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CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs claims of immunity in civil actions against foreign states in U.S. courts. The FSIA’s various statutory exceptions to a foreign state’s immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of the U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation, to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2015 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Jurisdiction and Venue under the FSIA in Actions to Enforce Arbitral Awards

On February 6, 2015, the United States submitted a letter brief as *amicus curiae* in a case in the U.S. Court of Appeals for the Second Circuit, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 13-4022 (2d. Cir.). *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* (“COMMISA”), a Mexican subsidiary of a U.S. corporation, sued in federal court to enforce an arbitral award against Pemex-Exploración y Producción (“PEP”), a subsidiary of the state-owned oil company of Mexico. The district court confirmed and increased the amount of the award, despite the fact that a Mexican court had nullified the award. Excerpts follow (with citations to the record omitted) from the sections of the U.S. brief discussing jurisdiction and venue under the FSIA. The sections of the brief discussing the district court’s errors in declining to recognize the nullification of the award and in

increasing the amount of the award are excerpted in Chapter 15. The letter brief is available in its entirety at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. The District Court’s Analysis of Personal Jurisdiction Was Flawed: The FSIA Incorporates Requirements That Meet Constitutional Standards, If Applicable

The district court held that it had personal jurisdiction over PEP on the theory that a foreign state instrumentality has no due process rights, and that PEP’s actions in connection with issuing debt instruments in the New York financial markets were sufficient to satisfy any applicable fairness or comity requirements. In the view of the United States, the district court’s analysis reflects a misunderstanding of the FSIA and erroneously relies on PEP’s connection to New York’s financial markets.

In holding that PEP lacks due process rights, the district court relied on *Frontera Res. Azerbaijan Corp. v. State Oil Company of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009), where this Court held that, because the jurisdictional requirements of the FSIA were met in an action against a foreign state and its state-owned corporation, the court did not need to engage in a separate due process inquiry. The Court reasoned that a foreign state is not a “person” within the meaning of the Due Process Clause, and that the same is true for a state-owned corporation so controlled by the state as to be its “agent” or “alter ego” under *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983). *Frontera*, 582 F.3d at 399–400. However, this Court explicitly declined to decide whether a state instrumentality that is juridically separate from the foreign state is entitled to due process protections, or what such protections would consist of in a case brought under the FSIA’s arbitration exception, 28 U.S.C. § 1605(a)(6). *Id.* at 401. *Compare GSS Grp. Ltd. v. Nat’l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012) (holding that separate agencies and instrumentalities of a foreign state are entitled to due process protections, including a requirement of minimum contacts for personal jurisdiction); *First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748–52 (5th Cir. 2012) (same).

This Court need not and should not reach the constitutional question whether a foreign state corporation has any due process rights, because exercising jurisdiction over PEP is consistent with due process. The FSIA’s jurisdictional provisions themselves incorporate a nexus requirement that should be sufficient to satisfy any constitutional standard that might apply. Moreover, even if a separate analysis were required, as discussed further below, it appears that the exercise of jurisdiction in this case would satisfy constitutional standards.

The FSIA “comprehensively regulat[es] the amenability of foreign nations to suit in the United States.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). Section 1330(b) provides that personal jurisdiction “shall exist” over a foreign state or its agency or instrumentality if an exception to immunity in Section 1605 applies and service has been made under Section 1608. 28 U.S.C. § 1330(b). As the legislative history elaborates, “[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied” in the FSIA. H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612. Each of Section 1605’s exceptions to immunity “require[s] some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from

jurisdiction,” thereby “prescrib[ing] the necessary contacts which must exist before our courts can exercise personal jurisdiction.” *Id.*

Although the original version of the FSIA did not include Section 1605(a)(6)’s explicit exception to immunity for actions to confirm or enforce certain arbitral awards, which was added in 1988, there is no indication that Congress believed that such an exception would fail to satisfy minimum contacts requirements. The legislative history to the original FSIA suggests that an agreement “to arbitration in another country” could come within Section 1605(a)(1)’s exception to immunity for express or implied waivers of immunity. H.R. Rep. No. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. Prior to the addition of 1605(a)(6), actions to enforce foreign arbitral awards against foreign states were sometimes brought under 1605(a)(1) under an implied waiver theory. *See, e.g., Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980); *Ipitrade Int’l, S.A. v. Fed. Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978).

This Court should follow the lead of other courts of appeals in holding that it is unnecessary to decide whether a foreign state agency or instrumentality enjoys due process protections, because the nexus required under the FSIA for the exercise of jurisdiction satisfies the constitutional “minimum contacts” test. *See, e.g., Sachs v. Republic of Austria*, 737 F.3d 584, 598–99 (9th Cir. 2013) (en banc) (holding that FSIA exception to immunity for commercial activity carried out in the United States by the foreign state, which requires “substantial contact” with the United States, “sets a higher standard . . . than the minimum contacts standard for due process”); *see also Hanil Bank v. PT. Bank Negara Indonesia, (Persero)*, 148 F.3d 127, 134 (2d Cir. 1998) (holding that it was unnecessary to decide whether foreign state has due process rights because defendant’s conduct that satisfied commercial activity exception to immunity was also sufficient to satisfy due process requirements). The approach the United States advocates is also consistent with *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), where the Supreme Court declined to decide whether Argentina was entitled to due process protections, instead reasoning that Argentina possessed sufficient “minimum contacts” with the United States to satisfy any applicable constitutional standards. *Id.* at 619.

The assertion of personal jurisdiction over PEP in this enforcement proceeding comports with any applicable constitutional requirements. Section 1605(a)(6) permits a court to exercise jurisdiction over an action “to confirm an award made pursuant to such an agreement to arbitrate,” if the “award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.” PEP entered into contracts with COMMISA (a subsidiary of a U.S. corporation), which provided for arbitration of any dispute. PEP, an instrumentality of Mexico, knew or should have known when it entered into the contracts that both Mexico and the United States are parties to the Panama Convention and that, as a result, any Mexican arbitral award could be enforced in U.S. courts. *Cf. Seetransport Wiking Trader Schiffahrtsgesellschaft MbH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993) (“[W]hen a country becomes a signatory to the [New York] Convention, . . . the signatory State must have contemplated enforcement actions in other signatory States.”) Furthermore, PEP was aware that COMMISA was a subsidiary of a U.S. corporation, and that it was foreseeable that performance of the contract might take place in part in the United States, which it then did. In these circumstances, PEP should reasonably have anticipated being haled into court in the United States in an action to enforce an arbitral award. *See, e.g., S & Davis Int’l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1304–05 (11th Cir. 2000) (holding that foreign state ministry that entered into contract with U.S. corporation, requiring

foreign state to open a letter of credit in the United States and providing for arbitration of any dispute, could reasonably anticipate that the U.S. corporation would sue in U.S. court to enforce any resulting arbitral award).

Although it is unnecessary for the Court to reach this question, the nature of a proceeding to confirm and enforce a foreign arbitral award would also typically support the conclusion that the exercise of jurisdiction is constitutional—putting to the side the question whether this same conclusion would apply if the underlying award has been nullified. A confirmation proceeding under the Panama or New York Conventions is typically “summary,” with the district court doing “little more than giv[ing] the award the force of a court order.” *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007). In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Supreme Court reasoned that, once a court with jurisdiction over a defendant has ruled “that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of a debt as an original matter.” *Id.* at 210 n.36. It seems appropriate to apply a similar rule in a confirmation proceeding—and the United States also agrees that a court can properly exercise quasi in rem jurisdiction in this context if the defendant has assets in the forum. *See, e.g., Frontera*, 582 F.3d at 398; *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123–26 (9th Cir. 2002). We note, however, that this case law is dependent on the context in which it arose—namely, proceedings to enforce arbitral awards—and that a foreign defendant should not be subject to general jurisdiction simply because the defendant owns property in the United States.

Finally, the United States urges this Court to make clear that a foreign entity’s involvement in U.S. financial markets is not itself a sufficient basis for a U.S. court to exercise personal jurisdiction over a dispute that is unrelated to such financing activities. “[T]he prevailing caselaw accords foreign corporations substantial latitude to list their securities on New York-based stock exchanges and to take the steps necessary to facilitate those listings (such as making SEC filings and designating a depository for their shares) without thereby subjecting themselves to New York jurisdiction for unrelated occurrences.” *Wiwa v. Royal Telcordia Tech. Inc. v. Telkon SA Ltd.*, 458 F.3d 172, 178 (3d Cir. 2006). *Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000) (citations omitted). This established principle is vital to the proper functioning of the U.S. financial markets. The district court’s reasoning that PEP’s guarantee of bonds issued in New York justified the court’s exercise of jurisdiction in this unrelated enforcement proceeding could have a harmful effect on foreign entities’ willingness to issue financing in the U.S. markets for fear of broadly subjecting themselves to jurisdiction here. The bond-issuing and guaranteeing activities that the district court emphasized, would, standing alone, be insufficient to satisfy the due process requirements for general personal jurisdiction, or the nexus requirements incorporated into the FSIA. As noted, the record refers to other contacts between PEP and the United States that more directly relate to the parties’ dealings, which illustrate that the exercise of personal jurisdiction under the FSIA should satisfy constitutional standards.

II. The Southern District of New York Was a Permissible Venue Under 28 U.S.C. § 1391(b)(3)

The district court held that venue was proper in the Southern District of New York, suggesting that PEP’s guarantee of debt instruments issued by its parent company in the New York financial markets constituted “doing business” within the meaning of 28 U.S.C. § 1391(f)(3). In the view of the United States, that conclusion was erroneous, but venue was proper in the district court under a distinct statutory provision, 28 U.S.C. § 1391(b)(3).

When the FSIA was originally enacted in 1976, it contained the provision now codified at 28 U.S.C. § 1391(f), which provides in relevant part for venue:

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

...

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Congress amended the FSIA in 1988 to add an additional exception to immunity for enforcement of foreign arbitral awards, but did not enact any corresponding amendment to the venue provision.

The district court's suggestion that venue was proper under section 1391(f)(3) could subject foreign state agencies and instrumentalities to venue in any forum in which they had minor, unrelated commercial dealings. Foreign state agencies might reasonably object to being haled into a U.S. court in any type of lawsuit based on such dealings when another venue was more appropriate under 1391(f). Such an approach is also inconsistent with well-established case law holding that an entity is not "doing business" in New York for purposes of the venue statutes based solely on financing activities that are unrelated to the subject matter of the litigation. *See ... Wiwa*, 226 F.3d at 97. This Court therefore should not endorse the district court's expansive construction of "doing business" under Section 1391(f)(3).

Instead, the Court should hold that venue was proper under Section 1391(b)(3), which provides that, "if there is no district in which an action may otherwise be brought as provided in this section [section 1391], venue is proper in any judicial district in which a defendant "is subject to the court's personal jurisdiction with respect to such action." In this action, venue does not lie under Section 1391(f)(1) or (f)(2), because the events giving rise to the claim did not occur in the Southern District of New York, nor is there property there that is the subject of the action. Similarly, venue does not lie under Section 1391(f)(3) because PEP is not licensed to do or doing business in the Southern District of New York. And Section 1391(f)(4) does not apply, because PEP is not a foreign state. Because the district court had personal jurisdiction over PEP, however, venue was proper under Section 1391(b)(3), which functions as a catch-all venue provision for the entire "section." _____

Because "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other," venue statutes are to be construed to "avoid[] leaving such a gap." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972). There is no indication in the statutory text or legislative history that, in adopting the 1988 amendment adding the arbitration exception to immunity, Congress intended to leave a gap between its grant of subject matter jurisdiction to enforce arbitral awards against foreign state agencies or instrumentalities, and venue over such entities. The construction urged by the United States would, in cases in which none of the venues listed in Section 1391(f) applies, allow for enforcement of arbitral awards against a foreign state

corporation in any venue where jurisdiction can be exercised, without the need for an unduly loose standard for “doing business.”

* * * *

2. Exceptions to Immunity from Jurisdiction: Commercial Activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case “in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”

As discussed in *Digest 2014* at 373-77, the United States filed a brief recommending the Supreme Court deny the petition for certiorari in *OBB Personenverkehr AG v. Carol P. Sachs*, No. 13-1067, a case involving the application of the first clause of the commercial activity exception of the FSIA. Respondent Sachs had sued OBB Personenverkehr AG (“OBB”), an agency or instrumentality of Austria, after sustaining injuries while boarding an OBB train in Austria. She had purchased the Eurail pass she used to travel on OBB’s railway in the United States via a travel agency (“RPE”). The district court in California dismissed the case for lack of jurisdiction and a panel of the Court of Appeals for the Ninth Circuit affirmed. However, the Ninth Circuit Court of Appeals ultimately reversed after granting rehearing en banc. At the petition stage, the U.S. brief explained that the Court of Appeals had incorrectly analyzed whether Sachs’s claims were “based upon” commercial activity—i.e., the sale of the Eurail pass in the United States—but that further review was not warranted, noting the lack of clarity about the precise nature of Respondent’s claims and the prevalence of forum-selection clauses in form ticket contracts for travel. The Supreme Court decided to grant the petition and, on April 24, 2015, the United States filed an *amicus* brief in support of reversing the court of appeals. Excerpts follow (with footnotes omitted) from the April 24, 2015 U.S. *amicus* brief, which argues that the en banc court of appeals erred in concluding that the claim at issue in this case was “based upon” commercial activity in the United States within the meaning of the FSIA’s commercial activity exception. The *amicus* brief also explains that the Court of Appeals had correctly held that a foreign state can “carr[y] on” commercial activity in the United States by means of common law agents. The brief is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

A. The Court Of Appeals Correctly Held That A Foreign State May Carry On Commercial Activity In The United States Through An Agent Acting On Its Behalf

1. The FSIA's commercial-activity exception provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(e) (defining latter phrase as commercial activity "carried on by such state and having substantial contact with the United States"). The exception is designed to ensure that when a foreign state acts as an "every day participant[]" in the marketplace—in other words, when the state engages in commercial ventures of the sort that private parties undertake—plaintiffs may seek judicial resolution of any resulting "ordinary legal disputes." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976) (*House Report*); *id.* at 17 (examples of disputes that would fall within exception include "business torts occurring in the United States"); see generally *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614- 615 (1992).

Private parties often engage in commercial activities with the assistance of agents acting on their behalf. Because an agent is subject to the direction and control of the principal, the agent is able to "act for or in place of" the principal on matters within the scope of the agency as if the principal itself were engaging in the act. *Black's Law Dictionary* 72 (9th ed. 2009) (*Black's*) (second meaning of "agent"); see *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392-393 (1982) (quoting 1 Restatement (Second) of Agency § 1(1) (1958)).

As a result, common-law agency principles are routinely applied in private commercial disputes. For purposes of both jurisdiction and liability, agency principles may provide a basis for attributing conduct to a principal who directed the activity at issue. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (explaining that acts of an agent may be imputed to the principal for purposes of exercising specific jurisdiction); see also 1 Restatement (Third) of Agency § 1.01 cmt. c (2006). Such attribution is particularly common when the principal is a corporation: because "the corporate personality * * * is a fiction," such an entity "can act only through its agents." *Daimler AG*, 134 S. Ct. at 759 n.13 (citations omitted); see, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316-317 (1945).

Congress would have expected traditional agency-law principles to play a similar role in determining when a foreign state has undertaken commercial activities that subject it to suit. Foreign states, like private actors, often engage in commercial activities by employing entities under their control to enter into and execute transactions. See *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F. 2d 1094, 1105 (D.C. Cir. 1982) (discussing "the realities of modern commercial undertakings"), cert. denied, 464 U.S. 815 (1983). Indeed, like corporations, foreign states can act only through agents of one sort or another. See Pet. App. 23. When a foreign state uses agents to accomplish its commercial ends, the state is acting as an "every day participant[]" in the marketplace. *House Report* 7. And by virtue of the state's control over the agent, the state is effectively taking actions in the United States commercial market itself—that is, "carr[ying] on" commercial activity. 28 U.S.C. 1605(a)(2); see *The Random House Dictionary of the English Language* 319 (2d ed. 1987) (defining "carry on" as "to manage; conduct").

Applying agency-law principles to determine when a foreign state has "carried on" commercial activity thus furthers Congress's purpose of ensuring that foreign states are subject to suit when they act in a commercial manner. See *Maritime Int'l*, 693 F. 2d at 1105; see also

Saudi Arabia v. Nelson, 507 U.S. 349, 372-373 (1993) (Kennedy, J., concurring in part and dissenting in part) (attributing to Kingdom of Saudi Arabia actions of private entity that “acted as the [Kingdom’s] exclusive agent for recruiting employees” in the United States); U.S. Amicus Br. at 14 n.8, *Nelson*, *supra* (No. 91-522). If the acts of an agent were not attributed to a foreign state when assessing whether the requirements of Section 1605(a)(2) are met, then a state could conduct extensive commercial activities in the United States through its agents, and could reap significant benefits from those activities, without ever subjecting itself to suit in this country.

The *House Report*’s discussion of a different (but overlapping) prong of the commercial-activity exception, which denies immunity for “act[s] performed in the United States in connection with a commercial activity of the foreign state elsewhere,” 28 U.S.C. 1605(a)(2), reinforces the conclusion that Congress expected that foreign states could be subject to suit as a result of their agents’ acts. The *House Report* (at 19) explains that “a representation in the United States by an agent of a foreign state” could constitute an “act performed” by a foreign state.

Exercising jurisdiction over a foreign state that has “carried on” commercial activity through an agent is also consistent with international practice. Cf. 28 U.S.C. 1602 (referring to immunity “[u]nder international law”); *Bancec*, 462 U.S. at 623. The International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts provide that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83, at 3 (Jan. 28, 2002). The United States expressed support for an earlier, materially similar draft article. State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998).

Thus, the use of common-law agency principles to make the “carried on” determination gives content to the FSIA’s plain text in a manner that is consistent with “articulated congressional policies” and “internationally recognized” legal doctrine. *Bancec*, 462 U.S. at 623, 630, 633-634; see *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473-478 (2003) (relying on “elementary principles of corporate law” to construe 28 U.S.C. 1603(b)(2), which refers to ownership of majority of “shares or other ownership interest”); see generally *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991). All of the courts of appeals to have addressed the issue have agreed with that conclusion.

* * * *

B. The Court Of Appeals Erred In Holding That Respondent’s Claims Are “Based Upon” Commercial Activity In The United States

1. a. To establish jurisdiction over a foreign state under the relevant clause of Section 1605(a)(2), a plaintiff must show that “the action is based upon” the state’s commercial activity carried on in the United States. In *Nelson*, this Court held that the phrase “based upon” connotes “conduct that forms the ‘basis,’ or ‘foundation,’ for a claim.” 507 U.S. at 357. The Court explained that the phrase “is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case,” and it cited with approval a decision describing the inquiry as focusing on “the gravamen of the complaint.” *Ibid.* (quoting *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985)). The Court also cautioned that it “d[id] not mean to suggest that the first clause of [Section] 1605(a)(2) necessarily requires that

each and every element of a claim be commercial activity by a foreign state” carried on in the United States. *Id.* at 358 n.4.

The plaintiffs in *Nelson* were a husband and wife who sued Saudi Arabia and its state-owned hospital for intentional and negligent torts committed against the husband in Saudi Arabia, allegedly in retaliation for his reporting safety hazards at the hospital where he worked after being recruited and hired in the United States by the defendants. See 507 U.S. at 352-354. The Court held that the plaintiffs’ suit was “based upon” the tortious acts committed in Saudi Arabia and not upon recruiting and hiring “activities that preceded the[] [torts’] commission.” *Id.* at 358. It was not enough, the Court explained, that the recruiting and hiring activities were “connect[ed] with” or “led to the conduct that eventually injured the [plaintiffs].” *Ibid.* As the Court stated, the suit could not be “based upon” the defendants’ earlier activities because “those facts alone entitle the [plaintiffs] to nothing.” *Ibid.*

b. *Nelson* did not decide how to treat a claim that consists of both elements premised on commercial activity described in Section 1605(a)(2) and elements that fall outside that category. 507 U.S. at 358 n.4. Nevertheless, *Nelson*’s discussion of the meaning of “based upon” indicates the correct approach: one that looks to the “gravamen of the complaint.” *Id.* at 357 (citation omitted). That calls for an inquiry into whether commercial activity carried on in the United States is the gist or essence of a claim, and not simply an analysis of whether an essential fact or single element of the claim turns on the existence of such activity. See U.S. Amicus Br. at 15 & n.10, *Nelson* (No. 91- 522) (court should identify “fundamental ingredient” of the cause of action); *Black’s* 770 (defining “gravamen” as “substantial point or essence of a claim, grievance, or complaint”).

The “gravamen” approach is well supported by the text and purpose of Section 1605(a)(2). As relevant here, the phrase to “base upon” means “to use as a base or basis for,” and the noun “base” means “the fundamental part of something: basic principle.” *Webster’s Third New International Dictionary of the English Language* 180 (1976) (definition 2 of verb “base”; definition 3a of noun “base”); see *Webster’s New Twentieth Century Dictionary of the English Language* 154 (2d ed. 1969) (definition 2 of noun “base”: “the foundation or most important element”); 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (*OED*) (definition 2.a. of noun “base”: “[f]undamental principle, foundation, groundwork”; sense II of noun “base”: “[t]he main or most important element or ingredient, looked upon as its fundamental part”); *Webster’s New International Dictionary of the English Language* 225 (2d ed. 1958) (definition 4.a of “base”: “[t]he main or chief ingredient of anything, viewed as its fundamental element or constituent”). *Nelson* relied on just such definitions to conclude that “based upon” in Section 1605(a)(2) refers to the “foundation” for a claim. 507 U.S. at 357 (citations omitted).

Although Section 1605(a)(2) asks what an “action” is “based upon,” a claim-by-claim analysis is warranted. See *Nelson*, 507 U.S. at 362-363; see also *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993); 28 U.S.C. 1330. Under such an analysis, there may be situations in which the foreign state’s commercial conduct in the United States establishes a single element of or fact necessary to a claim, and that element or fact is so “[f]undamental” to the particular claim— amounting to its “most important” part, *OED* 977— that the commercial activity may be said to be the gravamen of the plaintiff’s demand for relief. But the plain meaning of “based upon” precludes the conclusion that the requirement is met whenever the commercial activity in question constitutes *any* element or necessary factual predicate of the plaintiff’s claim— even one that has little to do with the core wrong the plaintiff has allegedly suffered.

