14-385(L)

14-438(CON), 14-569(CON)

To Be Argued By:
JEAN-DAVID BARNEA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 14-385(L), 14-438(CON), 14-569(CON)

SERVAAS INCORPORATED,

Plaintiff-Appellee,

—v.—

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PARTIAL REVERSAL

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STEPHEN ALBRIGHT,

Appellants,

REPUBLIC OF IRAQ, MINISTRY OF INDUSTRY OF
THE REPUBLIC OF IRAQ,

Defendants-Appellants.

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BRIEF FOR THE UNITED STATES OF AMERICA
AS *AMICUS CURIAE*
IN SUPPORT OF PARTIAL REVERSAL

Interest of the United States

Pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this *amicus curiae* brief in support of defendants-appellants Republic of Iraq (the "Republic") and its Ministry of Industry (the

"Ministry") (collectively "Iraq") in their appeal from the order entered by the United States District Court for the Southern District of New York (Berman, *J.*) imposing monetary contempt sanctions on them (the "Contempt Sanctions Order"). In this order, the district court imposed sanctions of $2,000 per day for Iraq's failure to abide by a prior court order compelling it to respond to broad post-judgment discovery requests relating to the property of Iraq and its agencies and instrumentalities (the "Asset Discovery Order") promulgated by plaintiff-appellee SerVaas Incorporated ("SerVaas").

Litigation in U.S. courts against foreign states can have significant foreign affairs implications for the United States and can affect the reciprocal treatment of the U.S. government in the courts of other nations. The property of foreign states in the United States is generally immune from execution, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA") provides only narrow exceptions to this rule. Although the Supreme Court recently held in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), that the FSIA does not limit the scope of post-judgment discovery into a foreign state's property, the Court also recognized that there may be other grounds that limit such discovery. The United States has a substantial interest in ensuring that U.S. courts supervising post-judgment discovery into presumptively immune foreign-state property carefully adhere to basic principles of relevance and are sensitive to the significant comity, reciprocity, and foreign-relations concerns raised by overly broad and burdensome discovery. In this case, it is clear that the

district court erred and abused its discretion in compelling discovery that is inconsistent with the fundamental principle of the separate juridical identity of state agencies and instrumentalities. *See infra* Point I.

The United States also has a substantial interest in the question of whether it is appropriate to impose monetary contempt sanctions on a foreign sovereign, an issue this Court has not yet squarely addressed. Absent a specific waiver by the foreign state, an order of monetary contempt sanctions is unenforceable under the FSIA. Such orders are also inconsistent with international practice, can cause considerable friction with foreign governments, and open the door to reciprocal orders against the United States in foreign courts. In the United States' view, these factors, together with basic principles of equity and comity, counsel decisively against issuing such unenforceable orders against a foreign state. Accordingly, the district court erred in imposing monetary contempt sanctions on Iraq in this case. *See infra* Point II.

Statement of Facts

SerVaas brought this action against the Republic and its Ministry under the FSIA to enforce a 1991 French judgment entered against the Ministry in a contract case. *See SerVaas, Inc. v. Republic of Iraq*, 686 F. Supp. 2d 346, 348 (S.D.N.Y. 2010) (A85-86),[1]

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[1] This brief cites the parties' Joint Appendix as "A__," Iraq's opening brief as "Iraq Br.," the Special Appendix thereto as "SPA__," and Iraq's August 14,

aff'd, No. 10-828-cv, 2011 WL 454501 (2d Cir. Feb. 16, 2011). Iraq filed a motion to dismiss on a number of grounds, including lack of jurisdiction under the FSIA, and argued that the Republic should not have been named as a defendant because the Ministry is a separate government instrumentality. The district court denied the motion—a decision this Court affirmed in a prior appeal—concluding that subject matter jurisdiction was appropriate under the FSIA's commercial-activity exception, and that the Republic was a proper defendant because the Ministry is a political subdivision of Iraq rather than a separate instrumentality. *See* (A100-03), *aff'd*, 2011 WL 454501, at **2-3. The district court subsequently entered judgment for SerVaas. *See SerVaas Inc. v. Republic of Iraq*, No. 09 Civ. 1862(RMB)(RLE), 2012 WL 335654 (S.D.N.Y. Feb. 1, 2012) (A125-36), *aff'd*, 540 F. App'x 38 (2d Cir. 2013).

In an effort to locate property to satisfy its judgment, SerVaas then promulgated broad requests for post-judgment discovery under Federal Rule of Civil Procedure 69, which defined "Property of the Republic" to include any property "in which the Republic, and/or its political subdivisions, agencies or instrumentalities (including State-owned enterprises and other commercial entities beneficially owned by the Republic) holds or possesses any right or interest." (A146, 148, 153, 155.)

2014, letter to the Court pursuant to Federal Rule of Appellate Procedure 28(j) as "Iraq 28(j) Ltr."

Iraq objected to the breadth of the discovery requests and cross-moved for a protective order, attaching to its papers a declaration from the Director General of the Legal Department of Iraq's Ministry of Justice explaining that the requests inappropriately sought information about property of entities that are legally separate from the Republic under Iraqi law and not responsible for the Republic's liabilities. (A168-200; A253-348.) The district court overruled the objections and entered the Asset Discovery Order on August 29, 2012, compelling Iraq to produce documents identifying "all of its assets and commercial activities with ties to the United States" within 21 days and denying a protective order. (A386-92.) In particular, the district court concluded that SerVaas was entitled to discovery about the property of not only Iraq and its political subdivisions but also Iraq's agencies and instrumentalities because "such information may 'aid [the] execution' of SerVaas's judgment." (A391 (quoting Fed. R. Civ. P. 69(a)(2).)

After Iraq failed to comply with the Asset Discovery Order, the court denied a motion to stay its discovery obligations pending appeal, *see SerVaas Inc. v. Republic of Iraq*, 09 Civ. 1862(RMB)(RLE), 2013 WL 5913363 (S.D.N.Y. Nov. 4, 2013) (A691-98), and ultimately imposed sanctions against Iraq of "$2,000 per day effective Friday, January 24, 2014, and continuing for each day that Iraq continues to fail to comply with the Discovery Order," *SerVaas Inc. v. Republic of Iraq*, 09 Civ. 1862(RMB)(RLE), 2014 WL 279507,

at *5 (S.D.N.Y. Jan. 24, 2014) (SPA19).[2] On appeal, Iraq argues that the Asset Discovery Order improperly compels the production of information about the property of 226 non-party juridically separate entities in the absence of an alter ego showing, and that the Contempt Sanctions Order was unwarranted and inconsistent with principles of international comity. *See* Iraq 28(j) Ltr. at 1-2.

Argument

POINT I

The District Court Should Not Have Compelled Iraq to Respond to Overbroad Discovery that Disregarded the Separate Juridical Status of Iraq's Agencies and Instrumentalities

In *NML Capital*, the Supreme Court recently addressed the "single, narrow question" of whether the FSIA "specifies a different rule" for post-judgment discovery where the judgment debtor is a foreign state. 134 S. Ct. at 2255. The Court concluded that it does not, reasoning that no provision of the FSIA explicitly "forbid[s] or limit[s] discovery in aid of execution," and refusing to imply a limitation from the general rule under the FSIA that a foreign state's property is immune from attachment or execution un-

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[2] The district court also imposed sanctions on Iraq's counsel. (SPA20.) The United States takes no position with respect to this portion of the Contempt Order.

less a specific statutory exception applies. *Id.* at 2256. The Supreme Court made clear, however, that its ruling "concern[ed] only the meaning of the [statute]," and posited that "other sources of law ordinarily will bear on the propriety of discovery requests of this nature and scope, such as settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state." *Id.* at 2258 n.6 (internal quotation marks omitted). The Court also left open the question whether "the scope of Rule 69 discovery in aid of execution is limited to assets upon which a United States court can execute." *Id.* at 2255 n.2.

In this case, the district court erred in compelling Iraq to provide discovery responses with respect to any property in which Iraq's "agencies or instrumentalities (including State-owned entities and other commercial entities beneficially owned by the Republic)" have any right or interest. (A146, 153.) The United States does not take a position on which of the 226 entities Iraq claims are covered by the Asset Discovery Order are separate agencies and instrumentalities under the FSIA, as opposed to political subdivisions that are part of the state itself. However, demanding that a foreign state produce any documents it might have in its possession relating to assets and transactions of numerous separate agencies and instrumentalities, without any allegations or threshold showing that such entities would be responsible for

paying the plaintiff's judgment against the state, is problematic for several reasons.[3]

First, it is well established that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," and the FSIA—consistent with law in other countries—does "'not permit execution against the property of one agency or instrumentality to satisfy a judgment against another,'" unless the plaintiff overcomes that presumption. *First Nat'l City Bank v. Banco para el Comercio*

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[3] The United States is not taking a position on all aspects of the discovery that may have been ordered in this case. It is not entirely clear, for example, to what extent the Asset Discovery Order compels information about property and transactions outside the United States, or whether it requires the production of information about military, diplomatic, or central bank property, which is categorically immune from execution under the FSIA. Iraq's appeal does not appear to challenge the Asset Discovery Order on such grounds, and the United States understands that the parties had engaged in some informal negotiations to limit the scope of discovery into the Republic's property in certain respects. In light of these uncertainties, the United States does not take a position on whether the Asset Discovery Order was otherwise improper in compelling information about assets that are not potentially subject to attachment, which would raise substantial issues of comity and other concerns.

Exterior de Cuba, 462 U.S. 611, 626-28 (1983) ["*Bancec*"] (quoting H.R. Rep. No. 94-1487, at 29-30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6628-29).[4] The Supreme Court has recognized that this presumption is based on "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations." *Id.* at 626-27. Thus, this Court has recognized that the assets of a separate juridical entity cannot be executed against to satisfy a judgment against the foreign state unless "'the party seeking attachment carrie[s] its burden of demonstrating that the instrumentality's separate juridical status was not entitled to recognition.'" *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d

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[4] The FSIA's definition of "agency or instrumentality" reflects the understanding that, over the last century, "governments throughout the world have established separately constituted legal entities to perform a variety of tasks." *Id.* at 624. While such instrumentalities can take many forms, they are "typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances." *Id.*; *see also id.* at 625-26 ("[T]he instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties."). Unlike entities that are not separate from the state itself, such an entity typically does not engage in core government functions, but instead is "run as a distinct economic enterprise." *Id.* at 624.

280, 298 (2d Cir. 2011) (quoting *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 477 (2d Cir. 2007)). To make this showing, the party seeking attachment must show that "the instrumentality is 'so extensively controlled by its owner that a relationship of principal and agent is created,'" or that "recognizing the instrumentality's separate juridical status would 'work fraud or injustice.'" *EM*, 473 F.3d at 477 (quoting *Bancec*, 462 U.S. at 628-29).

Courts have concluded that the *Bancec* presumption of juridical separateness must inform questions relating to the propriety of post-judgment discovery. As noted above, that presumption is based on principles of comity and respect for the dignity and sovereignty of foreign states, particularly in their operations within their own jurisdiction. *See Bancec*, 462 U.S. at 626; *see generally Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008); *In re Schooner Exchange*, 7 Cranch (11 U.S.) 116, 137 (1812). Courts, including this Court, have concluded that it would be inconsistent with *Bancec* and comity principles to order discovery into the property and finances of a separate instrumentality of a foreign-state judgment debtor without some threshold showing by a litigant that there is reason to think a separate juridical entity is an alter ego of the state and accordingly liable for its judgment. *See, e.g.*, *Sejias v. Republic of Argentina*, 502 F. App'x 19, 20-21 (2d Cir. 2012); *Olympic Chartering, S.A. v. Ministry of Industry & Trade of Jordan*, 134 F. Supp. 2d 528, 530 (S.D.N.Y. 2001).

In *Olympic Chartering*, the district court relied on these principles to deny requests for post-judgment

discovery into assets of the Central Bank of Jordan, which had not been alleged to be an alter ego of the judgment debtor and which had shown that it did not hold assets of the judgment debtor. *See* 134 F. Supp. 2d at 530. And in *Sejias*, this Court affirmed the district court's decision to deny plaintiffs jurisdictional discovery into the workings of a bank wholly owned by Argentina, alleged to be its alter ego, noting that the "district court correctly recognized the 'comity concerns implicated by allowing jurisdictional discovery from a foreign sovereign,'" and holding that "plaintiffs' burden was to demonstrate a reasonable basis for not according [the bank] the presumption of separate legal identity from Argentina." 502 F. App'x at 21 (quoting *First City, Tex.-Hous., N.A. v. Rafidain*, 150 F.3d 172, 176 (2d Cir. 1998)). Courts outside this Circuit have done the same. *See, e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, No. C 12-80185 JSW (MEJ), 2013 WL 655211, at **1-2 (N.D. Cal. Feb. 21, 2013) (denying motion to compel discovery regarding assets of third-party state-owned oil company because "NML's allegations regarding [the company's] relationship to the Republic are insufficient as a matter of law to overcome the presumption that [the company] is a separate juridical entity for purposes of asset discovery on an alter-ego theory").

The fact that the discovery requests at issue here were directed to Iraq (seeking information in its possession or custody) and did not request that Iraq's separate agencies and instrumentalities themselves produce information does not change the *Bancec* analysis. Indeed, the discovery in *Sejias* was sought from both the judgment debtor, Argentina, and its

alleged alter ego, the bank, *see Sejias v. Republic of Argentina*, No. 10 Civ. 4300 (TPG), 2011 WL 1137942, at *1 (S.D.N.Y. Mar. 28, 2011), but the court found both requests to be inappropriate. The discovery sought in *Olympic* was from a third-party bank (neither the judgment debtor nor its alleged alter ego, the Central Bank of Jordan), 134 F. Supp. 2d at 529, but the court nevertheless quashed the subpoena.

The situation this Court addressed in *Rafidain* is distinguishable; there, the plaintiff sought additional jurisdictional discovery from Rafidain Bank (the judgment debtor and a state instrumentality) to support its allegations that Iraq's central bank was Rafidain's alter ego and liable for its judgment. *See* 150 F.3d at 176. Here, SerVaas has not alleged, nor made any initial showing, that any of Iraq's agencies and instrumentalities are its alter ego and accordingly liable for its judgment. Instead, SerVaas's approach appears to be *first* to try to locate agencies or instrumentalities with property that might be subject to execution and only *then* to seek to establish an alter ego relationship. In any event, the question addressed in *Rafidain* was whether the district court had jurisdiction to order the discovery at issue from the judgment debtor, not whether the discovery was otherwise appropriate. *See First City, Tex. Hous., N.A. v. Rafidain Bank*, 281 F.3d 48, 54 (2d Cir. 2002) ("No doubt, courts should proceed with care in pursuing the assets of foreign governments and their instrumentalities, and in dealing with such allegations as fraudulent transfers. But Rafidain is challenging the court's subject matter jurisdiction, not its discretion.").

To allow broad, general asset discovery into government documents relating to assets and transactions of a wide range of presumptively separate agencies and instrumentalities in the absence of any threshold alter ego showing is likely to impose a considerable burden on the foreign state and be viewed as an affront by the sovereign. Foreign states may be acutely sensitive to the intrusiveness of such discovery requests because the "scope of American discovery is often significantly broader than is permitted in other jurisdictions." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S.D. of Iowa*, 482 U.S. 522, 542 (1987).

