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## PRELIMINARY STATEMENT

Pursuant to 28 U.S.C. § 517, the United States of America (the “United States” or the “Government”) respectfully submits this Statement of Interest regarding the pending motion to vacate the default judgment entered in the above-referenced case.<sup>1</sup>

Plaintiffs Ashim Khattri Chettri, d/b/a Tarala Internationals (“Tarala”), and Wu Lixiang (“Wu”), agent and partner of Tarala Internationals (together, “Plaintiffs”), filed this lawsuit on November 10, 2010, against, *inter alia*, Nepal Rastra Bank, the central bank of Nepal (“Nepal Rastra Bank”), and the Department of Revenue Investigation, Government of Nepal (“DRI”). Plaintiffs allege that the Government of Nepal entered into a contract with Tarala, which sub-contracted with Wu, for the purchase and delivery of goods for the Nepalese army; when Tarala wired \$1,000,000.00 to an account held by Wu at Nepal Rastra Bank, the defendants froze the account. *See* Complaint, dated November 8, 2010.

On January 18, 2011, this Court ordered DRI and Nepal Rastra Bank to show cause as to why an order for default judgment should not be entered against them for “failing to serve and file a response after having been served with the Summons and Complaint . . . .” Order to Show Cause, dated January 18, 2011 (the “January 18, 2011 Order to Show Cause”). When DRI and Nepal Rastra Bank failed to respond, the Court, on February 15, 2011, entered a default judgment against those defendants in favor of Plaintiffs in the amount of \$1,000,500.00. *See* Default Judgment, dated February 15, 2011. Accordingly, the Clerk of the Court issued a writ of execution against Nepal Rastra Bank and DRI, and the United States Marshals Service served the

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<sup>1</sup> 28 U.S.C. § 517 provides that “any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interest of the United States in a suit pending in a court of the United States.”

writ on Standard Chartered Bank in New York, levying on the rights, title and interest which Nepal Rastra Bank and DRI have in any funds, property or assets held in Standard Chartered Bank's possession, to satisfy the default judgment. *See* Writ of Execution, dated February 18, 2011.

On April 1, 2011, upon an application by Nepal Rastra Bank, the Court ordered Plaintiffs to show cause as to "why an order should not be entered vacating the default judgment against Nepal Rastra Bank and [DRI], and dismissing the complaint for lack of subject matter jurisdiction." Order, dated April 1, 2011. After briefing by Plaintiffs and Nepal Rastra Bank, *see* Docket Nos. 37, 43-45, and 52-53, on April 20, 2011, the Court ordered the parties to file supplemental briefs to address whether the default judgment was properly entered pursuant to 28 U.S.C. § 1608(e).<sup>2</sup>

On April 8, 2011 and April 20, 2011, Gerald Levine, Esq., entered appearances on behalf of Nepal Rastra Bank and DRI, respectively. *See* Notices of Appearance, dated April 8, 2011 and April 20, 2011. On May 5, 2011, DRI and Nepal Rastra Bank together filed a supplemental brief in support of the motion to vacate the default judgment entered against them and to dismiss the complaint. *See* Memorandum of Law in Support of Application to Set Aside Default Judgment Against Defendants Nepal Rastra Bank and Department of Revenue Investigation,

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<sup>2</sup> 28 U.S.C. § 1608(e) provides,

No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Government of Nepal, and Other Relief, dated May 4, 2011 (“Motion to Vacate”). Nepal Rastra Bank and DRI moved to vacate the default judgment and dismiss the complaint on the grounds that, *inter alia*, (1) Nepal Rastra Bank and DRI are immune from suit under the Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C. § 1602 *et seq.*, because the statute’s commercial activities exception to immunity does not apply; (2) Plaintiffs failed to establish their “right to relief by evidence satisfactory to the court,” pursuant to 28 U.S.C. § 1608(e); and (3) neither Nepal Rastra Bank nor DRI were properly served with process pursuant to the FSIA. *See id.*

In this Statement of Interest, the Government explains that: (1) DRI and Nepal Rastra Bank remain immune from suit because neither appear to have been properly served with the summons and complaint pursuant to the service of process provisions set forth in the FSIA; and (2) the clerk of the court lacked the authority to issue a writ of execution that was neither limited to specific foreign state property nor based on a judicial determination that the identified property was subject to execution, pursuant to Sections 1609-1611 of the FSIA.