As *Nelson* explained, “[w]hat the natural meaning of the phrase ‘based upon’ suggests, the context confirms.” 507 U.S. at 357. The two clauses of Section 1605(a)(2) that immediately follow the clause at issue in this case refer to acts performed “in connection with a commercial activity of the foreign state.” 28 U.S.C. 1605(a)(2). Because “Congress manifestly understood there to be a difference between a suit ‘based upon’ commercial activity and one ‘based upon’ acts performed ‘in connection with’ such activity,” the phrase “based upon” must be read to “call[] for something more than a mere connection with, or relation to, commercial activity.” *Nelson*, 507 U.S. at 357-358; see *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000), cert. denied, 532 U.S. 904 (2001). Looking at the gravamen of a claim gives “based upon” considerably more force than a requirement of a “mere connection” with the relevant commercial activity. But looking only at a single element or necessary fact to decide whether the relationship between the claim and the commercial activity is sufficiently close is essentially equivalent to requiring only a connection between the two—as the court of appeals here acknowledged. See Pet. App. 12 (under single-element test “commercial activity that occurs within the United States must be connected with the conduct that gives rise to the plaintiff’s cause of action”); *id.* at 33.

Finally, the purposes of the FSIA and the commercial-activity exception support a gravamen requirement. See 28 U.S.C. 1604. As this Court has recognized, that exception codifies the “restrictive” theory of sovereign immunity—a theory that makes a foreign state subject to suit for its commercial activities because engaging in those activities “do[es] not exercise powers peculiar to sovereigns,” but rather “only those powers that can also be exercised by private citizens.” *Weltover*, 504 U.S. at 614 (citation omitted); see *Nelson*, 507 U.S. at 363; 28 U.S.C. 1602. Were jurisdiction proper under the FSIA whenever a single fact necessary to make out a claim was linked to some commercial activity in this country, then the exception in Section 1605(a)(2) would enable suits in U.S. courts challenging activities that are best characterized as “state sovereign acts” rather than “state commercial and private acts.” *Weltover*, 504 U.S. at 613. The gravamen requirement, in contrast, ensures that the suit is indeed “based upon” alleged wrongdoing that centers on a commercial activity.

Even in situations in which all of the relevant activities of the foreign state are commercial ones, reading “based upon” to call for an examination of the gravamen of the claim ensures a meaningful linkage between the United States and an action over which U.S. courts may exercise jurisdiction. See 28 U.S.C. 1330, 1605. The commercial-activity exception supplies a territorial basis of jurisdiction. Accordingly, each of the exceptions in Section 1605(a) calls for a tie to the United States, so as to avoid inserting this Nation’s courts into disputes that are appropriately resolved elsewhere—an intrusion that may raise delicate questions of foreign relations when a foreign sovereign is the defendant. Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013); see generally *Republic of Phil. v. Pimentel*, 553 U.S. 851, 865 (2008); *National City Bank v. Republic of China*, 348 U.S. 356, 362 (1955). Too broad an interpretation of “based upon” would attenuate that tie, avoiding a significant jurisdictional limitation imposed by Congress and creating a serious risk that courts would assume jurisdiction over cases in which all or virtually all of the acts or omissions that are the subject of the parties’ dispute took place abroad.

c. In ruling that the “based upon” requirement is satisfied whenever the relevant commercial activity constitutes a single element of a claim or a necessary fact in establishing that element, the Ninth Circuit made no attempt to examine the text or purpose of the FSIA. See Pet. App. 32-33. Rather, that ruling appears to be derived solely from an overreading of *Nelson*.

In the decision below (and the prior Ninth Circuit decisions on which the majority relied), the court of appeals focused on *Nelson*'s statement that "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under [its] theory of the case." 507 U.S. at 357; see Pet. App. 32-33. But *Nelson*'s reference to "elements" does not suggest approval of the single-element test the court below adopted—particularly in light of *Nelson*'s reservation of the issue of how to treat a case in which certain elements of a claim are based on qualifying commercial activity and other elements are not. See 507 U.S. at 358 n.4. In addition, as Chief Judge Kozinski explained in his en banc dissent, the suggestion in *Nelson* that "a claim *can* be based upon commercial activity even if proving that activity [will not] establish every element of the claim" cannot be transmuted into "an endorsement of the converse proposition—that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim," no matter which one. Pet. App. 63.

The test adopted below not only departs from the text and purpose of the FSIA, but also would entail untoward consequences. Under that erroneous test, the scope of the commercial-activity exception would depend on the artfulness of a plaintiff's pleadings rather than on the nature of the sovereign's acts. If one claim permits qualifying commercial activity to be shoehorned into a single "element" of the claim while another does not, and both claims are based on the same underlying conduct, then the FSIA would—on the Ninth Circuit's view—permit the first claim to proceed while barring the second.

That approach would encourage the kind of gamesmanship that this Court disapproved in *Nelson*, which refused to give "jurisdictional significance" to a "feint of language" whereby "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn." 507 U.S. at 363; cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702 (2004) (criticizing "repackag[ing]" of claims to manipulate application of foreign-country exception to waiver of immunity in Federal Tort Claims Act). It would raise the possibility that the immunity analysis in very similar cases—even ones arising from essentially the same set of facts—would have different outcomes, creating uncertainty and a perception of unequal treatment in the "vast external realm." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). And it would create the risk that the United States would be subject to similar arbitrary rules when foreign courts evaluate whether jurisdiction over a claim against this country is proper. See *Boos v. Barry*, 485 U.S. 312, 323 (1988) (highlighting "concept of reciprocity").

2. An examination of the claims asserted in this case makes clear that respondent's claims are not "based upon" commercial activity in the United States.

The complaint alleges that petitioner provided an unsafe boarding area and permitted unsafe boarding procedures in Innsbruck, as a result of which respondent fell and was injured while she was attempting to board a train to Prague. . . . The complaint asserts claims of negligence; strict liability for defective railcars and platforms and a failure to warn of the defects; and a breach of implied warranties of merchantability and fitness relating to the railcars and the platform. . . . The only commercial activity in the United States attributed to petitioner was RPE's sale of her Eurail pass. But all of the allegedly tortious conduct occurred in Austria, after respondent purchased the pass and traveled to Europe.

While RPE's sale of the Eurail pass to respondent in the United States enabled respondent to use the pass in Innsbruck, the sale of the pass is not the "gravamen," or foundation, of respondent's suit. Respondent does not allege that the sale of the Eurail pass was itself wrongful, and this is not a breach-of-contract action based on her purchase of it. Rather, respondent alleges that the sale was a link in the chain of events that led her to be injured in

Austria by petitioner's allegedly tortious activities in that country. As was true in *Nelson*, those alleged bad acts, "and not the * * * commercial activities that preceded their commission, form the basis for the [plaintiff's] suit." 507 U.S. at 358.

Assuming that California law applies (as the court below concluded, see Pet. App. 34), a detailed examination of the elements of respondent's claims confirms that common-sense conclusion. First, the negligence claim centers around activity that took place in Austria rather than in the United States: petitioner's alleged failure to take sufficient care with respect to the condition of the platform and the boarding procedures in Innsbruck, and the injury that respondent says resulted from that failure. . . . The focus of tort claims is ordinarily on the breach of a duty of care and on the resulting injury, rather than on the circumstances giving rise to the duty in the first instance.

The court below said that the sale of the pass was necessary to establish an element of the claim, reasoning that petitioner owed respondent "a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship." . . . Even if that were correct, that would not shift the gravamen of the claim away from petitioner's allegedly negligent acts at a particular train station in Austria and the injury that is claimed to be the consequence of those acts. But it is wrong even as a matter of California law. Respondent need not show that petitioner owed her the duty of heightened care associated with the common carrier/ passenger relationship in order to prevail on a negligence claim; a rail carrier owes non-passengers a duty of ordinary care. See *Orr v. Pacific Sw. Airlines*, 257 Cal. Rptr. 18, 20-21 (Cal. Ct. App. 1989); *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 520, 522-524 (Cal. Ct. App. 1997). In addition, the pass itself did not create a common carrier/passenger relationship that gives rise to a heightened duty with respect to a tort claim. Under California law, that relationship is created when "one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler." *Orr*, 257 Cal. Rptr. at 21 (citation omitted); see *Grier v. Ferrant*, 144 P.2d 631, 633-634 (Cal. Dist. Ct. App. 1944) ("relationship is created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier"); see also 11A Cal. Jur. 3d *Carriers* § 143 (2007). Merely holding a ticket or a pass is neither sufficient, see *Orr*, 257 Cal. Rptr. at 21-22; see also *Simon v. Walt Disney World Co.*, 8 Cal. Rptr. 3d 459, 464-466 (Cal. Ct. App. 2004), review denied, Mar. 30, 2014, nor necessary, see *Grier*, 144 P.2d at 633; see also J.A. 15, 32, 40; see generally *Aschenbrenner v. United States Fid. & Guar. Co.*, 292 U.S. 80, 82-85 (1934).

Second, the strict-liability claims bear no relationship to the pass or its purchase. The complaint alleges that "the railcars and boarding platform were defective in their design" and should have been accompanied by warnings. . . .; the gravamen of those claims is outside the United States, where the allegedly defective items were designed, sold, and used, . . . and where any warnings about the items would have been provided. With respect to the defects, the court below confused the issue by apparently considering the sale of the pass to be a necessary element of a strict-liability claim. . . . That was wrong as a matter of California law, under which strict liability for defective products exists regardless of whether the injured party is a purchaser, a lessee, or simply a bystander. See, e.g., *Price v. Shell Oil Co.*, 466 P.2d 722, 725-726 (Cal. 1970) (disagreeing with Restatement (Second) of Torts § 402A); *Elmore v. American Motors Corp.*, 451 P.2d 84, 88 (Cal. 1969). Moreover, to the extent that a sale of the allegedly defective product to *someone* is required in order for strict liability to attach, the sale of the pass would not qualify, since the pass is not the thing that is said to be defective. . . . With respect to the need for a

warning, respondent has not alleged that the pass should have warned about the conditions on one specific platform in one particular city in Europe. If any warning was needed, it surely was one that should have been given in Innsbruck. . . .

Last, the breach-of-implied-warranty claims are merely a way of restating the strict-liability claims in an attempt to make them sound in contract and thus link them to the pass. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963). Just as in *Nelson*, the Court should not permit respondent to invoke the commercial-activity exception through a “feint of language.” 507 U.S. at 363. Under California law, implied warranties of merchantability and fitness attach to contracts to sell or supply goods, not contracts to provide services, see *Link-Belt Co. v. Star Iron & Steel Co.*, 135 Cal. Rptr. 134, 142 (Cal. Ct. App. 1976)—and a ride on a train falls into the latter category. See, e.g., *Garcia v. Halsett*, 82 Cal. Rptr. 420, 422 (Cal. Ct. App. 1970) (defining “bailment”). Respondent is not truly complaining about a breach of any promise contained in her pass; she is complaining of distinct tortious actions allegedly taken by petitioner on an Austrian rail platform, and her claim is therefore not “based upon” commercial activity in the United States.

* * * *

On December 1, 2015, the Supreme Court issued its decision, agreeing with the U.S. position that an action is “based upon” the particular conduct that constitutes the “gravamen” of the suit, and that the Respondent’s suit was not “based upon” the sale of the Eurail pass for purposes of §1605(a)(2). The opinion explains that, “[a]ll of Respondent’s claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria,” and accordingly her claims fall outside of the FSIA’s commercial activity exception and are barred by sovereign immunity. In light of this holding, the Court declined to reach the question of whether the FSIA allows attribution of commercial activity to a foreign state through principles of agency. *OBB Personenverkehr AG v. Sachs*, 136 S.Ct. 390 (2015).

3. Service of Process

a. Harrison v. Sudan

On November 6, 2015, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit in *Harrison v. Sudan*. The U.S. brief supports Sudan’s petition for rehearing of a decision of a panel of the Second Circuit allowing service on a foreign sovereign via its embassy in the United States, explaining that such service is inconsistent with the FSIA’s service procedures, the legislative history of the statute, and the inviolability of diplomatic missions under the Vienna Convention on Diplomatic Relations (“VCDR”). Excerpts follow (with footnotes omitted) from the U.S. brief, which is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The panel incorrectly construed § 1608(a)(3) of the FSIA to permit service upon foreign states by allowing U.S. courts to enlist foreign diplomatic facilities in the U.S. as agents for delivery to those sovereigns' foreign ministers. That method of service contradicts the FSIA's text and history, and is inconsistent with the United States' international obligations.

The FSIA sets out the exclusive procedures for service of a summons and complaint on a foreign state and provides that, if service cannot be made by other methods, the papers may be served "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). The most natural understanding of that text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work—*i.e.*, at the ministry of foreign affairs in the state's seat of government—not to some other location for forwarding. *See, e.g., Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent to foreign minister in state's capital city).

The panel observed that § 1608(a)(3) does not expressly specify a place of delivery for service on a foreign minister, and assumed that mailing to the embassy "could reasonably be expected to result in delivery to the intended person." (Slip op. 13). But the FSIA's service provisions "can only be satisfied by strict compliance." *Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001); *accord Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). It is inconsistent with a rule of strict compliance to permit papers to be mailed to the foreign minister at a place other than the foreign ministry, even if the mailing is nominally addressed to that person, based on the assumption it will be forwarded.

The Court supported its conclusion by contrasting § 1608(a)(3)'s silence regarding the specific address for mailing with § 1608(a)(4)'s provision that papers be mailed to the U.S. Secretary of State "in Washington, [D.C.]," and inferring that Congress therefore did not intend to require mailing the foreign minister at any particular location. (Slip op. 12). But a separate contrast in the statute undermines that conclusion. For service on a foreign state agency or instrumentality, Congress expressly provided for service by delivery to an "officer, a managing or general agent, or to any other [authorized] agent." § 1608(b)(2). In contrast, for service on the foreign state itself, Congress omitted any reference to an officer or agent. *Id.* § 1608(a). That difference strongly suggests that Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy, even if only for purposes of forwarding papers to the foreign ministry.

The FSIA's legislative history makes clear that Congress did not intend for service to be made via direct delivery to an embassy, and spells out significant legal and policy concerns with such an approach. The panel acknowledged that the relevant House report explicitly stated that "[s]ervice on an embassy by mail would be precluded under this bill." (Slip op. 15-16 (quoting H.R. Rep. No. 94-1487, at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625)). The panel was persuaded that this language did not reflect Congress's intent to preclude service by delivery to a foreign minister "via or care of an embassy," as opposed to precluding service "on" the embassy if, for example, the suit is against the embassy. But suits against diplomatic missions are also suits against foreign states for purposes of the FSIA, *see Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir.

1978), and there is no rationale for prohibiting service of papers at an embassy only in cases where the embassy is the named defendant.

Additional legislative history confirms that Congress was concerned about allowing foreign states to be served at their embassies. Early drafts of the FSIA provided for mailing papers to foreign ambassadors in the United States as the primary means of service on a foreign state. *See* S. 566, 93rd Cong. (1973); H.R. 3493, 93rd Cong. (1973). But, at the urging of the State Department, Congress removed any reference to ambassadors from the final service provisions, to “minimize potential irritants to relations with foreign states,” particularly in light of concerns about the inviolability of embassy premises under the VCDR. H.R. Rep. No. 94-1487, at 11, 26.

Indeed, the panel’s decision is contrary to the principle of mission inviolability and the United States’ treaty obligations. The VCDR provides that “the premises of the mission shall be inviolable.” 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. As this Court has correctly concluded in an analogous context, this principle must be construed broadly, and is violated by service of process—whether on the inviolable diplomat or mission for itself or “as agent of a foreign government.” *Tachiona v. United States*, 386 F.3d 205, 222, 224 (2d Cir. 2004); *accord Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) (“service through an embassy is expressly banned” by VCDR and “not authorized” by FSIA (emphasis added)); *see 767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301 (2d Cir. 1993) (approvingly noting commentator’s view that “process servers may not even serve papers without entering at the door of a mission because that would ‘constitute an infringement of the respect due to the mission’ ”); Brownlie, *Principles of Public Int’l Law* 403 (8th ed. 2008) (“writs may not be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs.”). The intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint.

The panel’s contrary conclusion also improperly allows U.S. courts to treat the foreign embassy as a forwarding agent, diverting its resources to determine the significance of the transmission from the U.S. court, and to assess whether or how to respond. The panel assumed that the papers would be forwarded on to the foreign minister via diplomatic pouch, which is provided with certain protections under the VCDR to ensure the safe delivery of “diplomatic documents and articles intended for official use.” VCDR, art 27. But one sovereign cannot dictate the internal procedures of the embassy of another sovereign, and a foreign government may well object to a U.S. court instructing it to use its pouch to deliver items to its officials on behalf of a third party.

Finally, the United States has strong reciprocity interests at stake. The United States has long maintained that it may only be served through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. Thus, the United States consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly and thus will not appear in the case or honor any judgment that may be entered. That position is consistent with international practice. *See* U.N. Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/ 59/508 (2004), art. 22 (requiring service through international convention, diplomatic channels, or agreed-upon method); European Convention on State Immunity, 1495 U.N.T.S. 181 (1972), art. 16 (service exclusively through diplomatic channels); U.K. State Immunity Act, 1978 c.33

(same). If the FSIA were interpreted to permit U.S. courts to serve papers through an embassy, it could make the United States vulnerable to similar treatment in foreign courts, contrary to the government's consistently asserted view of the law. *See, e.g., Medellín v. Texas*, 552 U.S. 491, 524 (2008) (U.S. interests including "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]" are "plainly compelling"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1995) (FSIA's purposes include "accord[ing] foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts").

* * * *

b. Salini v. Morocco

See Chapter 15 for discussion of and excerpts from the U.S. Statement of Interest in *Salini Construttori v. Kingdom of Morocco*, No. 14-2036, which relates to service of process pursuant to the FSIA.

4. Execution of Judgments against Foreign States and Other Post-Judgment Actions

a. Attempted attachment of property protected by the Vienna Convention

On January 23, 2015, the United States submitted a statement of interest in *Wyatt v. Syria*, No. 08-CV-502-RCL (D.D.C.). Plaintiffs sought to enforce a default judgment against the Syrian Arab Republic by attaching funds that the Embassy of Syria attempted to transfer from its diplomatic account at the Washington, D.C. branch of Abu Dhabi International Bank ("ADIB") to pay attorneys for legal services. The U.S. statement of interest, excerpted below, expresses the view that the funds may not be attached under either the Foreign Sovereign Immunities Act ("FSIA") or the Terrorism Risk Insurance Act ("TRIA") because of the protections such funds enjoy under the Vienna Convention on Diplomatic Relations ("VCDR"). The U.S. statement of interest is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The first question raised by the Court concerns whether the challenged funds are immune from attachment. As discussed in detail below, it is the United States' position that this question should be answered in the affirmative.

An applicable treaty, which is binding on federal courts to the same extent as a domestic statute, establishes the immunity of funds in Syria's Embassy bank accounts, including funds the mission attempts to transfer from such an account into a holding account in connection with the functions of the diplomatic mission. Although the FSIA serves as the exclusive basis for jurisdiction over foreign states in federal and state courts and also governs the execution of judgments obtained against foreign states, it is well-established that the FSIA does not displace the immunities provided by a treaty such as the VCDR. *See generally Cook v. United States*, 288

U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.”). When it enacted the FSIA, Congress recognized that the United States had existing international legal obligations with respect to the protection of diplomatic and consular property. Congress therefore provided in Section 1609 of the statute that the provisions addressing the immunity from attachment and execution of a foreign state’s property were “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.” 28 U.S.C. § 1609; see also H.R. Rep. No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610 (noting that the FSIA is “not intended to affect either diplomatic or consular immunity”); *767 Third Avenue Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 298 (2d Cir. 1993) (“Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act.”).

At the time the FSIA was enacted, the United States had already entered into several international agreements establishing its obligations to protect the property of diplomatic and consular missions from interference. These include the VCDR—to which Syria is also a party, which obligates the United States to ensure that diplomatic missions are accorded the facilities they require for the performance of their diplomatic functions. Article 25 of the VCDR provides that “the receiving state shall accord full facilities for the performance and functions of the mission.” VCDR, art. 25, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Article 3 of the VCDR delineates the functions of a diplomatic mission, which include, among other things, “[p]rotecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.”

Numerous courts interpreting Article 25 of the VCDR have recognized that bank accounts of diplomatic missions that are used for mission purposes are immune from attachment or execution, because a mission’s access to its funds in the receiving state is critical to the functioning of a mission. . . .

It is the view of the United States that the VCDR’s full facilities provision applies to protect from attachment funds under the circumstances here, where the mission attempted to transfer the funds from an embassy account to pay a legal fee, and the funds were then segregated into a separate holding account at the same bank. Funds intended to be used by diplomatic missions to pay for legal representation of the sending state in the courts of the receiving state are properly considered funds used in connection with the performance of the diplomatic functions of “[p]rotecting in the receiving State the interests of the sending State and of its nationals,” as contemplated by Article 3 of the VCDR. Indeed, the United States has a strong interest in ensuring that courts interpret the VCDR in a manner that protects funds used by a foreign government to pay for legal representation from attachment. That is because the United States routinely encourages foreign governments—through their embassies—to engage local counsel and to appear and defend when their government is sued in United States’ courts. The same is true with respect to the United States’ reciprocal interest in protecting from attachment funds it uses to pay for legal representation of the United States in foreign countries. Indeed, the United States has vigorously opposed efforts by private parties to attach its diplomatic accounts abroad, including by seeking to enlist the assistance of the government of the receiving state in such cases. See generally *Boos v. Barry*, 485 U.S. 312, 323 (1988) (respecting diplomatic immunity “ensures that similar protections will be accorded those that we send abroad to represent the United States”).

Nor should the location of the funds (in a separate holding account) change the VCDR analysis. The protections provided by the VCDR would be severely undercut if any funds segregated by a bank from an embassy bank account could be attached simply because the funds were no longer located in the mission account. The relevant question is whether the funds in the segregated bank account were being used in connection with the performance of the functions of the mission and accordingly protected by Article 25. Here, the Embassy of Syria attempted to transfer the funds in June 2013, almost nine months before the suspension of Syria's Embassy operations in the United States on March 31, 2014. Nor does the closure of the Embassy mean that the United States no longer has any obligation with respect to the funds. To the contrary, Article 45 of the VCDR makes clear the United States has an ongoing obligation under these circumstances to "respect and protect the premises of the mission, together with its property and archives." VCDR, art. 45 (emphasis added). This obligation extends to the protection of all property of the diplomatic mission, including its bank accounts, and therefore protects from attachment funds from such an account used to pay an outstanding expense of the mission in the host state.