In addition, overly broad discovery of this nature can also lead to reciprocal adverse treatment of the United States in foreign courts. *See Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.,* 179 F.3d 1279, 1295 (11th Cir. 1999). For a variety of reasons, the U.S. government may decide not to pay judgments entered in foreign courts (*e.g.*, where the United States' position is that service did not comport with the requirements of customary international law, the court lacked jurisdiction over the dispute, payment of the judgment would conflict with a U.S. law, or the judgment is inconsistent with fundamental U.S. sovereign interests). In some cases, private litigants have sought post-judgment discovery in an effort to enforce such judgments. The United States would have serious concerns should a foreign court require it to respond to similarly intrusive inquiries from a private judgment creditor attempting to determine if any separate U.S. agencies might have property or commercial transactions with "ties" to the forum

state, before coming forward with any threshold showing that such agencies are alter egos of the U.S. government such that their property could be levied upon to satisfy a judgment against the government.

Finally, the Asset Discovery Order is also unduly broad under ordinary rules of relevance. In run-of-the-mill civil cases, courts have consistently held that discovery related to the assets of non-judgment debtors is permissible only "when there is a reasonable belief that they have received assets transferred from the judgment-debtor, or a third party is believed to be the alter ego of the judgment debtor." *Integrated Control Sys., Inc. v. Ellcon-Nat'l, Inc.*, No. 3:00CV1295 (PCD), 2002 WL 32506291, at *1 (D. Conn. Dec. 30, 2002) (citations omitted)); *see also, e.g.*, *FTC v. Trudeau*, No. 1:12-mc-022, 2012 WL 6100472, at *4 (S.D. Ohio Dec. 7, 2012) (party seeking post-judgment discovery regarding a third party "must make a threshold showing of the necessity and relevance of the information sought," and such discovery is permitted only where relationship between judgment debtor and non-party sufficient to raise "reasonable doubt about the bona fides of the transfer of assets between them." (internal quotation marks omitted)); *GMA Accessories, Inc. v. Elec. Wonderland, Inc.*, No. 07 Civ. 3219(PKC)(DF), 2012 WL 1933558, at *5 (S.D.N.Y. May 22, 2012); *Costamar Shipping Co. v. Kim-Sail, Ltd.*, No. 95 Civ. 3349(KTD), 1995 WL 736907 (S.D.N.Y. Dec. 12, 1995); *Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 562 (S.D.N.Y. 1977); Charles Allen Wright et al., *Federal Practice and Procedure* § 3014 (2d ed. 2014) ("Ordinarily third persons can be examined only about the assets of the judg-

ment debtor and cannot be required to disclose their own . . . .”).

Even when a third party is alleged to have a close relationship with the judgment debtor, courts generally limit post-judgment discovery, at least in the first instance, to that necessary to ascertain whether the third party is actually the debtor’s alter ego. *See e.g.*, *Integrated Control*, 2002 WL 32506291, at *2 (permitting “[d]iscovery related to the alter ego status of judgment debtors” to “afford[ ] [plaintiff] the opportunity to establish its alter ego theory”); *First City, Tex.-Hous., N.A. v. Rafidain Bank*, 197 F.R.D. 250, 253 (S.D.N.Y. 2000); *Costamar Shipping*, 1995 WL 736907, at *4; *Magnaleasing*, 76 F.R.D. at 562.

Here, there have been no allegations, let alone any threshold showing, that Iraq’s agencies and instrumentalities are alter egos of the Republic. The district court thus erred in compelling Iraq to produce discovery regarding these entities’ assets. As explained above, such discovery offends ordinary relevance principles, and is particularly problematic in light of the comity, reciprocity, and foreign policy concerns implicated in this context.

Point II

The District Court Erred in Imposing Monetary Contempt Sanctions on Iraq

The district court also erred in imposing monetary sanctions against Iraq for its failure to comply with the Asset Discovery Order. As an initial matter, to the extent the discovery ordered was overbroad, sanc-

tions for noncompliance were unwarranted. *Cf. FG Hemisphere Assocs., LLC v. Dem. Rep. of Congo*, 637 F.3d 373, 379 & n.3 (D.C. Cir. 2011) (noting, but not deciding, "serious[ ]" concerns about a district court imposing sanctions for non-compliance with overbroad discovery); *In re Air Crash at Belle Harbor*, 490 F.3d 99, 106-07 (2d Cir. 2007) (explaining that, in order to appeal an overbroad discovery order, a party must sometimes subject itself to a potential contempt finding). Furthermore, even if some of the discovery into Iraq's property was permissible, it is generally inappropriate for courts to impose unenforceable orders of monetary contempt sanctions against a foreign state. The FSIA provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in United States courts. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). As discussed below, orders of monetary contempt sanctions are unenforceable under the FSIA. As such, a number of factors weigh decisively against imposing them on a foreign sovereign: basic considerations of equity and comity, the fact that such orders are inconsistent with international practice, and foreign relations concerns, including issues of reciprocity raised by such orders.

This Court has not yet squarely addressed the propriety of imposing monetary contempt sanctions against a foreign sovereign. In the *Rafidain* case, this Court addressed somewhat related issues, but these are distinguishable from those presented here: that decision affirmed a monetary sanctions order against an instrumentality of a foreign state, not the state itself, in the context of the instrumentality's failure to

comply with post-judgment discovery, *see* 281 F.3d at 49-51; moreover, the decision did not consider the propriety of the monetary sanctions order—it addressed only the question of whether the district court had subject-matter and personal jurisdiction over the instrumentality for purposes of conducting the post-judgment proceeding, *see id.* at 53-55.

Other circuits have reached varying conclusions on the issue presented here. Consistent with the United States' position, the Fifth Circuit held that a district court errs in imposing monetary contempt sanctions on a foreign state because the FSIA establishes the "sole, comprehensive scheme" for enforcing judgments against foreign states, and orders imposing monetary sanctions for contempt are not enforceable under the FSIA. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428-29 (5th Cir. 2006). In contrast, the D.C. Circuit upheld an order of monetary contempt sanctions against a foreign state; however, that court's holding was narrow, focusing on the limited question of whether the inherent authority of a federal court to impose contempt sanctions had been entirely displaced by the FSIA. *See FG Hemisphere*, 637 F.3d at 377-80 ("We hold today only that the FSIA does not abrogate a court's inherent power to impose contempt sanctions on a foreign sovereign, and that the district court did not abuse its discretion in doing so here.").

The United States is not arguing that U.S. courts lack inherent equitable authority or jurisdiction to entertain contempt proceedings against foreign states. Rather, in our view, district courts err when

they exercise their authority to impose such unenforceable orders in light of the various considerations weighing against them in this context.

A. Orders of Monetary Contempt Sanctions Against a Foreign State Are Unenforceable

The FSIA establishes a general rule that property of a foreign state is immune from execution or attachment. *See* 28 U.S.C. § 1609. Absent a foreign state's waiver of immunity from execution of an order imposing monetary sanctions, such an order does not fall within any statutory exception to immunity from execution. *See id.* § 1610(a). The FSIA thus provides no mechanism for a U.S. court to enter an enforceable contempt order imposing monetary sanctions against an unwilling foreign state. *See Af-Cap*, 462 F.3d at 428 ("A review of the relevant sections, [28 U.S.C.] § 1610 and § 1611, shows that they do not present a situation in which the [sanctions] order could stand. Those sections describe the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included."). We are not aware of any courts concluding otherwise. *See FG Hemisphere*, 637 F.3d at 377 (acknowledging without reaching questions about enforceability of a monetary sanctions order against a foreign state); *Agudas Chasidei Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148, 152 (D.D.C. 2013) (recognizing that enforcement of a monetary sanctions order would be "carefully restricted by the FSIA").

The legislative history of the FSIA also supports the conclusion that contempt sanctions may not be

enforceable in the absence of a waiver. For example, the accompanying House Report notes in the context of injunctions and specific performance orders that it may be appropriate to issue such orders in certain circumstances, but states that "this is not determinative of the power of the court to enforce such an order." H.R. Rep. No. 94-1487, at 22, *reprinted in* 1976 U.S.C.C.A.N. at 6621. In particular, the report recognized that a contempt "fine for violation of an injunction may be unenforceable if immunity exists under [28 U.S.C. §§] 1609-1610." *Id.*

B. Equitable Principles Weigh Against the Issuance of Unenforceable Orders Imposing Monetary Contempt Sanctions on Foreign States

As a general matter, a court "should not issue an unenforceable" order against a foreign state. *In re Estate of Marcos Human Rights Litig.*, 94 F.3d 539, 545, 548 (9th Cir. 1996). In exercising its equitable authority, a court should consider whether its orders will be effective and should utilize the least amount of compulsion necessary to achieve the desired end. *See, e.g.*, *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 637 n.8 (1988); *see also Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 550 (1937) ("[A] court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.").

The Contempt Sanctions Order appears to have been motivated by a desire to compel Iraq's compliance with the Asset Discovery Order. (SPA11-12, 14-

15.) However, an award of monetary contempt sanctions is simply not a meaningful way to ensure a foreign state's compliance with district court orders; it is more likely to accumulate uncollectable penalties.

In *FG Hemisphere*, the D.C. Circuit concluded that a district court need not consider whether a monetary sanctions order is enforceable against a foreign state before imposing such sanctions, because 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." 637 F.3d at 377-79. The court's analogy between monetary contempt sanctions and unsatisfied money judgments was erroneous, however. There are significant distinctions between entry of a judgment against a foreign state under 28 U.S.C. § 1605, which a plaintiff may or may not be able to enforce against a foreign state's property in the United States, and a court's exercise of its equitable powers to impose unenforceable monetary contempt sanctions. As an initial matter, there is widespread acceptance in modern international law that foreign states' immunity from adjudication may be restricted and judgments entered against foreign states in such cases, *see generally* Restatement (Third) of Foreign Relations Law, § 451 (1987); Hazel Fox, "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States," in *International Law*, 340, 355 (Malcolm D. Evans ed., 3d ed. 2010), and foreign states can and do voluntarily pay judgments entered under § 1605. Should a state fail to do so, a judgment

entered against a foreign state is not categorically unenforceable against the state's property; the question is whether the foreign state has property in the United States that satisfies an applicable exception to execution immunity. Even in the absence of non-immune property in the United States, a plaintiff may be able to locate attachable assets in the United States in the future; to register and enforce the judgment in another country; or to enlist the help of the U.S. State Department, which can urge the foreign state to pay the judgment.

In contrast, as discussed below, there is widespread acceptance in international practice that it is *not* appropriate to impose penalties on foreign states for noncompliance with a court order, so there is almost no possibility that a foreign state would voluntarily pay monetary contempt sanctions. Monetary contempt sanctions are generally viewed by foreign governments as inconsistent with principles of mutual respect and equality among sovereigns, so, rather than serving as an effective mechanism for encouraging compliance, such orders are likely to exacerbate existing disputes or lead to the foreign government's refusal to participate further in the litigation. Finally, a court issuing a monetary sanctions order against a foreign state has no possibility of enforcing its order: under the FSIA, the court lacks the authority to compel payment of the sanctions absent a specific waiver, and such an order will not be enforced in foreign courts. *See infra* Part II.C.

The conclusion that equitable considerations foreclose the imposition of monetary contempt sanctions

in this case is buttressed by the statutory prohibition on awarding punitive damages against a foreign state in 28 U.S.C. § 1606. The district court ordered Iraq to pay significant monetary fines, totaling nearly $500,000 as of the date of this filing, and continuing to accrue at a rate of $2,000 per day. Contempt sanctions may serve to "punish a prior offense as well as coerce an offender's future obedience." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994). It is hard to see how such orders can be squared with § 1606's categorical ban on punitive damages against a foreign state.[5]

C. Monetary Contempt Sanctions Orders Are Inconsistent with International Practice

A review of international and foreign law sources demonstrates that orders of monetary contempt sanctions against a foreign sovereign are considered inappropriate. For example, the European Convention on State Immunity bars a court from imposing monetary sanctions on a foreign state that is a party to judicial proceedings in another party state for "its failure or refusal to disclose any documents or other evidence." European Convention on State Immunity, art. 18, May 16, 1972, E.T.S. No. 74, 11 I.L.M. 470 (1972), *available at* http://conventions.coe.int/Treaty/en/

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[5] It is not clear from the district court's order whether the sanctions imposed on Iraq are payable to the plaintiff or to the court. However, to the extent that they are payable to SerVaas, the order is even more analogous to a punitive judgment.

Treaties/Html/074.htm. Under the Convention, a court faced with a foreign state's noncompliance is limited to remedies involving "whatever discretion [the court] may have under its own law to draw the appropriate conclusions from a State's failure or refusal to comply." *Id.* Explanatory Report, art. 18, ¶ 70, *available at* http://conventions.coe.int/Treaty/EN/Reports/Html/074.htm.

Similarly, the United Nations Convention on Jurisdictional Immunities of States and Their Property provides that "[a]ny failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act . . . shall entail no consequence other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal." United Nations Convention on Jurisdictional Immunities of States and Their Properties, art. 24(1), G.A. Res. 59/38, annex, Dec. 2, 2004, 44 I.L.M. 803 (2005). The Convention is not yet in force, and the United States is not a signatory to it. Nevertheless, a number of the Convention's provisions, including Article 24(1), reflect current international norms and practices regarding foreign state immunity. Notably, the principle reflected in Article 24 of the Convention was uniformly supported by member states, which disagreed only about whether to extend even further a state's immunity from coercion. *See* Int'l Law Comm'n, *Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments*, U.N. GAOR Supp. No. 10, at 24, 33, 58, U.N. Doc. A/CN.4/410

(Feb. 17, 1988), *available at* http://legal.un.org/ilc/documentation/english/a_cn4_410.pdf (comments of the United Kingdom and Mexico).

Finally, a number of nations that have codified foreign sovereign immunity law, including Canada, the United Kingdom, Israel, and Australia, have prohibited monetary sanctions against a foreign state for its failure to comply with an injunctive order.[6]

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[6] Canadian law provides that "[n]o penalty or fine may be imposed by a court against a foreign state" for its failure to produce documents or other information to the court, and further provides that a state shall be immune in toto from any "injunction, specific performance or the recovery of land or other property." State Immunity Act, R.S.C. 1985, c. S 18, §§ 13(1), 11(1) (Can.), *available at* http://laws-lois.justice.gc.ca/eng/acts/S-18. The United Kingdom's State Immunity Act similarly provides that a foreign state may not be penalized with monetary sanctions for its failure to disclose or produce any document or other information in court proceedings, and also may not be subject to any "injunction or order for specific performance," absent narrow circumstances not present here. State Immunity Act, 1978, c. 33, § 13(1)-(2) (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1978/33. In Israel, "[n]o fine or prison sentence shall be imposed on a foreign state . . . for non-compliance with a judgment or other decision of a court in Israel against that state." Foreign States Immunity Law, 5769-2008, § 15(b), SH No. 2189, p.76 (Isr.), *available at* http://www.coe.int/t/dlapil/cahdi/

In *FG Hemisphere*, the D.C. Circuit discounted these examples as "irrelevant," because U.S. law does not contain an express prohibition on monetary contempt sanctions against foreign states. 637 F.3d at 380. But, as discussed earlier, the FSIA makes clear that such orders are not enforceable, and the question presented here is whether a court should exercise its equitable authority to issue such an order. In considering that question, including whether issuance of such an order is likely to be an effective means of compelling a foreign sovereign's compliance, it is highly relevant to consider international norms regarding the acceptability of such sanctions to assess how foreign states are likely to respond. It is also generally appropriate to consider foreign and international legal norms of foreign sovereign immunity in adjudicating cases arising under the FSIA, both in light of the history of the statute and also because of the ramifications for the United States in litigation in foreign courts if U.S. courts diverge from international practice. *See, e.g.*, *De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984) (examining European Convention on State Immunity and United King-

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Source/state_immunities/Israel%20Immunities%20 January%202009.pdf. And under Australian law, "[a] penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court." Foreign States Immunities Act 1985, § 34 (Austl.), *available at* http://www.comlaw.gov.au/Details/C2010C00145.

dom's immunity statute in construing the FSIA's executional immunity provisions).