The FSIA provides the sole basis for service of process on foreign states and their political subdivisions, agencies and instrumentalities, and parties must adhere to its requirements. The United States has an important interest in ensuring that foreign states, along with their political subdivisions and agencies and instrumentalities, do not have to litigate suits against them in United States courts unless they have been properly served in accordance with the service provisions of the FSIA. Out of respect for United States and international law governing the immunity from process of foreign states, to ensure reciprocal respect for these principles when the United States is sued in foreign courts, and to ensure that United States law in this area

is correctly applied, the Government has a compelling interest in ensuring that foreign states are properly served with legal process before they are required to appear in United States courts. Moreover, the United States has a specific foreign policy interest in this matter, as the Government of Nepal has voiced its objection to subjecting its sovereign assets to attachment without proper notice of the judicial proceedings pursuant to the FSIA. Finally, the United States has a compelling interest in ensuring that foreign sovereign assets, which are presumptively immune, are subject to attachment only pursuant to Sections 1609-1611 of the FSIA.

## **ARGUMENT**

### **I. PLAINTIFFS FAILED TO PROPERLY SERVE DRI AND NEPAL RASTRA BANK PURSUANT TO THE FSIA**

Section 1608 of the FSIA (“Section 1608”) sets out the requirements for service on a foreign state and its political subdivisions, agencies and instrumentalities. *See* 28 U.S.C. § 1608 (Section 1608(a) provides methods for serving process upon a foreign state or its political subdivisions, and Section 1608(b) does the same for service on agencies or instrumentalities of a foreign state). 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.

#### **A. DRI Appears Not to Have Been Served in Accordance with 28 U.S.C. § 1608(a)**

The FSIA provides the sole basis for securing jurisdiction over foreign sovereigns and their political subdivisions in United States courts. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *Republic of Austria v. Altmann*, 541 U.S. 677, 698-99

(2004). Personal jurisdiction exists under the FSIA where there is both subject matter jurisdiction and proper service. *See* 28 U.S.C. § 1330(a)-(b); *Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) (“[U]nder the FSIA, subject matter jurisdiction plus service of process equals personal jurisdiction.”).<sup>3</sup>

DRI is a department within Nepal’s Ministry of Finance, and therefore a political subdivision of the Government of Nepal. *See* Motion to Vacate at 11; *see also First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 618 n.5 (1983) (“the [Cuban] Ministry of Foreign Trade is no different than the Government [of Cuba] of which its minister is a member” (alterations in original) (internal quotation marks omitted)); *Garb v. Republic of Poland*, 440 F.3d 579, 596 n.21 (2d Cir. 2006) (“[E]xisting case law hold[s] that departments or ministries of a central government qualify as ‘political subdivisions of a foreign state’ under FSIA.”); *Figueiredo Ferraz Consultoria E Engenharia De Projeto Ltda. v. Republic of Peru*, 655 F. Supp. 2d 361, 371 (S.D.N.Y. 2009) (finding that the Ministry of Housing, Construction and Sanitation was a political subdivision of the Republic of Peru). Accordingly, service on DRI is governed by Section 1608(a).

Section 1608(a) sets forth the exclusive procedures for service of process on foreign sovereigns, including the order in which they must be attempted:

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<sup>3</sup> Because service in this case did not comply with Section 1608, the Court lacked subject matter jurisdiction over DRI and Nepal Rastra Bank under Section 1330(b). Accordingly, this Statement of Interest does not address whether DRI or Nepal Rastra Bank are subject to suit under the FSIA’s commercial activities exception, 28 U.S.C. §1605(a)(2). Nor does this Statement of Interest address whether Plaintiffs established their right to relief pursuant to Section 1608(e).

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of 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.

28 U.S.C. § 1608(a); *see also Finamar Investors Inc. v. Rep. of Tadjikstan*, 889 F. Supp. 114, 116 (S.D.N.Y. 1995) (“Section 1608(a) prescribes a hierarchy of four alternative procedures to use when serving process on a foreign state or political subdivision.”).