* * * *

Plaintiffs do not dispute that the funds originated from a Syrian Embassy bank account, nor do they dispute the intended use of the funds as payment for Syria's attorneys for legal services. Moreover, as the this Court's October 28, 2014 Order recognizes, "[d]ocumentation submitted by proposed intervenors before the Court indicates that the funds constitute a blocked electronic funds transfer between the Embassy of Syria and an American attorney, W. Ramsey Clark, as payment for a legal fee." Oct. 28, 2014 Order, ECF No. 96; see also Affidavit of Ramsey Clark, attached as Ex. 2 to Mot. to Intervene in Garnishment Proceedings by W. Ramsey Clark and Lawrence M. Schilling Pursuant to Fed. R. Civ. P. 24, ECF No. 65-2, at ¶2 ("The \$150,000 is a payment of a legal fee for the provision of legal services by myself and Lawrence W. Schilling to the Syrian Arab Republic pursuant to Office of Foreign Assets Control ("OFAC") General License No. 2 issued pursuant to Executive Order 133582."); Letter from ADIB's Compliance Manager to the Embassy of Syria (June 24, 2013), attached as Ex. 1 to Mot. to Intervene in Garnishment Proceedings by W. Ramsey Clark and Lawrence M. Schilling Pursuant to Fed. R. Civ. P. 24, ECF No. 65-1 ("This letter will serve as a notice that on June 13, 2013, Abu Dhabi International Bank, N.V. blocked a \$150,000 wire transfer originated by the Embassy of Syria going to the final beneficiary of Ramsey Clark.").

As noted earlier, Section 1609 of the FSIA expressly provides that the statute's exceptions to immunity are subject to existing international agreements. As a result, where, as here, the VCDR governs the immunity of funds from attachment, the FSIA's exceptions to immunity from attachment discussed below, see *infra.*, Argument II, are simply "inapplicab[le] to an analysis of the validity of attachment. 767 *Third Avenue Assocs.*, 988 F.2d at 297. Thus, funds in a mission bank account that the Embassy intends to use in connection with the performance of mission functions, are immune under the "full facilities" provisions of the VCDR, even if the use of the funds may be considered commercial for other purposes. See VCDR, art. 25. Accordingly, courts have concluded that the fact that an embassy bank account includes funds used for "commercial" transactions that are incidental to or connected with the performance of the functions of the mission—*e.g.*, transactions to purchase goods and services from private entities—does not vitiate the entire account's protection from attachment under the

VCDR. *Liberian Eastern Timber Corp.*, 659 F. Supp. At 610; *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 257 n. 7 (5th Cir. 2002).

For the reasons identified above, the Court should conclude that the funds held in a segregated account by ADIB that the Embassy of Syria intends to use to pay for legal services rendered in connection with litigation in the United States are immune from attachment and execution under the VCDR.

II. THE SYRIAN EMBASSY FUNDS IN THE HOLDING ACCOUNT ARE NOT SUBJECT TO ATTACHMENT UNDER THE FSIA

Even if the funds at issue were not immune from attachment under the VCDR, plaintiffs have failed to establish that the requirements of the FSIA have been met. Pursuant to 28 U.S.C. § 1609, a foreign state's property in the United States is immune from attachment and execution unless a specific statutory exception applies. Furthermore, § 1610(c) of the FSIA prohibits attachment of or execution on a foreign state's property unless the court has issued an order determining such attachment or execution to be appropriate under the statute after a reasonable period of time following entry of the judgment (including service of a default judgment under § 1608(e), where required). See 28 U.S.C. § 1610(c); H.R. Rep. 94-1487, at 30 (explaining that allowing a judgment creditor to attach or execute on a foreign state's property simply by applying to the clerk or a local sheriff "would not afford sufficient protection to a foreign state"); Avelar, 2011 WL 5245206, at *5 n.8 ("[T]he FSIA requires that any steps taken by a judgment creditor to enforce the judgment must be pursuant to a court order authorizing the enforcement, independent of the judgment itself, and not merely the result of the judgment creditor's unilateral delivery of a writ to the sheriff or marshal."). Prior to issuing such an order of attachment, courts are required "to determine—sua sponte if necessary—whether an exception to immunity applies," a determination that must be made "regardless of whether the foreign state appears." *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785-86 (7th Cir. 2011); see also *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) ("[C]ourts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution sua sponte."). The judgment creditor bears the burden of identifying the particular property to be executed against and proving that it falls within a statutory exception to immunity from execution. See, e.g., *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011).

Thus, the Court must ensure compliance with the FSIA's provisions governing the attachment of or execution on a foreign state's property. See, e.g., *Liberian E. Timber Corp.*, 659 F. Supp. at 608-10. Here, the writ of attachment at issue was signed by the deputy clerk of court; it was not issued pursuant to a court order determining that ADIB holds property subject to attachment under the FSIA. . . . Nor have plaintiffs demonstrated that the funds at issue meet the substantive requirements for attachment of a foreign state's property under § 1610(a)(7) or § 1610(g), both of which require that the funds be used by the foreign state for commercial activity in the United States. See 28 U.S.C. § 1607(a)(7) (authorizing the attachment of property in the United States of a foreign state "used for a commercial activity in the United States" where the judgment relates to a claim for which the foreign state was not immune under § 1605A); *id.* § 1610(g) (authorizing in certain cases the attachment of property "as provided in this section," notwithstanding whether the property is property of the foreign state itself or one of its agencies or instrumentalities). Funds used in connection with the functions of a diplomatic mission, including funds intended to be used to pay for legal representation for the foreign state in litigation in U.S. courts, should not be considered property of a foreign state "used for

commercial activity” in the United States. . . . Because the writ of attachment was not issued in accordance with the FSIA’s requirements, it should be vacated.

III. THE FUNDS AT ISSUE ARE ALSO EXEMPT FROM ATTACHMENT UNDER TRIA

The challenged funds at issue in this case are also not attachable under TRIA. Section 201(a) of TRIA provides:

Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which the a terrorist party is not immune under [28 U.S.C. § 1605A], the blocked assets of that terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has adjudged liable.

TRIA § 201(a). Plaintiffs may not use TRIA as a vehicle through which to attach the funds at issue for two separate reasons. First, TRIA does not authorize the attachment of assets protected by the VCDR and used exclusively for a diplomatic purpose. Second, TRIA does not authorize attachment of assets where, as here, OFAC has issued a specific license prior to the issuance of a final turnover order.

A. Assets that are protected by the VCDR and used exclusively for a diplomatic purpose are not attachable under TRIA

Under TRIA, “blocked assets” do not include assets “being used exclusively for diplomatic or consular purposes,” the “attachment . . . of which would result in a violation of an obligation of the United States under the [VCDR].” TRIA § 201(d)(2)(B)(ii), (d)(3). . . . As explained above, the challenged funds are protected by the VCDR, and their attachment would be inconsistent with the United States’ obligations under both Articles 25 and 45 of the treaty.

This Court’s decision in *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53, 60-61 (D.D.C. 2003) is not to the contrary. In *Weinstein*, this Court held that funds lying dormant in an inactive checking account of an Iranian consulate—many years after diplomatic and consular relations were broken off between the United States and Iran—were subject to attachment under TRIA.

By contrast, unlike the assets at issue in *Weinstein*, here, the challenged funds are not simply excess funds in a long inactive mission account, but rather are intended to be used to pay an outstanding expense of the mission in the United States, payment for which Syria had initiated before its embassy functions were suspended. Indeed, the Court’s Order inviting the United States’ views expressly recognizes this fact. As noted above, the Syrian Embassy’s purpose in transferring the funds to pay its lawyers was in furtherance of a core function of the diplomatic mission within the meaning of Article 3 of the VCDR—to defend and represent Syria’s interests in the host state. Furthermore, OFAC’s regulations expressly authorize the provision of certain legal services rendered on behalf of Syria so long as a specific license is obtained prior to a lawyer’s receipt of a payment for such services. See 31 C.F.R. § 542.507. Consistent with this licensing policy, OFAC issued to Clark and Schilling a license to receive the funds in the ADIB account as payment for legal representation in connection with litigation against Syria in the United States. Under these circumstances, the Syrian Embassy funds in the holding account are “being used exclusively for a diplomatic purpose” and their attachment would “result in a violation of an obligation of the United States under the [VCDR].” TRIA § 201(d)(2)(B)(ii),

(d)(3). Because the funds in the account are not subject to attachment under TRIA, the Court should dissolve the writ of attachment.

B. Because OFAC issued a specific license authorizing the transfer of the challenged funds prior to the issuance of a final turnover order, the funds are not “blocked” and so are not attachable under TRIA

The Syrian Embassy funds in the holding account also are not subject to attachment under TRIA because they are not “blocked.” TRIA authorizes attachment and execution against “blocked assets” of a terrorist party. TRIA § 201(a). The statute defines the term “blocked assets” as “any asset seized or frozen by the United States” under specified statutory authority. *Id.* § 201(d)(2). Courts interpreting that statutory definition (including this Court) have held that assets whose transfer has been authorized pursuant to OFAC’s authority are not “seized or frozen” and thus do not constitute “blocked” assets within the meaning of the statute. . . .

At the time the payment at issue was initiated, OFAC had issued a general license (“General License No. 2”) authorizing the provision of certain legal services by United States persons to the Government of Syria, subject to the requirement that receipt of payment for such services needed to be specifically licensed. This general license was later codified, with some modification to the payment provision, in OFAC’s regulations. See 31 C.F.R. § 542.507(a), (d). Because an attempt to make payment for legal services was initiated without a specific license, the transaction was prohibited and the funds were placed in a blocked account. Subsequently, however, and consistent with the licensing policy with respect to payments for generally authorized legal services, OFAC issued a specific license authorizing ADIB to transfer the funds to Syria’s counsel as payment for legal services rendered on behalf of Syria. That specific license permits the transfer of the assets at issue for this identified purpose. As such, the Syrian Embassy funds in the holding account are not “seized or frozen” and therefore are not “blocked” for purposes of TRIA. Accordingly, the funds are not attachable under TRIA.

* * * *

On March 18, 2015, the court issued its decision, agreeing with the United States that the plaintiffs could not attach the funds under either the FSIA or TRIA because they are immune. Excerpts follow (with footnotes omitted) from the court’s memorandum and order, which is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

A. Foreign Sovereign Immunities Act Section 1610

To pursue attachment of these funds under section 1610 of the FSIA, the plaintiffs must show that the property at issue is not covered by the VCDR. A few portions of the VCDR are relevant to plaintiffs’ pending motion for condemnation and recovery. Article 25 requires the United States to “accord full facilities for the performance of the functions of the mission.” Part 1(b) of Article 3 defines the functions of a diplomatic mission to include “protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.” In the event that “diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled,” Article 45 confirms that the United States has

continuing obligations to “respect and protect the premises of the mission, together with its property and archives.”

The obligation to “accord full facilities” to a diplomatic mission includes the obligation to forbid the attachment, in satisfaction of a civil judgment, of bank accounts containing funds used for diplomatic purposes. *Liberian Eastern Timber Corp. v. Gov’t of Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987). To hold otherwise would put to foreign embassies the dilemma of either avoiding United States banks entirely or keeping money in this country subject to the threat of confiscation at any time. *Id.* This would be contrary to the VCDR’s stated purpose of “ensur[ing] the efficient performance of the functions of diplomatic missions.” *Id.* (quoting VCDR preamble).

In light of these authorities, the Court concludes that the funds at issue are protected from attachment under the VCDR. Undisputed documentation before the Court indicates that the Syrian Embassy attempted to transfer these funds from an account owned by the Embassy. W. Ramsey Clark has provided a sworn affidavit stating that this attempted transfer was initiated by the Syrian Embassy as payment of a legal fee arising out of Clark and Schilling’s provision of legal services to Syria in this country. The Embassy’s payment, therefore, fits squarely within Article 3’s expressly defined “functions of a diplomatic mission,” specifically “protecting in the receiving State the interests of the sending State and of its nationals.” Paying a legal fee arising out of litigation in the United States, incurred in Syria’s defense, is fundamentally an action intended to protect Syria’s interests in this country. As a result, the Court cannot order the attachment of this money because to do so would violate the United States’ obligation to accord full facilities for the performance of the functions of the Syrian diplomatic mission.

The suspension of Syrian Embassy operations as of March 18, 2014 does not abrogate the immunity attaching to the funds. Bureau of Near Eastern Affairs, U.S. Dep’t of State, U.S. Relations with Syria (Mar. 20, 2014), <http://www.state.gov/r/pa/ei/bgn/3580.htm> (confirming the suspension of Syrian Embassy operations). First, the attempted funds transfer was blocked on June 13, 2013, prior to the suspension of embassy operations. As of the date of transfer, then, the funds were property of the existing diplomatic mission, used for a diplomatic purpose. Second, article 45 of the VCDR requires the United States to continue to “respect and protect” the “property” of the Syrian diplomatic mission, despite the suspension of its operation. The money in the ADIB account is property of the Syrian Embassy and the United States must continue to protect it to the same extent it would if the Embassy were still functioning.

B. Terrorism Risk Insurance Act of 2002 Section 201

To prevail on their motion pursuant to section 201 of the TRIA, plaintiffs must show that the funds at issue are “blocked assets.” They are not, for two independent reasons.

First, the funds are excluded from the definition of blocked assets because they are property subject to the VCDR that is being used “exclusively” for “diplomatic . . . purposes.” For the reasons stated above, the funds at issue here are subject to the VCDR. Moreover, relevant to section 201, the Syrian Embassy’s payment of a legal fee incurred in representation of Syria in this country is a “diplomatic purpose” because the payment is in service of a diplomatic function, as defined by Article 3 of the VCDR. Uncontroverted sworn affidavits from Clark and Schilling indicate that the entirety of the funds in dispute are to be deposited to them as payment for the legal fee owed by Syria. Therefore, the funds are being used “exclusively” for a diplomatic purpose. The funds are specifically excluded from the TRIA’s coverage.

Second, the funds are not “frozen or seized” by the United States government at this time. A letter before the Court from the U.S. Department of the Treasury states that the OFAC has

reviewed the attempted transfer and determined that ADIB is “authorized to process the transfer in accordance with the original payment instructions.” ECF No. 103-1. The transaction is authorized under a specific license. *Id.* This specific license is pursuant to the general license provided by 31 C.F.R. § 542.507(a) and (d), which authorizes the provision of legal services to Syria in defined circumstances and states that payment for those services may be authorized pursuant to a specific license. Because the funds are subject to an OFAC license and may now be transferred without further OFAC intervention, they are no longer “frozen or seized” as required by the statute. Cf. *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 18 n.6 (D.D.C. 2011) (holding that payments made under a general license were merely “regulated” by OFAC, not “blocked”); *Bank of New York v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) (holding that property subject to a general license from the OFAC was not “blocked” within the meaning of the TRIA).

Therefore, regardless of whether the funds were frozen or seized as of the date of service of the writ of attachment or the filing of plaintiffs’ motion for condemnation and recovery, the funds may not now be attached pursuant to section 201 because they are no longer frozen or seized. See *United States v. Holy Land Found. For Relief and Dev.*, 722 F.3d 677, 685 (5th Cir. 2013) (citing TRIA § 201) (holding that “[b]y its terms, § 201 does not provide for execution against assets that are not blocked,” i.e. not currently blocked). This conclusion aligns with the rule under section 1610 of the FSIA that property is only subject to attachment under that statute if it is present within the United States at the time the Court authorizes execution—not when the garnishee receives notice of the garnishment action against them. *FG Hempishere Assocs. v. Republique du Congo*, 455 F.3d 575, 588–89 (5th Cir. 2006) (reasoning that the language of section 1610(a) does not permit attachment of “property that was in the United States or property that has been in the United States”) (emphasis in original). Similarly, the TRIA only speaks of assets that are now blocked. This interpretation of the statute has the common sense outcome of preventing the attachment of property under the TRIA that was blocked but that has since passed into other hands or out of the country.

* * * *

b. Restrictions on the Attachment of Property under the FSIA and TRIA

(1) Bennett v. Bank Melli

In *Bennett v. Bank Melli*, Nos. 13-15442, 13-16100 (9th Cir. 2015), the United States filed an *amicus* brief on October 23, 2015 in support of rehearing of a decision of a panel of the U.S. Court of Appeals for the Ninth Circuit concerning the proper interpretation of section 1610(g) of the FSIA and the Terrorism Risk Insurance Act (“TRIA”). Section 1610(g) provides that, for individuals holding judgments under section 1605A of the FSIA, “the property of a foreign state,” as well as the “property of” its agency or instrumentality, “is subject to attachment in aid of execution, and execution, . . . as provided in this section.” Section 201(a) of TRIA provides that “[n]otwithstanding any other provision of law,” certain terrorism-related judgment holders may attach “the blocked assets of” certain foreign states, including the blocked assets of any of their agencies or instrumentalities. Creditors holding judgments against Iran arising out of

several terrorist attacks invoked TRIA and/or section 1610(g) in an attempt to attach assets held by institutions in the U.S. that were owed to Bank Melli, an Iranian bank. The district court denied Bank Melli's motion to dismiss and a panel of the Ninth Circuit affirmed. Bank Melli sought both rehearing and rehearing en banc, and the Ninth Circuit invited the United States to submit an *amicus* brief on whether rehearing was warranted. The U.S. brief urges rehearing by the panel of the Ninth Circuit. Excerpts follow from the U.S. brief, which is available in full at <http://www.state.gov/s/l/c8183.htm>. For background on other attempts to execute on the judgment obtained by the *Bennett* judgment holders, see *Digest 2010* at 374-78.

* * * *

1.a. Under the FSIA's baseline rule, "the property in the United States of a foreign state [is] immune from attachment . . . except as provided" elsewhere in the FSIA. 28 U.S.C. § 1609. Section 1610 nonetheless permits attachment in various circumstances, which generally require a sufficient nexus to "commercial activity" by the foreign state or its instrumentality. *See id.* § 1610(a), (b), (d).

The plain text of section 1610(g) then provides special provisions for certain terrorism cases, but still makes clear that its specified property is "subject to attachment . . . as provided in this section." 28 U.S.C. § 1610(g)(1) (emphasis added). The referenced "section" is section 1610, and thus section 1610(g) plainly incorporates by reference the other requirements for attaching foreign state property provided under section 1610. Accordingly, section 1610(g) is not a freestanding exception to immunity that can be invoked independent of the rest of section 1610.

Indeed, a broader understanding of section 1610(g) would violate the "cardinal principle of statutory construction" that a statute should be construed to avoid superfluity. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Both sections 1610(a)(7) and (b)(3), which specifically apply (*inter alia*) to terrorism-related judgments entered under 28 U.S.C. § 1605A, require some relation to commercial activity in the United States on the part of the foreign state's property, or by the foreign state's agency or instrumentality, as a condition of attachment of property in aid of execution. Section 1610(g), which also relates to a judgment under section 1605A, does not independently require that commercial nexus. Thus, reading section 1610(g) to be a freestanding immunity exception would render the restrictions in sections 1610(a)(7) and (b)(3) superfluous (in addition to rendering superfluous the "as provided in this section" language in section 1610(g)). That cannot be correct.

Nor is it the case that the government's interpretation deprives section 1610(g) of all meaning. What section 1610(g) adds is the special rule that certain plaintiffs with a judgment against a foreign state may pursue not only the assets of that state itself, but also "the property of an agency or instrumentality of" the state, "including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." 28 U.S.C. § 1610(g). Accordingly, section 1610(g) overrides various legal principles that might otherwise require respect for an entity's separate juridical status. *See, e.g., First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 628-34 (1983) (creating a multi-factor

test for determining when a creditor can look to the assets of a separate juridical entity to satisfy a claim against a foreign sovereign under the FSIA). But that merely means that if a plaintiff covered by section 1610(g) wishes to attach the assets of a state agency or instrumentality, and the plaintiff can find an exception in section 1610 that would apply but for the fact that the plaintiff holds a judgment against the state itself—rather than an entity that would be considered legally distinct—the plaintiff would be able to proceed.

This Court's decision in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), is not to the contrary. In that case, which did not involve a proposed attachment under section 1610(g), this Court briefly stated in a footnote that section 1610(g) lets "judgment creditors . . . reach any U.S. property in which Iran has any interest." *Id.* at 1123 n.2. That footnote is dicta. *See, e.g., In re Magnacom Wireless, LLC*, 503 F.3d 984, 993-94 (9th Cir. 2007) ("[S]tatements made in passing, without analysis, are not binding precedent."). And it certainly does not purport to address whether section 1610(g) is a freestanding exception to immunity wholly divorced from section 1610's other requirements.

Notably, if the allegations in this case are true, this would appear to be just such a case where the plaintiffs need not rely on section 1610(g) as a freestanding immunity exception. Section 1610(b)(3) allows individuals to attach "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States," if they are seeking to satisfy certain terrorism-related judgments under the now-in-force section 1605A or the previously-in-force section 1605(a)(7). 28 U.S.C. § 1610(b)(3). Taking the complaint's allegations as true (which of course the Court must at this procedural posture) the property at issue is located in the United States, is alleged to be property of an Iranian agency or instrumentality engaged in commercial activity in the United States (*i.e.*, an entity that has contracted with Visa, an American company, to perform commercial services for that company), and the judgments sought to be enforced are section 1605A judgments. If these facts are established, section 1610(b)(3) would apply but for the fact that the judgment is against Iran and the Bank would (possibly) be accorded juridical status separate from Iran itself. (It may also be the case that plaintiffs could be able to satisfy section 1610(a)(7) if the Bank's separate juridical status is disregarded, but that issue is more complicated and would require further analysis; as the United States has elsewhere explained, section 1610(a) requires that the property at issue must have been used for a commercial activity in the United States by the foreign state itself. *See Br. for the United States as Amicus Curiae*, at 14-21, *Rubin v. Islamic Republic of Iran*, No. 14-1935 (7th Cir., filed Nov. 3, 2014)).

b. Because this appears to be a case in which the assets *do* appear to meet the additional requirements set out in at least one of section 1610's other provisions (ignoring the separate juridical status issue), this case does not actually present the issue of whether section 1610(g) provides a freestanding exception to immunity. Accordingly, we understand any contrary language in the panel's opinion to be dicta that leaves open in this Circuit the distinct question of whether a plaintiff can proceed under section 1610(g), even after ignoring the separate juridical status of an agency or instrumentality, if the plaintiff still cannot meet any of the immunity exceptions in section 1610. We thus see no need in this case for rehearing en banc. Nor do we see the panel's decision as foreclosing in this Circuit the positions we took in our filings in *Rubin v. Islamic Republic of Iran*, No. 14-1935 (7th Cir.), *Ministry of Defense v. Frym*, No. 13-57182 (9th Cir.), and *Hegna v. Islamic Republic of Iran*, No. 11-1582 (2d Cir.), as all of those cases presented the question whether a plaintiff could invoke section 1610(g) without showing the

requisite relation to commercial activity in the United States (by the relevant actor) set out in either section 1610(a)(7) or section 1610(b)(3).