D. Foreign Relations and Reciprocity Concerns Counsel Against the Imposition of Unenforceable Monetary Sanctions Orders

The potential adverse consequences for our foreign relations, as well as for the treatment of the U.S. government abroad, also counsel against U.S. courts issuing unenforceable monetary contempt sanctions orders. These concerns are not generic or theoretical. By way of example, in the *Chabad* case cited above, a district court imposed monetary contempt sanctions of $50,000 per day against the Russian Federation in an effort to compel its compliance with the court's specific-performance order directing Russia to transfer a collection of religious books and other documents to the plaintiff. *See* 915 F. Supp. 2d at 153-55.

The court's sanctions order has not led to compliance, however. Instead, it has created another obstacle in the diplomatic efforts aimed at resolving the dispute. *See* Statement of Interest of the United States, *Chabad*, No. 1:05-cv-01548-RCL, Ex. A, at 2 (D.D.C. filed Feb. 21, 2014) (letter from Mary E. McLeod, U.S. State Dep't, to Stuart Delery, U.S. Dep't of Justice (Feb. 20, 2014)) [ECF Docket No. 134-1]. In addition, following the sanctions order, the Russian Ministry of Culture and the Russian State Library filed a lawsuit in Moscow, naming the United States and the Library of Congress as defendants and requesting that the court issue a similar order compelling the United States and the Library of Congress

to return to Russia seven of books from the collection, and imposing a $50,000 daily fine for each day of non-compliance. *See id.* The Moscow court has since granted this request. *See* Decision, Case No. A40-82596/13, slip op. at 11 (Comm'l Ct. of Moscow May 29, 2014) (Russ.).[7]

This case illustrates the risk that monetary contempt sanctions orders will undermine efforts to resolve underlying disputes, and have negative consequences for the United States overseas. While the D.C. Circuit declined to defer to the United States' foreign relations and reciprocity concerns in *FG Hemisphere*, *see* 637 F.3d at 380, these are matters on which particular deference is owed to "the considered judgment of the Executive." *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (concluding that "[t]he Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling").

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[7] Copies of this and other unpublished foreign materials cited herein (along with informal translations thereof), are provided in the Addendum to this brief.

More generally, while foreign courts for the most part have followed accepted international practice and not allowed monetary contempt sanctions against other sovereigns, orders of U.S. courts imposing monetary contempt sanctions on foreign states may embolden foreign courts to impose similar sanctions on the United States. The U.S. government has a significant presence abroad and is frequently subject to suit in foreign courts. As noted earlier, for a variety of reasons, there are circumstances in which the United States may not comply with orders of foreign courts. Orders of U.S. courts imposing monetary contempt sanctions risk creating a precedent that may be relied upon in such cases.

For example, notwithstanding the fact that Spain is a signatory to the U.N. Convention cited above, a trial court in Spain recently decided to impose monetary sanctions of 10,000 euros per month on the United States, and recommended the commencement of criminal proceedings against U.S. officials, for the United States' failure to produce post-judgment discovery about its assets after a default judgment was entered against it.[8] *See Montasa-Montajes e Instalaciones v. Gobierno Estados Unidos de America*, No. 177/1997, slip op. at 2, S. Juz. Prim. (Rota), May 24, 2014 (Spain). The United States objected to the dis-

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[8] The United States did not receive service of the complaint in the action in a manner that comported with the requirements of customary international law, and thus has taken the position that it is not subject to the Spanish court's jurisdiction.

covery requests on sovereign immunity grounds and has filed a motion for reconsideration of the Spanish court's decision, arguing, among other things, that imposing such sanctions is inconsistent with international law and practice. *See* U.S. Mot. for Reconsideration, *Montasa*, No. 177/1997, at 3-4 (filed May 29, 2014). The court has not yet decided the reconsideration motion. There can be no doubt, however, that the Spanish court and others will be less likely to accept the United States' position in this regard should U.S. courts enter orders imposing monetary sanctions on foreign states, even if those orders are unenforceable.

Conclusion

The Court should vacate the Asset Discovery Order and the Contempt Order (to the extent it imposed monetary sanctions on Iraq), and should remand the case to the district court to reconsider the appropriate scope of discovery to be compelled.

Dated: New York, New York
September 9, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6,816 words in this brief.

PREET BHARARA,
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ADDENDUM

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АРБИТРАЖНЫЙ СУД ГОРОДА МОСКВЫ
115191, г.Москва, ул. Большая Тульская, д. 17
http://www.msk.arbitr.ru

Именем Российской Федерации
Р Е Ш Е Н И Е

г. Москва **Дело № А40-82596/13**
29 мая 2014 г.

Резолютивная часть решения объявлена 22.05.2014 г.
Полный текст решения изготовлен 29.05.2014 г.

Арбитражный суд в составе: председательствующего судьи Шведко О.И. (шифр судьи **69-560**)
при ведении протокола судебного заседания секретарем Джагацпанян К.С.,
рассмотрев в открытом судебном заседании дело
по иску Федерального государственного бюджетного учреждения «Российская государственная библиотека» (ОГРН 1037739390809, ИНН 7704097560, адрес: 119019, г.Москва, ул.Воздвиженка, д.3/5, дата регистрации: 06.01.1994)

Министерства культуры Российской Федерации (ОГРН 1087746878295, ИНН 7705851331, адрес: 109074, г.Москва, Китайгородский пр-д, д.7, стр.2, дата регистрации: 25.07.2008)

к Библиотеке Конгресса Соединенных Штатов Америки (Library of the United States Congress) (адрес: США, 20540, Округ Колумбия, Вашингтон, Индепенденс Авеню, 101 (101 Independence Ave SE, Washington, DC 20540, USA))

Соединенным Штатам Америки (The United States of America) (адрес: Белый дом, США, 20500, Округ Колумбия, Вашингтон, Пенсильвания Авеню, 1600 (The White House, 1600 Pensilvania Avenue NW, Washington, DC 20500, USA))

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при участии в судебном заседании:
от ФГБУ «РГБ»: Евдокимов А.А., доверенность от18.06.2013 № 273/77, Жилин Е.Р., доверенность от18.06.2013 № 273/77;

Add. 3

от Министерства культуры РФ: Сафонова Н.Е., доверенность от 24.12.213 № 118-43 «Д», Чугунов М.Ю., доверенность от 09.12 2013 № 104-43 «Д»;

от Прокуратуры г. Москвы: Епифанцева Н.В., предъявлено служебное удостоверение № 156347;

В судебное заседание не явились представители: Библиотеки Конгресса Соединенных Штатов Америки, Соединенных Штатов Америки, Некоммерческой организация Агудас Хасидей Хабад Соединенных Штатов;

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1. Луццато, Моше Хаим. Месилат иешарим. - Вильна: Ромм, 1860. 126 л. Приплет - 2 книги: - Ибн Габай, Меир. Толаат Яаков. Львов, 1858. 90 с.; - Каган, Шабтай бен Меир. Друш якар. - Львов, 1861. 8 л. (Luzzato, M. Sefer Mesillat Yesharim (Vilna, I860)).
2. Элизер бен Шмуэл из Меца. - Иреим. - Вильна: Ромм, 1902. 86, 16, 544 с. (Eliezer ben Samuel. Sefer Year'im (Vilna, 1902)).
3. Лампронти, Ицхак бен Шмуэль. Пахад Ицхак. - Лык: Мекице нирдамим, 1864. 8, 240 с. (Lampronti, Y. Pahad Yitshak (Lyck, 1864)).
4. Софер, Моше. Хатам Софер. - Пресбург: тип. Зибера, 1865. 95, 3, 87 л. (Sofer. M. Sefer Hatam Sofer (Pressburg, 1865)).
5. Ибн Хабиб, Яаков бен Шломо. Эйн Яаков. - Варшава: тип. Алапина, 1886, Ч. 3. 490 с. (Ibn Habib, J. 'Ein Ya'kov (Warsaw, 1886)).
6. Моше бен Шаймон. Сефер га Мицвот. - Варшава: тип. Монка, 1891. 4, 84, 56 л. (Moses ben Maimon. Sefer ha-Mitsvot (Warsaw, 1891)).
7. Азулаи, Аврагам бен Мордехай. Ор га хама. - Иерусалим: тип. Соломна, 1879. 209 л. (Azulai, A. Sefer Or ha-Hamah (Jerusalem, 1879)).

В судебном заседании 14 апреля 2014 года Истцами были уточнены заявленные требования и заявлено ходатайство о присуждении ФГБУ «Российская государственная библиотека» и Министерству культуры РФ денежных средств в размере 50 000 долларов США за каждый день неисполнения вступившего в законную силу судебного акта по существу рассматриваемого спора, в случае удовлетворения заявленных требований, в качестве компенсации за нарушение разумного срока судопроизводства.

Настоящее ходатайство будет рассмотрено судом при разрешении спора по существу.

В соответствии со ст. 248 АПК РФ (п. 1 ч. 1) к исключительной компетенции арбитражных судов в Российской Федерации по делам с участием иностранных лиц относятся дела по спорам в отношении находящегося в государственной собственности Российской Федерации имущества.

Поскольку предметом рассматриваемого спора являются Книги, принадлежащие на праве собственности Российской Федерации, рассматриваемый спор относится к исключительной компетенции арбитражных судов.

Согласно ч.2 ст. 3 Арбитражного процессуального кодекса Российской Федерации, порядок судопроизводства в арбитражных судах определяется Конституцией Российской Федерации, Федеральным конституционным законом "О судебной системе Российской Федерации" и Федеральным конституционным законом "Об арбитражных судах в Российской Федерации", Арбитражным процессуальным кодексом Российской Федерации и принимаемыми в соответствии с ними другими федеральными законами.

Add. 4

В судебное заседание не явились представители:

- Библиотеки Конгресса Соединенных Штатов Америки – о дате и времени судебного заседания уведомлены;

- Соединенных Штатов Америки – о дате и времени судебного заседания уведомлены;

- Некоммерческой организация Агудас Хасидей Хабад Соединенных Штатов - о дате и времени судебного заседания уведомлены.

На основании положений ст.ст. 121,123, 253 АПК РФ, а также с учетом мнения представителей Истцов и Прокурора г. Москвы, суд находит возможным рассмотреть настоящий спор в отсутствие представителей Ответчиков, а также 3-го лица, не заявляющего самостоятельных требований на предмет спора, надлежащим образом извещенных о дате и времени судебного разбирательства.

Обосновывая подсудность рассматриваемого спора Арбитражному суду г. Москвы, Истцы указали, что в городе Москве находится недвижимое имущество, принадлежащее Соединенным Штатам Америки, в связи с чем, а также, принимая во внимание, что спорные правоотношения имели место на территории Российской Федерации в городе Москве, суд в соответствии с п.п. 1, 3 ч. 1 ст. 247 АПК РФ полагает, что рассматриваемый спор подсуден Арбитражному суду г. Москвы.

Представители Истцов поддержали заявленные требования в полном объеме, представили доказательства направления копии заявления о присуждении денежной компенсации в случае неисполнения судебного акта в адрес Ответчиков и третьего лица.

Представитель Прокурора г. Москвы поддержал позицию Истцов.

Рассмотрев материалы дела, выслушав доводы представителей Истцом, мнение представителя Прокурора г. Москвы, суд установил.

В адрес Российской государственной библиотеки (Истца 1) в 1994 году поступило семь заказов Библиотеки Конгресса США от 14.01.1994, оформленных на бланках Международного библиотечного абонемента о предоставлении в пользование сроком на 60 дней следующих книг :

1 Луццато, Моше Хаим. Месилат иешарим. - Вильна: Ромм, 1860. 126 л. Приплет - 2 книги: - Ибн Габай, Меир. Толаат Яаков. Львов, 1858. 90 с.; - Каган, Шабтай бен Меир. Друш якар. - Львов, 1861. 8 л. (Luzzato, M. Sefer Mesillat Yesharim (Vilna, I860)).

2. Элизер бен Шмуэл из Меца. - Ireим. - Вильна: Ромм, 1902. 86, 16, 544 с. (Eliezer ben Samuel. Sefer Year'im (Vilna, 1902)).

3. Лампронти, Ицхак бен Шмуэль. Пахад Ицхак. - Лык: Мекице нирдамим, 1864. 8, 240 с. (Lampronti, Y. Pahad Yitshak (Lyск, 1864)).
4. Софер, Моше. Хатам Софер. - Пресбург: тип. Зибера, 1865. 95, 3, 87 л. (Sofer. M. Sefer Hatam Sofer (Pressburg, 1865)).
5. Ибн Хабиб, Яаков бен Шломо. Эйн Яаков. - Варшава: тип. Алапина, 1886, Ч. 3. 490 с. (Ibn Habib, J. 'Ein Ya'kov (Warsaw, 1886)).
6. Моше бен Шаймон. Сефер га Мицвот. - Варшава: тип. Монка, 1891. 4, 84, 56 л. (Moses ben Maimon. Sefer ha-Mitsvot (Warsaw, 1891)).
7. Азулаи, Аврагам бен Мордехай. Ор га хама. - Иерусалим: тип. Соломна, 1879. 209 л. (Azulai, A. Sefer Or ha-Hamah (Jerusalem, 1879)).

Данные книги входят в «Коллекцию Шнеерсона», которая является памятником культуры, Книги обладают особой имущественной ценностью и находятся в собственности Российской Федерации, так как Федеральное государственное бюджетное учреждение «Российская государственная библиотека» является национальной библиотекой Российской Федерации, созданной в соответствии с Указом

Add. 5

Президента Российской Федерации от 1992 № 38 «О создании Российской государственной библиотеки» на базе государственной библиотеки СССР имени В.И. Ленина.

В соответствии с п. 4 главы I Устава РГБ собственником имущества Библиотеки является Российская Федерация, с момента создания и по настоящее время Библиотека находится в ведении Министерства культуры Российской Федерации.

Истцом 1 было принято решение об исполнении поступивших от Библиотеки Конгресса США заказов.

Как следует из отметки на бланках указанных требований в графе «Дата получения» раздела «Библиотека-заказчица» и подтверждается имеющейся в материалах дела распиской в получении Книг от 15.01.1994, Книги были переданы представителям американской стороны и учены Библиотекой Конгресса 19.01.1994.

Принимая во внимание условия предоставления книг в рамках международного библиотечного абонемента, между РГБ и Библиотекой Конгресса сложились отношения безвозмездного пользования Книгами, принадлежащими РГБ.

При этом заключение договора о безвозмездном пользовании Книгами состоялось путем заполнения и направления Библиотекой Конгресса в адрес РГБ бланков-заказов о предоставлении книг, регистрации – принятия к исполнению этих заказов Истцом 1, а также путем последующих передачи и принятия сторонами договора испрашиваемых Книг.

По истечении 60-дневного срока, на который первоначально Книги были предоставлены Библиотеке Конгресса в пользование, они не были возвращены в адрес Истца 1.

Вследствие нахождения в пользовании Библиотеки Конгресса по истечении срока предоставления, в соответствии с положениями действовавшего на тот момент законодательства, договор безвозмездного пользования был продлен на неопределенный срок

Письмом от 13.03.2013 в адрес Библиотеки Конгресса Истец 1 отказался от договора безвозмездного пользования Книгами, а Библиотека Конгресса обязана была возвратить находящиеся у нее в течение длительного периода времени 7 Книг из «Коллекции Шнеерсона», однако, до настоящего момента Книги Библиотекой Конгресса не возвращены.

