Def. Sys.*, 385 F.3d 1206, 1223-24 (9th Cir. 2004) ... *vacated on other grounds sub nom., Ministry of Def. & Support for Armed Forces of Islamic Repub. of Iran v. Elahi*, 546 U.S. 450, 126 S. Ct. 1193, 163 L. Ed. 2d 1047 (2006); *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pak.*, 46 F. Supp. 2d 231, 239 (S.D.N.Y. 1999) ... *vacated on other grounds*, 273 F.3d 241 (2d Cir. 2001); *Banco Central de Reserva del Peru v. Riggs Nat'l Bank of Washington, D.C.*, 919 F. Supp. 13, 17 (D.D.C. 1994) (citing FSIA House Report); *Banque Compafina v. Banco de Guatemala*, 583 F. Supp. 320, 322 (S.D.N.Y. 1984) (same).

A second proposed definition of central bank property "held for its own account" is offered by the FRBNY, appearing as *amicus curiae*. FRBNY suggests an alternative definition drawn from the common law of bank deposits. ... Under the so-called "plain language test," property of a central bank is "held for its own account" if it is in an account in the central bank's name because "[u]nder fundamental banking law principles, a positive balance in a bank account reflects a debt from the bank to the depositor" and no one else. ...

Finally, relying on a "grammatical and syntactical construction of *Section 1611(b)*," plaintiffs suggest a third definition of property of a central bank "held for its account": "[p]roperty of a central bank is 'held for its own account' when it is held for [the central bank's] own profit or advantage." ... Drawing on this definition, plaintiffs argue that if, pursuant to *Bancec*, a court were to disregard the juridical separateness of BCRA, the FRBNY Funds "cannot be held for the central bank's own profit or advantage" because the central bank "is the sovereign." ...

Plaintiffs' definition is novel but cannot be correct. BCRA is charged by statute with power and responsibility over, among other things, issuing and monitoring the stability of the Argentine peso, establishing and implementing monetary policy, investing reserves, acting as the Republic's financial agent and as depository and agent for the Republic before "international monetary, banking and financial entities," and regulating the Argentine banking system and financial sector. ... These are all traditional activities of central banks. ... They are also, to a one,

functions which defy any attempt to divide the interest of the central bank from that of the state it serves.

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On the other hand, the “central banking activities” test is not without difficulty, either. On its face, the House Report “distinguish[es]” between property “used or held in connection with central banking activities,” which is immune from attachment under § 1611(b)(1), and that used “solely to finance the commercial transactions . . . of foreign states,” which is not. FSIA House Report 31, *reprinted in* 1976 U.S.C.C.A.N. at 6630. However, the structure of the FSIA suggests that property used for commercial activity and property of a central bank held for its own account are not mutually exclusive categories, because some property of a central bank held for its own account *is* a category of property used for commercial activity. . . .

In order to resolve this tension, one practitioner of central banking law has proposed a modified central bank functions test, pursuant to which “property of a central bank is immune from attachment if the central bank uses such property for central banking functions as such functions are normally understood, irrespective of their commercial nature.” Patrikis, *Foreign Central Bank Property*, 1982 U. Ill. L. Rev. at 277. Conversely, “if an activity is to be regarded as commercial, as distinguished from a central bank activity, it should be an activity of the foreign central bank not generally regarded as a central banking activity.” *Id.* at 277-78. This test was adopted by the district court in *Weston*, *see* 823 F. Supp. at 1113, and, more recently, by another district court in *Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan*, 134 F. Supp. 2d 528, 534 (S.D.N.Y. 2001) (“If the funds at issue are used for central bank functions as these are normally understood, then they are immune from attachment, even if used for commercial purposes.”).

We think that this modified test—which combines the “plain language” of the statute and “central bank activities” tests as conjunctive requirements—accords with the text and purpose of §1611(b)(1), and we therefore adopt this test for purposes of determining whether central bank property is “held for its own account.” Where funds are held in an account in the name of a central bank or monetary authority, the funds are presumed to be immune from attachment under § 1611(b)(1). This presumption is consistent with the recognition that “FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation.” *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000); *see also EM I*, 473 F.3d at 486 (district courts must calibrate the “ ‘delicate balancing between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign’s or sovereign agency’s legitimate claim to immunity from discovery’ ”) (quoting *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (quotation marks omitted))). A plaintiff, however, can rebut that presumption by demonstrating with specificity that the funds are not being used for central banking functions as such functions are normally understood, irrespective of their “commercial” nature.

Had the District Court applied this test, it would have concluded that the FRBNY Funds were property of the BCRA held for the central bank’s own account at FRBNY. We have already established that the FRBNY Funds are held in BCRA’s name at FRBNY. *See EM I*, 473 F.3d at 473 (“[T]he FRBNY Funds that plaintiffs seek to attach are held in BCRA’s name.”). Pursuant to the parties’ March 2009 Stipulation, the FRBNY Funds of December 30, 2005 are said to have been derived from four types of transactions conducted by BCRA: (1) \$31 million was transferred into the FRBNY account in order to pay Argentine banks that sought to reduce the

amount of their U.S. dollar reserves; (2) \$32.2 million was transferred into the account because certain Argentine banks were increasing their U.S. dollar reserves; (3) BCRA had purchased approximately \$35 million in U.S. dollars throughout the day in order to control its currency; and (4) \$1.2 million was deposited pursuant to a regulatory exchange rule that BCRA imposed on Argentine exporters. *See EM Ltd.*, 720 F. Supp. 2d at 303. The record clearly establishes that the accumulation of foreign exchange reserves to facilitate the regulation of the peso and the custody of cash reserves of commercial banks pursuant to central bank regulations are paradigmatic central banking functions. ...

(v)

Having concluded that the FRBNY Funds are property of the BCRA “held for its own account,” the final question under § 1611(b)(1) is whether there has been an effective waiver of immunity with respect to that property.

*Section 1611(b)(1)* provides that the only exception to the immunity for property of a central bank or monetary authority held for its own account is where “such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution.” 28 U.S.C. § 1611(b)(1).

The District Court concluded that the Republic had explicitly waived *its* immunity. *See EM Ltd.*, 720 F. Supp. 2d at 301. The terms and conditions governing the bonds provide that— with regard to any potential immunity from attachment and execution of the Republic’s property—“the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment.”...

However, the District Court also concluded that “there has been no waiver of immunity with respect to BCRA.” *EM Ltd.*, 720 F. Supp. 2d at 297 (emphasis supplied). We agree. Waiver under the FSIA must be “clear and unambiguous.” *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 (2d Cir. 2010). In circumstances in which we have recognized the waiver of immunity with respect to an agency or instrumentality of a foreign state, that waiver has specifically embraced the foreign state *and* the relevant agency or instrumentality. *See, e.g., LNC Invs., Inc. v. Republic of Nicaragua*, 115 F. Supp. 2d 358, 361 (S.D.N.Y. 2000), *aff’d sub nom., LNC Invs., Inc. v. Banco Central de Nicaragua*, 228 F.3d 423 (2d Cir. 2000) (waving immunity “[t]o the extent that the Republic or any Governmental Agency has or hereafter may acquire any immunity from jurisdiction of any court”).

Here, while the Republic waived immunity under the FSIA for “the Republic or any of its revenues, assets or property,” the Republic’s waiver did not mention the “instrumentalities” of the Republic or BCRA in particular, much less BCRA’s reserves at FRBNY. As we previously observed, “although the Republic’s waiver of immunity from attachment is worded broadly, it does not appear to clearly and unambiguously waive BCRA’s immunity from attachment, as it must do in order to be effective.” *EM I*, 473 F.3d at 485 n.22.

\* \* \* \*

Because BCRA’s sovereign immunity over the FRBNY Funds has not been waived and the FRBNY Funds are property of BCRA held for its own account under 28 U.S.C. § 1611(b)(1), we hold that the FRBNY Funds are immune from attachment and restraint. The District Court therefore erred in concluding that it had subject-matter jurisdiction to adjudicate a suit for

attachment and restraint of the FRBNY Funds. The April 7, 2010 opinion and all associated orders of the District Court are vacated and the cause is remanded to the District Court for further proceedings consistent with this opinion.

\* \* \* \*

#### 4. Availability of contempt sanctions

On March 15, 2011, the U.S. Court of Appeals for the District of Columbia Circuit decided that contempt sanctions against a foreign government were properly imposed by the district court in a case under the FSIA. *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011). Hemisphere sought to enforce two arbitral awards for delinquent payments on its credit agreement with the Democratic Republic of Congo (“DRC”) in 2004. The district court entered two default judgments after the DRC failed to appear. Hemisphere then sought to execute on the judgments. The DRC appeared in the enforcement proceedings, but failed to respond to discovery requests relating to property available for execution. See *Digest 2006* at 621-26 for a discussion of the court’s prior consideration of the availability of diplomatic properties for execution in the case. In 2009, two years after the district court ordered the DRC to produce a certain category of documents in response to its discovery plan, the court found the DRC in civil contempt for failing to comply. The DRC moved to vacate the contempt order, relying on the U.S. *amicus* brief in a Fifth Circuit case, *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417 (5<sup>th</sup> Cir. 2006) (discussed in *Digest 2006* at 603-11), in which the court found that contempt sanctions were not appropriate under the FSIA. The U.S. also filed an *amicus* brief in the D.C. Circuit asserting that contempt sanctions were improper.