We note that some language on page 12 of the panel's opinion might be read as addressing more than the issue that was before the Court. Indeed, the plaintiffs in the *Rubin* case have already cited the panel's opinion (in a Rule 28(j) letter) for the proposition that section 1610(g) allows them to attach assets of the foreign state itself, to satisfy a judgment against that state, even if the assets would otherwise be outside the scope of section 1610(a)(7) because they had not been used in commercial activity. Those same plaintiffs are also parties to the pending *Frym* case in this Circuit. Thus, to avoid confusion, we urge the panel to amend its opinion to clarify the limitations of its holding.

2. Separately, we urge the panel to grant rehearing with regard to its discussion of California law.

a. The Bank contended, and this Court did not dispute, that both TRIA and section 1610(g) only reach assets that are actually owned by the terrorist state or its agency or instrumentality. That was the D.C. Circuit's express holding in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-40 (D.C. Cir. 2013). TRIA authorizes attachment against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphases added). Section 1610(g) similarly applies to the property "of" a foreign state or "of" its agency or instrumentality. 28 U.S.C. § 1610(g). The assets "of" an entity are not naturally understood to include all assets in which it has any interest of any nature whatsoever. Rather, the Supreme Court has repeatedly observed that the "use of the word 'of' denotes ownership." *Board of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); see also *id.* at 2196 (describing *Flores-Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (brackets in original)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States").

Applying that understanding of "of" to a disputed provision of patent law, the Court in *Stanford* concluded that "invention owned by the contractor" or "invention belonging to the contractor" are natural readings of the phrase "'invention of the contractor.'" 131 S. Ct. at 2196. In contrast, in *United States v. Rodgers*, 461 U.S. 677 (1983), the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest when the relevant statute permitted execution with respect to "any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest." 26 U.S.C. § 7403(a) (emphases added); see also *Rodgers*, 461 U.S. at 692-94. The Court found it important that the statute explicitly applied not only to the property "of the delinquent," but also specifically referred to property in which the delinquent "has any right, title, or interest." See *Rodgers*, 461 U.S. at 692 (emphasis removed). TRIA and section 1610(g) omit that additional phrase; the former only applies to the blocked assets "of" a terrorist party, see TRIA § 201(a), and the latter only applies to the property "of" a terrorist state, see 28 U.S.C. § 1610(g)(1).

Indeed, extending these statutes beyond ownership would expand these statutes well beyond common law execution principles. It "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); see also *id.* at 702 (majority op.) (implicitly agreeing with this

description of the traditional common law rule); 50 C.J.S. Judgments § 787 (2015). Congress enacted TRIA and section 1610(g) against the background of these principles, and the statutes should be interpreted consistent with those common-law precepts. *See Staples v. United States*, 511 U.S. 600, 605 (1994); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991).

Nor would it make sense to expand the statutes beyond ownership. Allowing the victims of terrorism to satisfy judgments against the property of a terrorist party “impose[s] a heavy cost on those” who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin, discussing TRIA). Paying judgments from assets that are *not* owned by the terrorist party would not serve that goal.

b. Despite the fact that the panel opinion took issue with none of the above, the panel treated as dispositive the fact that California law would allow a judgment creditor to reach assets owed to a debtor. Op. 17. But the mere fact that state law authorizes attachment is insufficient. As explained above, federal law has an affirmative requirement that the assets actually be *owned* by the debtor state or instrumentality. Thus if a state decided (for example) that judgment creditors could obtain assets wholly owned by third parties, that state determination would be contrary to federal law in this context and without effect.

That rule is fully in accord with this Court’s decision in *Peterson*. *Peterson* itself recognized that state law on the enforcement of judgments only applies insofar as it does not conflict with federal law. *See* 627 F.3d at 1130. And while the Court in dicta stated that “[t]he FSIA does not provide methods for the enforcement of judgments against foreign states,” *id.*, the case did not address the interpretative question at issue here, nor did it even involve a proposed execution under either TRIA or section 1610(g).

Furthermore, the same sentence in *Peterson* went on to acknowledge that the FSIA controls whether or not specifically targeted properties are immune. *Peterson*, 627 F.3d at 1130. Thus, despite the fact that California law apparently allowed the property in question there to be attached, the Court nonetheless held that the property was immune because the FSIA provision invoked there only applied to property located in the United States, which the asset in question was not. *Id.* at 1130-32. While the Court may have used state law to determine the property’s location, federal law dictated the relevant question.

Here, as explained above, TRIA and section 1610(g) only apply insofar as the targeted property is owned by Iran or one of its agencies or instrumentalities. Thus, even assuming that ownership can be determined under state law rather than federal law, the relevant state law must be actually addressed to that question; the mere fact that state law makes the asset attachable is insufficient. Accordingly, the Court should grant rehearing in order to determine, under the relevant source of law, whether Bank Melli is the owner of the assets in question here.

* * * *

(2) Weinstein v. Iran

See Chapter 11 for discussion of the *Weinstein* case, which raises the question of whether country-code top-level domains for Iran, Syria, and North Korea (.ir, .sy, and .kp, respectively), the top-level domains associated with Internet names and addresses in those geographic regions, constitute “property” or “assets” of a foreign state under the FSIA and TRIA.

(3) Villoldo

As discussed in *Digest 2014* at 157-59 and 390-93, the *Villoldo* plaintiffs sought to attach certain securities and accounts held by Computershare, Ltd. in order to satisfy a judgment against Cuba for alleged acts of torture by the Cuban government. The U.S. statement of interest filed in 2014 asserted that the securities and accounts could not properly be attached pursuant to the FSIA and TRIA because they had not been demonstrated to be property of the Cuban government. The district court agreed and vacated its previous turnover orders that had been issued prior to submission of the U.S. statement of interest. Plaintiffs appealed. Excerpts follow from the U.S. *amicus* brief filed in the U.S. Court of Appeals for the First Circuit on December 16, 2015. The brief is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. The Act Of State Doctrine Does Not Require The Application Of Cuban Law In This Case

A. TRIA And Section 1610 Contain An Ownership Requirement That Incorporates U.S. Law

1. As the district court recognized, ...and as plaintiffs have not disputed in this Court, both TRIA and Section 1610 only reach assets that are owned by the terrorist state itself (or its agency or instrumentality). That was the D.C. Circuit’s express holding in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-40 (D.C. Cir. 2013). And it stems from the fact that TRIA authorizes attachment against “the blocked assets of [a] terrorist party,” TRIA § 201(a) (emphasis added), while the Foreign Sovereign Immunities Act similarly applies to the property “of” a foreign state or its agency or instrumentality, 28 U.S.C. §§ 1610(a)(7), (b)(3), (g)(1).

The assets “of” an entity are not naturally understood to include all assets in which it has any interest of any nature whatsoever. Rather, the Supreme Court has repeatedly observed that the “use of the word ‘of’ denotes ownership.” *Board of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); see also *id.* at 2196 (describing *Flores–Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase “identification [papers] of another person” as meaning such items belonging to another person (brackets in original)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase “works of the United States” to mean “works belonging to the United States”).

* * * *

Extending these statutes beyond ownership would also expand these statutes well beyond common law execution principles. ...

Nor would it make sense to expand the statutes beyond ownership. Allowing the victims of terrorism to satisfy judgments against the property of a terrorist party “impose[s] a heavy cost on those” who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin, discussing TRIA). Paying judgments from assets that are *not* owned by the terrorist party would not serve that goal, and would even work at cross-purposes since it would let the terrorist party satisfy an outstanding judgment with assets owned by third parties.

2. Because TRIA and Section 1610 create a federal ownership requirement, a court applying those statutes must next determine the source of law to use in determining ownership. There are only two possibilities—ownership is either determined as a matter of federal common law, or using the law of the state where the district court sits (which may or may not entail the application of that state’s choice of law principles, a separate issue on which we take no position).

Indeed, in *Heiser* the D.C. Circuit concluded that Congress “has not provided a rule for determining ownership” under TRIA and Section 1610, nor has it “directed the federal courts to adopt state ownership rules under” these statutes. 735 F.3d at 940. Accordingly, the D.C. Circuit saw the need to develop a judge-made ownership rule as a matter of uniform federal law. *See id.* Alternatively, it is possible that a court could find it appropriate to apply state law for these purposes. *See Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1289 (2015), *petition for reh’g en banc filed*, Nos. 13-15442, 13-16100 (Sept. 9, 2015) (stating that the court would apply state law in order to determine “ownership” for purposes of TRIA and Section 1610); *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (describing the Foreign Sovereign Immunities Act as a “pass-through to state law principles” in some circumstances); *cf. Calderon- Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1001-02 (2d Cir. 2014) (stating that Section 1610(g) “is silent as to what interest in property the foreign state, or instrumentality thereof, must have in order for that property to be subject to execution,” and then looking to New York property law to fill in the gap).

In this brief, the United States does not take a position on whether federal courts should look to federal common law principles or state law in order to apply the statutory ownership requirement. For present purposes, this Court need only recognize that nothing in TRIA or Section 1610 requires courts to determine ownership using foreign law. And tellingly, plaintiffs have not challenged the district court’s conclusion that Cuban law does not apply here unless the act of state doctrine applies. *See Villoldo Br.* 35-52.

B. The Act Of State Doctrine Does Not Displace The Otherwise Governing Law In This Case

Notwithstanding the fact that the governing law under TRIA and Section 1610 is either state or federal law, plaintiffs invoke the act of state doctrine to contend that Cuban law should determine ownership here. Plaintiffs are wrong.

1. As traditionally understood, the act of state doctrine “precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign power committed within its own territory.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 421-27 (1964). The doctrine is rooted in part on international comity considerations, recognizing that international conflict can arise when the courts of one country seek to reexamine the sovereign acts of another. *Id.* at 416-18. It also derives from separation of powers concerns, *id.* at 423,

including the desire to avoid “conflict between the Judicial and Executive Branches.” *Id.* at 433. Whether the doctrine applies in a given case is subject to case-by-case adjudication in light of the above principles. *See id.* at 427-28; Restatement (Third) of the Foreign Relations Law of the United States § 443 cmt. b (1987).

Notably, however, the doctrine’s underlying policies are not a “doctrine unto themselves” that should be expanded “into new and uncharted fields” unnecessarily. *W.S. Kirkpatrick & Co. v. Env’tl. Tectonics Corp., Int’l.*, 493 U.S. 400, 409 (1990). Accordingly, when a case does not fall within the doctrine’s traditional formulation, the doctrine’s proponent bears a particularly heavy burden. And that is especially true when a litigant seeks to apply the doctrine to assets located in the United States (as is the case here, since the securities accounts were located in Massachusetts, not Cuba, at the time of the purported confiscation). Indeed, the Supreme Court has partially justified the act of state doctrine by explaining that “the concept of territorial sovereignty is so deep seated” that “any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders.” *Sabbatino*, 376 U.S. at 432. And because of a foreign state’s “obvious inability . . . to complete an expropriation of property beyond its borders,” that state has less of an “expectation[] of dominion over that property” and “the potential for offense to the foreign state is reduced” when a foreign confiscatory law is not given extraterritorial effect. *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1028 (5th Cir. 1972); *see also Tchacosh Co. v. Rockwell Int’l Corp.*, 766 F.2d 1333, 1337 (9th Cir. 1985).

Accordingly, plaintiffs cannot succeed unless they demonstrate that the act of state doctrine’s underlying policies—including its concern for U.S. foreign policy interests—are so significantly advanced in the case that extraterritorial application of Cuba’s confiscatory law is justified. *Accord Republic of Iraq v. First Nat’l City Bank*, 353 F.2d 47, 51-52 (2d Cir. 1965) (refusing to give extraterritorial effect to an expropriation of property that was inconsistent with U.S. law and policy).

2. Plaintiffs cannot make that showing. Indeed, invoking the doctrine here will harm rather than further U.S. foreign policy interests.

First, and crucially, the targeted assets are blocked under an economic sanctions program. Such programs “permit the President to maintain” particular “foreign assets at his disposal for use in negotiating the resolution of a” serious foreign policy conflict, including for use as a bargaining chip in international negotiations. *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981); *see also Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 57 (1st Cir. 2013) (recognizing that “blocked assets play an important role in the conduct of United States foreign policy”). If the act of state doctrine were invoked here to permit execution, the pool of blocked assets would be reduced, which would in turn interfere with the President’s ability to use those assets to serve this country’s foreign policy goals. Moreover, because execution would increase interference with the President’s foreign affairs powers, applying the act of state doctrine would increase interbranch conflict—exactly the kind of circumstance the doctrine is meant to avoid.

Recent events only confirm these points. In December 2014, the President announced the Administration’s intent to normalize bilateral relations between the United States and Cuba. *See Statement By The President On Cuba Policy Changes*, <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes> (Dec. 17, 2014). Among other things, that process involves a recently-initiated dialogue on the resolution of outstanding claims. There is particular value in maintaining the pool of blocked assets during that dialogue. Plaintiffs’ proposal would also create tension with policies behind TRIA and the provisions of Section 1610 related to terrorism judgments obtained under Section 1605A. Those statutes are

based in part on the idea that it is important to “impose a heavy cost on those” who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin, discussing TRIA). It does not further that goal to let Cuba satisfy the judgment against it using assets that would otherwise belong to third parties. *Accord Heiser*, 735 F.3d at 940. And while plaintiffs are correct that these statutes also seek to gain some measure of compensation for terrorism victims, ... the statutes only express a desire for victims to be compensated from assets that are actually owned by Cuba. If the relevant law triggered by those statutes does not deem Cuba the assets’ owner, then it does not advance the U.S. interests embodied in TRIA and Section 1610 to force a result the statutes would not otherwise dictate.

Additionally, to the extent the Cuban law here can be deemed an expropriation of property without any compensation for the account holders, applying the act of state doctrine would conflict with U.S. policy interests embodied in the Fifth Amendment’s Takings Clause. Those policies express the general view that it is improper for a government to take private property without paying any compensation, and so extraterritorial expropriations create particularly significant conflicts with U.S. policies. *See Maltina Corp.*, 462 F.2d at 1027 (5th Cir.); *Republic of Iraq*, 353 F.2d at 51 (2d Cir.).

Plaintiffs contend, however, that the Cuban laws in question are not actually examples of an expropriation. Rather, they view those laws as applying a “sanction of forfeiture” against Cuban nationals who failed to repatriate foreign currency accounts. ... But even assuming plaintiffs are correct that the execution of these laws accords with Fifth Amendment policies, it would still be contrary to U.S. sanctions policy and the policies embodied in TRIA and Section 1610.

Furthermore, if plaintiffs’ understanding of Cuban law is accurate, execution would trigger the penal law rule and thus not be an appropriate instance to apply the act of state doctrine. The penal law rule states the longstanding principle “that a court need not give effect to the penal . . . laws of foreign countries.” *Sabbatino*, 376 U.S. at 413. In the United States, the rule’s origin traces at least far back as *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), which explained that “[t]he Courts of no country execute the penal laws of another.” *Id.* at 123; *see also* Restatement (Third) § 483. The doctrine applies when a foreign sovereign is seeking to recover pecuniary penalties for the violation of its laws, *Oklahoma ex rel. West v. Gulf, C. & S. F. R. Co.*, 220 U.S. 290, 298 (1911), and such attempts at recovery are still “penal” even if they occur in an ostensibly civil proceeding, *see Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290-92, 299-300 (1888), *overruled in part on other grounds by Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 278-79 (1935). *See also Pelican Ins.*, 127 U.S. at 299 (explaining that regardless of the particular form taken, a law is penal when a sovereign seeks to “punish the offense against her sovereignty” by “compelling the offender to pay a pecuniary fine”); Restatement (Third) § 483 cmt. b (explaining that even non-judicial actions can be penal, such as when a government agency imposes fines or penalties).

As described by plaintiffs, there can be little doubt that the Cuban laws are “penal” in nature. Their own expert described the key provision as “a criminal law with a criminal forfeiture penalty for failure to comply with the law.” RA578. And there is no suggestion that the Cuban laws are intended to redress a wrong visited on a private entity. Rather, plaintiffs’ expert opined that the laws were designed to address a currency crisis. RA570-72. This squarely implicates the penal law rule. *See Sabbatino*, 376 U.S. at 413 n.15 (“[A] penal law for the purposes of this doctrine is one which seeks to redress a public rather than a private wrong.”); *Huntington v. Attrill*, 146 U.S. 657, 673-74 (1892) (“The question whether a statute . . . is a penal law, in the

international sense . . . depends upon . . . whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.”).

Nor should the Court credit any suggestion by plaintiffs that the penal law rule does not apply because they are seeking a personal benefit and are “not acting on behalf of a foreign state.” . . . TRIA and Section 1610 may not themselves be “penal” laws, but the law plaintiffs are trying to give effect to is a Cuban criminal law enacted for Cuba’s public benefit. In any event, Cuba *does* benefit from plaintiffs’ proposed execution here because if plaintiffs succeed, Cuba’s outstanding liability to the plaintiffs will be reduced by the recovery amount.

Furthermore, the penal law rule is rooted in notions of territorial jurisdiction, as well as concerns for international comity (including respect for the discretion of another country’s executive branch to pardon an offense or to decline prosecution). *Huntington*, 146 U.S. at 669; *see also United States v. Federative Republic of Brazil*, 748 F.3d 86, 95 (2d Cir. 2014). Cuba’s absence in these proceedings does not alleviate the doctrine’s concerns about territorial jurisdiction. And that absence *exacerbates* concerns about respect for Cuban sovereignty since we cannot even be confident that Cuba agrees with plaintiffs’ interpretation of Cuban law.

3. This case is materially different from *United States v. Belmont*, 301 U.S. 324 (1937), and *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 658 F.2d 903 (2d Cir. 1981), both of which applied the act of state doctrine to assets located in the United States. In *Belmont*, the United States was itself asking the Court to apply the doctrine, since the United States had agreed to act as the Soviet Union’s assignee for claims against assets in this country that were purportedly nationalized. 301 U.S. at 326-30. Thus not only did *Belmont* not involve assets blocked for foreign policy reasons, it involved a clear statement by the United States that its foreign policy goals would be served if the foreign law were given effect.

Chemical Bank—which the Second Circuit decided before the Supreme Court placed important limits on the act of state doctrine in *W.S. Kirkpatrick*—also did not involve assets understood to be blocked for foreign policy reasons. *See* 658 F.2d at 909 (finding it significant that assets would “escheat to the State of New York” if the act of state doctrine were inapplicable). Nor did it involve a situation, like this case, in which the United States is affirmatively telling a court that applying the doctrine will harm the country’s interests. And while *Chemical Bank* saw significance in the fact that former owners of the U.S. assets had lodged no protest to a purported Cuban expropriation in over 20 years of litigation, *see id.*, in this case there is little reason to believe that the account holders have acquiesced in Cuba’s purported forfeiture. Rather, the relative absence of objections may well have resulted from the abbreviated period allowed for notice to the account holders (only a month and half), and the high likelihood that notices sent to addresses apparently dating to the 1950s did not reach all affected individuals.

4. For the reasons expressed above, it should be clear that U.S. policy interests will not be sufficiently furthered by the act of state doctrine so as to justify its application in this case. But if any doubt remains on that score, that doubt should be resolved by the fact that the government’s filing in this case merits substantial deference. At least eight Justices agreed in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), that the Executive Branch’s position was at a minimum entitled to deference in act of state cases. *See id.* at 768 (plurality opinion) (arguing that the executive’s views should be dispositive); *id.* at 774 (Powell, J., concurring) (arguing that the judiciary should account for “the position, if any, taken by the political branches of government”); *id.* at 790 (Brennan, J., dissenting) (recognizing that the State

Department's views "are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine"). And since the doctrine is based at least in part on the need to avoid conflict between the judicial and executive branches, *see Sabbatino*, 376 U.S. at 433, it makes particular sense for the judiciary to accord deference to the Executive's understanding of the country's foreign policy interests. *See also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (recognizing the Executive's significant and unique role in foreign relations).

* * * *

(4) Martinez

On October 16, 2015, the United States submitted a statement of interest in *Martinez v. Cuba*, No. 07-6607 (S.D.N.Y.) to the effect that bank accounts, blocked pursuant to the Cuban Assets Control Regulations ("CACR") and sought for attachment under TRIA and the FSIA, were not owned by Cuba and therefore not subject to attachment. In particular, the U.S. statement explains that electronic fund transfers ("EFTs") are only deemed property of Cuba if the state or an agency or instrumentality of the state transmitted the EFT directly to the bank where the account was blocked.

On December 14, 2015, the United States submitted a supplemental statement of interest in response to assertions by plaintiffs that the ruling in *Vera v. Republic of Cuba*, 12-1596 (S.D.N.Y.) should be applied to the *Martinez* case. The December statement of interest makes the points that the *Vera* ruling is contrary to government regulations and that *Vera* does not support plaintiffs' arguments in *Martinez* in any event. Excerpts follow from the December statement of interest (redacted), which is also available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. CONTRARY TO THE *VERA* HOLDING, A BANK CANNOT DISCLAIM ITS INTEREST IN PROPERTY BLOCKED PURSUANT TO THE CACR

In *Vera*, the plaintiffs filed a petition seeking turnover of a \$3 million EFT "emanating from Cuba, or its agencies or instrumentalities, transmitted to New York banks for clearance purposes, and blocked pursuant to the [CACR]." ... In response to the petition, HSBC Bank USA N.A. ("HSBC"), the New York intermediary bank that held the blocked account, filed an interpleader petition to resolve claims on the \$3 million transfer. ... HSBC stated that the blocked transfer was initiated by a Cuban bank, Banco Internacional de Comercia, S.A. ("BICSA"), which instructed ING Bank France, Succursale de ING Bank N.V. ("ING") to transfer the \$3 million from a BICSA account at ING to another BICSA account at Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA"). ... Consistent with this statement, the parties later stipulated that a Cuban bank had initiated the \$3 million transfer, and was also the intended beneficiary of the transfer. ... Neither BICSA nor ING responded to the interpleader petition. ...