Courts have uniformly held that service on a foreign state and its political subdivisions must strictly comply with the requirements of Section 1608(a). *See, e.g., Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001) (“We conclude that the provisions for service of process upon a foreign state or political subdivision of a foreign state outlined in section 1608(a)

can only be satisfied by strict compliance.”); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *Lewis & Kennedy, Inc. v. Permanent Mission of the Republic of Botswana to the United Nations*, No. 05 Civ. 2591(HB), 2005 WL 1621342, at \*3 (S.D.N.Y. July 12, 2005) (“Courts have been unequivocal that § 1608(a) ‘mandate[s] strict adherence to its terms, not merely substantial compliance.’”) (citation omitted); *Finamar Investors*, 889 F. Supp. at 117-18 (“Whether or not respondent received actual notice of the suit is irrelevant when strict compliance is required.”); *Transaero, Inc. v. La Fuerza Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994).

In the instant case, the docket does not reflect any attempt to serve DRI in compliance with the procedures specified in Section 1608(a). In particular, the record does not reflect any special arrangement between DRI and Plaintiffs, *see* 28 U.S.C. § 1608(a)(1), or that service was attempted through an applicable international convention on service of judicial documents, *see* 28 U.S.C. § 1608(a)(2). Nor does the record indicate that Plaintiffs requested the Clerk of this Court to mail the summons and complaint (along with a Nepalese translation thereof) to Nepal’s Ministry of Foreign Affairs, *see id.* § 1608(a)(3), or that they asked the Department of State to effect service of such papers (along with a Nepalese translation thereof) through diplomatic channels, *see id.* § 1608(a)(4).

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. *See* Affidavit of Service, dated November 22, 2010 (Docket No. 6). This attempted method of service fails on several grounds. First, it does not comply with Section 1608(a). *See* 28 U.S.C. § 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.” *See generally Mateo v. Perez*, No. 98 CIV. 7426 (SAS), 1999 WL 216651, at \*5 (S.D.N.Y. Apr. 13, 1999) (discussing Article 43 of the Vienna Convention on Consular Relations). Third, it appears that Mr. Rai also serves as a 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. *See generally 767 Third Ave. Assoc. v. Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295 (2d Cir. 1993) (discussing complete inviolability of United Nations missions under international law). 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. *See, e.g., Gray v. Permanent Mission of the People’s Republic of the Congo to the United Nations et al.*, 443 F. Supp. 816, 821-22 (S.D.N.Y. 1978) (holding that service on Permanent Mission’s secretary did not constitute adequate service under FSIA and vacating default judgment for lack of jurisdiction based on insufficiency of process); *40 D 6262 Realty Corp. v. United Arab Emirates Government*, 447 F. Supp. 710, 712 (S.D.N.Y. 1978) (holding that plaintiff’s attempted service on foreign government by affixing notice to premises in question and mailing notice to permanent mission to the U.N. was improper service and court therefore lacked jurisdiction).

Moreover, the docket sheet indicates that Plaintiffs attempted to serve the January 18, 2011 Order to Show Cause by Federal Express to DRI and the Nepalese Consulate in New York,

see Affidavits of Service, dated January 26, 2011 (Docket Nos. 21 and 25), and by personal service on Bed Prasad Khanal at DRI, see Affidavit of Service, dated January 21, 2011 (Docket No. 23). Those methods likewise do not comply with Section 1608(a).

Indeed, in opposing the motion to vacate, Plaintiffs entirely fail to address service under Section 1608(a), apparently conceding that their attempts to serve DRI did not comply with the FSIA. See Brief of Ashim Khattri Chettri d/b/a Tarala Internationals and Wu Lixiang in Support of Opposition to Motion to Vacate Default Judgment, dated April 27, 2011, at 5-7. Instead, Plaintiffs argue that DRI “had actual notice of the lawsuit.” *Id.* at 6. 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). See, e.g., *Trans Commodities, Inc. v. Kazakstan Trading House*, No. 96 Civ. 9782(BSJ), 1997 WL 811474, at \*4 (S.D.N.Y. May 28, 1997) (finding that because “[s]ervice must be effectuated via rigid adherence to the FSIA’s literal requirements enumerated in 28 U.S.C. § 1608(a), . . . whether Kazakstan received actual notice of the suit is irrelevant”) (citing *Finamar Investors*, 889 F. Supp. at 117-118 (same)) (further citations omitted).

The Government respectfully submits that, absent strict compliance with Section 1608(a), this Court would not have personal jurisdiction over DRI, and DRI would remain immune from suit.