The D.C. Circuit disagreed with the Fifth Circuit and the U.S. position and concluded that an order imposing sanctions was appropriate, even if such an order could not be enforced or executed. Excerpts of the court’s opinion follow (footnotes and citations to the record omitted). For the court’s treatment of the comity arguments presented by the U.S., see Chapter 15.B.4.

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\* \* \* \*

The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution. See *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984) (plaintiff may hold a right without a remedy under the FSIA). Otherwise a plaintiff must rely on the government’s diplomatic efforts, or a foreign sovereign’s generosity, to satisfy a judgment. Therefore, it is not anomalous to divide, as Hemisphere does, the question of a court’s power to impose sanctions from the question of a court’s ability to enforce that judgment through execution. Hemisphere’s contention that whether the court can enforce its contempt sanction is irrelevant to the availability of a contempt order is consistent with the statutory scheme.

\* \* \* \*

As the Seventh Circuit has recognized, there is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court’s inherent contempt power. *Autotech Techs. v. Integral Research & Dev.*, 499 F.3d 737, 744 (7th Cir. 2007). Nor is there any legislative history supporting such a claim. Indeed, the House Report to the FSIA demonstrates that Congress kept in place a court’s normal discovery apparatus in FSIA proceedings. *See* H.R. Rep. No. 94-1487, at 23 (1976) (“The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area.”). And the same report illustrates that Congress specifically contemplated that contempt sanctions would be available under the FSIA as a remedy for discovery violations:

[If] a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply. Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. *However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.* *Id.* (emphasis added); *see also* Fed. R. Civ. P. 37(b)(2)(A)(vii) (sanctions available for failure to abide by court-ordered discovery).

\* \* \* \*

To be sure, the Fifth Circuit in *Af-Cap Inc.*, upon which the government and the DRC heavily rely, held that a contempt order requiring the Republic of Congo to pay money into the court’s registry and send its business associates notice of an outstanding judgment was inconsistent with the FSIA. The court concluded that “[sections 1610 and 1611 of the FSIA] describe the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included.” *Af-Cap*, 462 F.3d at 428. Although the Seventh Circuit in *Autotech* distinguished *Af-Cap* on the grounds that the Fifth Circuit did not purport to decide the antecedent “power” question, i.e. whether the statute precluded the contempt order, *see Autotech Techs.*, 499 F.3d at 745, it does seem to us that the Fifth Circuit accepted the government’s litigating effort to conflate the power to impose a contempt sanction with the authority to enforce it (as we noted, the government apparently filed a similarly confusing brief in that case). In any event, since the Fifth Circuit never considered the distinction between the two types of orders, we do not regard its decision as persuasive. We agree with the Seventh Circuit that contempt sanctions against a foreign sovereign are available under the FSIA.

\* \* \* \*

## 5. Service of process

Section 1608(a) of the FSIA provides four methods of service of process on a foreign state:

- (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

- (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
- (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
- (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

FSIA § 1608(b) similarly provides a hierarchy for methods of service of process on an agency or instrumentality of a foreign state. This section discusses a selection of cases in 2011 in which the interpretation of FSIA § 1608 was at issue.

**a. Avelar**

See the discussion in section A.3.b(2) *supra*, for background on this case in which the United States filed a statement of interest. The section of the statement of interest arguing that service of process was improper in the case is excerpted below (with footnotes and citations to the record omitted). The statement of interest is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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\* \* \* \*

**A. Based on the Record, Plaintiff's Purported Service of the Amended Complaint on the Congo's U.N. Mission Failed to Comply with the FSIA and Was Contrary to the Vienna Convention.**

A lawsuit against a foreign state's permanent mission to the United Nations is, by definition, a suit against a foreign sovereign. *See Gray v. Perm. Mission of the People's Republic of the*

*Congo to the U.N.*, 443 F. Supp. 816, 819\_20 (S.D.N.Y.) (“[I]t is hard to imagine a purer embodiment of a foreign state than that state’s permanent mission to the United Nations.”), *aff’d without opinion*, 580 F.2d 1044 (2d Cir. 1978); *Lewis & Kennedy, Inc. v. Perm. Mission of the Republic of Botswana to the U.N.*, No. 05 Civ. 2591, 2005 WL 1621342, at \*3 (S.D.N.Y. July 12, 2005) (citing *Gray*, 443 F. Supp. at 820). Therefore, Plaintiff was required to serve process upon the Congo’s U.N. Mission in accordance with 28 U.S.C. § 1608(a), which governs service “upon a foreign state” in both the “courts of the United States and of the States.”

Plaintiff bears the burden of showing that he properly served the Mission in accordance with Section 1608(a). *Lewis & Kennedy*, 2005 WL 1621342, at \*2. Plaintiffs must comply strictly with the service of process requirements of Section 1608(a). *See USAA Casualty Ins. Co. v. Perm. Mission of the Republic of Namibia*, No. 10 Civ. 4262, 2010 WL 4739945, at \*1 (S.D.N.Y. Nov. 17, 2010); *Lewis & Kennedy*, 2005 WL 1621342, at \*3 (“Courts have been unequivocal that § 1608(a) ‘mandates strict adherence to its terms, not merely substantial compliance.’” (citation omitted)). As a result, a plaintiff cannot excuse his failure to comply with Section 1608(a) by showing the defendant had actual notice of the lawsuit. *See Finamar Investors Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 118 (S.D.N.Y. 1995) (“Whether or not respondent received actual notice of the suit is irrelevant when strict compliance is required.”).

Subsections (1) through (4) of Section 1608(a) provide the only four methods by which process may be served on a foreign state. The record contains evidence of only one attempt to serve process on the Congo’s U.N. Mission: hand delivery on July 17, 2009, of the summons and amended complaint in English upon an unidentified woman on the premises of the Mission. This purported service, proof of which was used to obtain the default judgment, failed to comply with any of the methods set forth in subsections (1) through (4) of Section 1608(a):

- a. There is no evidence in the record that there has ever been any special arrangement between Plaintiff and the Congo’s U.N. Mission for service of process under Section 1608(a)(1).
- b. The Republic of the Congo is not a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at the Hague on Nov. 15, 1965, T.I.A.S. 6638 [hereinafter Hague Service Convention], the principal convention governing service of judicial documents under Section 1608(a)(2). *See* Hague Conference on Private International Law, Status Table, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=17](http://www.hcch.net/index_en.php?act=conventions.status&cid=17) (last updated Apr. 8, 2011). Plaintiff does not purport to have made service consistent with the Hague Service Convention or any other convention.
- c. Plaintiff does not purport to have made service under Section 1608(a)(3) by arranging for the clerk of court to send by mail copies of the summons, amended complaint, and a notice of suit, as well as translations of each into French (the official language of the Republic of the Congo), to the head of the Republic of the Congo’s ministry of foreign affairs. Certainly, Plaintiff’s July 17, 2009 attempt to serve process by hand on an unnamed woman on the Mission’s premises does not satisfy Section 1608(a)(3)’s requirements.
- d. Finally, Plaintiff does not purport to have served process under Section 1608(a)(4) by arranging for the clerk of court to send by mail to the Department of State’s Director of Special Consular Services, for transmission via diplomatic channels, two copies each of the summons, amended complaint, and a notice of suit, all

translated into French. Clearly, the one attempt to serve process on the Mission that is reflected in the record does not comply with Section 1608(a)(4).

Thus, Plaintiff's purported service of the summons and the amended complaint upon the Congo's U.N. Mission failed to comply with Section 1608(a) and was therefore ineffective to initiate an action against it.

In addition, Plaintiff's attempt to serve process upon the Congo's U.N. Mission was contrary to the inviolability of the Mission because, according to the record, Plaintiff had a process server personally deliver a copy of the amended complaint and summons on the premises of the Mission. Article 22 of the Vienna Convention, which, as noted previously, applies to permanent missions to the United Nations through the Headquarters Agreement and the U.N. Convention, states that "[t]he premises of the mission shall be inviolable." The term "inviolable" is an "advisedly categorical, strong word." *767 Third Avenue Assocs.*, 988 F.2d at 298. The Vienna Convention "recognize[s] no exceptions to mission inviolability." *Id.* at 300 (holding that Article 22 prevents a landlord from evicting a diplomatic mission to the U.N. from its premises for non-payment of rent).