The plaintiffs in *Vera* moved for summary judgment. . . . In response, HSBC “reiterate[d] its position as merely a stakeholder in [the] dispute,” but also opposed the motion, arguing that the blocked EFT was not subject to attachment under TRIA or the FSIA, because the plaintiff could not establish that the EFT was the property of Cuba for purposes of New York law. . . . In making this argument, HSBC relied on the Second Circuit’s decisions in *Calderon-Cardona* and *Hausler* holding that an EFT blocked midstream is the property of a foreign state only if the state or its agency or instrumentality transmitted the EFT directly to the bank holding the blocked EFT. *See id.* HSBC reasoned that, because the funds were transmitted to HSBC (a U.S. bank) by HSBC Bank plc, a United Kingdom bank, the EFT was not Cuban property for purposes of TRIA or the FSIA. *Id.*

Judge Hellerstein rejected this argument. The court ruled that, because HSBC Bank plc was not interpled, and because ING did not respond to the interpleader petition, “any potential interest in the chain of transactions leading from BICSA to HSBC has been disclaimed.” . . . The court concluded—without citing any legal authority—that, for the purposes of *Calderon-Cardona* and *Hausler*, the blocked assets were to be “considered to have been transmitted to HSBC directly from BICSA.” . . . Thus, *Vera* appears to stand for the proposition that where originating and intermediary banks “disclaim” interest in blocked assets, the assets may be considered to be the property of the originator. Because the originator in *Vera* was an instrumentality of Cuba, Judge Hellerstein found that the blocked EFT was Cuba’s property, and that it was therefore attachable under TRIA and the FSIA. . . .

The reasoning in *Vera* is contrary to the governing regulations. Under the CACR, a foreign bank is prohibited from disclaiming any interest in property subject to the jurisdiction of the United States, if Cuba also has an interest in that property. Specifically, section 515.201(b)(2) of the CACR prohibits “[a]ll transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States” if the transfers involve property in which Cuba (or its agency or instrumentality) has or had “any interest of any nature whatsoever, direct or indirect.” The word “transfer” is specifically defined to include “any actual or purported act or transaction, . . . the purpose, intent, or effect of which is to create, *surrender*, *release*, transfer, or alter, directly or indirectly any . . . interest with respect to any property.” 31 C.F.R. § 515.310 (emphasis added).

In *Vera*, there was no dispute that the blocked EFT was subject to the jurisdiction of the United States or that Cuba had an interest in the property. Therefore, under the CACR, ING and HSBC Bank plc were prohibited from “surrender[ing]” or “releas[ing]” their interests in the EFT that was blocked in New York and intended for a Cuban beneficiary. Moreover, the CACR specifically provides that any transfer in violation of the CACR involving property in which Cuba has an interest “is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property.” 31 C.F.R. § 515.203(a); *see also Zarmach Oil Services, Inc. v. U.S. Dep’t of the Treasury*, 750 F. Supp. 2d 150, 157 (D.D.C. 2010) (“OFAC regulations . . . provide only one method by which the Sudanese Government’s interest in the funds may be extinguished: a valid license from OFAC . . . and contain no provision by which the efforts of a sanctions target and a company it wishes to do business with can, on their own, ‘un-block’ assets frozen by OFAC.” (citations omitted)). Thus, under the CACR, any “disclaimer” by ING or HSBC Bank plc would be “null and void,” and could not operate to transfer the property interest in the blocked asset to Cuba, or its agencies or instrumentalities.

Plaintiff's argument in this case that [redacted] disclaimer of interest in Accounts 1 and 2 in this case renders them attachable under TRIA and the FSIA is therefore unavailing. Under the CACR, the foreign [redacted] entities cannot surrender or release their interests in the blocked EFTs, as they are property subject to the jurisdiction of the United States in which Cuba has an interest as the intended beneficiary. *See* 31 C.F.R. §§ 515.201(b)(2), 515.310. Any attempt to do so would be "null and void." *See* § 515.203(a). For this reason, the reasoning in *Vera* should be rejected. That decision did not consider, let alone correctly analyze, the impact of the CACR on intermediary banks' purported attempt to "disclaim" an interest in an asset subject to the regulations.

II. THE *VERA* HOLDING DOES NOT SUPPORT PLAINTIFF'S POSITION

Setting aside the error in *Vera*, Judge Hellerstein's reasoning in that case is inapplicable here for the additional reason that there is no indication that Cuba was the originator of the blocked EFTs in Accounts 1 and 2. In *Vera*, the parties stipulated that a Cuban bank was both the originator and beneficiary of the blocked EFT. ... But here, as Plaintiff concedes, there is no originator information available for the blocked transfers. ...

Plaintiff asks this Court to "infer" that Cuba was the originator of the EFTs here from the lack of originator information on the accounts. Without citing any legal or evidentiary support, Plaintiff speculates that "the originator's identity was purposefully omitted or scrubbed from the wire information" for the accounts at issue. ... Plaintiff argues that the supposed "purposeful omission" of originator information should cause the Court to infer that Cuba was the originator of the blocked EFTs, and therefore, under *Vera*'s flawed reasoning, the owner of the blocked accounts. ... But Plaintiff fails to cite a single fact to support her speculation that the lack of originator information for the EFTs at issue was purposeful, much less that Cuba was the originator.

In fact, the only evidence on this point leads to the opposite conclusion. ... In a November 5, 2015, letter to Plaintiff's counsel (copying the Government), counsel explained that the blocked EFTs at issue involve old transactions for which "[t]he absence of [originator] information at this late date is not surprising," particularly in light of the fact that the [redacted] entity involved has "undergone various mergers and acquisitions." ... And the mere fact that the EFTs were blocked does not support Plaintiff's claim, because the EFTs' intended recipient was Cuba, which would trigger a block of the transfer regardless of the originator's identity or nationality. In short, there is no evidence that Cuba originated the EFTs at issue, and therefore, no cause to apply the reasoning in *Vera*. Accordingly, this Court may rule that *Vera* would not apply to permit attachment of Accounts 1 and 2 in this case without addressing whether that case was correctly decided.

* * * *

(5) Harrison

In the November 2015 *amicus* brief in *Harrison v. Sudan*, discussed in section 10.A.3. *supra* (Service of Process), the United States also argued that the Second Circuit panel had erred by suggesting that the plaintiffs need not obtain a license from the Office of Foreign Assets Control ("OFAC") before executing upon blocked assets under the FSIA. An excerpt follows from the U.S. brief, which is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

... [T]he United States has repeatedly taken the position that section 201(a) of the Terrorism Risk Insurance Act (“TRIA”) permits a person holding a judgment under 28 U.S.C. § 1605A to attach assets that have been blocked pursuant to certain economic sanctions laws, without obtaining an OFAC license. That position rests on the terms of TRIA, which permits attachment of blocked assets in specified circumstances “[n]otwithstanding any other provision of law.” TRIA § 201(a).

But the panel erroneously applied the same construction to § 1610(g) of the FSIA. ... As the United States has previously stated, where “funds at issue fall outside TRIA but somehow are attachable by operation of the FSIA alone . . . an OFAC license would be required before the funds could be transferred to plaintiffs.” Statement of Interest of United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502 (D.D.C. Jan. 23, 2015), at 18. While § 1610(g)(2) provides that certain property of a foreign state “shall not be immune from attachment,” that language, consistent with the paragraph’s title (“United States sovereign immunity inapplicable”), merely removes a defense of sovereign immunity. Section 1610(g) lacks TRIA’s broad notwithstanding any other provision” language, and does not override other applicable rules such as the need for an OFAC license. *See* 31 C.F.R. §§ 538.201(a), 538.313.

* * * *

c. *Constitutionality of the Iran Threat Reduction and Syria Human Rights Act of 2012*

In December 2015, the United States filed an *amicus* brief in the U.S. Supreme Court in support of respondents in *Bank Markazi v. Peterson et al.*, No. 14-770. The case presents the question of the constitutionality under Article III (separation of powers) of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8701 *et seq.* The Act makes certain assets in which the Central Bank of Iran has a security entitlement subject to attachment in aid of execution in connection with terrorism-related judgments against Iran in *Peterson*. 22 U.S.C. § 8772. The Act was adopted by Congress while the *Peterson* case was pending. The case was brought by more than 1000 victims of terrorist attacks sponsored by Iran, or their representatives and surviving family members, seeking to execute judgments on property of Iran within the jurisdiction of the U.S. District Court for the Southern District of New York. Based on the Act, the district court granted partial summary judgment for the respondents, holding that certain bond assets of Bank Markazi (Iran’s central bank) were subject to turnover under § 8772 and TRIA. The court of appeals affirmed. The U.S. *amicus* brief, excerpted below, explains why the Act does not violate the separation of powers because it amended the law on which the court would make its determination and did not direct the result of that determination. The United States also filed an *amicus* brief opposing the petition

for certiorari in the case in August 2015. The brief is available in full at <http://www.state.gov/s/l/c8183.htm>.

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C. The Political Branches Have Historically Established Particularized Rules Governing Claims Against Foreign Sovereigns And Foreign Sovereign Assets, And Those Actions Have Long Been Understood To Be Consistent With Article III

The political Branches historically have exercised extensive authority over claims against foreign sovereigns and the disposition of foreign-state assets subject to the United States’ jurisdiction—including by specifying the substantive law to be applied in a particular pending case. Those actions have never been thought to be inconsistent with courts’ exercise of the “judicial Power” under Article III. To the contrary, this Court has long recognized that in adjudicating suits against foreign sovereigns, courts must take account of the principle that the conduct of foreign relations is “so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952); see *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). The Court has also recognized that the political Branches often must quickly respond to evolving international situations, and pending suits should not be permitted to impede their ability to conduct the Nation’s foreign relations. *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981).

1. This Court has understood the Executive’s case-specific foreign sovereign immunity determinations to be consistent with Article III

a. For much of our Nation’s history, the Executive Branch had the authority to determine the immunity of foreign states in civil suits in courts of the United States on a case-by-case basis, and those determinations were binding on the courts. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945). A foreign sovereign’s immunity is grounded not in any constitutional entitlement, but instead arises out of principles of international law, reciprocity, and comity among sovereigns. *Altmann*, 541 U.S. at 689; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit in our courts, the Court historically looked to “the political branch of the government charged with the conduct of foreign affairs” to decide whether immunity should be recognized in the particular case. *Hoffman*, 324 U.S. at 34. The Executive would make a determination based upon principles of immunity, informed by customary international law and reciprocal practice. *Verlinden*, 461 U.S. at 487.

This Court has described an Executive immunity determination as a “rule of substantive law governing the exercise of the jurisdiction of the courts.” *Hoffman*, 324 U.S. at 36; see also *Ex parte Peru*, 318 U.S. 578, 588 (1943) (same). As a result, the Court has explained, it is “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” *Hoffman*, 324 U.S. at 35; see also, e.g. *Ex parte Peru*, 318 U.S. at 588 (“the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction”) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)); *Compania Espagnola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

The Executive's determination of the "rule of substantive law" of immunity, *Hoffman*, 324 U.S. at 36, would necessarily be made in the context of a particular claim against a sovereign, and therefore necessarily pertained only to the specific case in question. Such a determination, and the effect accorded to it by the court, were never thought to be a violation of Article III. Indeed, this Court has rejected the suggestion that "the President's determination of a foreign state's immunity" could be thought to be "an encroachment on [the federal courts'] jurisdiction" in violation of Article III. *Dames & Moore*, 453 U.S. at 684-685. The Court explained that the Executive's immunity determination permissibly "direct[s] the courts to apply a different rule of law"—necessarily in a single case. *Ibid.*

b. In 1976, Congress enacted the FSIA, which transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit. *Verlinden*, 461 U.S. at 488-489. Although the FSIA establishes comprehensive "legal standards governing claims of immunity" that are generally applicable to all cases involving foreign-sovereign defendants, *ibid.*, Congress has on occasion taken further steps to alter a foreign state's immunity with respect to ongoing litigation.

In 2003, in response to the institution of a new government in Iraq, Congress authorized the President to suspend the application of the FSIA's terrorism exception to Iraq in order to avoid burdening the new government with "crushing liability" for the terrorist acts of its predecessor. *Republic of Iraq v. Beaty*, 556 U.S. 848, 852-853, 864 (2009) (quoting *Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (opinion of Roberts, J.), cert. denied, 544 U.S. 1010 (2005)). The President exercised that authority for the express purpose of protecting Iraq's property from "attachment, judgment, decree, lien, execution, garnishment, or other judicial process." *Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003). That action, this Court recognized, altered the law governing two pending suits against Iraq, with the result that "immunity kicked back in" and "the District Court lost jurisdiction" over the suits. *Beaty*, 556 U.S. at 865. While neither the statutes at issue nor the President's action referenced specific pending cases by name, the express purpose of the political Branches' actions was to ensure that pending and potential claims against Iraq (whatever their number) did not undermine the United States' foreign policy in the region.

2. *The political Branches may settle pending claims against foreign sovereigns or transfer them to a non-Article III tribunal*

The political Branches' authority over claims of U.S. nationals against foreign sovereigns extends to disposing of those claims, including by removing them from Article III courts. Because "outstanding claims by nationals of one country against the government of another country" often may be "sources of friction between the two sovereigns," the President may settle or extinguish such claims in the exercise of his authority over foreign affairs. *Dames & Moore*, 453 U.S. at 679. Since the nineteenth century, the Executive Branch has entered into numerous executive agreements "renounc[ing] or extinguish[ing] claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures." *Id.* at 679-680 & n.8 (canvassing historical practice); see, e.g., *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (same); *United States v. Pink*, 315 U.S. 203, 227-228 (1942). Many of those settlements involved the claims of identified individuals arising out of a specific incident. See John Bassett Moore, *Treaties and Executive Agreements*, 20 Pol. Sci. Q. 385, 403-417 (1905).

The political Branches' authority to settle claims extends to those pending in court. In *Schooner Peggy*, this Court, relying on a treaty that was ratified while the case was pending before the Court, reversed a judgment holding that a captured vessel should be forfeited to the United States and private parties. The treaty provided that captured ships, "not yet definitively condemned, * * * shall be mutually restored" by each party. 5 U.S. (1 Cranch) at 107 (reporter's note). The Court observed that the treaty settling the claim "positively change[d] the rule which governs." *Id.* at 110.

In *Dames & Moore*, the Court rejected an Article III challenge to the President's authority to enter into an executive agreement that suspended pending claims of U.S. nationals against Iran and provided for their submission to the Iran-United States Claims Tribunal. 453 U.S. at 684-685; Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981) (implementing agreement). This Court rejected the argument that "the President, by suspending [the plaintiff's] claims, has circumscribed the jurisdiction of the United States courts in violation of" Article III. 453 U.S. at 684. The Court explained that the President's settlement of the claims "has simply effected a change in the substantive law governing the lawsuit," much like an Executive suggestion of sovereign immunity. *Id.* at 685.

3. *The political Branches have long regulated the legal status of specific foreign-state assets, including those involved in pending litigation*

a. Since World War I, Congress has authorized the President, in times of war or national emergency, to regulate property in which a foreign enemy state has an interest, including by blocking it or, in certain circumstances, vesting title to it in the United States. See TWEA, 50 U.S.C. App. 2(b) and 5(b); IEEPA, 50 U.S.C. 1701 *et seq.* The Executive Branch invoked the power under TWEA to vest in the United States specific foreign-state assets. See, *e.g.*, *Propper v. Clark*, 337 U.S. 472, 474-476 (1949).

The purpose of statutes permitting blocking (or vesting) of foreign assets is "to put control of foreign assets in the hands of the President" so that he may dispose of them in the manner that best furthers the United States' foreign-relations and national-security interests. *Propper*, 337 U.S. at 493; see *Dames & Moore*, 453 U.S. at 673. By blocking assets, the Executive Branch "immobilize[s] the assets * * * so that title to them might not shift from person to person, except by license, until" the Executive Branch determines whether "those assets [are] needed for prosecution of [a] threatened war or to compensate our citizens or ourselves for the damages done by" the relevant foreign governments. *Propper*, 337 U.S. at 484.

In *Dames & Moore*, this Court upheld the President's authority under IEEPA to issue a series of orders and regulations that first blocked Iranian state assets that were the subject of litigation in federal and state court, and then subsequently "nullified" any intervening judicial attachment orders restraining the assets. 453 U.S. at 663-666; see Exec. Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981). In upholding the President's authority, the Court emphasized that the purpose of freezing foreign-state assets is to "maintain" them at the President's "disposal" for use as a "bargaining chip" in negotiations with a hostile country. 453 U.S. at 673. The Court therefore refused to adopt a construction of IEEPA that would permit "individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments, garnishments, or similar encumbrances on property." *Ibid.*; see *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 657 F.2d 3, 5 (2d Cir. 1981) (vacating attachment orders in accordance with the Court's decision in *Dames & Moore*).

b. The political Branches have previously taken control of particular identified foreign-state assets in order to compensate terrorism victims or satisfy the victims' judgments against

foreign states. In 1996, acting under TWEA, the President “vest[ed] in the United States” \$1.2 million in blocked Cuban assets and directed payment “to surviving relatives of” individuals whose civilian airplanes were shot down over international waters by the Cuban Air Force. *Alejandre v. Republic of Cuba*, 96-10127 Doc. No. 61, at 42 (S.D. Fla. Dec. 30, 1998) (President William J. Clinton, Memorandum for the Secretary of the Treasury (Oct. 2, 1996)). And in 2000, Congress directed the President to use blocked property belonging to Cuba and Iran to make payments to certain individuals with terrorism-related judgments against those states. Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, Div. C, § 2002, 114 Stat. 1541.

4. *Functional considerations inform the political Branches’ historical authority concerning claims against, and assets of, foreign sovereigns*

Domestic litigation seeking compensation for wrongs committed by a foreign state against U.S. nationals can have significant implications for the Nation’s relations with foreign sovereigns, as well as its interest in affording a means of compensation for injuries suffered by its nationals. See *Dames & Moore*, 453 U.S. at 673-674. The history of Executive and congressional control over claims against foreign states and foreign-state assets reflects the recognition that the political Branches must have the ability to address the various concerns raised by such litigation. The political Branches often may need to employ narrow measures that are expressly limited to particular foreign-sovereign litigation or assets. See *Beatty*, 556 U.S. at 856-857 (recognizing that political Branches may alter a generally applicable statute to implement foreign-relations interests). Such targeted alterations to the governing legal framework enable the political Branches to craft nuanced responses to particular international situations, while preserving flexibility to change course as events unfold or to draw distinctions between particular claims, states, or assets. Those measures will necessarily affect only a finite number of cases. In upholding the political Branches’ ability to alter substantive rules of law governing defined sets of claims or assets, this Court has never suggested that the validity of such actions would turn on how many pending cases they affect. . . . And with good reason: such an interpretation of Article III would permit the existence of pending litigation—and the happenstance that only a single case might be pending—to tie the hands of the political Branches in an arena in which flexibility and dispatch are crucial. See *Dames & Moore*, 453 U.S. at 673-674 & n.6.

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d. *Propriety of monetary contempt sanctions under the FSIA*

(1) *Sanctions for failure to comply with discovery*

In response to a request from the court, the United States filed a statement of interest on August 25, 2015 in *Walters v. People’s Republic of China*, No. 1:01-mc-300, a case in the U.S. District Court for the District of Columbia. The plaintiffs in the case attempted to obtain post-judgment asset discovery from China in an effort to execute a \$9.8 million default judgment entered against China in the 1990s relating to the death of their teenage son. The United States previously filed statements of interest in the case in 2012 relating to the discovery sought by the plaintiffs. See *Digest 2012* at 305-07. The 2015 statement of interest addresses the plaintiffs’ request to impose monetary

contempt sanctions on China for its failure to comply with the court's discovery orders and explains that a number of important international and domestic legal considerations weigh against the imposition of such sanctions on foreign states. Excerpts follow from the U.S. statement of interest submitted in 2015. The full statement is available at <http://www.state.gov/s/l/c8183.htm>. The case was voluntarily dismissed by the plaintiffs prior to a ruling on the motion for sanctions.

* * * *

Although the D.C. Circuit has held that the FSIA does not restrict a district court's inherent authority to impose contempt sanctions against a foreign sovereign, *see FG Hemisphere*, 637 F.3d at 375, any decision to wield such authority must be consistent with the equitable principles governing civil contempt. In this case, those considerations weigh decisively against imposing monetary sanctions. The relevant considerations include (A) the unenforceability and limited utility of the sanctions order, (B) the punitive nature of the proposed sanctions, (C) the foreign policy and reciprocity concerns presented by imposing sanctions on China, and (D) the overbroad nature of the underlying discovery requests. Those considerations should guide the Court in exercising its discretion as to whether to order the sanctions requested by Plaintiffs.

A. Equitable Principles Weigh Against The Issuance of An Unenforceable Order Imposing Monetary Contempt Sanctions on China

Absent exceptional circumstances, 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 (9th Cir. 1996). As discussed below, the requested contempt sanctions are at odds with the purposes of the civil contempt power and the equitable principles that guide courts in exercising it.

As a preliminary matter, there does not appear to be any dispute that an order imposing monetary contempt sanctions on China would be unenforceable. Section 1609 of the FSIA provides that where a valid judgment has been entered against a foreign state, property of that state is immune from execution or attachment unless one of the statutory exceptions in sections 1610 or 1611 applies. *See* 28 U.S.C. § 1609. None of the statutory exceptions in those sections apply to allow for enforcement of an order of monetary contempt sanctions, and no other provision of the FSIA permits a court to issue an enforceable contempt order imposing monetary sanctions against a foreign state that is unwilling to pay them. *See Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006). Accordingly, any attempt to reduce the accrued fines to a judgment and collect them through the execution of Chinese assets would be foreclosed by the FSIA.