Выше изложенные обстоятельства послужили основанием для обращения Федерального государственного бюджетного учреждения «Российская государственная библиотека» и Министерства культуры Российской Федерации в Арбитражный суд города Москвы с рассматриваемыми требованиями о присуждения к исполнению обязанности в натуре в виде возврата 7 Книг из «Коллекции Шнеерсона» в связи отказом от договора безвозмездного пользования к Библиотеке Конгресса Соединенных Штатов Америки и Соединенным Америки

С целью реализации принципа исполнимости судебных актов, как одного из основополагающих принципов судопроизводства, принимая во внимание длительное неисполнение Ответчиками обязательства по возврату Книг, Истцы также ходатайствовали о присуждении ФГБУ «Российская государственная библиотека» и Министерству культуры РФ денежных средств в размере 50 000 долларов США за каждый день неисполнения вступившего в законную силу решения суда, в случае удовлетворения заявленных требований, в качестве компенсации за нарушение разумного срока судопроизводства.

Рассматриваемые требования предъявлены Истцами к двум Ответчикам, Библиотеке Конгресса США и Соединенным Штатам Америки, являющихся

иностранными лицами. Для установления процессуального статуса Ответчиков, суд исходит из следующего.

Согласно ст.ст. 1202 и 1203 Гражданского кодекса Российской Федерации, личным законом иностранных юридических лиц, а также организаций, которые не признаются юридическими лицами по иностранному праву, является право той страны, в которой учреждено соответствующее юридическое лицо или соответствующая организация. В силу указанных норм личный закон, в числе прочего, определяет статус иностранного юридического лица или организации, не являющейся юридическим лицом по иностранному праву.

Как следует из имеющегося в материалах дела Юридического заключения Федерального государственного бюджетного учреждения науки «Институт государства и права Российской Академии наук»,

Библиотека Конгресса США была учреждена в Соединенных Штатах Америки в 1800 году, что позволяет сделать вывод о том, что личным законом указанной Библиотеки является право Соединенных Штатов Америки. Библиотека Конгресса США создавалась как хранилище материалов, необходимых Правительству США (Government of the United States или US Government) и, в частности, Президенту США (President of the United States) Вице-президенту США (Vice President of the United States), членам Сената США (Senate) и Палаты представителей (House of Representatives) - членам Конгресса США (Congress of the United States).

Согласно Конституции США, на федеральном уровне вся государственная власть в Соединенных Штатах Америки принадлежит Правительству США (US Government).

Правительство США подразделяется на законодательную, исполнительную и судебную ветви власти. Библиотека Конгресса США находится в непосредственном ведении Конгресса США, осуществляющего законодательную власть.

Закон об административном процессе (Administrative Procedure Act) является одним из центральных источников административного права Соединенных Штатов Америки. Названный Закон включён в титул 5 Кодекса Соединённых Штатов Америки, который представляет собой инструмент кодификации, составляемый одним из органов Конгресса США в целях облегчения поиска и использования действующего законодательства. Кодекс США систематизирует нормы по отраслевому, подотраслевому и институциональному признакам. Текст Кодекса США, согласно § 204 титула I Кодекса США, является официальным текстом принятых Конгрессом США законодательных актов.

Титул 2 Кодекса США озаглавлен «Конгресс». Данный титул включает главу 5, которая носит наименование «Библиотека Конгресса» (Chapter 5—Library Of Congress (§§131-185).

В соответствии с §116 Кодекса США Библиотека Конгресса является хранителем официальных текстов законов Соединенных Штатов. Параграфом 407 Кодекса США установлено, что Библиотека Конгресса выполняет также ряд депозитарных функций в сфере авторского права, а также иных государственных функций. В силу изложенного Библиотека Конгресса США по своим функциям и организационной природе соответствует определению Федерального агентства США, данному в указанном выше § 551 титула 5 Кодекса США.

Согласно официальному сайту Правительства США, Библиотека Конгресса США является вспомогательным по отношению к Конгрессу США государственным органом в рамках системы органов законодательной власти. Данное обстоятельство также подтверждается непосредственно сайтом Библиотеки Конгресса США, где указано, что Библиотека является «исследовательским подразделением Конгресса».

Таким образом, системное толкование действующего законодательства Соединенных Штатов Америки, а также официальных сведений, публикуемых

Add. 7

Правительством США и Библиотекой Конгресса США, позволяет сделать вывод о том, что Библиотека Конгресса США является федеральным агентством Правительства США, относящимся к законодательной ветви власти, а договоры, заключённые федеральным агентством, напрямую создают обязательства для Правительства США.

Данный вывод также подтверждается статьей 4 Главы 11 Резолюции 56/83 об ответственности государств за международно-противоправные деяния, принятой на 56 сессии Генеральной Ассамблеи ООН, состоявшейся 28.01.2001 года , согласно которой, поведение любого органа государства рассматривается как деяние данного государства по международному праву независимо от того, осуществляет ли это органа законодательные, исполнительные, судебные или какие-либо иные функции, независимо от положения, которое он занимает в системе государства, и независимо от того, является ли он органом центральной власти или административно-территориальной единицы государства.

На основании ч. 1 ст. 253 Арбитражного процессуального кодекса Российской Федерации дела с участием иностранных лиц рассматриваются арбитражным судом по правилам АПК РФ с особенностями, предусмотренными главой 33 АПК РФ, если международным договором Российской Федерации не предусмотрено иное.

Таким образом, с учетом правовых конструкций законодательства Соединенных Штатов Америки, суд приходит к выводу, что рассматриваемые требования правомерно предъявлены Истцами солидарно к Библиотеке Конгресса США и Соединенным Штатам Америки, как государству.

В соответствии с положениями ст. 251 АПК РФ, иностранное государство, выступающее в качестве носителя власти, обладает судебным иммунитетом по отношению к предъявленному к нему иску в арбитражном суде в Российской Федерации, привлечению его к участию в деле в качестве третьего лица, наложению ареста на имущество, принадлежащее иностранному государству и находящееся на территории Российской Федерации, и принятию по отношению к нему судом мер по обеспечению иска и имущественных интересов. Обращение взыскания на это имущество в порядке принудительного исполнения судебного акта арбитражного суда допускается только с согласия компетентных органов соответствующего государства, если иное не предусмотрено международным договором Российской Федерации или федеральным законом.

Согласно концепции ограниченного иммунитета, иностранное государство, его органы, а также их собственность пользуются иммунитетом только тогда, когда государство осуществляет суверенные функции, т.е. действия jure imperi. Если же государство участвует в осуществлении хозяйственной деятельности (заключает концессионные и иные соглашения и т.д., выступает обычным участником гражданского оборота), т.е. действия jure gestionis, то оно не пользуется иммунитетом.

Рассматривая настоящий иск, суд исходит из концепции функционального иммунитета, так как рассматриваемый спор не затрагивает публичные функции Соединенных Штатов Америки как носителя государственной власти, США выступают не как суверен, но как участник гражданского оборота на общих основаниях с другими субъектами гражданского права.

Определяя применимое к отношениям сторон право, суд учитывает следующие обстоятельства:

- Библиотека Конгресса направила в письменной форме заказы о предоставлении Книг;
- заказы были зарегистрированы Истцом 1 и приняты к исполнению;
- Книги были переданы РГБ Библиотеке Конгресса библиотеке Конгресса в безвозмездное пользование .

В силу статьи 166 Основ гражданского законодательства Союза ССР и республик (утверждены Постановлением Верховного Совета СССР 31.05.1991 № 2211-1),

подлежащих применению к гражданско-правовым отношениям, возникшим в 1994 году (согласно п. 1 Постановления Верховного Совета РФ от 14.07.1992 № 3301-1 «О регулировании гражданских правоотношений в период проведения экономической реформы»), правом, применимым к обязательствам в связи с передачей имущества в пользование, является право страны - места нахождения наймодателя.

В рассматриваемом случае наймодателем является РГБ с местом нахождения в г. Москве.

На основании вышеизложенного, при отсутствии в Правилах о международном библиотечном абонементе порядка определения права страны, регулирующей возникшие правоотношения, с учетом законодательства, действовавшего в период передачи Книг Библиотеке Конгресса США, места исполнения передачи Книг, суд приходит к выводу, что применимым правом при рассмотрении настоящего иска является российское право.

Согласно ст. 8 Рекомендаций Международной Федерации библиотечных ассоциаций и учреждений (ИФЛА) «Международное взаимоиспользование ресурсов и доставка документов. Принципы и руководство по ведению», принятых в 1954, и определяющих правила предоставления книг в рамках международного абонемента, решение об оплате обслуживания библиотека принимает индивидуально. Как Российская государственная библиотека, так и Библиотека Конгресса являются членами Федерации.

Согласно п. 9 Положения о международном библиотечном абонементе, утвержденного Приказом Министра культуры СССР от 31.10.1955 № 690, предоставление книг по международном библиотечному абонементу осуществляется безвозмездно.

Статьями 7, 23, 35 Положения о библиотечном деле в СССР, утвержденного Указом Президиума Верховного Совета СССР от 13.03.1984 № 10926-X, и действовавшего на момент передачи Книг РГБ Библиотеке Конгресса, были установлены права на бесплатное пользование библиотеками книг, получение книг во временное пользование, а также участие библиотек в деятельности соответствующих международных организаций и осуществление международных связей с библиотеками зарубежных стран.

При таких обстоятельствах, суд приходит к выводу, что регулировавшие в 1994 году пользование фондами библиотек на территории Российской Федерации международные правовые нормы, а также нормы законодательства СССР, подлежащие применению к рассматриваемым правоотношениям в силу п. 2 Постановления Верховного Совета РСФСР от 12.12.1991 №2014-1 «О ратификации Соглашения о создании Содружества Независимых Государств»), установили, что пользование, по общему правилу, является безвозмездным.

В соответствии с положениями ст. 342 Гражданского кодекса РСФСР, действовавшего в период передачи Книг Истцом 1 Ответчику 1, по договору безвозмездного пользования имуществом одна сторона обязуется передать или передает имущество в безвозмездное временное пользование другой стороне, а последняя обязуется вернуть то же имущество.

К договору безвозмездного пользования имуществом соответственно применяются правила статей 276, 279, 281 (часть первая), 283, 285 и 291-293 настоящего Кодекса.

При этом, согласно ст. 291 ГК РСФСР при прекращении договора найма нанимателю надлежало обязан вернуть наймодателю имущество в том состоянии, в каком он его получил, с учетом нормального износа, или в состоянии, обусловленном договором.

Так как по окончании 60-дневного срока получения Книг по международному библиотечному абонементу Ответчик 1 не возвратил Истцу 1 полученные на основании расписки от 15.01.1994 года Книги, а РГБ не возразила, в соответствии со ст. 279 ГК РСФСР, применяемой к отношениям из договора безвозмездного пользования в силу норм ст. 342 ГК РСФСР, договор, считается возобновленным на неопределенный срок.

В соответствии со ст. 279 ГК РСФСР, каждая из сторон договора безвозмездного пользования, возобновленного на неопределенный срок, вправе в любое время отказаться от договора. Согласно ст.ст. 291, 342 ГК РСФСР при прекращении договора безвозмездного пользования имуществом лицо, получившее имущество в соответствии с данным договором, обязано вернуть его. Аналогичные положения содержатся в ст.ст. 689, 699 действующего Гражданского кодекса Российской Федерации.

Письмом от 13.03.2013 в адрес Библиотеки Конгресса Российская государственная библиотека отказалась от договора безвозмездного пользования Книгами, вследствие чего Библиотека Конгресса обязана была возвратить находящиеся у нее 7 Книг из «Коллекции Шнеерсона», однако, до настоящего момента книги Библиотекой Конгресса не возвращены.

Согласно положениям ст.ст. 309, 310 Гражданского кодекса Российской Федерации, обязательства должны исполняться надлежащим образом в соответствии с условиями обязательства и требованиями закона, иных правовых актов, а при отсутствии таких условий и требований - в соответствии с обычаями делового оборота или иными обычно предъявляемыми требованиями.

Односторонний отказ от исполнения обязательства и одностороннее изменение его условий не допускаются, за исключением случаев, предусмотренных законом. Односторонний отказ от исполнения обязательства, связанного с осуществлением его сторонами предпринимательской деятельности, и одностороннее изменение условий такого обязательства допускаются также в случаях, предусмотренных договором, если иное не вытекает из закона или существа обязательства.

В соответствии со ст.ст. 322, 323 Гражданского кодекса РФ, солидарная обязанность (ответственность) или солидарное требование возникает, если солидарность обязанности или требования предусмотрена договором или установлена законом, в частности при неделимости предмета обязательства.

При солидарной обязанности должников кредитор вправе требовать исполнения как от всех должников совместно, так и от любого из них в отдельности, притом как полностью, так и в части долга.

Кредитор, не получивший полного удовлетворения от одного из солидарных должников, имеет право требовать недополученное от остальных солидарных должников.

Солидарные должники остаются обязанными до тех пор, пока обязательство не исполнено полностью.

Как выше изложено, Библиотека Конгресса США является федеральным агентством Правительства США, относящимся к законодательной ветви власти, в связи с чем договоры, заключённые федеральным агентством, напрямую создают обязательства для Правительства США.

При таких обстоятельствах суд находит предъявленные Федеральным государственным бюджетным учреждением «Российская государственная библиотека» и Министерством культуры Российской Федерации к Библиотеке Конгресса Соединенных Штатов Америки и Соединенным Штатам Америки солидарные требования о возврате Федеральному государственному бюджетному учреждению

«Российская государственная библиотека» 7 книг из «Коллекции Шнеерсона» обоснованными и подлежащими удовлетворению в полном объеме.

В соответствии со ст. 6.1 Арбитражного процессуального кодекса Российской Федерации одним из принципов судопроизводства в арбитражных судах является принцип исполнения судебного акта в разумный срок.

Указанная норма базируется на положениях п. 1 ст. 6 Конвенции о защите прав человека и основных свобод (являющейся составной частью правовой системы России в силу ч. 4 ст. 15 Конституции РФ), закрепляющих право каждого на справедливое и публичное разбирательство дела в разумный срок независимым и беспристрастным судом, созданным на основании закона.

При этом Конституционный Суд РФ и Европейский Суд по правам человека неоднократно в своих актах обращали внимание на необходимость установления надлежащих гарантий исполнения судебных актов, поскольку, «если в национальной правовой системе допускается, что окончательное, обязательное судебное решение может оставаться неисполненным, "право на суд" становится иллюзорным. Европейский Суд по правам человека также признает, что нарушение этого права может приобрести форму задержки исполнения судебного акта. В таких случаях, как указывают Европейский Суд по правам человека, а также Конституционный Суд РФ и Высший Арбитражный Суд РФ, лицу, которому причинен вред неисполнением или несвоевременным исполнением судебного акта, должна быть присуждена соответствующая справедливая компенсация.

Настоящий подход был подтвержден и получил свое дальнейшее развитие в утвержденном на заседании Пленума ВАС РФ 04.04.2014 Постановлении № 22 «О некоторых вопросах присуждения взыскателю денежных средств за неисполнение судебного акта», согласно которому суд по требованию истца, заявляемому в исковом заявлении либо в ходатайстве по ходу рассмотрения дела, в резолютивной части решения, обязывающего ответчика совершить определенные действия или воздержаться от совершения определенного действия, вправе присудить денежные средства на случай неисполнения такого решения.