The principle of mission inviolability set forth in Article 22 precludes service of process on the premises of a mission. *See 40 D 6262 Realty Corp. v. United Arab Emirates*, 447 F. Supp. 710, 712 n.3 (S.D.N.Y. 1978) (citing Article 22 in holding ineffective purported service of process by posting copies of the summons and complaint on the premises of a foreign mission and mailing copies of those documents to the mission). The drafters' commentary on Article 22 confirms that service of process on the premises of a mission runs afoul of the principle of mission inviolability:

A special application of this principle is the rule that no writ may be served within the premises of the mission, and that no summons to appear before a court may be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. The service of such documents should be effected in some other way.

Report of the International Law Commission, Diplomatic Intercourse and Immunities, U.N. GAOR, 13<sup>th</sup> Sess., Supp. 9, U.N. Doc. A/3859 (1958), *reprinted in* [1958] II Y.B. Int'l L. Comm'n 89, 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1. In its comments on a draft of Article 22, the United States also explicitly "agree[d] that a process server may not serve a summons or process on the premises of the mission." *Id.* at 136. Since the premises of the Congo's U.N. Mission are inviolable under the Vienna Convention, Plaintiff could not properly effectuate service by personally serving an unnamed woman on the premises of the Mission. *See 40 D 6262 Realty Corp.*, 447 F. Supp. at 712 n.3.

**B. Based on the Record, Plaintiff Failed to Properly Serve the Default Judgment Upon the Congo's U.N. Mission in Accordance with the FSIA.**

Another provision of the FSIA, 28 U.S.C. § 1608(e), specifies that a copy of any default judgment obtained against a foreign state "shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section," *i.e.*, using one of the four methods specified in Section 1608(a), which are discussed in Part A above. There is no indication in the record that Plaintiff served the default judgment upon the Congo's U.N. Mission in accordance with any of the methods specified in Section 1608(a). Thus, Plaintiff appears to have failed to properly serve the Congo's U.N. Mission with the default judgment.

\* \* \* \*

In its November 2011 order dismissing the case, the court agreed with the United States that service in the case was improper under the FSIA. That portion of the court’s decision is excerpted below (with footnotes and citations to the record omitted).

\* \* \* \*

The service provision of the FSIA, § 1608(a), is the exclusive provision by which a plaintiff in a civil action may effect service of process on a “foreign state.” See *Daly*, 30 F.Supp.2d at 416; see also Fed. Civ. R. Proc. 4(j) (“A foreign state ... must be served in accordance with § 1608.”). Section 1608(a) (1)-(4), ... authorizes four methods of service... Courts unequivocally hold that § 1608(a) “mandate[s] strict adherence to its terms, not merely substantial compliance.” *Finamar Investors Inc. v. Republic of Taj.*, 889 F.Supp. 114, 117 (S.D.N.Y.1995); see *Gray*, 443 F.Supp. at 820; see also *Magness v. Russ. Fed’n*, 247 F.3d 609, 615 (5th Cir.2001); *BPA Int’l, Inc. v. Kingdom of Swed.*, 281 F.Supp.2d 73, 84 (D.D.C.2003); cf. *Finamar Investors*, 889 F.Supp. at 117 (mere “substantial compliance” may suffice for service on an “agency or instrumentality of a foreign state” pursuant to § 1608(b)). FSIA governs service of process in state and federal courts alike. See § 1608(a) (“Service in the courts of the United States and of the States shall be made upon a foreign state [as follows.]”); see also, e.g., *Trans Commodities, Inc. v. Kaz. Trading House*, No. 96–CV–9782 (BSJ), 1997 WL 811474, at \*4 (S.D.N.Y. May 28, 1997) (“[T]he FSIA ... sets forth four possible methods of service to be used in a suit against a foreign state in any court—state or federal—in the United States.”) (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491–97, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983)).

#### **B. Purported service on Congo Mission**

Congo Mission is a “foreign state” for purposes of the FSIA. *Gray*, 443 F.Supp. at 820; *Lewis & Kennedy, Inc. v. Permanent Mission of Republic of Bots.*, No. 05–CV–2591, 2005 WL 1621342, at \*3 (S.D.N.Y. July 12, 2005). Therefore, service on Congo Mission is governed by § 1608(a).

The various steps taken by plaintiff to apprise Congo Mission of the pendency of the instant litigation did not comply with the FSIA. Plaintiff delivered a copy of the state court summons and complaint to a receptionist working at Congo Mission premises, mailed various discovery and litigation-related documents to Congo Mission, and mailed a copy of the state court order awarding default judgment. Plaintiff does not claim these efforts were undertaken pursuant to any private agreement with Congo Mission. See § 1608(a)(1). The People’s Republic of the Congo is not a party to the most commonly cited international convention, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Convention”)—which in any event applies only to international service—and plaintiff does not contend his purported service complied with any international convention. See Hague Convention, art. 31, Nov. 15, 1965, 20 U.S.T. 361; § 1608(a)(2); *Lewis & Kennedy, Inc.*, 2005 WL 1621342, at \*4; *Daly*, 30 F.Supp.2d at 416; 13A Federal Procedure, Lawyers Edition § 36:418 (2011). Plaintiff did not effect service by the Clerk of this Court or the state court, or by the United States Department of State. See § 1608(a)(3)-(4). Thus, plaintiff did not comply with the FSIA service provisions, and the Court is without power to deem plaintiff’s asserted compliance “in principle” sufficient to meet the strict standard of adherence the statute

demands. *See Finamar Investors*, 889 F.Supp. at 117. At most, Congo Mission had notice of the action, but “informal notification through channels clearly outside the obvious requirements of [the FSIA] cannot be substituted for those which meet the requirements.” *Gray*, 443 F.Supp. at 821 (noting also that delivery of process to “[Congo Mission’s] secretary” does not comply with the FSIA). The United States, in asserting its diplomatic interest in this case, both as host nation to the United Nations and a member of that body, agrees that service was improper.

Therefore, as plaintiff failed properly to serve Congo Mission, the state court’s default judgment is a nullity, as are all subsequent liens, attachments and restraints on Congo Mission property levied in execution of that judgment. 14C Wright *et al.*, *supra*, § 3738 (“The federal court ... may reconsider a default judgment entered by the state court prior to the removal, if the removal notice has been filed within the time period specified in the removal statute.”); *see Covington Indus., Inc. v. Resintex A. G.*, 629 F.2d 730, 732 (2d Cir.1980) (“A judgment entered against parties not subject to the personal jurisdiction of the rendering court is a nullity.... [T]he enforcing court has the inherent power to void the judgment, whether the judgment was issued by a tribunal within the enforcing court's domain or by a court of a foreign jurisdiction.”) *Granville Gold Trust–Switz.*, 924 F.Supp. at 402–03 (noting that court’s prior vacatur pursuant to Rule 60(b) of state court default judgment for improper service under FSIA); *Gray*, 443 F.Supp. at 821; *see also First City, Tex.-Hous., N.A. v. Rafidain Bank*, No. 09–CV–7360(JSM), 1992 WL 296434, at \*1 (S.D.N.Y. Oct.6, 1992) (“It is well settled that absent effective service [under the FSIA], a court lacks jurisdiction over the defendant and all actions pertaining to such defendants, including the [state court's] entry of default judgment, are void.”).

\* \* \* \*

#### **b. Chettri v. Nepal Bangladesh Bank**

In May 2011, the United States filed a statement of interest in the U.S. District Court for the Southern District of New York in a case brought against the central bank of Nepal (“Nepal Rastra Bank”) and the Department of Revenue Investigation of the Government of Nepal (“DRI”). *Chettri v. Nepal Bangladesh Bank, et al.*, 10-8470 (S.D.N.Y.). The U.S. statement of interest explained that these two defendants were immune from suit because they had not been properly served under the FSIA. Excerpts of the U.S. statement of interest follow (with citations to the record omitted). The full text of the U.S. statement of interest is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

Section 1608 of the FSIA...sets out the requirements for service on a foreign state and its political subdivisions, agencies and instrumentalities. ...Because it appears that Plaintiffs failed to adhere to the provisions of Section 1608(a), DRI was not properly served in this matter. Likewise, because it appears that Plaintiffs failed to adhere to the provisions of Section 1608(b), Nepal Rastra Bank was also not properly served in this matter. Absent proper service, entry of a default judgment is improper.

\* \* \* \*

DRI is a department within Nepal’s Ministry of Finance, and therefore a political subdivision of the Government of Nepal. ...

\* \* \* \*

Courts have uniformly held that service on a foreign state and its political subdivisions must strictly comply with the requirements of Section 1608(a). ...

In the instant case, the docket does not reflect any attempt to serve DRI in compliance with the procedures specified in Section 1608(a). ...