The most immediate problem with an unenforceable contempt order is that it does nothing to further the purposes of civil contempt. A civil contempt sanction may serve either to "coerce the defendant into compliance with the court's order, or [to] compensate the complainant for losses sustained." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994) (citation omitted). Although a district court has discretion in fashioning a contempt remedy, *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274, 1289 (D.C. Cir. 1993), "a court is obliged to use the least possible power adequate to the end proposed," *Spallone v. United States*, 493 U.S. 265, 276 (1990) (citation omitted). In this regard, courts are

advised to consider “the probable effectiveness of any suggested sanction in bringing about [compliance].” *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Technologies, Inc.*, 369 F.3d 645, 657-58 (2d Cir. 2004).

It seems apparent that imposing monetary sanctions on China would not further the purposes of civil contempt. An unenforceable sanctions order would not be an effective way to coerce China to comply with the Court’s discovery order, much less to compensate Plaintiffs for any injuries they have sustained as a result of China’s noncompliance. *See Edeh v. Carruthers*, No. 10-2860, 2011 WL 4808194, at *4 (D. Minn. Sept. 20, 2011) (observing that defendant’s “complete failure to respond to plaintiff and to the Court indicates that financial consequences would have no effect on [defendant’s] willingness to comply with the Court’s order”).

As discussed below, *see infra* Section C, given that other countries generally view it as inappropriate to impose penalties on foreign sovereigns for failing to comply with a court order, it would be exceedingly rare for *any* foreign state to voluntarily pay a contempt sanction. But the prospect of voluntary compliance is all the more remote in this case, where China has been steadfast in its refusal to participate in the litigation or to comply with orders of the Court. *See* Notice to Court, Dkt. No. 10 (“China . . . has never accepted the jurisdiction of US courts. Neither has China ever accepted the so-called default judgment against it entered by the US court in 1996.”). Rather, China’s consistent position that it is absolutely immune virtually ensures that any attempt by Plaintiffs to collect the fines would be met by the same response they have met in attempting to execute the underlying damages award.

For similar reasons, a decision to levy fines on China necessarily would discount the “probable effectiveness” of the contempt remedy, *Paramedics*, 369 F.3d at 657-58, and certainly would not represent “the least possible power adequate to the end proposed,” *Spallone*, 492 U.S. at 276. As discussed below, *see infra* Section C, while any contempt sanction imposed on a foreign state would prove worrisome from a foreign policy standpoint, a sanction against a foreign state that for some reason were willing to voluntarily comply at least could be said to serve the functions of the contempt power. But there is nothing to recommend a contempt sanction that is all but certain to be ignored by a foreign state. *See In re Estate of Marcos*, 94 F.3d at 548 (holding that the district court abused its discretion by issuing a “futile injunction” against a foreign state); *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.”). Such a sanction would not achieve its intended purpose, and any negligible utility it may have would almost always be outweighed by its costs.

B. The Proposed Monetary Contempt Sanctions Are Punitive in Nature and Inconsistent with the FSIA

As noted above, civil contempt sanctions may serve either to coerce compliance with an order or compensate a party for loss; they may not be designed to punish. *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 70, 76 (D.D.C. 2003). Moreover, in the context of contempt proceedings involving foreign sovereigns, sanctions that are punitive in nature run afoul of the FSIA’s ban on imposing punitive damages on foreign states. 28 U.S.C. § 1606 (“[A] foreign state . . . shall not be liable for punitive damages . . .”). The monetary fines sought here (\$246,500 per day, to be paid to the Walters, until China satisfies its discovery obligations or pays the final judgment. . .) bear several hallmarks of a punitive contempt sanction.

First, although Plaintiffs have requested that the monetary sanctions be payable directly to them as opposed to the Court, . . . it seems clear that the requested amount has no relation to

any damages they may have incurred as a result of China's noncompliance with the discovery order. While a court may order a civil contemnor to compensate the injured party for losses caused by the violation of the court order, *Landmark Legal Found.*, 272 F. Supp. 2d at 76, such compensatory sanctions should "correspond at least to some degree with the amount of damages," and "proof of loss must be present to justify its compensatory aspects," *Paramedics*, 369 F.3d at 658 (citation omitted); *see also Landmark Legal Found.*, 272 F. Supp. 2d at 76 (observing that compensatory contempt sanctions often consist of "reasonable costs (including attorneys' fees) incurred in bringing the civil contempt proceeding.").

Plaintiffs' proposed contempt sanctions have none of these features. Plaintiffs have made no effort to tie the requested amount to any actual damages they may have incurred as a result of China's noncompliance with the discovery order. *See N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1353-54 (2d Cir. 1989) (holding that the district court abused its discretion by making contempt sanctions payable directly to plaintiffs). Moreover, Plaintiffs have not suggested that any fines they may collect as a result of the contempt order would offset the amount owed by China under the final judgment. Rather, Plaintiffs request that they be paid the monetary contempt fines in addition to the amount of the outstanding final judgment.

Second, Plaintiffs have failed to present evidence as to what it would take to ensure China's compliance with the discovery order. *Autotech Techs. v. Integral Research & Dev. Corp.*, 499 F.3d 737, 751-52 (7th Cir. 2007) (holding that it was an abuse of discretion to order contempt fine against foreign government instrumentality in the absence of evidence that the requested fines were calibrated to actual losses or the prospect of coercing compliance). Plaintiffs contend that the requested sanctions are reasonable in light of the amount of the sanctions imposed against Russia in the *Chabad* litigation (\$50,000 per day), *see Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148, 153-55 (D.D.C. 2003), and the relative size of China's economy ... But this rough approximation is a poor substitute for actual evidence. The discovery-related sanctions requested here would surpass not only the sanctions imposed in *Chabad*, but also other monetary contempt sanctions that have been imposed on foreign sovereigns in the past. *See FG Hemisphere*, 637 F.3d at 376 (\$5,000 per week payable to plaintiff doubling every four years until reaching a maximum of \$80,000 per week); *Chabad*, 915 F. Supp. 2d at 153-55 (\$50,000 per day to plaintiff); *Af-Cap*, 462 F.3d at 428-29 (\$10,000 per day to the court). For these reasons, it would be difficult to square these extraordinary fines with the FSIA's categorical ban on punitive damages against a foreign state.

C. The Proposed Sanctions Raise Significant Foreign Policy Concerns

The United States has significant foreign policy concerns about Plaintiffs' pursuit of contempt sanctions in this matter. Most immediately, there is a risk that contempt sanctions will create diplomatic tension between the United States and China, complicating foreign relations and risking adverse consequences for U.S. interests in Chinese courts. A finding of civil contempt is a declaration that a sovereign has behaved in a manner worthy of sanction. *Cf. In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (noting that contempt order against senior Greek official "offends diplomatic niceties even if it is ultimately set aside on appeal."). As such, it is likely to be received by the foreign state as punitive and an affront to its sovereign immunity, and may even embolden the foreign state to respond in kind. The United States is cognizant of the D.C. Circuit's statement that "sensitive diplomatic considerations[,] . . . if reasonably and specifically explained[,] " could influence a court's consideration of whether to impose sanctions against a foreign sovereign. *FG Hemisphere*, 637 F.3d at 380. *See also Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (stating that foreign policy is an area

where deference is owed to “the considered judgment of the Executive”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21 (2004) (observing 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”).

Although the very sensitivities of diplomatic considerations make them difficult to air in public, these concerns are not “generic.” *Cf. FG Hemisphere*, 637 F.3d at 380. By way of illustration, in *Chabad*, the district court imposed monetary contempt sanctions of \$50,000 per day against Russia with the aim of coercing Russia to comply with an order directing Russia to return a collection of religious books and other documents to the plaintiff. *See* 915 F. Supp. 2d at 153-155. Rather than bringing Russia into compliance, the sanctions order created an additional hurdle to the United States’ efforts to resolve 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). Moreover, in response to the sanctions order, the Russian Ministry of Culture and the Russian State Library filed a lawsuit against the United States in Moscow. The suit named the United States and the Library of Congress as defendants and requested a court order directing the defendants to return to Russia seven books that had been loaned to the Library of Congress from the *Chabad* collection and imposing a \$50,000 daily fine for each day of noncompliance. Judgment was entered, including the fine, which continues to accrue. *See* Decision, Case No. A40-82596/13, slip op. at 11 (Comm’l Ct. of Moscow May 29, 2014) (Russ.).

This is not to say that China will take the same approach that Russia did in *Chabad*. But *Chabad* does illustrate that the imposition of contempt sanctions can have negative consequences for the United States, while doing nothing to improve the position of the complainant. China already has expressed its “grave concern [of] the negative consequences that the case will cause if it continues to develop,” Dkt. No. 10 at 1, and a judicial declaration that China’s conduct is worthy of sanction, accompanied by an order levying daily fines on the Chinese Government until the conduct is corrected, is not likely to support friendly bilateral relations.

International practice also weighs against an order of monetary contempt sanctions against China. In enacting the FSIA, Congress sought to adhere closely to accepted international practice and standards relating to sovereign immunity. *See Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1234 (2d Cir. 1995) (stating that the FSIA “was primarily codifying pre-existing international and federal common law.”). It is therefore appropriate to consider foreign and international legal norms, as well as the potential ramifications for the United States if U.S. courts deviate from such norms, in adjudicating cases arising under the FSIA. *See, e.g., Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1999). As the United States has discussed at length in previous submissions, the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property generally prohibit the imposition of monetary sanctions based on a foreign state’s conduct in judicial proceedings. *See* European Convention on State Immunity, art. 18, May 16, 1972 E.T.S. No. 74, 11 I.L.M. 470 (1972); United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 24(1), G.A. Res. 59/38, annex, Dec. 2, 2004, 44 I.L.M. 803 (2005). Indeed, under the European Convention, this bar expressly applies to monetary sanctions imposed on a foreign state for “its failure or refusal to disclose any documents or other evidence.” European Convention, art. 18-Point 70. Although the United States is not a party to either convention, the conventions reflect international practice and legal norms regarding foreign state immunity, and similar bars on monetary sanctions have been adopted by numerous nations that have codified the restrictive view of sovereign immunity law,

including Canada, the United Kingdom, and Australia. *See, e.g.*, Canadian State Immunity Act, §§ 12(1), 10(1); United Kingdom State Immunity Act, § 13; Australian Foreign States Immunities Act of 1985, § 34. The United States, as a defendant to foreign proceedings, has benefitted from the international practice prohibiting such sanctions against sovereigns. 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 sanctions on foreign states may embolden foreign courts to impose similar sanctions on the United States.

The *FG Hemisphere* court discounted these examples of international practice as “irrelevant” to whether contempt sanctions are available under the FSIA. 637 F.3d at 380. But the question here is not whether the Court has authority to impose contempt sanctions; rather, the question is whether such authority should be exercised in this case. In considering that question, including the likelihood that China will comply, it is appropriate to account for the manner in which comparable orders are received under foreign and international law. *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 Kingdom’s immunity statute in construing the FSIA’s executorial immunity provisions). Indeed, China’s repeated appeals to international law and practice in its notices to the Court suggest that these concerns are particularly salient here. *See* Dkt. Nos. 10, 25. Thus, foreign policy considerations weigh against the sanctions that Plaintiffs propose in this case.

D. The Proposed Sanctions Are Unwarranted in Light of The Scope of The Overbroad Discovery Order

A final factor weighing against contempt sanctions is the overly broad nature of the underlying discovery order. The Court has ordered China to provide Plaintiffs with information on what appears to be every commercial asset owned directly or indirectly by the Chinese government in the United States. . . . The United States has previously taken the position in this case that such “broad, general-asset discovery” is inconsistent with the FSIA. . . . Although the Supreme Court has since held that the FSIA does not immunize foreign sovereigns from post-judgment discovery, *see Republic of Argentina v. NML Capital Ltd.*, 134 S. Ct. 2250 (2014), the Court explained 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.” *Id.* at 2258 n.6 (internal quotation marks omitted). The Court also recognized that foreign sovereigns may be able to obtain relief from post-judgment discovery to the extent the discovery is directed to “information that could not lead to executable assets in the United States or abroad” *Id.* at 2257. Because the scope of the Court’s discovery order permits plaintiffs to seek information that is not relevant to their ability to execute their judgment, the Court should be extremely cautious about imposing monetary contempt sanctions on China. *See FG Hemisphere*, 637 F.3d at 379 & n.3 (noting, without addressing, the United States’ “serious[.]” concerns about a district court imposing sanctions for non-compliance with overbroad discovery). Even as narrowed by the Court, the requests at issue here are overbroad in a number of respects:

1. Plaintiffs obtained the judgment against China under the commercial activities exception, 5 U.S.C. § 1605(a)(2). The only potentially relevant exception to China’s attachment immunity is 5 U.S.C. § 1610(a)(2), under which China’s property in the United States is not immune from execution if it “is or was used for the commercial activity upon which the claim is based” Thus, in this case discovery requests relating to China’s commercial property in the

United States are relevant only to the extent they concern assets used in connection with the sale and distribution of firearms. But Plaintiffs' requests are not limited to the commercial activity "upon which the claim is based." ...

2. Plaintiffs' discovery requests are inconsistent with the principle that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." See *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). ...

* * * *

(2) *Pursuit of monetary contempt sanctions in Chabad*

The United States has filed several statements of interest in the U.S. District Court for the District of Columbia in *Chabad v. Russian Federation*, No. 1:05-cv-01548. See *Digest 2014* at 410-13 for a discussion of the statement of interest of the United States filed in 2014; *Digest 2012* at 319-23 for a discussion of the statement of interest of the United States filed in 2012; and *Digest 2011* at 445-47 for a discussion of the statement of interest of the United States filed in 2011. The case concerns Chabad's efforts to secure the transfer of certain books and manuscripts ("the Collection") from the Russian Federation. The Collection consists of materials that were seized at the time of the Bolshevik Revolution and are now held by the Russian State Library, and materials seized by Nazi Germany and later taken by Soviet forces and now held at the Russian State Military Archive. In 2010, the district court entered a default judgment in Chabad's favor directing transfer of the Collection. In 2013, the court imposed monetary contempt sanctions for Russia's failure to make the transfer.

Despite the opposition of the United States to the imposition and enforcement of monetary sanctions against the Russian Federation, including at a hearing before the Court in August 2015, the Court granted Chabad's motion for an interim judgment of accrued sanctions on September 10, 2015, finding that \$43.7 million in fines had accrued since the sanctions order was entered. In an effort to enforce the Court's sanctions order and judgment, Chabad proceeded to serve subpoenas on a number of third parties, and also obtained documents from the Office of Foreign Assets Control within the Department of Treasury.

The United States filed a further statement of interest on October 23, 2015, objecting to the proposed protective order, filed by Chabad in September 2015, regarding the handling of information Chabad is seeking from third parties. The October 23, 2015 statement of interest is available at <http://www.state.gov/s/l/c8183.htm>.

B. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

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

2. Samantar

In 2015, the United States filed a brief as *amicus* on the third petition for a writ of certiorari in *Samantar*. On remand from the Supreme Court's 2010 decision, the district court determined that Samantar was not entitled to immunity, the court of appeals affirmed, and the Supreme Court denied the second petition for certiorari. After the district court entered its final judgment and the court of appeals denied the appeal, Samantar petitioned for certiorari yet again. The United States submitted a brief as *amicus curiae* on January 30, 2015, suggesting that the petition for certiorari should be denied because the court reached the correct result despite erroneously holding that the Executive Branch's immunity determination was not binding on the court and adopting a per se rule of non-immunity that was not drawn from a determination made or principles articulated by the Executive Branch. The Supreme Court denied the petition for certiorari on March 9, 2015. Excerpts follow from the U.S. *amicus* brief.

* * * *

I. THE COURT OF APPEALS' DECISION IS ERRONEOUS IN TWO RESPECTS

A. The Court Of Appeals Erred In Holding That The Executive Branch's Determination As To Conduct-Based Immunity Is Not Controlling

Under this Court's decisions, an Executive Branch determination whether a foreign official is immune from suit is binding on the courts. This principle applies both to status-based and conduct-based immunities, and the court of appeals erred in holding otherwise.

1. a. In *Samantar*, this Court held that the FSIA left in place the Executive Branch's historical authority to determine the immunity of foreign officials. 560 U.S. at 321-325. The Court described that historical practice in terms that made clear the deference that courts traditionally accorded to Executive Branch foreign sovereign immunity determinations before the FSIA's enactment. See *id.* at 311-312. As the Court explained, under the pre-FSIA two-step procedure, a foreign state facing suit could request a "suggestion of immunity" from the State Department and, if the State Department made such a suggestion, the district court "surrendered its jurisdiction." *Id.* at 311. If the State Department took no position on immunity, "a district court had authority to decide for itself whether all the requisites for such immunity existed," applying "the established policy" of the State Department to make that determination. *Id.* at 311-

312 (citation and internal quotation marks omitted). The Court also recognized that the same two-step process would be applied in cases against individual foreign officials. *Id.* at 312.

b. The pre-FSIA immunity decisions that this Court cited in *Samantar* confirm that the State Department's determination regarding immunity is, and historically has been, binding in judicial proceedings. 560 U.S. at 311-312. In *Ex parte Peru*, 318 U.S. 578 (1943), for example, the Court held that in suits against foreign governments, "the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *Id.* at 588 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court instructed that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35; see, e.g., *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

From early in the Nation's history, individual foreign officials were recognized as having immunity "from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see, e.g., *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794). In pre-FSIA suits against foreign officials, courts followed the same two-step procedure as in suits against foreign states. See, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Heaney v. Government of Spain*, 445 F.2d 501, 503-506 (2d Cir. 1971) (applying principles articulated by the Executive Branch because the Executive did not express a position in the case); see also 560 U.S. at 311-312.

2. The court of appeals drew a distinction between Executive Branch determinations concerning status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations of conduct-based immunities, which the court considered itself free to second-guess. That distinction has no basis.

a. As an initial matter, this Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the *Samantar* Court recognized that the same procedures applied in cases involving the conduct-based immunity of foreign officials. 560 U.S. at 311-312. Indeed, the two cases cited by this Court involving foreign officials—*Heaney*, 445 F.2d at 504-505, and *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960)—both involved consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity. And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department's recognition of conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see 560 U.S. at 321-322.

b. In concluding that conduct-based immunity determinations are not binding on the Judiciary, the court of appeals relied on two law review articles for the proposition that the Executive's determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive's conduct-based determinations are not grounded on a similar "constitutional basis." Pet. App. 56a-57a. But this Court has long recognized that the Executive's authority to make foreign sovereign immunity determinations, and the requirement of judicial deference to such determinations, flow from the Executive's constitutional responsibility for conducting the Nation's foreign relations, not the more specific recognition power. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be

accepted by the courts as a conclusive determination by the political arm of the Government” that “continued retention of the vessel interferes with the proper conduct of our foreign relations”); see also *Hoffman*, 324 U.S. at 34; *Lee*, 106 U.S. at 209; *National City Bank v. Republic of China*, 348 U.S. 356, 360-361 (1955).

The Executive’s authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. While the scope of foreign state and foreign official immunity is not invariably coextensive, see 560 U.S. at 321, the basis for recognizing the immunity of current and former foreign officials is that “the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.” *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), aff’d, 168 U.S. 250 (1897); see Pet. App. 78a-84a. As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate recognition power. Pet. App. 55a-56a. To the contrary, they emphasized the Executive’s responsibility for foreign affairs. See *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005); *United States v. Noriega*, 117 F.3d 1206, 1211-1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110-111 (D.D.C. 2005).

c. Accordingly, in the years before the FSIA, courts routinely accepted as binding Executive Branch determinations of conduct-based immunity of both foreign states and foreign officials. Because the Executive Branch, beginning in 1952, applied the restrictive theory of sovereign immunity, under which foreign states enjoy immunity only as to sovereign, not commercial, activity, 560 U.S. at 312, determinations of foreign state immunity were conduct-based, and courts deferred to the Executive’s decisions. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir.), cert. denied, 404 U.S. 985 (1971); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 110 (2d Cir.), cert. denied, 385 U.S. 931 (1966); *Amkor Corp. v. Bank of Kor.*, 298 F. Supp. 143, 144 (S.D.N.Y. 1969). In the relatively few cases involving foreign officials, moreover, courts also followed the “same two-step procedure” as in cases involving foreign states. 560 U.S. at 312 (citing *Heaney and Waltier*).

That deferential judicial posture as to conduct-based immunity determinations is based on the constitutional principle of separation of powers. Under the Constitution, the Executive is “the guiding organ in the conduct of our foreign affairs.” *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). As this Court recognized previously in this case, the Executive Branch’s constitutional authority over the conduct of foreign affairs continues as a foundation for the Executive’s authority to determine the immunity of foreign officials. 560 U.S. at 323; see *Mistretta v. United States*, 488 U.S. 361, 401 (1989). In the absence of a governing statute (such as the FSIA), it continues to be the Executive Branch’s role to determine foreign official immunity from suit. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). The court of appeals therefore erred in holding that the Executive Branch’s determinations of conduct-based immunity are not entitled to controlling weight.

B. The Court Of Appeals Erred In Creating A New Categorical Judicial Exception To Immunity

The court of appeals also committed legal error in declining to rest its determination of non-immunity on the specific grounds set forth in the Executive Branch’s Statement of Interest, and instead fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms.

1. The per se rule of non-immunity adopted by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the

United States specifically requested the court not to address respondents' broader argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. Pet. App. 111a n.3. The court's decision is thus inconsistent with the basic principle that Executive Branch immunity determinations establish "substantive law governing the exercise of the jurisdiction of the courts." *Hoffman*, 324 U.S. at 36.

Indeed, both before and after this Court's decision in *Samantar*, the United States has suggested immunity for former foreign officials who were alleged to have committed *jus cogens* violations. See U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004); see also Statement of Interest & Suggestion of Immunity at 7- 11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381- DLI-CLP (E.D.N.Y. Dec. 17, 2012); Suggestion of Immunity at 6, *Doe v. De León*, No. 3:11-cv-01433- AWT (D. Conn. Sept. 7, 2012); Statement of Interest & Suggestion of Immunity at 5-8, *Giraldo v. Drummond Co.*, No. 1:10-mc-00764-JDB (D.D.C. Mar. 31, 2011). The courts deferred to the United States' Suggestions of Immunity in those cases. See *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Ye*, 383 F.3d at 626-627; *Rosenberg v. Pasha*, 577 Fed. Appx. 22, 23- 24 (2d Cir. 2014); *Doe v. De León*, 555 Fed. Appx. 84, 85 (2d Cir.), cert. denied, 135 S. Ct. 78 (2014); *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012) (per curiam), cert. denied, 133 S. Ct. 1637 (2013).