С учетом вышеизложенного, суд удовлетворяет заявление Истцов о присуждении компенсации в случае неисполнения вступившего в законную силу решения Арбитражного суда г. Москвы по настоящему делу.

Определяя размер компенсации в случае неисполнения судебного акта, суд принимает во внимание длительный период удержания ответчиками 7 Книг из «Коллекции Шнеерсона», то обстоятельство, что Соединенные Штаты Америки являются одним из крупнейших государств мира, бюджет США и финансовые возможности страны значительно превышают бюджеты и финансовый потенциал большинства наиболее развитых государств мира, в связи с чем суд находит обоснованным требование Истцов о компенсации за неисполнение судебного акта в размере 50 000,00 долларов США за каждый день просрочки.

Руководствуясь ст.ст. ст.ст.64, 65, 104, 110, 123, 124, 167-170, 171, 176, 180, 181, 247, 248, 251 АПК РФ суд

РЕШИЛ:

Обязать Библиотеку Конгресса Соединенных Штатов Америки и Соединенные Штаты Америки возвратить Федеральному государственному бюджетному учреждению «Российская государственная библиотека» следующие книги:

1 Луццато, Моше Хаим. Месилат иешарим. - Вильна: Ромм, 1860. 126 л. Приплет - 2 книги: - Ибн Габай, Меир. Толаат Яаков. Львов, 1858. 90 с.; - Каган, Шабтай бен Меир. Друш якар. - Львов, 1861. 8 л. (Luzzato, M. Sefer Mesillat Yesharim (Vilna, I860)).

2 Элизер бен Шмуэл из Меца. - Иреим. - Вильна: Ромм, 1902. 86, 16, 544 с. (Eliezer ben Samuel. Sefer Year'im (Vilna, 1902)).
3 Лампронти, Ицхак бен Шмуэль. Пахад Ицхак. - Лык: Мекице нирдамим, 1864. 8, 240 с. (Lampronti, Y. Pahad Yitshak (Lyck, 1864)).
4 Софер, Моше. Хатам Софер. - Пресбург: тип. Зибера, 1865. 95, 3, 87 л. (Sofer. M. Sefer Hatam Sofer (Pressburg, 1865)).
5 Ибн Хабиб, Яков бен Шломо. Эйн Яков. - Варшава: тип. Алапина, 1886, Ч. 3. 490 с. (Ibn Habib, J. 'Ein Ya'kov (Warsaw, 1886)).
6 Моше бен Шаймон. Сефер га Мицвот. - Варшава: тип. Монка, 1891. 4, 84, 56 л. (Moses ben Maimon. Sefer ha-Mitsvot (Warsaw, 1891)).
7 Азулаи, Аврагам бен Мордехай. Ор га хама. - Иерусалим: тип. Соломна, 1879. 209 л. (Azulai, A. Sefer Or ha-Hamah (Jerusalem, 1879)).

Присудить ФГБУ «Российская государственная библиотека» и Министерству культуры РФ денежные средства в размере 50 000 долларов США за каждый день, в случае неисполнения окончательного судебного акта по настоящему делу, начиная со дня, следующего за днем вступления в законную силу.

Взыскать с Библиотеки Конгресса Соединенных Штатов Америки и Соединенных Штатов Америки в пользу ФГБУ «Российская государственная библиотека» 4000,00 руб. расходов по оплате госпошлины

Настоящее решение вступает в законную силу, если не будет обжаловано в Девятый арбитражный апелляционный суд в течение месяца с момента принятия.

Судья **О.И. Шведко**

Add. 12

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COMMERCIAL COURT OF MOSCOW
17 Bolshaya Tulskaya St., Moscow, 115191
http://www.msk.arbitr.ru

In the name of the Russian Federation
DECISION

Moscow 29 May 2014 **Case No. A40-82596/13**

Operative part of the decision is announced on 22.05.2014.

The full text of the decision is prepared on 29.05.2014.

Commercial Court consisting of: presiding judge O.I. Shvedko (judge code **69-560**) the court transcripts recorded by Secretary K. S. Dzhagacpanyan upon conducting an open court session in regards to the case **involving a lawsuit** filed by the Federal State Budget-Funded Agency "Russian State Library" (OGRN 1037739390809, INN 7704097560, address: 3/5 Vozdvizhenka St., Moscow, 119019, date of registration: 06.01.1994)

The Ministry of Cultural Affairs of the Russian Federation (OGRN 1087746878295, INN 7705851331, address: 7 Kitaigorodsky Proezd, Bldg. 2, Moscow 109074, date of registration: 25.07.2008)

Against the Library of the United States Congress (Library of the United States Congress) (address: 101 Independence Ave SE, Washington, DC 20540, USA)

The United States of America (address: the White House, 1600 Pennsylvania Avenue NW, Washington, DC 20500, USA)

Pertaining to the defendants' obligation to return the books to the Federal State Budget-Funded Agency "Russian State Library", on awarding monetary compensation in case of non-fulfillment of court order

Intervener with one of the litigants: non-profit organization Agudas Chassidei Chabad of United States, address: 788 Eastern Parkway, Brooklyn, NY 11212-3409, USA

With courtroom participation of:

from FBFA RSL: A.A. Evdokimov, power of attorney dated 18.06.2013 No. 273/77, E.R. Zhilin, power of attorney dated 18.06.2013 No. 273/77;

Add. 13

From the Ministry of Cultural Affairs of the Russian Federation: N.E. Safonova, power of attorney dated 24.12.213 No. 118-43 D, M.Y. Chugunov, power of attorney dated 09.12.2013 No. 104-43 D;

From the Prosecutor's Office of Moscow: N.V. Epifantseva, presented an official identification No. 156347;

The representatives of the following agencies did not appear in court: Library of the United States Congress, the United States of America, non-profit organization Agudas Chassidei Chabad of the United States;

Federal State Budget-Funded Agency "Russian State Library" (hereinafter referred to as RSL, Plaintiff 1) and the Ministry of Cultural Affairs of the Russian Federation (hereinafter referred to as Ministry, Plaintiff 2) appealed to the Commercial Court of Moscow with the claim against the Library of the United States Congress and the United States of America, and petitioned the Court to order the defendants to return the following books to FSBA "Russian State Library":

1 Luzzatto, Moshe Chaim. Mesillat Yesharim. - Vilna: Romm, 1860 p. Binding - 2 books: Ibn Gabbai, Meir. Tolaat Yaakov. Lviv, 1858 p.; - Kagan, Shabtai ben Meir. Drush yakar. -Lviv, 1861. 8 p. (Luzzato, M. Sefer Mesillat Yesharim (Vilna, I860)).

2 Eliezer ben Samuel. Sefer Year'im (Vilna: Romm, 1902. 86, 16, 544 p. (Eliezer ben Samuel. Sefer Year'im (Vilna, 1902)).

3 Lampronti, y. Pahad Yitshak. Lusk: Mekice nirdamim, 1864. 8, 240 p. (Lampronti, y. Pahad Yitshak (Lusk, 1864)).

4 Sofer, Moshe. Hatam Sofer. -Pressburg: Zibera, 1865. 95, 3, 87 p. (Sofer. M: Sefer Hatam Sofer (Pressburg, 1865)).

5 Ibn Habib, J. 'Ein Ya'kov. - Warsaw: Alapina, 1886, 490 p (Ibn Habib, J. 'Ein Ya'kov (Warsaw, 1886)).

6 Moses Ben Maimon. Sefer ha-Mitsvot. - Warsaw: Monka, 1891. 4, 84, 56 p.: (Moses ben Maimon. Sefer ha-Mitsvot (Warsaw, 1891)).

7 Azulai, Avragam Ben Mordecai. Or ha-Hamah. - Jerusalem: Solomna, 1879. 209 p. (Azulai, a. Sefer Or ha-Hamah (Jerusalem, 1879)).

At the court hearing on 14 April 2014, Plaintiffs ascertained the stated claims and filed the request to award the FSBA "Russian State Library" and the Ministry of Cultural Affairs of the Russian Federation the funds in the amount of $50,000 USD for each day of non-fulfillment of the court order that became legal and binding on the merits of the dispute in question, shall the stated claims be satisfied, as compensation for the violation of the reasonable duration of proceedings.

The present request will be reviewed by the Court in the course of the dispute resolution on the merits of the case.

In accordance with Article 248 Commercial Procedural Code of the Russian Federation (c. 1, p. 1), the exclusive jurisdiction of the commercial courts of the Russian Federation in cases involving foreign nationals pertains to cases on disputes concerning state property of the Russian Federation.

Since the subject of the dispute in question are the Books that are considered the property of the Russian Federation, the dispute in question shall be deemed the exclusive jurisdiction of commercial courts.

According to part 2 of article 3 of the Arbitration Procedure Code of the Russian Federation, legal proceedings in commercial courts are determined by the Constitution of the Russian Federation, Federal Constitutional Law "On the Judicial System of the Russian Federation" and Federal Constitutional Law "On Commercial Courts in the Russian Federation", Arbitration Procedure Code of the Russian Federation, and other federal laws adopted in compliance with the aforementioned laws.

The representatives of the following agencies did not appear in court:

- Library of the United States Congress - were notified of the date and time of the hearing;

- United States of America - were notified of the date and time of the hearing;

- Non-profit organization Agudas Chassidei Chabad of the United States - were notified of the date and time of the hearing.

Pursuant to provisions of articles 121,123, 253 of Commercial Procedural Code of the Russian Federation, as well as taking into account the opinions of the representatives of the Plaintiffs and the Prosecutor of Moscow, the Court finds it possible to review the present dispute in the absence of the Defendants, as well as the intervener with one of the litigants, who were notified accordingly of the date and time of the hearing.

When identifying the jurisdiction of the dispute to the Commercial Court of Moscow, Plaintiffs pointed out that the United States of America have fixed property located in Moscow, and therefore, also taking into account that the legal relations in dispute occurred in the Russian Federation in the city of Moscow, the Court, in accordance with c. 1, 3, p.1, of article 247 of Commercial Procedural Code of the Russian Federation, rules that the dispute falls within the jurisdiction of the Commercial Court of Moscow.

The representatives of Plaintiffs fully supported the stated claims and provided proof of the fact that the copy of preference to award monetary compensation in case of failure to fulfill the court decision was sent to the Defendants and the intervener with one of the litigants.

The representative of the Prosecutor of Moscow supported the position of Plaintiffs.

Having reviewed the materials of the case and listened to the arguments of Plaintiff and taken into consideration the opinion of the representative of Prosecutor of Moscow, the Court established the following.

In 1994, the Russian State Library (Plaintiff 1) received seven requests from the Library of the United States Congress dated 14.01.1994 and documented in the International Library Card forms for the use of the following books for a period of 60 days:

1 Luzzatto, Moshe Chaim. Mesillat Yesharim. - Vilna: Romm, 1860 p. Binding - 2 books: Ibn Gabbai, Meir. Tolaat Yaakov. Lviv, 1858 p.; - Kagan, Shabtai

ben Meir. Drush yakar. -Lviv, 1861. 8 p. (Luzzato, M. Sefer Mesillat Yesharim (Vilna, I860)).

2 Eliezer ben Samuel. Sefer Year'im (Vilna: Romm, 1902. 86, 16, 544 p. (Eliezer ben Samuel. Sefer Year'im (Vilna, 1902)).

3 Lampronti, y. Pahad Yitshak. Lusk: Mekice nirdamim, 1864. 8, 240 p. (Lampronti, y. Pahad Yitshak (Lusk, 1864)).

4 Sofer, Moshe. Hatam Sofer. -Pressburg: Zibera, 1865. 95, 3, 87 p. (Sofer. M: Sefer Hatam Sofer (Pressburg, 1865)).

5 Ibn Habib, J. ‘Ein Ya’kov. - Warsaw: Alapina, 1886, 490 p (Ibn Habib, J. 'Ein Ya'kov (Warsaw, 1886)).

6 Moses Ben Maimon. Sefer ha-Mitsvot. - Warsaw: Monka, 1891. 4, 84, 56 p.: (Moses ben Maimon. Sefer ha-Mitsvot (Warsaw, 1891)).

7 Azulai, Avragam Ben Mordecai. Or ha-Hamah. - Jerusalem: Solomna, 1879. 209 p. (Azulai, a. Sefer Or ha-Hamah (Jerusalem, 1879)).

These books are a part of the Schneerson Collection, which is considered a cultural artifact; the Books have a special value and are owned by the Russian Federation, since the Federal State Budget-Funded Agency “Russian State Library” is the National Library of the Russian Federation, established in accordance with the Decree No. 38 of the President of the Russian Federation of 1992 “On the Establishment of the Russian State Library" at the premises of the V.I. Lenin State Library of the USSR.

In accordance with c. 4 of chapter I of the Statute of the RSL, the Library is owned by the Russian Federation, and since the moment of its establishment up until the present moment, the Library has been under the jurisdiction of the Ministry of Cultural Affairs of the Russian Federation.

Plaintiff 1 decided to fulfill the requests of the Congress of the United States.

As noted on the forms of the stated requirements in "Date Received" column of the Receiving Library section and supported by the notice of receipt of Books dated 15.01.1995 and available in the case files, the Books were handed over to the American representatives and registered by the Library of Congress on 19.01.1994.

Taking into account the fact that the books were handed over on the terms of the International Library Card, the RSL and the Library of Congress were operating on the terms of gratuitous use of the Books that were the property of the RSL.

In order to conclude the contract on gratuitous use of the Books, the Library of Congress completed and forwarded to the RSL the forms requesting the books, Plaintiff 1 registered and accepted the requests, and both parties to the contract subsequently handed over and accepted the requested Books.

After the 60-day deadline, which was originally provided for the gratuitous use of the Books to the Library of Congress, they were not returned to Plaintiff 1.

Due to the fact that the books were in the possession of the Library of Congress upon expiration of the period of gratuitous use thereof, in accordance with the provisions of the existing legislation, the gratuitous use contract was extended for an indefinite period of time.

On 13.03.2013, Plaintiff 1 forwarded a letter to the Library of Congress terminating the contract on gratuitous use of the Books, and the Library of Congress was under an obligation to return the 7 books from the Schneerson Collection that had been in its possession for a long period of time; however, the Library of Congress has not returned the Books as of yet.

The above-described circumstances constituted the ground for the Federal State Budget-Funded Agency "Russian State Library" and the Ministry of Cultural Affairs of the Russian Federation to file claims at the Moscow Commercial Court for judgment for specific performance of an obligation in the form of returning the 7 Books from the Schneerson Collection in connection with the termination of the contract on gratuitous use of the Books that was sent to the Library of the United States Congress and the United States of America

In order to implement the principle of deliverability of judicial acts as one of the fundamental principles of court proceedings and taking into account the long-term failure of the Defendants to return the Books, the Plaintiffs also petitioned for the FSBA "Russian State Library" and the Ministry of Cultural Affairs of the Russian Federation to be awarded the funds in the amount of $50,000 USD for each day of non-fulfillment of the Court decision that had entered into force, shall the stated claims be satisfied, as compensation for the violation of the reasonable duration of court proceedings.

Pending claims are brought by Plaintiffs against the two Defendants - the Library of the United States Congress and the United States of America, which are deemed foreign persons. In order to establish the procedural status of the Defendants, the Court proceeds from the following.

According to articles 1202 and 1203 of the Civil Code of the Russian Federation, personal law of foreign legal persons, as well as organizations that are not recognized as legal persons under foreign law, is the law of the country, in which the respective legal person or respective organization was established. Pursuant to the specified provisions, personal law, among other things, defines the status of a foreign person or organization that is not a legal person under foreign law.