Rather, the docket indicates that service of the summons and complaint was attempted by personal delivery on Amrit Rai, an employee of the Office of General Consulate of Nepal in New York. ... This attempted method of service fails on several grounds. First, it does not comply with Section 1608(a). ... Second, this attempt at service through Mr. Rai is also impermissible under Article 43 of the Vienna Convention on Consular Relations, which provides that, “[c]onsular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.” ... Third, it appears that Mr. Rai also serves as Counselor at the Nepal Mission to the United Nations in New York, which is located on the same premises as the Nepalese Consulate. The premises of a United Nations mission are inviolable. ... Mr. Rai enjoys personal inviolability and comprehensive civil immunity in his role as member of the Nepal mission to the United Nations and thus cannot be served or made an involuntary agent for service of process. ...

\* \* \* \*

...Plaintiffs argue that DRI “had actual notice of the lawsuit.” Even if that were true, a party’s notice of a lawsuit is irrelevant to a determination as to whether service is proper under Section 1608(a).

\* \* \* \*

The parties agree that Nepal Rastra Bank is an “agency or instrumentality” of Nepal, as defined in Section 1603(b) of the FSIA. ...

Like the service provisions of Section 1608(a), the requirements in Section 1608(b) fulfill the critically important goal of ensuring that foreign state agencies have meaningful notice of the initiation of a suit against them. Although “several federal courts have rejected a strict reading of section 1608(b) and have upheld service where the serving party has ‘substantially complied’ with the requirements under the Act,” *Sakhrani v. Takhi*, No. 96-CV-2900 (KMW)(RLE), 1997 WL 33477654, at \*6 (S.D.N.Y. Sept. 10, 1997)..., it is not necessary for the purposes of this case to determine whether substantial compliance would be sufficient. ...

In this case, Plaintiff failed to substantially comply with the provisions of Section 1608(b). The docket indicates that service of the summons and complaint upon Nepal Rastra Bank was attempted only by personal delivery on Mr. Rai. That method does not comply with any of the provisions of Section 1608(b), is impermissible under Article 43 of the Vienna Convention on Consular Relations, and is inconsistent with the inviolability of United Nations missions. ...

...[Plaintiffs'] later service also did not substantially comply with the provisions of 1608(b).

...[T]he docket sheet shows that Plaintiffs attempted to serve the order to show cause by personal service on Raj Kumar Shrestha at Nepal Rastra Bank. ...However, service by personal delivery to Mr. Shrestha at Nepal Rastra Bank may only comply with Section 1608(b) if: (a) Mr. Shrestha was "authorized...by appointment or by law to receive service of process," 28 U.S.C. § 1608(b)(2); and (b) the delivery was made in the United States—neither of which is alleged here.

...[T]here is no indication that the documents were translated into Nepalese, as required by Section 1608(b)(3). In addition, ...Plaintiffs did not effectuate service as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request. ...And finally, Plaintiffs failed to comply with Section 1608(b)(3)(C) because Plaintiffs failed to demonstrate that any of their attempts at service were "directed by order of the court consistent with the law of the place where service is to be made." 28 U.S. C. § 1608(b)(3)(C).

\* \* \* \*

## **B. IMMUNITY OF FOREIGN OFFICIALS**

### **1. Overview**

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*, including the *amicus* brief filed by the United States and the Supreme Court's opinion. The cases discussed below involve the consideration of foreign official immunity post-*Samantar*.

### **2. Samantar**

#### ***a. U.S. statement of interest on remand to the district court***

On February 14, 2011, the United States submitted a statement of interest in the U.S. District Court for the Eastern District of Virginia to convey the Department of State's determination that the defendant, a former Somali official, was not immune from suit. *Yousuf v. Samantar*, No. 04-1360 (E.D. Va.). The suit was brought, pursuant to the Torture Victim Protection Act ("TVPA") and the Alien Tort Statute ("ATS"), against Mohamed Ali Samantar, a U.S. resident who had formerly served in several high-ranking positions in the Somali government. In 2011, the case was before the district court on remand from the U.S. Supreme Court. See *Digest 2010* at 397-428 and *Digest 2009* at 370-74 for background on the case.

The U.S. statement of interest in *Yousuf v. Samantar* relied on the Supreme Court's determination in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), that the FSIA does not govern the immunity of individual officials. The statement of interest included as an exhibit the determination of the Department of State that Samantar does not enjoy immunity from the

jurisdiction of U.S. courts in this action. Excerpts of the U.S. statement of interest follow (with footnotes and citations to the record omitted). The full text, including the State Department’s determination as Exhibit 1, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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In *Samantar*, the Supreme Court explained that if the Department of State recognized and accepted the foreign government’s request for a suggestion of immunity, the district court surrendered its jurisdiction. 130 S. Ct. at 2284. The Executive’s role traditionally has encompassed acknowledging that certain foreign government officials enjoy immunity because of their particular status as well as acknowledging whether the officials should be immune from suit for the conduct at issue. *See, e.g., Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (deferring to State Department’s determination that alleged conduct was of a public, as opposed to a private/commercial nature). Taking into account the relevant principles of customary international law, the Department of State has made the attached determination on immunity in this case, and we explain below certain critical factors underlying the Executive’s determination here. Because the Executive Branch is taking an express position in this case, the Court should accept and defer to the determination that Defendant is not immune from suit. *See Samantar*, 130 S. Ct. at 2284; *Isbrandtsen Tankers*, 446 F.2d at 1201 (“[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.”).

Upon consideration of the facts and circumstances in this case, as well as the applicable principles of customary international law, the Department of State has determined that Defendant enjoys no claim of official immunity from this civil suit. *See* State Dep’t Letter, attached as Ex. 1. Particularly significant among the circumstances of this case and critical to the present statement of interest are (1) that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive’s assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents.

The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official. *See, e.g., Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits) (a foreign official “will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity”). Former officials generally enjoy residual immunity for acts taken in an official capacity while in office. *Id.* Because the immunity is ultimately the state’s, a foreign state may waive the immunity of a current or former official, even for acts taken in an official capacity. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (“Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders.”).

The typical practice is for a foreign state to request a suggestion of immunity from the Department of State on behalf of its officials. *See Samantar*, 130 S.Ct. at 2284. . . . Because the immunity belongs to the state, and not the individual, and because only actions by former officials taken in an official capacity are entitled to immunity under customary international law,

the Executive Branch takes into account whether the foreign state understood its official to have acted in an official capacity in determining a former official's immunity or non-immunity.

This case presents a highly unusual situation because the Executive Branch does not currently recognize any government of Somalia. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."). ...

As noted, a former official's residual immunity is not a personal right. It is for the benefit of the official's state. In the absence of a recognized government authorized either to assert or waive Defendant's immunity or to opine on whether Defendant's alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here. That determination has taken into account the potential impact of such a decision on the foreign relations interests of the United States. *See Ex. 1*. In future cases presenting different circumstances, the Department could determine either that a former official of a state without a recognized government is immune from civil suit for acts taken in an official capacity, or that a former official of a state with a recognized government is not immune from civil suit for acts that were not taken in an official capacity.

The Executive's conclusion that Defendant is not immune is further supported by the fact that Defendant has been a resident of the United States since June 1997. A foreign official's immunity is for the protection of the foreign state. Thus, a former foreign official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit for acts taken while in office. Basic principles of sovereignty, nonetheless, provide that a state generally has a right to exercise jurisdiction over its residents. *See, e.g., Schooner Exchange*, 11 U.S. at 136. In the absence of a recognized government that could properly ask the Executive Branch to suggest the immunity of its former official, the Executive has determined in this case that the interest in permitting U.S. courts to adjudicate claims against U.S. residents warrants a denial of immunity.

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***b. U.S. brief as amicus in the U.S. Court of Appeals for the Fourth Circuit***

After the district court accepted the U.S. Department of State's determination of non-immunity and denied Samantar's motion to dismiss, Samantar appealed to the Court of Appeals for the Fourth Circuit. *Yousuf v. Samantar*, No. 11-1479 (4th Cir.). On October 24, 2011, the United States filed a brief as *amicus curiae* in the Fourth Circuit to reiterate its determination of non-immunity and support a decision affirming the district court's dismissal of the motion to dismiss. The U.S. *amicus* brief is excerpted below (with footnotes and citations to the record in the case omitted) and is available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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After the Government informed the district court that the State Department had determined that Samantar is not immune from this suit, the district court properly denied Samantar's motion to dismiss.

1. In holding that the FSIA does not govern Samantar's claim of foreign official immunity, the Supreme Court described the courts' historic deference to Executive Branch foreign sovereign immunity determinations before Congress enacted the FSIA. *Samantar*, 130 S. Ct. at 2284. The Supreme Court explained that "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar*, 130 S. Ct. at 2284. The Court first recognized the doctrine in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812). *Samantar*, 130 S. Ct. at 2284. "Following *Schooner Exchange*, a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Ibid.* A foreign state facing suit in our courts could request a "suggestion of immunity" from the State Department. *Ibid.* (quotation marks omitted). If the State Department accepted the request and filed a suggestion of immunity, the district court "surrendered its jurisdiction." *Ibid.* But if the State Department took no position in the suit, "a district court had authority to decide for itself whether all the requisites for such immunity existed." *Ibid.* (quotation marks omitted). In such a circumstance, the district court was to apply "the established policy of the [State Department]" to determine whether the foreign state was entitled to immunity. *Ibid.* (quotation marks omitted).