2. Respondents erroneously suggest (Br. in Opp. 2- 3, 24-25) that the court of appeals' creation of a categorical exception to immunity whenever *jus cogens* violations are alleged is supported by the United States' 2010 merits-stage amicus brief in this case. See 08-1555 U.S. Amicus Br. 7, 24-26. Specifically, they contend (Br. in Opp. 24) that the United States stated that various factors, including the nature of the acts alleged, are "appropriate to take into account" in immunity determinations. As the United States explained in its December 2013 invitation brief, that is incorrect. 12-1078 U.S. Amicus Br. 20-21.

The passages in the United States' merits-stage amicus brief identified considerations, not accounted for under the FSIA, which the Executive Branch could find appropriate to take into account in making immunity determinations. The passages thereby served to underscore the range of discretion properly residing in the Executive Branch under the Constitution in making immunity determinations. The United States' brief in this Court did not state that the Executive Branch had in fact decided if or how any particular consideration should play a role in specific immunity determinations, much less suggest that a court should independently weigh those considerations (or invoke any one of them) to make a determination of immunity or non-immunity on its own.

In any event, this Court unanimously ruled in this case that the courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before the enactment of the FSIA. See 560 U.S. at 321-325. The Executive Branch made a determination of non-immunity in this case. The court of appeals fundamentally erred in failing to rest on the United States' submission and instead itself announcing a categorical exception to official immunity whenever allegations of *jus cogens* violations are made. See *Hoffman*, 324 U.S. at 35.

The court of appeals thus erred in two significant respects, and its decision conflicts with the Second Circuit's decision in *Matar v. Dichter*, *supra*, which held that courts must defer to the immunity determination in the Executive Branch's suggestion of immunity in a case involving alleged violations of *jus cogens* norms. See *Rosenberg*, 577 Fed. Appx. at 23- 24 (following *Dichter*, but acknowledging conflict with Fourth Circuit); see also *Kazemi Estate v. Islamic Rep.*

of Iran, 2014 SCC 62, ¶ 106 (Can.) (recognizing conflict, and declining to recognize a *jus cogens* exception to official immunity). An appellate decision holding that courts need not defer to the Executive's immunity determination and announcing a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would warrant review by the Court at an appropriate time.

II. THIS COURT SHOULD DENY CERTIORARI

This Court should deny certiorari because, although the Fourth Circuit's opinion was erroneous for the reasons stated above, its judgment affirming the denial of petitioner's immunity is in accord with the Executive Branch's determination that petitioner is not immune. The Fourth Circuit's judgment therefore properly disposes of the immunity issue in this case.

A. The United States' previous recommendation that the Court GVR [grant certiorari, vacate, and remand without an opinion] in this case rested primarily on the State Department's need to engage in diplomatic discussions with the newly recognized Somali Government in order to consider the position on the immunity issue that had been expressed by that Government. 12-1078 U.S. Amicus Br. 22-23. The correspondence filed by the parties concerning the Somali Government's position on immunity that occurred shortly after the United States filed its brief, see p. 8, *supra*, underscored the need for diplomatic engagement.

Those discussions have now occurred. The State Department has concluded that Somalia does not request immunity for petitioner in this suit. The Executive has decided that, under the circumstances, there is no reason to alter its determination that petitioner is not immune from this suit. See pp. 10-11, *supra*. Unlike the last time this case was before the Court, the United States is able to convey to the Court its determination with respect to immunity.

B. Because the Executive Branch has decided not to alter its determination that petitioner is not immune, it is now clear that the judgment of the court of appeals (albeit not its rationale) is consistent with the Executive Branch's determination. Accordingly, it is the view of the United States that the court of appeals' judgment properly disposes of the immunity issue in this case. In light of the unique circumstances of this case, review of the now-final judgment in this case is not warranted.

Petitioner argues (Pet. 23) that the Court should address "the legal question presented—whether *jus cogens* allegations categorically preclude common-law immunity—and then remand for application of the appropriate legal rule, taking into account the position of the Somali government." Petitioner contends (Reply Br. 7-9) that such a decision would afford him meaningful relief because, once the Court has established that there is no *jus cogens* exception, he might obtain on remand a judicial decision finding him immune from this suit. Petitioner bases that prediction on two premises: first, his incorrect assumption that the Somali Government *does* request immunity, such that the United States might alter its immunity determination; and second, his assertion that the United States' original Statement of Interest has been overtaken by subsequent events. *Id.* at 8. Both of those premises, however, have been vitiated by the Executive Branch's intervening ascertainment of the Somali Government's actual position, and the Executive's conclusion under the circumstances that it will not alter its immunity determination.

In the event of the remand petitioner seeks, the Fourth Circuit would presumably accord at least "substantial weight" to the Executive Branch's conclusion that petitioner is not entitled to immunity. Pet. App. 58a. The Fourth Circuit has already opined that the factors on which the Statement of Interest initially relied were entitled to significant weight. See *id.* at 67a (stating that the low "risk of offending a foreign nation by exercising jurisdiction" in this case and petitioner's "binding tie to the United States" added "substantial weight in favor of denying

immunity”). Now that the Executive Branch has reaffirmed its determination of non-immunity, following its diplomatic engagement with the Government of Somalia, there is no reason to believe that the Fourth Circuit would decline to reinstate its judgment denying immunity.

In sum, because the court of appeals’ judgment in respondents’ favor is consistent with the Executive Branch’s determination that petitioner is not immune, and in light of all the circumstances, this Court should not grant review simply to correct the erroneous reasoning in the Fourth Circuit’s opinion. ...

* * * *

3. Immunity of Rabbinical Judges and Administrator

On December 9, 2015, a state court in New Jersey accepted the U.S. suggestion of immunity and dismissed a complaint filed against rabbinical judges and a rabbinical court official in Israel relating to child custody disputes. *Ben-Haim v. Edri*, No. L-3502-15 (Sup. Ct. N.J.). The suggestion of immunity is excerpted below (with footnotes omitted) and is also available, along with Attachment 1 referenced therein (the letter from the State Department to the Justice Department) at <http://www.state.gov/s/l/c8183.htm>.

* * * *

A. The Department of State’s Foreign Official Immunity Determinations Are Controlling and Not Subject to Judicial Review.

Unlike foreign sovereign immunity determinations, which are now governed by the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1602 et seq., the immunity of foreign officials continues to be resolved according to a long-standing two-step procedure. *See Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (“Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the [FSIA’s] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.”); *Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp. 2d 336, 341 (E.D.N.Y. 2013) *aff’d sub nom. Rosenberg v. Pasha*, 577 F. App’x 22 (2d Cir. 2014) (“[C]ourts have extended this two-step procedure to provide foreign officials immunity from civil suits.”). Under this regime, a diplomatic representative of the sovereign can request a “Suggestion of Immunity” from the Department of State. *Samantar*, 560 U.S. at 311. If the Department of State accedes to the request and files a Suggestion of Immunity, the court “surrender[s] its jurisdiction.” *Id.* If the Department of State takes no position in the suit, the “court ‘ha[s] authority to decide for itself whether all the requisites for such immunity exist[.],’” applying “‘the established policy of the [State Department].’” *Id.* (internal citations omitted; alteration in original).

As the U.S. Court of Appeals for the Second Circuit has recognized, the separation of powers requires courts to defer to the Executive Branch’s determination regarding foreign official immunity. *See Matar v. Dichter*, 563 F.3d 9, 15 (2009) (“Here, the Executive Branch has urged the courts to decline jurisdiction over appellants’ suit, and under our traditional rule of deference to such Executive determinations, we do so.”); *Rosenberg*, 577 F. App’x at 24 (“[I]n

light of the Statement of Interest filed by the State Department recommending immunity . . . the action must be dismissed”). And as the U.S. Court of Appeals for the Seventh Circuit observed in *Ye v. Zemin*, “[i]t is a guiding principle in determining whether a court should [recognize a suggestion of immunity] in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs . . . by assuming an antagonistic jurisdiction.” 383 F.3d 620, 626 (2004) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (alteration in original)). Similarly, principles of federalism require state courts to defer to Executive Branch immunity determinations. Thus, “[t]he common law of foreign sovereign immunity is, perhaps uncharacteristically, facile and straight-forward: if the State Department submits a Suggestion of Immunity, then the district court surrender[s] its jurisdiction.” *Rosenberg*, 980 F. Supp. 2d at 341 (quoting *Tawfik v. al-Sabah*, 2012 WL 3542209, at *2 (S.D.N.Y. Aug. 16, 2012) (alteration in original)).

B. The Department of State Has Determined that Defendants Are Immune From Suit.

According to the procedure set forth above, the Court should dismiss this action because the Department of State has determined that defendants are immune from this suit. As a general matter, under principles of customary international law accepted by the Executive Branch, a foreign official enjoys immunity from suit based upon acts taken in an official capacity. In making the immunity determination, the Department of State considers, *inter alia*, a foreign government’s request (if there is such a request) that the Department of State suggest the official’s immunity. Notwithstanding such a request, the Department of State could determine that a foreign official is not immune. That would occur, for example, should the Department of State conclude that the conduct alleged was not taken in an official capacity, as might be the case in a suit challenging an official’s purely private acts, such as personal financial dealings. In making that determination, it is for the Executive Branch, not the courts, to determine whether the conduct alleged was taken in a foreign official’s official capacity. *See Hoffman*, 324 U.S. at 35 (“It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”).

Here, the Government of Israel has requested the Department of State to recognize the immunities of the seven defendants. Upon careful consideration of this matter, the Department of State has determined that defendants are immune from suit in this case. *See Exhibit 1* (Letter from Mary E. McLeod, Principal Deputy Legal Adviser, Department of State, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, Department of Justice, requesting that the United States suggest the immunity of defendants). In arguing otherwise, Plaintiff relies primarily on his view that, because the rabbinical courts are “religious tribunals,” their judgments are not enforceable in New Jersey and they should “not [be] recognized in New Jersey as . . . judicial tribunal[s] of the State of Israel.” Compl. ¶¶ 10, 37-38, 87-88. Neither the religious nature of the rabbinical courts, nor the enforceability of their judgments in U.S. courts, is relevant to the issue of immunity, however. Instead, the relevant inquiry is whether the rabbinical courts are part of the Government of Israel, such that defendants’ actions on behalf of the courts could be said to have been undertaken in their official capacities and whether the Department of State has determined that the officials are immune from suit. *See e.g., Rosenberg*, 980 F. Supp. 2d at 342 (deferring to Department of State’s view that the Inter-Services Intelligence (“ISI”) is part of the Pakistani government and that individual defendants were immune for acts taken in their capacities as Directors General of the ISI). Here, the U.S. District Court for the District of New Jersey, *see Remand Order, Ben-Haim v. Edri*, No. 15-cv-3877, ¶ 8 (D.N.J. Oct. 1, 2015) (ECF No. 31), the Department of State, *see Attachment 1 at 2* (citing

Complaint Exhibits 12-14), and the Government of Israel, *see id.*; <http://www.rbc.gov.il/Documents/AboutEnglishVersion.docx>, have confirmed that the rabbinical courts are courts of the State of Israel.

Moreover, by expressly challenging defendants' exercise of their powers as judges and as (in the case of Gamliel) an employee of the rabbinical courts, Plaintiff's claims challenge defendants' exercise of their official powers as officials of the Government of Israel. The Complaint does not refer to any private conduct by defendants, but only to their actions as officials of the State of Israel. Plaintiff's allegations against the six judges are bound up with orders they issued and decisions they made as part of their duties as judges on Israel's rabbinical courts, Compl. ¶¶ 82-84, 97-99 & Ex. 12, and Plaintiff's allegations against Mr. Gamliel all concern actions he allegedly took "on behalf of" the rabbinical courts "while working with" them as their "agent and messenger," *id.* ¶¶ 30, 102-04, 109f. On their face, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity, and Plaintiff has provided no reason to question that determination.

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C. HEAD OF STATE IMMUNITY

1. President Xi of China

On October 6, 2015, the United States submitted a suggestion of immunity in a lawsuit against President Xi Jinping, the sitting head of state of the People's Republic of China. Excerpts follow (with footnotes omitted) from the suggestion of immunity. The submission in its entirety, including the Letter from Principal Deputy Legal Adviser Mary E. McLeod to Principal Deputy Assistant Attorney General Benjamin C. Mizer, dated September 22, 2015, attached as Exhibit A, is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

1. The United States has an interest in this action because President Xi is the sitting head of a foreign state, and thus this lawsuit raises the question of President Xi's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has authority to determine the immunity from suit of sitting heads of state. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and the conduct of its international relations, to recognize President Xi's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Indeed,

no court has ever subjected a sitting head of state to suit once the Executive Branch has determined that he or she is immune.

2. The Office of the Legal Adviser of the Department of State has informed the Department of Justice that the Embassy of the People's Republic of China has formally requested the Government of the United States to "take the steps necessary to have this action against the President dismissed on the basis of his immunity from jurisdiction as a sitting foreign head of state." Letter from Mary E. McLeod to Benjamin C. Mizer, dated September 22, 2015 (copy attached as Exhibit A). The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Xi as a sitting head of state from the jurisdiction of the United States District Court in this suit." *Id.*

3. For many years, the immunity of both foreign states and foreign officials was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. *See, e.g., Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. *See id.* § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

4. As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id.* at 323 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity from suit, including the immunity of foreign heads of state. *See id.* at 311 & n.6 (noting the Executive Branch's role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity determinations are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs.

6. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35-36; *Ex parte Peru*, 318 U.S. 578, 588-89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch's immunity determination, declared that such a determination "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. After a Suggestion of Immunity is filed, it is the "court's duty" to surrender jurisdiction. *Id.* at 588. The

courts' deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

7. For the same reason, courts also have routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state. *See Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations." (quotation omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (noting that "in the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state"; "flexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision").

8. When the Executive Branch determines that a sitting head of state is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the Executive Branch in these matters, the Seventh Circuit noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Id. See also Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citing *United States v. Lee*, 106 U.S. 196, 209 (1882))); *Ex parte Peru*, 318 U.S. at 588. As noted above, in no case has a court subjected a sitting head of state to suit after the Executive Branch has determined that the head of state is immune.

9. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's status as the current holder of the office. In this case, because the Executive Branch has determined that President Xi, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, President Xi is entitled to immunity from the jurisdiction of this Court over this suit.

* * * *

2. Prime Minister Modi of India

On January 14, 2015, the court dismissed a lawsuit brought against Prime Minister Narendra Modi of India in the U.S. District Court for the Southern District of New York. *American Justice Center v. Modi*, No. 14-7780 (S.D.N.Y.). As discussed in *Digest 2014* at 425, the United States submitted a suggestion of immunity and a supplemental brief in 2014. Excerpts follow from the court's order dismissing the claims on the basis of the Executive Branch's immunity determination.

* * * *

...[T]he FSIA is not controlling with respect to the immunity determination here. The immunity of foreign heads of state and heads of government is governed not by FSIA but by common law principles of foreign official immunity. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (“Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the [FSIA’s] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.”); *see also Zemin*, 383 F.3d at 625 (“Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976-with the Executive Branch.” (citation omitted)).

... The Executive Branch’s assertion of foreign official immunity is not rendered ineffective by allegations that Modi engaged in unlawful conduct that exceeded his official authority by violating *jus cogens* (international law norms) and that took place before he became Prime Minister. A sitting head of state’s immunity from jurisdiction is based on the Executive Branch’s determination of official immunity without regard to the specific conduct alleged. *Matar*, 563 F.3d at 15 (“[I]n the common-law context, we defer to the Executive’s determination of the scope of immunity. ...A claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity.”); *see also Zemin*, 383 F.3d at 627.

Courts are likewise bound by the Executive Branch’s determination even when the alleged conduct took place prior to the assumption of office. *Habyarimana*, 696 F.3d at 1032; *see also Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 280 (S.D. Tex. 2005) (accepting Executive Branch’s determination that Pope Benedict XVI was entitled to head-of-state immunity even though the alleged conduct occurred before he was Pope and “exceeded the authority granted him by former Pope John Paul II”).

Finally, ... the TVPA and ATS did not override or create an exception to an Executive Branch determination of foreign official immunity. *See, e.g., Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013) (“[T]he common law of head of state immunity survived enactment of the TVPA.” (citing *Matar*, 563 F.3d at 15)). Indeed, the Second Circuit has dismissed analogous claims in recognizing an Executive Branch determination of immunity in a case brought under the TVPA and ATS. *See Matar*, 563 F.3d at 15; *accord Devi v. Rajapaksa*, 11 Civ. 6634, 2012 WL 3866495, at *3 (S.D.N.Y. Sept. 4, 2012), *appeal dismissed*, 2013 WL 3855583 (2d Cir. Jan. 30, 2013); *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994). The Court has considered the remainder of Plaintiffs’ arguments and finds them to be without merit.

* * * *

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Consular and Diplomatic Immunity

a. *Rana v. Islam et al.*

On January 6, 2015, the U.S. District Court for the Southern District of New York denied defendants' motion to dismiss a complaint brought against them by their former domestic employee. Among other grounds for dismissal, the defendants asserted they were immune from suit based on their consular status. Excerpts from the district court's opinion, including the reasoning for finding defendants not to be entitled to immunity, appear below.

* * * *

The Vienna Convention on Consular Relations (“VCCR”) governs consular immunity. *United States v. Kostadinov*, 734 F.2d 905, 910 (2d Cir. 1984). The degree of immunity that consular officers receive is more restricted than that enjoyed by diplomats. *See United States v. Khobragade*, 15 F. Supp. 3d 383, 385 (S.D.N.Y. 2014). Specifically, whereas diplomatic officers have almost complete immunity from a receiving state's civil and criminal jurisdiction, consular officers and employees are only entitled to immunity “in respect of acts performed in the exercise of consular functions.” *Compare* Vienna Convention on Diplomatic Relations [hereinafter “VCDR”] art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *with* Vienna Convention on Consular Relations [hereinafter “VCCR”] art. 43(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

When he was Consul General of the Consulate General of Bangladesh in New York, Defendant Islam was unquestionably a “consular officer” within the meaning of Article 43 of the VCCR. *See Park v. Shin*, 313 F.3d 1138, 1141 (9th Cir. 2002). Consequently, Islam is entitled to consular immunity for acts he “performed in the exercise of consular functions.” VCCR art. 43(1).

* * * *

Determining whether consular immunity applies “involves a two part inquiry.” *Ford v. Clement*, 834 F. Supp. 72, 75 (S.D.N.Y. 1993) (citing *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 346 (9th Cir. 1993)). First, the court must determine whether the official's actions “implicated some consular function.” *Id.* Second, the “acts for which the consular officials seek immunity must be ‘performed in the exercise of the consular functions’ in question.” *Id.*

The VCCR sets forth twelve specific consular functions, including protecting “the interests of the sending State and its nationals” and “issuing passports and travel documents to nationals of the sending State.” VCCR art. 5. In addition, the VCCR contains a catchall provision defining consular functions as “any other functions entrusted to a consular post by the sending

State which are not prohibited by the laws and regulations of the receiving State or . . . which are referred to in the international agreements in force between the sending State and the receiving State.” VCCR art. 5(m).

The Court finds that defendants’ employment of Rana was not a consular function within the meaning of the VCCR. Hiring a domestic worker to cook, clean, and provide childcare in a consular official’s household falls neither within any of the specific functions set forth in the VCCR nor within the scope of Article 5(m)’s catchall provision.

This Court’s determination accords with the decisions of at least two Courts of Appeal. In *Park v. Shin*, the U.S. Court of Appeals for the Ninth Circuit held that a consular official’s employment of a “*personal domestic servant*” is not a consular function. 313 F.3d at 1142 (emphasis in original). Similarly, in *Swarna v. Al Awadi*, 622 F.3d 123, 137140 (2d Cir. 2010), the U.S. Court of Appeals for the Second Circuit rejected the notion that “residual” diplomatic immunity—that is, immunity for past acts performed in the receiving state that the diplomat continues to enjoy even after he has left that country—shields a diplomat from causes of action arising out of the employment of a domestic worker. The standard for residual diplomatic immunity is virtually identical to that for consular immunity. Specifically, Article 39(2) of the VCDR provides that former diplomats are entitled to immunity for “acts performed by such a person in the exercise of his functions as a member of the mission,” while Article 43(1) of the VCCR art. 43(1) grants immunity to consular officers “in respect of acts performed in the exercise of consular functions.” Because the residual immunity enjoyed by diplomats is essentially the same as that accorded consular officers, *Swarna* thus teaches that consular immunity cannot shield a consular officer from claims arising out of his or her employment of a personal domestic worker.

Both the Second Circuit decision—*Swarna*—and the Ninth Circuit decision—*Park*—emphasized three facts in reaching their conclusions, all of which are present in this case. First, the plaintiffs in both cases were issued visas specifically intended for personal employees of diplomats or consular officers. *Swarna*, 622 F.3d at 138; *Park*, 313 F.3d at 1142–43. Here, Rana held an A 3 visa (Compl. ¶ 9), the same visa issued to the plaintiff in *Park*, 313 F.3d at 1142–43. Second, the defendants in *Park* and *Swarna* paid for the domestic workers’ services out of their own personal funds. *Swarna*, 622 F.3d at 138; *Park*, 313 F.3d at 1143. Similarly, Prova allegedly promised to pay Rana \$3,000 per month for his services (Compl. ¶ 34), and there is nothing in the record to suggest that the Bangladesh Consulate agreed to pay Rana or that it maintained a practice of compensating the personal employees of its consular officers. Third, in both *Park* and *Swarna*, the plaintiffs spent “the bulk” of their time cooking and cleaning for the defendants and caring for their children. *Swarna*, 622 F.3d at 138; *Park*, 313 F.3d at 1143. Here, Rana allegedly worked over 16 hours per day in defendants’ household, cooking, cleaning, and looking after their child. (Compl. ¶¶ 40–41.)

Defendants contend that they are entitled to immunity because their employment of Rana was “incidental” to Islam’s post as Consul General of Bangladesh. (Defs.’ Mem. at 5.) They point to two facts in support of this argument: (1) Rana “was retained to perform domestic services for [defendants] while Defendant Islam was posted as Consul General”; and (2) Rana was required to perform services not only at defendants’ apartment, but also at the Bangladesh Consulate. (*Id.*)

These exact arguments, however, were rejected in *Park*. There, the defendants, a consular officer and his wife, argued that the officer “could not fulfill his other functions as a consular officer as effectively if he were required to cook, clean, take care of his children, and perform the

other services that Plaintiff provided for” his family. 313 F.3d at 1142. Although the Ninth Circuit panel recognized that that contention might indeed be true, it nonetheless concluded that “this fact alone is insufficient to make hiring and supervising [a domestic worker] a consular function.” *Id.* (“A direct, not an indirect, benefit to consular functions is required.”).