Pursuant to the Legal Memorandum of the Federal State Budget-Funded Agency "Institute of State and Law of the Russian Academy of Sciences" that is available in the case files, the Library of the United States Congress was established in the United States of America in 1800, which allows to conclude that the personal law of the Library is the law of the United States of America. The Library of the United States Congress was established as a repository for materials necessary for the US Government and, in particular, for the President of the United States, Vice-President of the United States, the Senate of the United States, and the House of Representatives - the Congress of the United States.

According to the Constitution of the United States, on the federal level, all state authority in the United States belongs to the US Government.

US Government is divided into legislative, executive and judicial branches of the government. The Library of the United States Congress reports directly to the United States Congress that exercises legislative power.

Administrative Procedure Act is one of the central sources of administrative law of the United States of America. The Act is included in title 5 of the Code of the United States of America, which represents a codification instrument drawn up by one of the bodies of the United States Congress in order to facilitate the search and use of the existing legislation. United States Code systematizes regulations in accordance with branch, sub-branch, and institutional characteristics. The text of the United States Code in accordance with §204 of title I of the Code of the United States, is the official text of the legislation adopted by the Congress of the United States.

Title 2 of the Code of the United States is entitled "Congress". This title includes chapter 5, which carries the name "Library of Congress" (Chapter 5 - Library of Congress (§§ 131-185).

In accordance with § 116 of the Code of the United States, Library of Congress is the custodian of official texts of the laws of the United States. Section 407 of the Code of the United States establishes that the Library of Congress also performs a number of depositary functions in the field of copyright, as well as other state functions. Pursuant to the aforementioned facts, the Library of the United States Congress as set forth in their functions and organizational nature conforms to the definition of the United States Federal Agency in compliance with the above-mentioned § 551 of title 5 of the Code of the United States.

According to the official website of the US Government, the Library of the United States Congress is a subsidiary state body in relation to the United States Congress in the framework of judicial establishment. This fact is also confirmed by the United States Library of Congress website that states that the Library is the "research division of the Congress".

Thus, comprehensive interpretation of the current legislation of the United States of America, as well as of the official information published by the US Government and the Library of the United States Congress, suggests that the Library of the United States Congress is a Federal Government agency of the United States that is related to the legislative branch, and contracts concluded by a Federal Agency directly create obligations for the US Government.

This conclusion is also confirmed by article 4 of Chapter 11 of Resolution 56/83 on the responsibility of states for international wrongful acts, adopted by the 56th session of the UN General Assembly held on 28.01.2001, according to which, the conduct of any state organ shall be considered an act of that state under international law regardless of whether the body exercises legislative, executive, judicial or any other functions, regardless of the position it holds in the organization of the state and regardless of whether it is a body of the central government or of a territorial unit of the state.

Pursuant to p. 1 article 253 of the Arbitration Procedural Code of the Russian Federation, cases involving foreign individuals shall be considered by the Commercial Court of the Russian Federation with the peculiarities set forth by chapter 33 of Commercial Procedural Code of the Russian Federation, unless an international contract of the Russian Federation provides otherwise.

Thus, taking into account the legal structures of the legislation of the United States of America, the Court finds that the claims were legitimately, jointly and severally filed by Plaintiffs against the Library of the United States Congress and the United States of America, as a state.

In accordance with the provisions of article 251 of the Commercial Procedural Code of the Russian Federation, a foreign state acting as power holder, has judicial immunity against lawsuits filed in commercial court in the Russian Federation, against being subpoenaed as a third person, against seizure of property belonging to the foreign state and located in the Russian Federation, and against the Court measures in regards to the foreign state aimed at satisfying claims and property interests. Foreclosure on the property by way of compulsory execution of the judicial act of the commercial court is allowed only with the agreement of the competent authorities of the state concerned, unless otherwise provided by an international agreement of the Russian Federation or by Federal Law.

According to the concept of restrictive immunity, a foreign state, its bodies, and their property enjoy immunity only when the state exercises sovereign functions, i.e. jure imperi actions. If the state is engaged in economic activity (concludes concession and other agreements, etc., and acts as party to civil transactions), i.e. the jure gestionis actions, it then does not enjoy immunity.

In considering this claim, the Court proceeds from the concept of functional immunity, since the dispute does not affect the public functions of the United States of America as a holder of public power, the United States do not act as a sovereign, but as a party to civil transactions on equal bases with other subjects of civil law.

Determining the law applicable to the relations of the parties, the Court shall take into account the following circumstances:

- the Library of Congress sent written forms requesting the Books;

- the requests were registered and accepted by Plaintiff 1;

- the Books were handed over by the RSL to the Library of Congress for gratuitous use.

Under article 166 of the Basic Civil Legislation of the Union of the Soviet Socialist Republics (approved by the Decree of the Supreme Soviet of the USSR of 31.05.1991 No. 2211-1 to be applied to civil-legal relations arisen in 1994 (according to c.1 of the Decree of the Supreme Council of the Russian Federation of 14.07.1992 No. 3301-1 "On Regulating Civil Relations in the Period of Economic Reform"), the law, applicable to the obligations in connection with the transfer of assets for use, is the law of the country where the lender is located.

In the present case, the lender is the RSL that is located in Moscow.

Based on the foregoing, in the absence of the International Library Card procedure for determining the law governing the emerged legal relationship, based on the legislation in force during the time of the transfer of the Books to the Library of the United States Congress, the location of the transfer of the Books, the Court finds that the law applicable in the present case

is the Russian law.

According to article 8 of the Recommendations of the International Federation of Library Associations and Institutions (IFLA), “International Mutual Utilization of Resources and Delivery of Documents. Principles and Guidelines for Review", adopted in 1954 and defining the rules for the provision of books on the terms of international library card, the decision on the payment for the services rendered will

be taken individually by the library. The Russian State Library, as well as the Library of Congress are members of the Federation.

According to c. 9 of the International Library Card, approved by the Order of the Minister of Cultural Affairs of the USSR dated 31.10.1955 No. 690, provision of books on the terms of International Library Card is implemented free of charge.

Articles 7, 23, 35 of the Librarianship Act of the USSR, approved by Decree of the Presidium of the Supreme Soviet of the USSR of 13.03.1984 No. 10926-X that was in effect at the time of the transfer of the Books by the RSL to the Library of Congress, established the right to gratuitous use of library books, acceptance of books for temporary use, as well as participation of libraries in the activities of relevant international organizations and establishing international connections with foreign libraries.

In such circumstances, the Court finds that the international regulations that were governing the use of the book by the libraries' funds in 1994 on the territory of the Russian Federation, as well as the legislation of the USSR, to be applied to the legal relations in force pursuant to c. 2 of the Decree of the Supreme Soviet of the RSFSR dated 12.12.1991 No. 2014-1 "On Ratification of Agreement on the Establishment of the Commonwealth of Independent States), established that, as a general rule, the use of books is gratuitous.

In compliance with the provisions of article 342 of the Civil Code of the RSFSR, that was in force at the time of the transfer of the Books by Plaintiff 1 to Defendant 1, in accordance with the agreement on gratuitous use of property, one party undertakes to transfer or transfers the property for gratuitous temporary use to another party, and the latter party agrees to return the same property.

The rules of articles 276, 279, 281 (part one), 283, 285, 291-293 of the current Code apply respectively to the agreement on gratuitous use of property.

In addition, according to article 291 of the Civil Code of the RSFSR, upon termination of the loan contract, the lessee was obliged to return the property to the lessor in the same condition that the lessee had received the property, subject to normal wear and tear, or in the condition specified in the contract. As at the end of the 60-day period of the transfer of the Books on the terms on the International Library Card, Defendant 1 failed to return to Plaintiff 1, the Books received pursuant to notice of receipt of 15.01.1994, and the RSL failed to object to that, in accordance with Article 279 of the Civil Code of the RSFSR, applicable to the relations of the contract on gratuitous use in compliance with the rules of Article 342 of the Civil Code of the RSFSR, the contract is considered to be renewed indefinitely.

In accordance with Article 279 of the Civil Code of the RSFSR, each party to the contract on gratuitous use that is renewed indefinitely shall have the right to terminate the contract at any time. According to Articles 291 and 342 of the CC of the RSFSR, upon termination of the contract on gratuitous use of property, the person that received the property in accordance with this contract, shall be obliged to return this property. Similar provisions exist in Articles 689 and 699 of the current Civil Code of the Russian Federation.

On 13.03.2013, the Russian State Library forwarded a letter to the Library of Congress terminating the contract on gratuitous use of the Books, and the Library of Congress was under an obligation to return the 7 books from the Schneerson Collection, however, the Library of Congress has not returned the Books as of yet.

According to Articles 309 and 310 of the Civil Code of the Russian Federation, the obligations must be performed properly in accordance with the terms of the obligations and the requirements of the law, other legal acts, and in the absence of such conditions and requirements - in accordance with customary business practices or other usual requirements.

Unilateral refusal to perform obligations and unilateral change of their conditions are not allowed, except in the cases prescribed by law. Unilateral refusal to perform an obligation connected with conduct by its parties of entrepreneurial activity, and unilateral change to the conditions of this obligation are also allowed in the cases provided for in the contract, unless otherwise results from the law or the nature of the obligation.

In accordance with articles 322 and 323 of the Civil Code of the Russian Federation, joint and several responsibility (liability) or a joint and several claim arises, if the solidarity, obligations or requirements are provided for by the contract or established by law, in particular when the subject of the obligation is indivisible.

In case of a joint and several obligation of the debtor, the creditor reserves the right to demand the fulfillment of the obligation from all debtors jointly and by any one of them separately, pertaining to the entire debt or a part of it.

Creditor that fails to receive full satisfaction from one of the joint and several debtors, reserves the right to demand what was not received from the other joint and several debtors.

Joint and several debtors shall remain obligated until the obligation is not fulfilled in full.

As stated above, the Library of the United States Congress is a Federal Agency of the US Government that is related to the legislative branch, and contracts concluded by a Federal Agency directly create obligations for the US Government.

In such circumstances, the Court finds the joint and several claims filed by the Federal State Budget-Funded Agency “Russian State Library” and the Ministry of Cultural Affairs of the Russian Federation against the Library of the United States Congress and the United States of America for return to the Federal State Budget-Funded Agency "The Russian State Library” of the 7 books from the Schneerson Collection justified and subject to satisfaction in full.

In accordance with Article 6.1 of the Arbitration Procedure Code of the Russian Federation, one of the principles of judicial proceedings in commercial courts is the principle of exercising a judicial act within a reasonable time.

This regulation is based on the provisions of c. 1 art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (which is an integral part of the legal system of Russia pursuant to p.4 of Article 15 of the Constitution of the Russian Federation) that sets forth the right of everyone to a fair and public hearing of a case within a reasonable time by an independent and impartial court established in compliance with law.

The Constitutional Court of the Russian Federation and the European Court of Human Rights acts have on several occasions drawn attention to the need to establish adequate guarantees for the enforcement of judicial acts, since, “if a national legal

system allows for a final and binding judicial decision to remain unsatisfied, “the right to a court hearing" becomes illusory. The European Court of Human Rights also recognizes that a breach of this right may take the form of a delay in enforcing judicial acts. In such cases, as indicated by the European Court of Human Rights, as well as by the Constitutional Court of the Russian Federation and the Supreme Commercial Court of the Russian Federation, the person that suffered damages due to non-performance or late performance of a judicial act should be awarded a fair compensation.

This approach was confirmed and further developed by the approved at the meeting of the Plenary Assembly of the Supreme Commercial Court of the Russian Federation of 04.04.2014 Decree No. 22 “On Some Questions Regarding Awarding Plaintiffs with Monetary Compensation for Failure to Perform a Judicial Act”, which allows the Court at the request of the plaintiff that was stated in the claim or in the request for case review, in the operative part of the decision, which obliges the defendant to exercise certain actions or refrain from exercising certain actions, to award the monetary compensation, should the defendant fail to exercise such decision.

In the light of the foregoing, the Court shall grant the Plaintiffs' claim for compensation in the event of non-fulfillment of an enforceable decision of the Commercial Court of Moscow in the present case.

When determining the amount of compensation in case of non-fulfillment of the judicial act, the Court takes into account a long retention period by the defendants of the 7 Books from the Schneerson Collection, the fact that the United States of America is one of the largest countries of the world, the budget of the United States of America and the financial capacity of the country greatly exceed the budgets and financial potential of the most developed countries in the world, and therefore the Court finds reasonable the Plaintiffs' demand for compensation for failure to comply with the judicial act in the amount of $ 50,000.00 USD for each day of delay.

Guided by Articles 64, 65, 104, 110, 123, 124, 167-170, 171, 176, 180, 181, 247, 248 and 251, the Commercial procedural Code, the Court

HEREBY ORDERS:

To oblige the Library of the United States Congress and the United States of America to return the following books to the Federal State Budget-Funded Agency "Russian State Library":

1 Luzzatto, Moshe Chaim. Mesillat Yesharim. - Vilna: Romm, 1860 p. Binding - 2 books: Ibn Gabbai, Meir. Tolaat Yaakov. Lviv, 1858 p.; - Kagan, Shabtai ben Meir. Drush yakar. -Lviv, 1861. 8 p. (Luzzato, M. Sefer Mesillat Yesharim (Vilna, I860)).

2 Eliezer ben Samuel. Sefer Year'im (Vilna: Romm, 1902. 86, 16, 544 p. (Eliezer ben Samuel. Sefer Year'im (Vilna, 1902)).

3 Lampronti, y. Pahad Yitshak. Lusk: Mekice nirdamim, 1864. 8, 240 p. (Lampronti, y. Pahad Yitshak (Lusk, 1864)).

4 Sofer, Moshe. Hatam Sofer. -Pressburg: Zibera, 1865. 95, 3, 87 p. (Sofer. M: Sefer Hatam Sofer (Pressburg, 1865)).

5 Ibn Habib, J. ‘Ein Ya’kov. - Warsaw: Alapina, 1886, 490 p (Ibn Habib, J. 'Ein Ya'kov (Warsaw, 1886)).

6 Moses Ben Maimon. Sefer ha-Mitsvot. - Warsaw: Monka, 1891. 4, 84, 56 p.: (Moses ben Maimon. Sefer ha-Mitsvot (Warsaw, 1891)).

7 Azulai, Avragam Ben Mordecai. Or ha-Hamah. - Jerusalem: Solomna, 1879. 209 p. (Azulai, a. Sefer Or ha-Hamah (Jerusalem, 1879)).

To award the FSBA “Russian State Library” and the Ministry of Cultural Affairs of the Russian Federation the funds in the amount of $ 50,000 USD for each day of delay, in the event of non-fulfillment of the final judicial act pertaining to the present case, starting on the day following the date of entry into force.

To charge the Library of the United States Congress and the United States of America in favor of the FSBA “Russian State Library” 4000.00 RUB in costs for payment of the state fee.

This decision shall enter into force unless it is challenged in the Ninth Commercial Court of Appeals within one month from the date of adoption.

Judge **O.I Shvedko**

Add. 23

Gloria Parra Menacho
Procuradora
La Plaza 170 1º C
11510 Puerto Real (Cádiz)
Tfno. 956 835952
Fax: 956 475312

FORMULARIO DE TRANSMISIÓN POR MAIL

D/Dª.EDUARDO TRIGO
Abogado/a

Adjunto le remito el último trámite procesal en el asunto abajo referenciado.