Of considerable significance to this case, the Supreme Court further explained that, "[a]lthough cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity." *Id.* at 2284–85 (citing cases). Accepting the Government's argument as *amicus curiae*, the *Samantar* Court explained that "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Id.* at 2291. Accordingly, the Court could discern "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Ibid.* And, as the Supreme Court explained, the State Department's role was to determine whether a foreign state or official was immune from suit and courts would look to principles articulated by the State Department when determining foreign official immunity in suits in which the State Department did not participate. *Id.* at 2284.

At the time this suit was before the Supreme Court, the State Department had made no determination concerning Samantar's immunity. Accordingly, the Court left open the question whether Samantar "may be entitled to immunity under the common law," and it remanded the suit "for further proceedings consistent with this opinion." *Id.* at 2292–93. On remand, the Government informed the district court that the State Department had determined that Samantar is not immune from this suit.... Under the Supreme Court's decision in this case, that determination was binding, and the district court properly gave it effect.

**2.a.** In attacking the district court's order, Samantar principally argues that the common law of foreign official immunity impels courts to defer only to Executive Branch determinations that a foreign official is immune from suit, but not to determinations that the official lacks immunity. But Samantar's argument is contrary to the Supreme Court's explanation of the State Department's role in foreign official immunity determinations.

First, Samantar focuses on the Supreme Court's statement, describing pre-FSIA practice, that "in the absence of recognition of the immunity by the Department of State, a district court had authority to decide for itself whether all the requisites for such immunity existed." *Ibid.* (quoting *Samantar*, 130 S. Ct. at 2284 (emphasis omitted)). Samantar's reliance on this sentence is misplaced. As plaintiffs argue in their appellee brief, in context, it is clear that the Supreme Court did not suggest that courts had authority before the FSIA was enacted to disregard the

State Department's determination that a foreign sovereign was not immune from suit. Rather, the Supreme Court explained that, when the State Department made no immunity determination, the district court should make the determination, by considering “*whether the ground of immunity is one which it is the established policy of the[State Department] to recognize.*” *Samantar*, 130 S. Ct. at 2284 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)) (emphasis added). Thus, the Supreme Court recognized that the State Department's immunity principles govern the courts' determinations regarding foreign official immunity.

This rule is confirmed by the pre-FSIA immunity decisions cited by the Court in *Samantar*. In *Ex Parte Peru*, for example, the Supreme Court held that in suits against foreign governments, “the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.” 318 U.S. 578, 588 (1943) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In that case, involving an *in rem* action against a foreign state-owned vessel, the Supreme Court unambiguously stated “that courts are required to accept and follow the executive determination that the vessel is immune.” *Ibid.*

More importantly, the Supreme Court shortly thereafter noted that “[e]very judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government.” *Hoffman*, 324 U.S. at 35 (emphasis added). For that reason, the Court instructed that — in words that directly rebut *Samantar*'s argument — it is “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” *Ibid.* (emphasis added). The Supreme Court added that “recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.” *Id.* at 36.

In sum, the law that developed in various Supreme Court opinions — and that the Court in *Samantar* held had not been displaced by Congress when it enacted the FSIA — stated unequivocally that the courts should not either deny or recognize immunity for a foreign official contrary to determinations of the State Department. *Samantar*'s argument that a district court may disregard the State Department's determination that a specific former foreign official is not immune from suit is contrary to the Supreme Court's decision in this case. In a case like this one in which the Government has clearly stated the State Department's conclusion that *Samantar* is not entitled to foreign official immunity, and pointed to the particularly significant circumstances underlying the Government's Statement of Interest, a court would obviously not be following the “established policy of the State Department” (*Samantar*, 130 S. Ct. at 2284 (quotation and alternation marks omitted)), if it chose to overrule the State Department and grant immunity anyway.

In addition, *Samantar*'s contention that courts are free to override the State Department's determination that a foreign official is not immune from suit misunderstands the respective roles of the Executive Branch and the courts. Before the FSIA was enacted, the Supreme Court, this Court, and other courts of appeals recognized that judicial deference to Executive Branch determinations of foreign sovereign immunity was supported by the constitutional separation of powers. The Supreme Court grounded judicial deference to Executive Branch determinations of foreign sovereign immunity on the Executive's constitutional responsibility to conduct the Nation's foreign relations. See *Ex Parte Peru*, 318 U.S. at 588 (“That principle is that courts may

not so exercise their jurisdiction [over foreign sovereigns] as to embarrass the executive arm of the government in conducting foreign relations”); *accord Hoffman*, 324 U.S. at 35–36.

By referring to the Executive Branch’s constitutional authority over the conduct of foreign relations, this Court has similarly rejected the notion that courts may ignore the State Department’s immunity determinations. *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (“Despite these contentions, we conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion”). Other Circuits have done likewise. ...

The Executive Branch’s constitutional authority over the conduct of foreign affairs continues as a foundation for the State Department’s authority to determine the immunity of foreign officials and for the courts’ duty to follow its determinations. *See Samantar*, 130 S. Ct. at 2291 (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (“[T]raditional ways of conducting government \* \* \* give meaning to the Constitution.” (quotation marks omitted)). In the absence of a governing statute, it is the State Department’s role to determine the principles governing foreign official immunity from suit.

**b.** *Samantar* appears to make a distinct argument that courts may properly defer to the State Department’s determination of a foreign official’s immunity only where the State Department has identified some foreign policy harm that would follow if the court fails to abide by the determination. That argument is mistaken; it confuses the rule of judicial deference to State Department immunity determinations with the Supreme Court’s explanation for the reasons underlying the rule.

As explained above, before the FSIA was enacted, the Supreme Court held that courts must give effect to the State Department’s determinations of foreign official immunity because, among other reasons, the failure to defer to the State Department’s decision could undermine the Executive Branch’s conduct of foreign relations. *See, e.g., Hoffman*, 324 U.S. at 35–36. But the Supreme Court never required the State Department to specifically articulate any foreign policy harm, let alone suggest, as does *Samantar*, that courts should review the State Department’s foreign policy judgments. As plaintiffs persuasively argue, such a requirement would conflict with the separation-of-powers principles underlying the requirement of judicial deference to determinations of foreign official immunity by the State Department.

Moreover, *Samantar*’s proposed requirement is foreclosed by Circuit precedent. *Rich*, 295 F.2d at 26 (“[T]he doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.”); *accord Hoffman*, 324 U.S. at 36; *Ex Parte Peru*, 318 U.S. at 588–89; *Southeastern Leasing Corp.*, 493 F.2d at 1224; *Isbrandtsen Tankers*, 446 F.2d at 1201; *see also Smith v. Reagan*, 844 F.2d 195, 198 (4th Cir. 1988) (“Plaintiffs seek in this suit to investigate and evaluate the executive branch’s conduct of foreign policy, an area traditionally reserved to the political branches and removed from judicial review.”).

**3.** The United States largely agrees with plaintiffs’ arguments in support of the district court’s order denying *Samantar*’s motion to dismiss. However, plaintiffs’ brief makes misstatements of fact and law, some of which we briefly address.

a. Plaintiffs argue that Samantar is not entitled to head of state immunity because “[t]he United States never recognized Samantar as the head of state of Somalia,” and because the Somali Constitution designates the President, not the Prime Minister, as the head of state. Although Samantar is not entitled to head of state immunity from this suit, it is not for these reasons.

The State Department has determined that Samantar is not immune from this suit under any immunity doctrine. As explained above, that determination controls. *See also United States v. Noriega*, 117 F.3d 1206, 1211–12 (11th Cir. 1997) (declining to recognize defendant’s claim to head of state immunity where Executive Branch made clear that the defendant did not enjoy such immunity).

b. Regarding Samantar’s claim to foreign official immunity (as distinct from his claim to head of state immunity), plaintiffs correctly argue that foreign official immunity is not an individual right of the official, but instead is for the benefit of the foreign state. But plaintiffs further contend that the State of Somalia “does not exist in the eyes of the United States government.” And plaintiffs argue that, under the “governing legal standard”— which plaintiffs identify as Section 66(f) of the Restatement (Second) of the Foreign Relations Law of the United States— “the common-law basis for asserting [foreign official] immunity largely evaporates”. This argument and its factual premise are mistaken.

The United States does not currently recognize any entity as the *government* of Somalia. But the United States continues to recognize Somalia as an independent state of the world. *See* Bureau of Intelligence and Research, U.S. Dep’t of State, *Independent States of the World* (Oct. 11, 2011), <http://www.state.gov/s/inr/rls/4250.htm> (listing Somalia among independent states recognized by the United States). The fact that the United States does not currently recognize a government of Somalia is relevant to Samantar’s immunity, but not because of anything in the Second Restatement. Rather, the absence of a recognized Somali government is relevant to Samantar’s immunity because the Executive Branch identified it as a factor “critical” to the State Department’s immunity determination in this case. It is that determination that controls.