**B. Nepal Rastra Bank Appears Not to Have Been Properly Served Pursuant to 28 U.S.C. § 1608(b)**

The parties agree that Nepal Rastra Bank is an “agency or instrumentality” of Nepal, as defined in Section 1603(b) of the FSIA. Section 1608(b) governs service of process on agencies or instrumentalities of foreign states, providing the following hierarchical methods of service:

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of 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 agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as 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).

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) (citing *Finamar Investors*, 889 F. Supp. at 117)

(further citations omitted), it is not necessary for the purposes of this case to determine whether substantial compliance would be sufficient to constitute proper service under Section 1608(b).

In this case, Plaintiffs 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. *See* Affidavit of Service, dated November 22, 2010 (Docket No. 5). 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, *see* Point I.A, *supra*.

To the extent the Plaintiffs suggest that the subsequent service of a copy of the complaint along with a copy of January 18, 2011 Order to Show Cause and other papers was sufficient to cure any earlier defect in service, that argument is also erroneous because, even assuming for the sake of argument that later service could cure the defects of the earlier service, the later service also did not substantially comply with 1608(b). *First*, Plaintiffs failed to comply with the provisions of Section 1608(b)(1) because there is no allegation of any special arrangement between Plaintiffs and Nepal Rastra Bank for service.

*Second*, Plaintiffs failed to comply with Section 1608(b)(2) because: (a) service was not made on an officer, managing or general agent, or other authorized agent to receive service; and (b) service was not made in accordance with an applicable international convention on service of judicial documents. Indeed, the docket sheet indicates that Plaintiffs attempted to serve the order to show cause by personal service on Raj Kumar Shrestha at Nepal Rastra Bank. *See* Affidavit of Service, dated January 21, 2011 (Docket No. 24). 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.

*Third*, Plaintiffs failed to comply with provisions of Section 1608(b)(3)(A)-(C). As an initial matter, there is no indication that the documents were translated into Nepalese, as required by Section 1608(b)(3). In addition, the provisions of Section 1608(b)(3)(A) were not met because 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. Likewise, Plaintiffs failed to comply with Section 1608(b)(3)(B) by sending the order to show cause by Federal Express to Nepal Rastra Bank and the Nepalese Consulate in New York, *see* Affidavits of Service, dated January 26, 2011 (Docket Nos. 22 and 26), because the mailing was not dispatched by the clerk of the court. 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).

Accordingly, it appears that Plaintiffs failed to substantially comply with the service requirements of Section 1608(b). The Government respectfully submits that, absent substantial compliance (at a minimum) with Section 1608(b), this Court would not have personal jurisdiction over Nepal Rastra Bank, and Nepal Rastra Bank would remain immune from suit. Absent proper service, entry of a default judgment is improper.

## **II. NEPAL’S SOVEREIGN ASSETS ARE NOT SUBJECT TO ATTACHMENT**

If this Court agrees that service of process was inadequate as to the foreign state

defendants, it is not necessary to address the question whether execution of that judgment against specific sovereign property might be permissible. However, the United States notes that, even if service in this case had been proper, and even if there were an applicable exception to the default presumption of foreign state immunity under 28 U.S.C. § 1605 that would confer subject matter jurisdiction on the Court under 28 U.S.C. § 1330, the writ of execution issued in this case would still have been impermissible. The writ of execution appears to have been issued by the Clerk of the Court, and on its face it purports to authorize execution against any personal or, if necessary, real property belonging to the defendants and located in the Southern District of New York. Under the FSIA, however, property of a foreign state is presumptively immune from attachment, arrest, and execution. 28 U.S.C. § 1609. The property of a foreign state or its agency or instrumentality may be executed against only if it is “in the United States” and “used for a commercial activity” in this country, 28 U.S.C. § 1610(a). Furthermore, even if foreign state property would be subject to execution under Section 1610, it is nevertheless immune from execution if, *inter alia*, it is the property “of a foreign central bank or monetary authority held for its own account,” unless the bank or authority, or its parent foreign government, has explicitly waived immunity. 28 U.S.C. § 1611.

The determination whether those requirements are satisfied, moreover, must be made by a district court rather than a judgment creditor or a marshal. *See* 28 U.S.C. § 1610(c). *See also Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 250 (5th Cir. 2002) (recognizing that, under Sections 1609, 1610(a), and 1610(c), “only a court may enter an order of attachment or execution against a foreign state’s property” and may do so only after ascertaining that an exception to immunity under Section 1610(a) or (b) applies to the property); *Rubin v.*