Cliente:	**GOBIERNO ESTADOS UNIDOS DE AMERICA**
Contrario:	**MONTASA-MONTAJES E INSTALACIONES**
Juicio:	**MENOR CUANTIA177/1997**
Juzgado:	**I INSTANCIA Nº 1 ROTA**
M/Ref.:	**C 2003/76**
S/Ref.:	

Ultimo Tramite:

589.3 DECRETO IMPOSICION MULTAS

Un cordial saludo.

Fecha de notificación: 23-05-2014

JUZGADO DE PRIMERA INSTANCIA E INSTRUCCIÓN NUMERO 1 DE ROTA

C/ Celestino Mutis, 24
Tlf.: 671.599.911 y 671.598.639. Fax: 956.243.158
NIG: 1103041C19971000006
Procedimiento: Menor Cuantía 177/1997. Negociado: PV
Sobre: RECLAMACIÓN CANTIDAD
De: D/ña. MONTASA
Procurador/a Sr./a.: JAIME TERRY MARTINEZ
Letrado/a Sr./a.: FRANCISCO MANUEL DE LA TORRE LOPEZ
Contra D/ña.: GOBIERNO DE ESTADOS UNIDOS
Procurador/a Sr./a.: GLORIA PARRA MENACHO
Letrado/a Sr./a.: EDUARDO TRIGO SIERRA

DECRETO

Secretario/a Judicial, Sr./a.: MARÍA ELENA MARTÍNEZ PÉREZ
En ROTA, a veintidós de mayo de dos mil catorce.

ANTECEDENTES DE HECHO

Primero.- En la presente ejecución se acordó requerir al/los ejecutado/s GOBIERNO DE ESTADOS UNIDOS, para que manifestara/n relacionadamente bienes y derechos suficientes para cubrir la cuantía de la ejecución, con expresión, en su caso, de cargas y gravámenes, así como, en el caso de inmuebles, si están ocupados, por qué personas y con qué título, con el apercibimiento previsto en el artículo 589.2 de la L.E.C.

Segundo.- Que ha transcurrido el término otorgado al/los ejecutado/s sin que hayan realizado manifestación alguna.

Tercero.- Asimismo, la parte ejecutante ha solicitado la imposición de multas coercitivas y la remisión de testimonio de las actuaciones al Ministerio Fiscal para que informe sobre la posible comisión de un delito de desobediencia grave a la autoridad y la incoación del correspondiente procedimiento penal contra el ejecutado.

FUNDAMENTOS DE DERECHO

Único.- Según dispone el artículo 589 de la L.E.C., en su párrafo 3, el Secretario Judicial podrá también, mediante decreto, imponer multas coercitivas periódicas al ejecutado que no respondiere debidamente al requerimiento a que se refiere el apartado 2 del mismo precepto.
Para fijar la cuantía de las multas, se tendrá en cuenta la cantidad por la que se haya despachado ejecución, la resistencia a la presentación de la relación de bienes y la capacidad económica del requerido, pudiendo modificarse o dejarse sin efecto el apremio económico en atención a la ulterior conducta del requerido y a las alegaciones que pudiere efectuar para justificarse.

PARTE DISPOSITIVA

Acuerdo:
Imponer a GOBIERNO DE ESTADOS UNIDOS multas coercitivas periódica, en cuantía de DIEZ MIL EUROS MENSUALES, hasta que pague al ejecutante las cantidades adeudadas, los gastos y las costas.
Dar traslado de todo lo actuado, mediante testimonio, al Ministerio Fiscal, para que, en término de 20 días, se pronuncie sobre la posible comisión de un delito de desobediencia grave a la autoridad, imputable al ejecutante.
MODO DE IMPUGNACIÓN: contra esta resolución cabe interponer **recurso directo de revisión**, que deberá interponerse en el plazo de cinco días mediante escrito en el que deberá citarse la infracción en que la resolución hubiere incurrido, (art. 454 bis LEC). El recurso deberá interponerse por escrito en el plazo de **CINCO DÍAS** hábiles contados desde el siguiente de la notificación, con expresión de la infracción cometida a juicio del recurrente y, deberá constituir y acreditar al tiempo de la interposición el DEPÓSITO para recurrir de VEINTICINCO EUROS, mediante su ingreso en la Cuenta de Consignaciones nº 1281 0000 00 05 0177 97 del JUZGADO DE PRIMERA INSTANCIA E INSTRUCCIÓN NUMERO 1 DE ROTA, salvo que el recurrente sea: beneficiario de justicia gratuita, el Ministerio Fiscal, el Estado, Comunidad Autónoma, entidad local u organismo autónomo dependiente. Sin cuyos requisitos NO SE ADMITIRÁ A TRÁMITE el recurso, y todo ello conforme a lo dispuesto en los arts. 451, 452 y concordantes LEC y la Disposición Adicional Decimoquinta de la LOPJ.

Así lo acuerdo y firmo.

EL/LA SECRETARIO JUDICIAL

"En relación a los datos de carácter personal, sobre su confidencialidad y prohibición de transmisión o comunicación por cualquier medio o procedimiento, deberán ser tratados exclusivamente para los fines propios de la Administración de Justicia (ex Ley Orgánica 15/99, de 13 de diciembre, de protección de datos de carácter personal)".

FIRST INSTANCE COURT NO. 1
OF ROTA

COURT ORDER

Court clerk: Mrs. MARÍA ELENA MARTÍNEZ PÉREZ

In ROTA, on 22 May 2014.

FACTUAL BACKGROUND

First.- In these proceedings, under the penalties prescribed by article 589.2 of Spanish Procedural Law, the US Government was required to provide with (i) a list of enough assets and rights in order to cover the amount requested by the claimant; (ii) the burden and encumbrances of the abovementioned assets and rights; and (iii) , and in the event of real estate assets, if those assets were leased to third persons, as well as the identity of such third persons.

Second.- The term given to the US Government has elapsed and they have not provide with any information as required.

Third.- The claimant has requested to the Court to impose periodic penalty payment to the US Government as well as the beginning of criminal proceedings against the US Government.

LEGAL REASONING

Sole.- According to by article 589.3 of Spanish Procedural Law, the Court clerk shall is entitled to impose periodic penalty payment to the defendant in the case that the defendant does not answer to the requirement regulated in article 589.2 of Spanish Procedural Law.

With the aim to fix the amount of the periodic penalty payment, the Court clerk shall take into account the amount requested by the claimant, the resistance from the defendant to inform about its assets and the defendant's financial status. The periodic penalty payment already imposed could be amended or removed pursuant further behaviour of the defendant as well as its allegations in order to justify its behaviour.

SUBSTANTIVE ORDER

I order to impose periodic penalty payment in the amount of EUR 10,000 per month to the US Government until the outstanding amounts, costs and expenses are paid by the US Government.

I also order to inform to the Prosecutor so as to him to pronounce whether the feasible commission by the US Government of an offence of gross disobedience to Judge's authority.

MEANS OF CHALLENGING: A review appeal could be submitted against this Court order within the five days following its notification and the review appeal has to express the infringement incurred by the Court clerk in this Court Order. The appellant must deposit the amount of EUR 25 in the First Instance Court No. 1 of Rota's bank account No. 1281 000000 05 0177 97, unless the appellant is immune according to Spanish law. According to articles 451 and following of Spanish Procedural Law, the infringement of any of these requirements shall imply that the review appeal shall not be admitted.

I so declare, order and sign on the date hereof.

THE COURT CLERK

Procedimiento: Menor Cuantía 177/1997

AL JUZGADO DE 1ª INSTANCIA E INSTRUCCIÓN Nº 1 DE ROTA

DÑA. GLORIA PARRA MENACHO, Procuradora de los Tribunales y de **LOS ESTADOS UNIDOS DE AMÉRICA**, cuya representación tengo debidamente acreditada en los presentes autos de juicio de menor cuantía 177/1997 al margen referenciados, ante el Juzgado comparezco y, como mejor proceda en Derecho, **DIGO:**

I. Que, por Decreto de fecha 22 de mayo de 2014, notificado el día 23 del mismo mes y año, se impone a mi mandante, el Gobierno de los ESTADOS UNIDOS DE AMÉRICA, "*multas coercitivas periódicas, en cuantía de DIEZ MIL EUROS MENSUALES, hasta que pague el ejecutante las cantidades adeudadas, los gastos y costas*". Asimismo, se acuerda "*dar traslado de todo lo actuado, mediante testimonio, al Ministerio Fiscal, para que, en término de 20 días, se pronuncie sobre la posible comisión de un delito de desobediencia grave a la autoridad, imputable al ejecutante.*"

II. Que, con fecha 26 de mayo de 2014, se le notificó a esta parte el Decreto de fecha 23 de mayo de 2014, por el que se aclaraba la parte dispositiva del Decreto de fecha 22 de mayo de 2014, que ha quedado redactada del siguiente modo:

> "*Se requiere nuevamente al ejecutado, Gobierno de Estados Unidos, para que, en término de DIEZ DÍAS, designe bienes de su propiedad para responder de las cantidades reclamadas en esta ejecución, con apercibimiento de que, de no verificarlo en dicho plazo, se procederá a la imposición de multas coercitivas periódicas en cuantía de DIEZ MIL EUROS MENSUALES (10.000'00 €), así como de ser procesado, cuando menos, por delito de desobediencia grave.*
>
> *Dar traslado de todo lo actuado, mediante testimonio, al Ministerio Fiscal, para que, en término de 20 días, se pronuncie sobre la posible comisión de un delito de desobediencia grave a la autoridad, imputable al ejecutante.*"

III. Que, a la vista de ello, mi mandante formula respetuoso RECURSO DE REVISIÓN contra el citado Decreto, al amparo de lo previsto en los artículo 451 y siguientes de la Ley de Enjuiciamiento Civil ("**LEC**"), en base a los siguientes

MOTIVOS

PRIMERA-. INFRACCIÓN DEL ART. 589 DE LA LEC. SU APLICACIÓN E INTERPRETACIÓN DEBE EFECTUARSE ATENDIENDO A LAS ESPECIALES CIRCUNSTANCIAS DEL EJECUTADO Y A LOS TRATADOS INTERNACIONALES SUSCRITOS POR EL ESTADO ESPAÑOL

Resulta indubitado que el órgano competente para determinar la embargabilidad o no de los bienes designados por el ejecutado ex art. 589 de la LEC es el órgano jurisdiccional. Sin embargo, en el presente caso, tal y como ha manifestado esta parte y no lo ha desmentido el propio Ministerio de Hacienda (en respuesta de averiguación de los bienes de que disponen los ESTADOS UNIDOS DE AMÉRICA en territorio español), tales bienes son:

> "***(i) los muebles e inmuebles destinados al desempeño de las funciones de la misión diplomática de los Estados Unidos de América en España o de sus oficinas consulares, sus misiones especiales, sus misiones ante organizaciones internacionales o sus delegaciones en organizaciones o conferencias internacionales; (ii) los bienes de carácter militar que son utilizados o están destinados a ser utilizados en el desempeño de las funciones militares dirigidas por los Estados Unidos de América y la OTAN y los que están amparados por el Convenio bilateral de defensa suscrito con el Reino de España; y, (iii) los bienes de interés científico, como la estación de seguimiento espacial de la NASA sita en la localidad de Robledo de Chavela (Madrid)***." (el subrayado y la negrita son nuestros)

Estos bienes, por su propia naturaleza, son indubitadamente inembargables, sin que quepa interpretación en contrario. Concretamente, siendo público y notorio el emplazamiento de los edificios donde se encuentran las sedes diplomáticas de mi mandante en Madrid y Barcelona, así como las Bases Militares de actuación conjunta y la Estación de seguimiento espacial de la NASA, y habiendo ya comunicado mi mandante tales bienes al Juzgado, carece de sentido pretender que no se ha atendido con el requerimiento del Juzgado.

Lo que obviamente carece de sentido es enumerar todos y cada uno de los bienes que se encuentran dentro de esas instalaciones pues, los muebles, documentos y resto de activos que se encuentran en dependencias diplomáticas y

militares: a) forman parte inescindible de esas dependencias; y b) están afectos a su uso para su actividad como Estado y tanto su propiedad como la disposición sobre los mismos vienen protegidos por los tratados internacionales suscritos por España.

Al respetuoso criterio de esta parte, la aplicación del decreto que ahora se recurre ha infringido el art. 589 de la LEC, toda vez que mi mandante en ningún caso ha incumplido el requerimiento del Juzgado pues ha indicado los bienes de que se dispone en territorio español en la forma que corresponde a un Estado extranjero y conforme a los tratados internacionales que lo amparan. Mi mandante ha cumplido, como no podía ser de otro modo, con el requerimiento del Juzgado, en los respetuosos términos que corresponden y con acatamiento a los preceptos de Derecho Internacional que son de obligado cumplimiento. No podía hacerlo de otro modo.

Por ello, no se puede interpretar y aplicar el art. 589 de la LEC desconectado de las especiales características de mi mandante (un Estado extranjero). Llevar a cabo otro tipo de interpretaciones conduciría al absurdo de que, por no especificar la dirección concreta de las sedes diplomáticas de Madrid y Barcelona de los ESTADOS UNIDOS DE AMÉRICA en España, o de las bases militares de utilización conjunta. se diera lugar a que se considerase que no se ha cumplido con el requerimiento del Juzgado, lo cual carecería de sentido. Mi mandante muestra y ha mostrado máxima colaboración, pero dentro de las normas internacionales a las que viene obligado. Lo que no puede hacer es soslayar estas o inventarse bienes porque aquellos que ha manifestado al Juzgado no sean embargables ni del agrado del ejecutante.

Por tanto, esta parte entiende respetuosamente que **el Gobierno de los ESTADOS UNIDOS DE AMÉRICA ha cumplido debidamente con el requerimiento del Juzgado ex art. 589 de la LEC.**

SEGUNDA-. IMPROCEDENCIA DE CUALQUIER MEDIDA COERCITIVA

En relación con las multas coercitivas a que hace referencia el Decreto de 22 de mayo de 2014, cabe recordar que este tipo de medidas se adoptan ex 589.3 de la LEC y que solo pueden imponerse "*al ejecutado que no respondiere debidamente al requerimiento* [...]". Por tanto, en la medida en que, como ya ha quedado demostrado por mi mandante, no ha existido ningún incumplimiento, no procede la imposición de las medidas coercitivas que se anuncian en el Decreto de 22 de mayo de 2014.