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### 3. *Ahmed v. Magan*

On March 15, 2011, the United States submitted a statement of interest in a case in the U.S. District Court for the Southern District of Ohio. *Ahmed v. Magan*, No. 10-342. The *Ahmed* case is similar to *Samantar*, discussed in section 2 above. The suit against Magan, another former Somali official, was brought by a different plaintiff, Ahmed, a native of Somalia, who alleged that Magan, as a colonel and chief of the National Security Service Department of Investigations in Somalia, had directed and participated in interrogating and torturing plaintiff and others. Magan resides in the United States and Ahmed is a resident and citizen of the United Kingdom. The suit was also brought pursuant to the TVPA and the ATS. The statement of interest in *Ahmed*, like the statement of interest in *Samantar*, conveyed the State Department’s determination of non-immunity. The full text of the U.S. statement of interest in *Ahmed* and the State Department’s determination of non-immunity are both available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

#### 4. *Abi Jaoudi and Azar Trading Corp. v. CIGNA*

On December 5, 2011, the United States filed a statement of interest, including the State Department's determination on immunity as exhibit 1, in *The Abi Jaoudi and Azar Trading Corp. v. Cigna Worldwide Ins. Co.*, No. 91-6785 (E.D. Pa.). The Abi Jaoudi and Azar Trading Corp. ("AJA") had obtained a judgment against Cigna Worldwide Insurance Company ("Cigna" or "CWW") in Liberian courts for property damage resulting during the Liberian civil war. AJA sought to enforce the Liberian judgment, but U.S. courts had previously determined that CWW rightfully invoked the insurance policy's war risk provision and had issued an anti-suit injunction against further proceedings to collect on the insurance claims.

In 2008, CWW brought contempt proceedings against AJA and other respondents based on their efforts to pursue enforcement of the Liberian judgment. Respondent Josie Senesie served as Liberian Insurance Commissioner and was appointed in 2007 by the Liberian government as receiver of the estate of CWW's Liberian branch. Respondent Senesie retired while the contempt proceedings were pending and was replaced by respondent Foday Sesay.

Excerpts from the statement of interest follow. Both the statement of interest and exhibit 1, the State Department's immunity determination, are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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In assessing immunity, the Department of State takes into account the relevant principles of international law, as well as the United States's foreign policy interests. In particular, current and former officials of a foreign state generally enjoy immunity for acts undertaken in their official capacities. See, e.g., *Arrest Warrant of 11 Apr. 2000* (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits). The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official. See *id.* As a result, the Department of State takes into account the views of a foreign state as to the immunity of its own officials, including whether a foreign state understands its officials to have acted in an official capacity, when determining a foreign official's entitlement to immunity. However, the views of the foreign state on whether an act was taken in an official capacity are not dispositive. Another consideration relevant to the immunity determination is whether the law of the foreign state treats the act at issue as one taken in an official capacity.

In light of these principles and the particular facts of this case, the Department of State has concluded that Respondents Senesie and Sesay are immune from this contempt action to the extent the Court finds that the acts for which CIGNA seeks to hold them in contempt—namely, recognizing AJA's proof of claim based upon its Liberian judgment and initiating and continuing the indemnity suit in the Cayman Islands against ACE—were, under Liberian law, acts taken by Senesie and Sesay in their official capacities as Insurance Commissioners for the Republic of Liberia. See Letter from Harold Hongju Koh to the Honorable Tony West at 3, dated December 5, 2011 (attached as Ex. 1). Conversely, to the extent the Court finds that either or both of these acts were, under Liberian law, taken by Senesie and Sesay solely in their capacities as representatives of the estate and thus outside of their official capacities, the Department of State

concludes that they are not immune from this contempt action with respect to such acts. *Id.* The Department of State recognizes that Liberian law may treat acts taken in the Insurance Commissioner's capacity as representative of the estate as acts taken in his official capacity, in which event he would not be acting solely in his capacity as representative of the estate. *Id.*

Although, based on the current record, the United States is declining to take a position on whether, under Liberian law, the acts at issue were taken within Senesie's and Sesay's official capacities, leaving that determination to the Court, the United States does note there is at least some evidence in the current record bearing on this question.

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##### **5. *Giraldo v. Drummond*: Immunity from providing testimony**

On March 31, 2001, the United States filed a statement of interest and suggestion of immunity in the U.S. District Court for the District of Columbia in *Giraldo v. Drummond*, No. 1:10mc00764. Plaintiffs in the case sought to depose the former president of Colombia, Alvaro Uribe. The government of Colombia formally requested that the State Department take the steps necessary to have the subpoena for Uribe's testimony quashed on the basis of his immunity as a former head of state. The United States conveyed the State Department's determination that Uribe enjoys residual immunity from the court's jurisdiction insofar as plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official. The United States also requested that, in the interests of comity, the court require the plaintiffs to exhaust other means for obtaining any information not coming within the State Department's immunity determination before compelling the deposition of former president Uribe. On September 8, 2011, the district court issued its decision denying plaintiffs' motion to compel the testimony, holding that the former president had residual immunity and that plaintiffs had failed to exhaust other means of obtaining the information. 808 F. Supp. 2d 247 (D.D.C. 2011). Plaintiffs have appealed the court's decision.

The U.S. statement of interest is excerpted below and available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). Exhibit 2 to the U.S. statement of interest, the Legal Adviser's letter conveying the Department of State's determination of immunity, is also available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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As set forth more fully herein, the United States suggests that former President Uribe enjoys residual immunity from this Court's jurisdiction insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official. Insofar as Plaintiffs seek to depose former President Uribe regarding (i) acts performed or information that he obtained while not serving as a government official; or (ii) acts performed or information obtained during his time in office other than in his official capacity as a governmental official, the United States does not suggest that he is entitled to immunity. Nonetheless, in light of the concerns expressed by the Government of Colombia,

and in the interest of comity, the United States respectfully requests that this Court order Plaintiffs to exhaust other reasonably available means of obtaining the information they would seek from former President Uribe before ordering him to give a third-party deposition regarding those matters as to which he would not be entitled to testimonial immunity.

In support of its interest and suggestion, the United States sets forth as follows:

1. The United States has an interest in this action because it raises the question whether a former foreign governmental official, who has served in several governmental capacities including, among other offices, as a senator, governor of Antioquia Department, and President of Colombia, is immune from the Court's jurisdiction to compel his testimony. Historically, in suits against a foreign state or its officials, courts would look to the State Department for a determination of whether the foreign state or its official was immune from the courts jurisdiction or, instead, subject to it. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010). The practice of judicial deference to State Department foreign sovereign immunity determinations has its roots in the Supreme Court's *Schooner Exchange* decision in 1812. *Id.*; see *the Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

2. Until the enactment of the Foreign Sovereign Immunities Act in 1976 (FSIA), 28 U.S.C. § 1602 et seq., courts routinely "surrendered" jurisdiction over suits against foreign sovereigns "on recognition, allowance, and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certification to that effect is presented to the court by the Attorney General." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945); see *Samantar*, 130 S. Ct. at 2284; *Ex parte Peru*, 318 U.S. 578, 587-89 (1943). The Supreme Court made clear that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. This deferential judicial posture was not merely discretionary, but was rooted in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Given the Executive's leading foreign-policy role, it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" on questions of foreign sovereign immunity. *Hoffman*, 324 U.S. at 36; see also *Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

3. When Congress enacted the FSIA, it transferred from the Executive Branch to the courts the responsibility to make immunity determinations in suits against foreign states. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). Congress, however, did not codify standards for determining the immunity of foreign officials. Accordingly, many courts continued to look to the Executive Branch for a determination of foreign official immunity, especially in suits against foreign heads of state. See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). Some courts nevertheless held that the FSIA and not the Executive Branch determined the principles governing foreign official immunity. See, e.g., *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990). The Supreme Court resolved the circuit conflict last Term, holding that, "[a]lthough Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Samantar*, 130 S. Ct. at 2291. In so

concluding, the Court found “no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.” *Id.* Thus, the Executive Branch continues to play the primary role in determining the immunity of foreign officials as an aspect of the President’s responsibility for the conduct of foreign relations and recognition of foreign governments. Accordingly, courts today must continue to defer to Executive determinations of foreign official immunity, just as they deferred to determinations of foreign state immunity before the enactment of the FSIA.

4. In making a foreign official immunity determination, the Department of State takes into account principles of international law as well as the United States’ foreign policy interests. Under international law, sitting heads of state enjoy a broad immunity from the jurisdiction of foreign courts. Considering customary international law, the Executive Branch historically has suggested the immunity from suit of sitting heads of state. See, e.g., *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004). Under international law, former heads of state have residual immunity from suit only for acts taken in an official capacity while in office. See, e.g., *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits). As with immunity for sitting heads of state, the Executive Branch historically has accepted this principle of residual immunity and has suggested the immunity from suit of former heads of state. See *A, B, C, D, E, F v. Jiang Zemin*, 282 F. Supp. 2d 875, 883 (N.D. Ill. 2003) (holding that head of state was immune from suit brought while he was sitting head of state even though he left office during the pendency of the litigation).

5. The Legal Adviser of the United States Department of State has informed the Department of Justice that the Colombian Government, through its Ambassador to the United States, Gabriel Silva, has formally requested that the Government of the United States suggest “any and all immunities applicable to President Uribe and to specifically request head-of-state immunity on his behalf.” Letter from Gabriel Silva to the Honorable Hillary Clinton, dated November 12, 2010 (attached as Exhibit 1). Taking into account the relevant principles of customary international law and the United States’ foreign policy interests, the Executive Branch has determined that permitting the action to proceed against former President Uribe would be incompatible with the principles adopted by the Executive Branch governing residual immunity insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official. Insofar as Plaintiffs seek to depose former President Uribe regarding (i) acts performed or information that he obtained while not serving as a government official; or (ii) acts performed or information obtained during his time in office other than in his official capacity as a governmental official, the United States does not suggest that he is entitled to immunity.

6. Insofar as Plaintiffs seek information from former President Uribe for which he does not enjoy immunity, the United States nonetheless retains a foreign relations interest in minimizing the burden on former President Uribe as a former head of state. On the present record, it does not appear that Plaintiffs can demonstrate that they have exhausted other reasonably available avenues to obtain the information about which they seek to depose former President Uribe. In this regard, Plaintiffs have advised the Department of State that they have not sought information from the Government of Colombia through letters rogatory or other avenues that may be available under Colombian law. See Letter from Harold Hongju Koh to the Honorable Tony West, dated March 31, 2011 (attached as Exhibit 2, with attachments). In view of comity concerns, the respect due former presidents of friendly states, and the concerns

expressed by the Colombian Government, the United States respectfully requests that, before allowing the deposition to proceed as to information or topics not subject to the Executive Branch's suggestion of immunity, this Court order Plaintiffs to exhaust other reasonably available methods of procuring such information.

7. The D.C. Circuit has recognized that principles of comity require courts to consider sensitivities that would be raised by an attempt to take the deposition of a senior foreign official, as such concerns would be raised when seeking the deposition of a senior U.S. official. *In Re Minister Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998). Cf. H.R. Rep. No. 94-1487 at 12, 23 (legislative history of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330; 1602-1611). Courts, moreover, should be wary of permitting deposition testimony from a former foreign official in the absence of a strong showing of a demonstrated need for testimony concerning material facts in the unique personal knowledge of that individual. Cf. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 546 (1987) (enjoining U.S. courts to “exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position” and to “demonstrate due respect . . . for any sovereign interest expressed by a foreign state.”). Indeed, courts in this jurisdiction have appropriately required parties seeking to depose former high level officials to demonstrate that the former official’s “testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested.” *United States v. Poindexter*, 732 F. Supp. 142, 147 (D.D.C. 1990). In considering the impact of Plaintiffs’ efforts to seek the deposition of former President Uribe, moreover, the Court should take into consideration the interests of the United States. Discovery in U.S. courts involving the head of state of a friendly foreign state, or the former head of state, is rare and implicates the foreign policy interests of the United States. Because such cases are also rare in other countries, U.S. practice may influence how foreign courts handle this issue as well. In particular, foreign courts confronted with a request to compel discovery from former U.S. Presidents could apply reciprocally the standards used by U.S. courts.

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### C. HEAD OF STATE IMMUNITY

On August 29, 2011, the United States submitted a suggestion of immunity of the sitting head of state of Rwanda, Paul Kagame, in the U.S. District Court for the Western District of Oklahoma. *Habyarimana et al. v. Kagame et al.*, No. 10-437-W (W.D. Okla.). The submission included as an exhibit an August 25, 2011 letter from State Department Legal Adviser Harold Hongju Koh to the Department of Justice requesting that the action be dismissed based on President Kagame’s immunity as the sitting head of state while in office. That letter is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The U.S. suggestion of immunity, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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1. The United States has an interest in this action because the sole remaining Defendant, President Kagame, is the sitting head of state of a foreign state, thus raising the question of President Kagame's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of sitting heads of state. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Kagame's immunity from this suit while in office.<sup>3</sup>

2. The Legal Adviser of the U.S. Department of State has informed the Department of Justice that Rwanda has formally requested the Government of the United States to suggest the immunity of President Kagame from this lawsuit. The Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Kagame as a sitting head of state from the jurisdiction of the United States District Court in this suit." Letter from Harold Hongju Koh to Tony West (copy attached as Exhibit A). As discussed below, this determination is controlling and is not subject to judicial review. No court has ever subjected a sitting head of state to suit once the Executive Branch has suggested the head of state's immunity.

\* \* \* \*

5. The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity decisions are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by suggestions of immunity submitted by the Executive Branch. *See [Republic of Mexico v.] Hoffmann*, 324 U.S. [30] at 35–36 [(1945)]; *Ex parte Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch's immunity determination, declared that the Executive Branch's suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. After a suggestion of immunity is filed, it is the "court's duty" to surrender jurisdiction. *Id.* at 588. The courts' deference to Executive Branch suggestions of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

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7. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's status as the current holder of the office. Thus, acts committed before a sitting head of state assumed that position are not excluded from the scope of his immunity while in office. *See, e.g., Doe [v. Roman Catholic Diocese of*

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<sup>3</sup> The fact that the Executive Branch has the constitutional power to suggest the immunity of a sitting head of state does not mean that it will do so in every case. The Executive Branch's decision in each case is guided, inter alia, by consideration of international norms and the implications of the litigation for the Nation's foreign relations.

*Galveston-Houston*], 408 F. Supp. 2d [272] at 281 [(S.D. Tex. 2005)] (accepting the Executive Branch determination that the incumbent Pope enjoyed head of state immunity for acts allegedly committed before he became the Pope). After a head of state leaves office, however, that individual generally retains residual immunity only for acts taken in an official capacity while in that position and not for alleged acts predating the individual's tenure in office. *See* 1 *Oppenheim's International Law* 1043–44 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). In this case, because the Executive Branch has determined that President Kagame, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, President Kagame is entitled to immunity from the jurisdiction of this Court over this suit.

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#### **D. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES**

On February 24, 2011, the United States filed a statement of interest in the U.S. District Court for the Central District of California in *Hassen v. Sheikh Mohamed et al.*, No. 09-1106 (C.D. Cal.). The United States notified the court in its statement of interest that the defendant, His Highness Sheikh Mohamed Bin Zayed Al Nahyan ("Sheikh Mohamed"), had not been lawfully served in the case because the plaintiff had attempted to serve Sheikh Mohamed through diplomatic agents who are inviolable and immune from service of process pursuant to the Vienna Convention on Diplomatic Relations ("Vienna Convention"). The U.S. statement of interest provided as exhibit 1 a letter from Mr. Koh.

The statement of interest and the attached State Department determination explained that the Vienna Convention disallows treating diplomats as involuntary agents for the purpose of service of process. The U.S. statement of interest, including the State Department's letter as exhibit 1, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

On March 28, 2011, the United States filed a supplemental statement of interest with the court to respond to arguments by plaintiff that the court should apply the commercial activity exception in Article 31 of the Vienna Convention to validate the service of process on the diplomats. The United States explained in its supplemental brief that plaintiff's argument missed the mark because:

finding an exception to a diplomatic agent's immunity from jurisdiction requires a finding that the one otherwise entitled to immunity from jurisdiction was engaged in commercial activity. Art. 31(1)(c). Thus, in this case, finding an exception would require that the diplomatic agents themselves engaged in commercial activity, not the Defendants. Plaintiff does not allege that the UAE Ambassador and Military Attaché personally engaged in commercial activities.

The supplemental statement of interest is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

## E. INTERNATIONAL ORGANIZATIONS

### 1. Immunity of the United Nations

On July 6, 2011, the United States filed a statement of interest in U.S. District Court for the Southern District of New York in *Sadikoglu v. United Nations Development Program*, No. 11-0294 (S.D.N.Y.). The United States made its submission in response to the court's March 18, 2011 letter to the U.S. Attorney's Office inviting the United States to express its views on the exercise of jurisdiction over the United Nations Development Program ("UNDP"). Plaintiff brought the action against UNDP claiming breach of contract. The statement of interest explained that UNDP, as a part of the UN, enjoys absolute immunity from suit and legal process, absent an express waiver. The statement of interest is excerpted below (with footnotes and citations to the record omitted) and available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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#### A. The UN Enjoys Absolute Immunity

The UN General Convention, to which the United States is a party, explicitly provides that the UN is absolutely immune from suit in the absence of an express waiver—indeed, “from every form of legal process.” General Convention, art. II, § 2.