No obstante, y sin perjuicio de lo anterior, caber recordar que España se adhirió en 2011 al Convenio de las Naciones Unidas, de 2 de diciembre de 2004, sobre las Inmunidades Jurisdiccionales de los Estados y sus Bienes. En el apartado primero del artículo 24 del citado Convenio se establece lo siguiente:

> ***Artículo 24. Privilegios e inmunidades durante la sustanciación del proceso ante un tribunal***
>
> "*1. **El hecho de que un Estado incumpla o rehúse cumplir el requerimiento de un tribunal de otro Estado por el que se le inste a realizar o abstenerse de realizar determinado acto o a presentar cualquier documento o revelar cualquier otra información** a los efectos del proceso no tendrá más consecuencias que las que resulten de tal comportamiento en relación con el fondo del asunto. En particular, **no se condenará a ninguna multa o pena al Estado que haya incumplido o rehusado cumplir tal requerimiento**.*"(el subrayado y la negrita son nuestros)

Esta prohibición legal ha sido amparada también por la doctrina, tal y como refleja el profesor GASCÓN INCHAUSTI (*Inmunidades Procesales y Tutela Judicial frente a Estados Extranjeros*, Aranzadi, Navarra, 2008), que afirma que:

> "[...] *si se entiende como medida coercitiva el requerimiento dirigido a una parte, con el apercibimiento de la sanción prevista, podremos decir que respecto de los Estados extranjeros, no están prohibidas las medidas coercitivas en su conjunto, sino sólo parcialmente. En cambio **si la noción de medida coercitiva se restringe a la sanción asociada al requerimiento, resulta obvio deducir que la prohibición es total***" (el subrayado y la negrita son nuestros)

Por tanto, esta parte considera que **no le pueden ser impuestas multas coercitivas de ningún tipo, no solo porque mi mandante ha cumplido con el requerimiento del Juzgado, sino porque lo contrario violaría frontalmente las normas de Derecho Internacional Privado acogidas por el Estado español.**

TERCERA-. IMPROCEDENCIA LEGAL DE LA INICIACIÓN DE PROCEDIMIENTO PENAL CONTRA ESTADOS SOBERANOS Y SUS AGENTES DIPLOMÁTICOS. INFRACCIÓN DEL ART. 21.2 Y 23 DE LA LOPJ EN RELACIÓN CON EL ART. 3 DEL CONVENIO DE VIENA

En último lugar, nos referimos a lo dispuesto en el Decreto de 22 de mayo de 2014, por el que se apercibe a mi mandante de que, si no atiende al requerimiento de "*designar bienes de su propiedad para responder de las cantidades reclamadas en esta ejecución*", podrá "*ser procesado, cuando menos, por delito de desobediencia grave*". Asimismo, nos referimos al traslado que se le da al Ministerio Fiscal "*para que, en término de 20 días, se pronuncie sobre la posible comisión de un delito de desobediencia grave a la autoridad, imputable al ejecutante.*"

Los artículos 21.3 y 23 de la Ley Orgánica del Poder Judicial ("**LOPJ**") establecen, como límite al conocimiento por parte de los tribunales españoles, los supuestos de inmunidad de jurisdicción y ejecución establecidos por las normas de Derecho Internacional Público.

Dentro de las normas de Derecho Internacional Público a que hacen referencia los preceptos aludidos, cabe destacar que, de acuerdo con lo previsto en el artículo 3 del Convenio de Viena de 18 de abril 1961 –ratificado tanto por España como por ESTADOS UNIDOS DE AMÉRICA–, la representación de un Estado acreditante corresponde a la misión diplomática y, concretamente, al agente diplomático (jefe de la misión) por estar al frente de la misma *ex* artículo 1.e) del citado Convenio.

Asimismo, de acuerdo con el artículo 31 del mismo convenio:

> *"1. **El agente diplomático gozará de inmunidad de la jurisdicción penal del Estado receptor**. Gozará también de inmunidad de su jurisdicción civil y administrativa, excepto si se trata:*
> *a. de una acción real sobre bienes inmuebles particulares radicados en el territorio del Estado receptor, a menos que el agente diplomático los posea por cuenta del Estado acreditante para los fines de la misión;*
> *b. de una acción sucesoria en la que el agente diplomático figure, a título privado y no en nombre del Estado acreditante, como ejecutor testamentario, administrador, heredero o legatario;*
> *c. de una acción referente a cualquier actividad profesional o comercial ejercida por el agente diplomático en el Estado receptor, fuera de sus funciones oficiales.*
> *2. El agente diplomático no está obligado a testificar.*
> *3. El agente diplomático no podrá ser objeto de ninguna medida de ejecución, salvo en los casos previstos en los incisos a, b y c del párrafo 1 de este artículo y con tal de que no sufra menoscabo la inviolabilidad de su persona o de su residencia."* (el subrayado y la negrita son nuestros)

Por tanto, en virtud del concepto de agente diplomático recogido en el artículo 3 del Convenio al que se está haciendo referencia, tanto el jefe de la misión como el resto de miembros de su personal que posean la condición de diplomáticos gozarán de inmunidad en la jurisdicción penal del Estado receptor.

La citada inmunidad es incuestionable y así lo ha reconocido nuestra jurisprudencia. Por todas, la Sentencia del Tribunal Supremo de 21 de octubre de 1991, que establece que:

> *"La inmunidad diplomática a que se refieren los artículos 21.2 y 23 de la Ley Orgánica del Poder Judicial en su remisión a los Tratados internacionales en los que España sea parte y que con anterioridad se regulaba en el artículo 334 de la Ley Orgánica de 1870 ofrece, como señala la reciente Sentencia de esta Sala de 1 de junio de 1987 -una vez superada la ficción de la extraterritorialidad- un doble fundamento: **el representante diplomático acreditado ante el país receptor no puede ser sometido a la ley extranjera y, por otra parte, los representantes diplomáticos deben gozar de la libertad necesaria para desempeñar cumplidamente su misión: libertad de la que carecerían si pudieran ser acusados, más o menos mendazmente, ante las autoridades judiciales del país donde ejerzan su ministerio y juzgados y encausados por dichos tribunales**, lo que, en definitiva, redundaría en mengua y desdoro de la soberanía de la Potencia acreditante."* (el subrayado y la negrita son nuestros)

Por lo expuesto, **no procede que se dé traslado al Ministerio Fiscal para que se pronuncie sobre la posible comisión de un pretendido delito de desobediencia, pues no ha habido tal y la inmunidad protege tanto a los**

ESTADOS UNIDOS DE AMÉRICA como al personal diplomático de su misión diplomática en España.

En su virtud,

SUPLICO AL JUZGADO: Que, teniendo por presentado este escrito con sus copias, se sirva admitirlo, tenga por interpuesto respetuoso recurso de revisión contra el Decreto de 22 mayo de 2014 y, en su día, dicte resolución dejándolo sin efecto.

Por ser Justicia que respetuosamente pido en Rota, a 29 de mayo de 2014.

Eduardo Trigo y Sierra
URÍA MENÉNDEZ ABOGADOS
Nº COL. ICAM 24.108

Judicial procedure of minor amount No. 177/97

ADDRESSED TO THE FIRST INSTANCE COURT NO. 1 LOCATED IN ROTA

MRS. GLORIA PARRA MENACHO, as Court representative of **THE UNITED STATES OF AMERICA**, as I have accredited on this judicial procedure of minor amount No. 177/97 appears before that Court and, according to law, respectfully **STATES** as follows:

I. On May 23rd, 2014, this party received a Court order dated May 22rd, 2014, pursuant which the Judge ordered to impose to the Government of UNITED STATES OF AMERICA, "*periodic penalty payments of EUR 10,000 per month until US Government pay the outstanding amounts, costs and expenses to the claimant*". In addition, the Judge ordered to "*inform the Prosecutor on all the acts herein, so he must give its opinion, in the following 20 days, on the possibility that the US Government has committed an offence of gross disobedience to authority.*"

II. On May 26rd, 2014, this party received a Court order dated May 23rd, 2014, clarifying the Court order on May 22rd, 2014. As a result, the Court order dated May 22rd states as follows:

> "*The Government of the United States of America is hereby newly required to indicate assets to pay the outstanding amounts, costs and expenses to the claimant, by advising that, if such obligation is not complied within the referred period, periodic penalty payments of EUR 10,000 per month will be imposed to the US Government and criminal proceedings will begin in relation with the commission of an offence of gross disobedience to authority.*
>
> *To inform the Prosecutor on all the acts herein, so he must give its opinion, in the following 20 days, on the possibility that the US Government has committed an offence of gross disobedience to authority.*"

III. In light of the above-mentioned and according to article 589 of the Spanish Civil Procedural Law ("**CPL**"), the THE UNITED STATES OF AMERICA respectfully serve with this APPEAL ("recurso de revisión") to the Court against the referred Court order on May 22rd, 201, on the following

GROUNDS

<u>FIRST</u>-. INFRINGEMENT OF ARTICLE 589 OF CPL. APPLICATION AND INTERPRETATION OF THE REFERRED ARTICLE MUST BE DONE ACCORDING TO SPECIAL CIRCUMSTANCES OF THE RESPONDENT AS WELL AS ALL INTERNATIONAL TREATIES ENTERED INTO BY SPAIN

There is no doubt that the only one entitled to determine if assets designed by the respondent are or not enforceable is the Judge by virtue of article 589 of CPL. Nevertheless, as it has been already declared by us and the Ministry of Finance has not denied it (as a result of the checking of US assets in Spain requested by the Court), in this case those assets are to following ones:

> "*(i) assets (including real estate) related to the development of the function of the US diplomatic mission (as well as all the consulate offices, special mission offices, missions before international organizations and delegations before any international conference);*
>
> *(ii) assets with military character which are used or are intended to be used in developing military functions leaded by the US and the NATO, as well as those assets protected by Bilateral Convention on Defense entered into between US and Spain; and*
>
> *(iii) assets of scientific interest, such as the Chavela Satellite Tracking Station (belonging to NASA), located at Madrid.*"

All these assets, pursuant their nature, are clearly unenforceable and there can be no other interpretation. Specifically, everybody knows the location where the buildings containing the diplomatic mission of the US in Madrid and Barcelona, as well as US military bases in Spain and the Chavela Satellite Tracking Station (NASA), located at Madrid. In addition, THE UNITED STATES OF AMERICA has already communicated these assets to the Court. Therefore, it makes no sense to affirm that the requirement from the Court has not been complied with by THE UNITED STATES OF AMERICA.

What it is illogical is listed all and every single asset owned by THE UNITED STATES OF AMERICA in those premises located in Spain, since the furniture, documents and other assets located in diplomatic and military premises are: a) indivisible part of such diplomatic and military premises; and b) subject to be used

by THE UNITED STATES OF AMERICA in developing sovereign functions, and their ownership and right to dispose over such assets are protected by means of international treaties entered into by Spain.

This party respectfully considers that application of the Court order appealed herein implies an infringement of article 589 of CPL, since THE UNITED STATES OF AMERICA has always complied with the Judge's requirement by indicating its assets located in Spain in the way corresponding to a foreign State and in accordance with international treaties on this matter and, therefore, in compliance of Public International Law. We cannot act in a different way.

Hence, article 589 of CPL cannot be interpreted and applied disregarding the special characteristics of the respondent (a foreign and sovereign State). Otherwise it would be absurd that, because of not specifying the specific address of the diplomatic premises of THE UNITED STATES OF AMERICA in Madrid and Barcelona, or its military bases, the Judge would consider that the obligation under article 589 of CPL has been breached. THE UNITED STATES OF AMERICA has fully collaborated until now, but always within the scope of the international rules which are mandatory. What THE UNITED STATES OF AMERICA cannot carry out is to act in such a way breaching international rules or inventing new assets due to the claimant is not pleasured with those owned to THE UNITED STATES OF AMERICA or because those assets are unenforceable.

Therefore, this party respectfully considers that **THE UNITED STATES OF AMERICA has duly complied with the Court's requirement *ex* article 589 of CPL.**

SECOND-. NO PERIODIC PENALTY PAYMENTS CAN BE IMPOSED

Regarding the periodic penalty payments referred to in Court order dated May 22rd, 2014, it should be pointed out that this kind of measure are regulated in article 589.3 of CPL and, according to this article: "*the respondent who does not comply with the requirement* […]". Thus, inasmuch as THE UNITED STATES OF AMERICA has

duly comply with its obligations as we have explained along this writ, the periodic penalty payments referred to in Court order dated May 22rd, 2014 cannot be imposed to THE UNITED STATES OF AMERICA.

Notwithstanding, without the above-mentioned, it should be highlighted that Spain adhered in 2011 to United Nations Convention (2004) on Jurisdictional Immunities of States and Their Property. According to article 24 of this UN Convention:

> ***Article 24. Privileges and immunities during court proceedings***
>
> *1.* ***Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information*** *for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular,* ***no fine or penalty shall be imposed on the State by reason of such failure or refusal.*** (underlining and bold added)

This legal prohibition has been supported by Spanish doctrine, such as professor GASCÓN INCHAUSTI (*Inmunidades Procesales y Tutela Judicial frente a Estados Extranjeros*, Aranzadi, Navarra, 2008), who declares that:

> "[…] *Likewise,* ***if the concept of periodic penalty payments is limited to a sanction due to the requirement****, it is completely obvious that* ***the prohibition of imposing such penalties is total***" (underlining and bold added)

Therefore, this party respectfully considers that **no periodic penalty payment can be imposed to THE UNITED STATES OF AMERICA, not just because THE UNITED STATES OF AMERICA has duly comply with its obligations under article 589 of CPL, but also because such penalties infringe the rules contained in Public International Law currently in force in Spain.**

THIRD-. NO CRIMINAL PROCEEDINGS CAN BE STARTED AGAINST SOVEREIGN STATES AND ITS DIPLOMATIC AGENTS. INFRINGEMENT OF ARTICLES 21.2 AND 23 OF LAW ON THE ORGANIZATION OF THE JUDICIARY, IN CONNECTION WITH ARTICLE 3 OF VIENNA CONVENTION ON DIPLOMATIC RELATIONS

In relation with the statement contained on Court order dated May 22rd, 2014 whereby THE UNITED STATES OF AMERICA is advised that, in case of the non-compliance of the Court's requirement on "*indicating assets to pay the outstanding amounts, costs and expenses to the claimant*", "*criminal proceedings could begin in relation with the commission of an offence of gross disobedience to authority*". Additionally, in reference with the communication done to the Prosecutor "*to give its opinion, in the following 20 days, on the possibility that the US Government has committed an offence of gross disobedience to authority*".

According to articles 21.2 and 23 of Law on the Organization of the Judiciary there is a threshold to the function of Spanish Courts, which is all cases related to immunity from jurisdiction and enforcement regulated under Public International Law.

Within the scope of Public International Law, specifically referred to immunity, it should be noted the Vienna Convention on Diplomatic Relations, dated on April 18th, 1961 (which was ratified for both US and Spain), the representative of any foreign State will be hold by the diplomatic mission and, specifically on the diplomatic agent (mission chief) pursuant article 1.e) of that Convention.

Moreover, according to article 31 of Vienna Convention:

> *"1.**A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State**.*
> *He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:*
> *(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;*
> *(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;*
> *(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.*
> *2.A diplomatic agent is not obliged to give evidence as a witness.*
> *3.No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph*

> *1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.*
> *4.The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."* (underlining and bold added)

Hence, both the mission chief and the rest of the members who belong to the diplomatic mission (holding the diplomatic character) enjoy immunity within criminal jurisdiction of any foreign country.

There is no doubt on the referred immunity as the Spanish case-law has supported. For instance, we quoted the Supreme Court's resolution on October 21st, 1991, which declares the following:

> "*Diplomatic immunity referred to in articles 21.2 y 23 of Law on the Organization of the Judiciary Law on the Organization of the Judiciary addressing to International Treaties where Spain is part of, contains a double legal base:* ***any diplomatic representative in a foreign country is immune to foreign law and, furthermore, these diplomatic representatives are enough free to duly carry out its diplomatic mission. This is because they cannot be declared guilty in criminal proceedings in any foreign country where they perform its diplomatic mission****."* (underlining and bold added)

Therefore, this party respectfully considers that **the Prosecutor has not to be informed neither he must give its opinion on the on the possibility that the US Government has committed an offence of gross disobedience to authority, since there has not been any disobedience and, besides, both THE UNITED STATES OF AMERICA and its diplomatic staff are protected due to immunity regulated in international treaties which are in force in Spain**.

Pursuant all the above-mentioned throughout this writ,

I HEREBY REQUEST TO THIS JUDGE: to admit this writ with its copies and issue a new Court order annulling the Court order dated May 23rd, 2014.

We respectfully request Justice in Rota, on May 29th, 2014.

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