The United States understands this provision to mean what it unambiguously says: the UN, including, here, its integral component the UNDP, enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity. There is no allegation, much less evidence, that the UN has waived its immunity here. On the contrary, the UN itself expressly maintains its immunity, including the UNDP's, from this suit. *See* letters dated January 18 and April 14, 2011, from Stephen Mathias, Assistant Secretary-General in charge of UN Office of Legal Affairs, to Russell Graham, U.S. Mission to the UN, annexed (without enclosures) hereto respectively as Exhibits 1 and 2.

To the extent there could be any contrary reading of the General Convention's text, the Court should defer to the United States Executive Branch's interpretation. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”). Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference under, *inter alia*, *Kolovrat*. The Executive Branch's interpretation should be given still greater deference in this case since, as noted above, the interpretation is shared by the UN. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (where parties to treaty agree on meaning of treaty provision, and interpretation “follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation”).

Consistent with the applicable treaty language and the Executive Branch's views, courts repeatedly, and indeed to the United States' knowledge uniformly, have recognized that “[u]nder the Convention the United Nations' immunity is absolute, subject only to the organization's

express waiver thereof in particular cases.” *Boimah v. United Nations General Assembly*, 664 F.Supp. 69, 71 (E.D.N.Y. 1987); *see also, e.g., Askir*, 933 F. Supp. at 371. ...

The UNDP, as an integral program of the UN, enjoys this same absolute immunity. Indeed, the Office of Legal Affairs of the United Nations equated the UNDP with the United Nations when requesting that the United States take action to assert the UN’s immunity in this case. ...

**B. Plaintiff’s Arguments to Limit or Disregard the UN’s Immunities Under the General Convention Lack Merit**

There is no merit to Plaintiff’s contention that the UN enjoys only functional, not absolute, immunity, and that the UN’s assertedly functional immunity does not extend to the alleged private contract in this case, which Plaintiff alleges constitutes commercial activity. According to Plaintiff, ... the UN Charter provides only for functional immunity because it states that the UN shall enjoy “such privileges and immunities as are necessary for the fulfillment of its purpose.” He further argues that commercial activities are not “necessary for the fulfillment of [the UN’s] purpose,” and therefore are not covered by the immunity granted by the UN Charter. Plaintiff is incorrect. While the UN Charter does not explicitly state what exact nature and extent of immunity is “necessary for the fulfillment of” the UN’s purposes, the General Convention eliminates any possible ambiguity by providing that “[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” General Convention, art. II, § 2. It is easy to understand why the UN would need such broad immunity; without it, it could be subject to over 190 disparate legal systems. ...

Plaintiff’s argument also is inconsistent with the plain meaning of Article II, Section 2 of the General Convention. While he is correct that the General Convention requires the UN to establish arbitration procedures to settle contract disputes, ... these provisions do not even remotely suggest that the UN has somehow waived its immunity from “legal process.” Indeed, these provisions actually complement the UN’s absolute immunity, and do not justify ignoring or limiting it as Plaintiff suggests. The UN’s provisions for non-judicial dispute resolution provide an alternative to judicial proceedings that mitigates any effects of the UN’s immunity from suit or process in member states’ court systems. However, nothing in the procedures Plaintiff invokes purports to limit or waive the UN’s immunity from judicial proceedings.

Also incorrect is Plaintiff’s contention that, if the General Convention were read to provide for absolute immunity, it would conflict with the UN Charter and to that extent would be inoperative pursuant to Article 103 of the UN Charter. Plaintiff has not established, and cannot establish, the conflict with the UN Charter on which his argument depends. The General Convention’s plain language providing for absolute immunity does not conflict with the UN Charter because, at the time the General Convention was adopted, the then-recently-adopted UN Charter had left that possibility open by not specifying the extent of immunity enjoyed by the UN. Indeed, the UN Charter itself anticipated the possible subsequent issuance of a convention setting forth a more specific definition of the scope of the UN’s immunity: Article 105, § 3 of the UN Charter specifically provides that “[t]he General Assembly may make recommendations with a view to determining the details” of the immunity provided to the UN in Article 105(1), “or may propose conventions to the Members of the United Nations for this purpose.” UN Charter, art. 105, § 3. The General Convention served this purpose...

**C. The IOIA Did Not and Cannot Create an Exemption to the UN’s Absolute Immunity Granted Under the UN Charter and General Convention**

Plaintiff is incorrect to contend that the International Organizations Immunity Act (“IOIA”), 22 U.S.C. § 288 *et seq.*, limits the immunities afforded the UN in the General Convention to those enjoyed by foreign governments under the Foreign Sovereign Immunity Act (“FSIA”), 28 U.S.C. §§ 1330, 1602 *et seq.* It is an open question in the Second Circuit whether, in any circumstances, the IOIA incorporates FSIA’s exception to sovereign immunity for international organizations’ commercial activities or whether it incorporates the absolute immunity that foreign governments enjoyed at the time of the IOIA’s enactment. *See Brzak [v. United Nations]*, 597 F.3d [107, 112 (2d Cir. 2010)].

This question does not matter here, however, because the UN Charter and General Convention make the UN absolutely immune, and the Second Circuit in a controlling decision has held that those provisions preclude a challenge to the UN’s immunity based on the IOIA. *See id.* As the Second Circuit recognized: “[W]hatever immunities are possessed by other international organizations [subject to the IOIA], the [General Convention] unequivocally grants the United Nations absolute immunity without exception.” *Id.* Thus, Plaintiff’s invocation of the IOIA here is unavailing.

**D. The Court Cannot Exercise Jurisdiction Over the UN If Absolute Immunity Applies, Regardless of Whether Other Fora Are Available**

Finally, even assuming *arguendo* that Plaintiff is correct that recognizing the UN’s absolute immunity would leave Plaintiff with no forum to resolve his claim, the UN’s immunity still precludes the Court from exercising jurisdiction over the UN, contrary to Plaintiff’s argument. The UN’s immunity under Section 2 of the General Convention is not contingent upon the UN’s making provision for an appropriate mode of settlement pursuant to Section 29. . . . Plaintiff has identified no United States case law in support of his position, thus leaving undisturbed the uniform body of this country’s law enforcing the UN’s absolute immunity.

Indeed, the Second Circuit in *Brzak* rejected a contention similar to Plaintiff’s here: “Although the plaintiffs argue that purported inadequacies with the United Nations’ internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word ‘expressly’ out of the [General Convention].” *Brzak*, 597 F.3d at 112. This observation applies with equal force here. Indeed, there is no basis to conclude that invoking the international law principle of *pacta sunt servanda* could ever enable a party to overcome the UN’s treaty-based immunities, which themselves are entitled to be followed under the very same international law principle, merely based on allegations that the UN has breached a contract or violated a policy of submitting disputes to arbitration. Such an exception would swallow the applicable immunities and risk repeatedly embroiling the UN in litigation, thereby defeating the precise intent of the relevant treaty provisions. Accordingly, Plaintiff has provided no basis to disregard the UN’s absolute immunity.

\* \* \* \*

**2. Extension of Immunities**

On March 8, 2011, President Obama issued Executive Order 13568, reprinted below, extending immunities to the Office of the High Representative in Bosnia and Herzegovina and to the International Civilian Office in Kosovo. 76 Fed. Reg. 13497 (Mar. 11, 2011).

\* \* \* \*

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. § 288) and the Extending Immunities to the Office of the High Representative in Bosnia and Herzegovina and the International Civilian Office in Kosovo Act of 2010 (Public Law 111-177), \*\*\*\*\* I hereby extend to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) and to the International Civilian Office in Kosovo (and to its officers and employees), all the privileges, exemptions, and immunities provided by the International Organizations Immunities Act. In the event either of these organizations is dissolved, the privileges, exemptions, and immunities of that organization under the International Organizations and Immunities Act, as well as those of its officers and employees, shall continue to subsist.

This designation is not intended to abridge in any respect privileges, exemptions, or immunities that the Office of the High Representative in Bosnia and Herzegovina or the International Civilian Office in Kosovo, or the officers and employees thereof, otherwise may have acquired or may acquire by law.

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### **Cross References**

*Litigation under the Alien Tort Claims Act and the Torture Victim Protection Act*, **Chapter 5.B.**

*Act of state*, **Chapter 5.C.**

*Nazi era claims [Cassirer]*, **Chapter 8.B.2.**

*Protecting power*, **Chapter 9.A.**

*Immunity of Vessels*, **Chapter 12.A.7.**

*International Civil Litigation*, **Chapter 15.B.**

*Revisions to the Cuban Asset Control Regulations*, **Chapter 16.A.6.e(1)**

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\*\*\*\*\* Editor's note: For discussion of the Extending Immunities to the Office of the High Representative in Bosnia and Herzegovina and the International Civilian Office in Kosovo Act of 2010 (Public Law 111-177), see *Digest 2010* at 459-60.