The defendants in *Park* also argued that their employment of the plaintiff constituted a consular function because her duties included preparing and serving food when the defendants entertained official guests of the consulate in their home. *Park*, F.3d at 1142. However, the court held that because the plaintiff spent “the bulk” of her time attending to the defendants’ household, the “[p]laintiff’s work for the Consulate was merely incidental to her regular employment as the [defendants’] personal domestic servant and, accordingly, Mr. Shin’s hiring and supervision of her was not a consular function.” *Id.* at 1143.

Here, too, the fact that Rana worked for defendant Islam while he was a consular officer does not mean that defendants’ employment of Rana was a consular function. The record on this motion shows that Rana was employed to meet defendants’ private needs and not the official needs of the Consulate General of Bangladesh. *See Swarna*, 622 F.3d at 138 (the plaintiff’s work in the home of defendant, a diplomat, was not “part of any mission related functions”). Defendants have not alleged that their employment of Rana required consular authorization or approval. Furthermore, nothing in the record suggests that Rana’s occasional work in the Bangladesh Consulate was anything more than incidental to his regular employment in defendants’ household. As noted above, defendants have provided no evidence that the Consulate hired or paid Rana and the facts alleged are that Rana devoted substantially all of his time attending to defendants’ household. (Compl. ¶¶ 40–42.) The fact that Rana occasionally “cook[ed] food for events at the Bangladesh Consulate” and provided services at “monthly community events” there (Compl. ¶ 42) is not sufficient to render his employment a consular function. *See Swarna*, 622 F.3d at 128, 138 (defendants’ employment of a domestic servant was not an official diplomatic function, even though the plaintiff “cooked for an official event held at the Kuwait Mission on ‘at least one occasion.’”); *Park*, 313 F.3d at 1143.

Defendant Prova’s claim to immunity rests on the same grounds as her husband’s; therefore, she also is not entitled to consular immunity.

c. Consular Immunity Does Not Shield Islam from this Action Because He Was Not Acting as an “Agent” of Bangladesh When He Contracted for Rana’s Employment

Even if Article 43(1) of the VCCR provided a basis for consular immunity here, the Court would still find subject matter jurisdiction to exist because the alleged circumstances of Rana’s employment would trigger an exception to the immunity provision of the VCCR. Specifically, the VCCR provides that immunity from jurisdiction in a civil action does not apply when the action “aris[es] out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State.” Art. 43(2)(b).

First, there is little doubt that Rana’s claims for relief arise out of his employment contract with defendants. As an initial matter, Rana’s breach of contract, unjust enrichment, and quantum meruit claims arise directly out of the contract. Defendants’ alleged fraudulent misrepresentations also arise out of the contract insofar as they occurred in the course of the parties’ negotiation over the terms of Rana’s employment. (Compl. ¶¶ 2, 28, 34–35.) Finally, the alleged acts giving rise to the remaining claims—conversion, trespass to chattels, assault and battery, and false imprisonment—all occurred during the course of Rana’s employment.

Second, the alleged facts also clearly show that Islam was not acting as an agent of the state of Bangladesh when he contracted to employ Rana. Here, too, the pertinent facts are that Rana was issued an A 3 visa, that defendants were responsible for paying him, and that Rana spent the bulk of his time serving defendants' household. Indeed, insofar as these facts establish that defendants' employment and supervision of Rana do not qualify as consular functions, they also demonstrate that Islam was not acting as Bangladesh's agent when he contracted for Rana's labor.

For all of these reasons, defendants are not immune from this action. Consequently, to the extent their motion to dismiss is premised on a lack of subject matter jurisdiction, it is denied.

* * * *

b. *Waiver of immunity: Ambassador Lippert*

On March 5, 2015, U.S. Ambassador to the Republic of Korea Mark Lippert was attacked by a Korean national wielding a knife. Ambassador Lippert was treated at a hospital in Seoul and recovered from the attack. The U.S. Department of State granted limited waivers of testimonial immunity and archival inviolability under the Vienna Convention on Diplomatic Relations to assist authorities in the Republic of Korea investigating the incident. The limited waiver of testimonial immunity allowed Ambassador Lippert to provide statements. The limited waiver of archival inviolability allowed the Embassy to provide documents from its archives regarding Ambassador Lippert's injuries as well as statements from an embassy staff member who witnessed the attack. The suspected attacker was taken into custody by Korean National Police and charged with multiple crimes. Excerpts follow from the diplomatic note granting the limited waivers, which was delivered by the U.S. Embassy to the Foreign Ministry of the Republic of Korea.

* * * *

The Korean National Police requested testimony from Ambassador Mark Lippert and Mi Yeon Kim regarding the attack on Ambassador Lippert on March 5, 2015, in the Republic of Korea. The police have also requested documents regarding the attack that were produced by the Embassy and maintained in the Embassy's archives and documents.

Ambassador Lippert is accredited to Korea as the head of the United States diplomatic mission. As an accredited diplomatic agent, under Article 31(2) of the Vienna Convention on Diplomatic Relations, he is not obliged to give evidence as a witness. Given the circumstances of this case, and in the spirit of cooperation, the United States expressly waives the immunity Ambassador Lippert enjoys under Article 31 (2) for the limited purpose of allowing him to provide a statement to the Korean National Police and/or the prosecutor regarding the events of March 5, 2015, and related events and for no other purpose.

Under Article 24 of the Vienna Convention on Diplomatic Relations, the archives and documents of the Embassy shall be inviolable at any time and wherever they may be. Given the

circumstances of this case, and in the spirit of cooperation, the United States expressly waives the inviolability of the Embassy's archives under Article 24 for the limited purpose of providing documents regarding the attack against Ambassador Lippert on March 5, 2015, and related events, and for no other purpose.

Mi Yeon Kim, a Korean national, is a translator for the Embassy and was seated beside Ambassador Lippert during the attack. The United States considers that the knowledge its employees obtain as a result of their employment with the Embassy is part of the Embassy's inviolable archives and documents. Given the circumstances of this case, and in the spirit of cooperation, the United States expressly waives the archival inviolability it enjoys under Article 24 for the limited purpose of allowing Mi Yeon Kim to be interviewed by the Korean National Police and/or the prosecutor regarding the events of March 5, 2015, and related events, which might include information from the Embassy's inviolable archives, and to provide a witness statement regarding those events, and for no other purpose.

The Ministry is requested to inform the Korean National Police and the prosecutor of Ambassador Lippert's immunity and the inviolability of the Embassy's archives and documents under the Vienna Convention on Diplomatic Relations. Further, the Ministry is requested to inform the Korean National Police and the prosecutor of this limited waiver of Ambassador Lippert's immunity and limited waiver of the Embassy's archival inviolability.

* * * *

2. Determination under the Foreign Missions Act

On July 14, 2015, Under Secretary of State Patrick Kennedy made a designation and determination pursuant to the Foreign Missions Act regarding the development of a portion of the former Walter Reed Army Medical Center in Washington, D.C. to be used to provide facilities for foreign missions in the United States. 80 Fed. Reg. 44,415 (July 27, 2015). Excerpts follow from the Federal Register notice of Under Secretary Kennedy's determination.

* * * *

In order to facilitate the Department of State's acquisition abroad of real property on which to construct safe, secure, and modern facilities for American diplomatic and consular operations, and in light of the difficulties that a growing number of foreign missions in the United States have encountered with respect to identifying properties and locations in the District of Columbia suitable for the construction and operation of modern chancery facilities, the Department of State intends to establish a second location in the Nation's Capital that is dedicated to foreign mission operations.

Thus, pursuant to the Department of State's authority under 22 U.S.C. 4308(e)(1), which authorizes the head of any Federal agency to transfer property to the Department of State to further the purposes of the Foreign Missions Act (22 U.S.C. 4301–4316) ("FMA"), the Department of State has concluded an agreement with the Department of the Army concerning

the transfer to the Department of State of approximately 32 acres of excess Federal property at the location of the former Walter Reed Army Medical Center (hereinafter referred to as the “Foreign Missions Center” or “FMC”). The official metes and bounds of this property are in the process of being formally established.

In accordance with the authority vested in me under the FMA and under Delegation of Authority No. 147, dated September 13, 1982, and after due consideration of the need to exercise reciprocity to obtain certain benefits for the United States, I hereby designate the acquisition and use of property (including construction or renovation of facilities on the property) by foreign missions at the FMC, as well as access to and use of roads, sidewalks and other common areas, and other public services at the FMC, to be a benefit as defined in 22 U.S.C. 4302(a)(1). I hereby determine, under 22 U.S.C. 4304, that the Department of State’s regulation of the acquisition and use of property in the FMC, as well as access to and use of roads, sidewalks and other common areas, and other public services at the FMC is reasonably necessary in order to: (1) Facilitate relations between the United States and a sending State; (2) protect the interests of the United States; and (3) adjust for costs and procedures of obtaining benefits for missions of the United States abroad. This action will enable the Office of Foreign Missions (OFM) of the Department of State to facilitate the secure and efficient operation of foreign missions in the United States.

Accordingly, the process through which foreign missions will be authorized to acquire, use, and dispose of property and to construct or renovate facilities will be subject to all terms and conditions established in this regard by the Director of the Office of Foreign Missions (OFM). At a minimum, such terms and conditions on which OFM will approve a request from a foreign mission for the acquisition of a lot at the FMC shall include due consideration of the related real property accommodations extended to missions of the United States in the country or territory represented by that foreign mission.

Pursuant to 22 U.S.C. 4306(b)(2)(B), because the FMC is in an area other than one referenced in § 4306(b)(1), the location, replacement, or expansion of chanceries at the FMC is permitted, subject only to disapproval by the District of Columbia Board of Zoning Adjustment in accordance with the procedures and criteria set forth in 22 U.S.C. 4306.

* * * *

3. Enhanced Consular Immunities

Section 7056 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L. 114-113) (“FY 2016 SFOAA”) authorizes the Secretary of State, with the concurrence of the Attorney General, on the basis of reciprocity, to specify privileges and immunities for the members of a consular post and their families which result in treatment more favorable than that provided in the Vienna Convention on Consular Relations (“VCCR”). The Vienna Convention on Diplomatic Relations and the VCCR provide differing levels of immunity from, among other things, the criminal and civil jurisdiction of the host government. Section 7056 states:

The Secretary of State, with the concurrence of the Attorney General, may, on the basis of reciprocity and under such terms and conditions as the Secretary may determine, specify privileges and immunities for a consular post, the

members of a consular post and their families which result in more favorable or less favorable treatment than is provided in the Vienna Convention on Consular Relations, of April 24, 1963 (T.I.A.S. 6820), entered into force for the United States December 24, 1969: Provided, That prior to exercising the authority of this section, the Secretary shall consult with the appropriate congressional committees on the circumstances that may warrant the need for privileges and immunities providing more favorable or less favorable treatment specified under such Convention.

E. INTERNATIONAL ORGANIZATIONS

1. *Georges v. United Nations*

On January 9, 2015, the U.S. District Court for the Southern District of New York issued its opinion in *Georges v. United Nations*, No. 13-7146 (2015), finding that the UN and UN officials were immune from a suit alleging their liability for a cholera outbreak in Haiti. The U.S. Statement of Interest filed in 2014, asserting immunity, is discussed and excerpted in *Digest 2014* at 434-47. Excerpts follow from the opinion of the district court.

* * * *

Plaintiffs bring this class action diversity suit alleging various tort and contract claims against defendants the United Nations (“UN”), the United Nations Stabilization Mission in Haiti (“MINUSTAH”), United Nations Secretary-General Ban Ki-moon, and former Under-Secretary-General for MINUSTAH, Edmond Mulet. (Dkt. No. 1 (“Compl.”).) Specifically, Plaintiffs allege that Defendants are responsible for an epidemic of cholera that broke out in Haiti in 2010, killing over 8,000 Haitians and making over 600,000 ill. (Id. ¶¶ 1-2.)

Before the Court are two issues. First, Plaintiffs have been unable to serve the UN in person, and they request affirmation by the Court that service has been made, or, in the alternative, an extension of time for service of process by alternative means. Second is the question whether, under international treaties to which the United States is a party, Defendants are immune from Plaintiffs’ suit. For the reasons that follow, the Court concludes that all Defendants are immune. Accordingly, the case is dismissed for lack of subject matter jurisdiction, and Plaintiffs’ motion is denied as moot.

* * * *

Plaintiffs allege that in October 2010, Defendants deployed over 1,000 UN personnel from Nepal to Haiti without screening them for cholera, a disease that is endemic to Nepal and with which some of the personnel were infected. (Compl. ¶¶ 5, 59.) Plaintiffs further allege that Defendants stationed these personnel on a base at the banks of the Meille Tributary, which flows into Haiti’s primary source of drinking water, the Artibonite River. It was at this base, Plaintiffs

contend, that these recently transferred personnel discharged raw untreated sewage into the tributary, causing an outbreak of cholera in Haiti. (Id. ¶¶ 6-9.)

Plaintiffs allege that Defendants have failed to establish any claims commission or other dispute resolution mechanism to resolve the claims of those who have been injured or who have lost family members to the cholera outbreak. This refusal, Plaintiffs contend, is in direct contravention of Defendants' responsibility under the Convention on the Privileges and Immunities of the United Nations ("CPIUN") and the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti ("SOFA") to offer appropriate modes of settlement for third-party private-law claims. (Id. ¶¶ 10-12.)

Because Plaintiffs could not personally serve the Complaint, they moved this Court to affirm that service had been made or to permit service by alternative means. (Dkt. No. 4.) The UN did not respond to Plaintiffs' motion; instead, the United States filed a "Statement of Interest" contending that Defendants are immune from Plaintiffs' suit and requesting that the Court dismiss the Complaint for lack of subject matter jurisdiction. (Dkt. No. 21 ("Statement of Interest").)

* * * *

The Charter of the United Nations ("UN Charter") states that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter art. 105, para. 1. The CPIUN, which was adopted less than a year after the UN Charter, defines the UN's privileges and immunities in more detail. See Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, entered into force with respect to the United States Apr. 29, 1970, 21 U.S.T. 1418. The CPIUN provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." CPIUN art. II, § 2. Because the CPIUN is self-executing, this Court must enforce it despite the lack of implementing legislation from Congress. *Brzak*, 597 F.3d at 111-12.

The Second Circuit's decision in *Brzak v. United Nations* requires that Plaintiffs' suit against the UN be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(h)(3). In *Brzak*, the Second Circuit unequivocally held that "[a]s the CPIUN makes clear, the United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity.'" 597 F.3d at 112 (quoting CPIUN art. II, § 2). Here, no party contends that the UN has expressly waived its immunity. (Statement of Interest at 6 ("In this case, there has been no express waiver. To the contrary, the UN has repeatedly asserted its immunity."); (Dkt. No. 43, at 1 ("Waiver is not at issue here.")) Accordingly, under the clear holding of *Brzak*, the UN is immune from Plaintiffs' suit. In addition, MINUSTAH, as a subsidiary body of the UN, is also immune from suit. See *Sadikoglu v. United Nations Dev. Programme*, No. 11 Civ. 0294 (PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011).

Plaintiffs argue that the UN has materially breached the CPIUN such that it is not entitled to the "benefit of the bargain." Specifically, Plaintiffs insist that the UN has breached section 29(a), which provides that "[t]he United Nations shall make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party." CPIUN art. VIII, § 29(a). Because the UN has failed to

provide any mode of settlement for the claims at issue here, Plaintiffs argue, it is not entitled to benefit from the CPIUN's grant of absolute immunity.

This argument is foreclosed by *Brzak*. In *Brzak*, the plaintiffs argued that the UN's dispute resolution mechanism was inadequate to resolve their case, and that this inadequacy stripped the UN of its immunity. The Second Circuit rejected this argument on the ground that it ignores the "express waiver" requirement of the CPIUN. *Brzak*, 597 F.3d at 112. Here too, construing the UN's failure to provide "appropriate modes of settlement" for Plaintiffs' claims as subjecting the UN to Plaintiffs' suit would read the strict express waiver requirement out of the CPIUN.

Moreover, nothing in the text of the CPIUN suggests that the absolute immunity of section 2 is conditioned on the UN's providing the alternative modes of settlement contemplated by section 29. See *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) ("When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used." (internal quotation marks omitted) (interpreting the CPIUN)). As the Second Circuit held in *Brzak*, the language of section 2 of the CPIUN is clear, absolute, and does not refer to section 29: the UN is immune from suit unless it expressly waives its immunity. *Brzak*, 597 F.3d at 112; see also *Sadikoglu*, 2011 WL 4953994, at *5 ("Nor does the contested status of the parties' efforts to arbitrate or settle the current dispute strip [the United Nations Development Programme] of its immunity. The CPIUN merely requires the UN to 'make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.' However, nothing in this section or any other portion of the CPIUN refers to or limits the UN's absolute grant of immunity as defined in article II—expressly or otherwise." (citation omitted)). Further, the CPIUN's drafting history indicates at most the commitment that, pursuant to section 29, the UN will provide a dispute resolution mechanism for private claims; it does not, as Plaintiffs argue, indicate the intent that such a mechanism is required in order for the UN to claim immunity in any particular case. See *Tachiona*, 386 F.3d at 216 ("Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (brackets and internal quotation marks omitted)).

It is true that section 29 uses mandatory language, providing that the UN "shall make provisions for appropriate modes of settlement of . . . disputes . . ." This language may suggest that section 29 is more than merely aspirational—that it is obligatory and perhaps enforceable. But even if that is so, the use of the word "shall" in section 29 cannot fairly be read to override the clear and specific grant of "immunity from every form of legal process"—absent an express waiver—in section 2, as construed by the Second Circuit.

Finally, "in construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch.'" *Id.* (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)) (alteration in original); see also *Swarna v. Al-Awadi*, 622 F.3d 123, 133 (2d Cir. 2010) ("[W]hile the interpretation of a treaty is a question of law for the courts, given the nature of the document and the unique relationships it implicates, the 'Executive Branch's interpretation of a treaty is entitled to great weight.'" (quoting *Abbott v. Abbott*, 560 U.S. 1, 15 (2010))). For the reasons given above, the United States' interpretation that the CPIUN's grant of immunity is vitiated only by an express waiver of that immunity by the UN is reasonable. Here, where such an express waiver is absent, the UN and its subsidiary body MINUSTAH are immune from suit.

C. Immunity from Suit of Ban Ki-moon and Edmond Mulet

The UN Charter provides that “officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization.” U.N. Charter art. 105, para. 2. The CPIUN further provides that “the Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law.” CPIUN art. V, § 19. The Vienna Convention on Diplomatic Relations is the relevant international law here; that convention states that current diplomatic agents “enjoy immunity from [the] civil and administrative jurisdiction” of the United States, except in three situations, none of which is relevant here. See Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961, entered into force with respect to the United States Dec. 13, 1972, 23 U.S.T. 3227, (the “Vienna Convention”); *Brzak*, 597 F.3d at 113 (stating that, under the Vienna Convention, “current diplomatic envoys enjoy absolute immunity from civil and criminal process”). Thus, Ban Ki-moon and Edmond Mulet, both of whom currently hold diplomatic positions, are immune from Plaintiffs’ suit. Accordingly, Plaintiffs’ suit against them must be dismissed. See 22 U.S.C. § 254d (requiring a district court to dismiss “[a]ny action or proceeding against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention”).

* * * *

Plaintiffs appealed the dismissal by the district court to the U.S. Court of Appeals for the Second Circuit. *Georges v. United Nations*, No. 15-455 (2015). On August 26, 2015, the United States filed its *amicus* brief arguing in favor of affirming the dismissal by the district court. Excerpts follow (with footnotes omitted) from the U.S. brief on appeal. The brief in its entirety is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. Appellants’ Claims Against The United Nations And MINUSTAH Were Properly Dismissed For Lack Of Subject Matter Jurisdiction

A. The UN and MINUSTAH Are Immune From Suit Unless Such Immunity Is Expressly Waived

It is well-established that the UN and its subsidiary organ MINUSTAH are absolutely immune from suit in domestic courts. See, e.g., *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010). The district court therefore correctly rejected Appellants’ argument that the UN’s immunity from suit is conditioned upon the provision of an alternate mechanism to resolve Appellants’ tort claims. Nothing in the General Convention or the SOFA suggests that the UN’s immunity is conditional. To the contrary, as reflected by the text and drafting history of the General Convention, and as confirmed by every court to have considered the issue, the UN’s immunity is absolute in the absence of an express waiver.

1. The UN and MINUSTAH Enjoy Absolute Immunity From Suit Pursuant to Section 2 of the General Convention

“The interpretation of a treaty, like the interpretation of a statute, begins with its text.”

Medellin v. Texas, 552 U.S. 491, 506 (2008). Section 2 of the General Convention provides, in pertinent part, that “[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” The United States understands Section 2 of the General Convention to mean what it unambiguously says: the UN, including MINUSTAH, enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity. The provision could not be any clearer. The word “except” is followed by a single exception: express waiver. Section 2 does not admit of any other exceptions or preconditions, it does not cross-reference other sections of the treaty, and it does not contain any caveats. It therefore establishes the UN’s absolute immunity from suit, absent an express waiver, in unequivocal terms.

* * * *

2. The Text of the General Convention Confirms that the UN’s Immunity is Not Preconditioned upon Compliance with Section 29

The plain language of the treaty makes clear that the immunity conferred upon the UN by Section 2 is not conditioned upon compliance with the settlement resolution provisions found in Section 29(a) of the General Convention. Section 29 provides: “The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.” General Convention, art. VIII, §29. Nothing in Section 29(a) states, either explicitly or implicitly, that compliance with its terms is a precondition to the UN’s immunity under Section 2. Conversely, Section 29(a) is not even referenced in Section 2, let alone listed as a precondition or an exception to the immunity afforded the UN under that provision. Appellants argue, in effect, that such a precondition should exist, but the text of the General Convention makes clear that it does not.

This Court has previously rejected an almost identical argument regarding the interplay between Section 29 and Section 2. In *Brzak*, plaintiffs argued that, where there are “inadequacies with the [UN’s] internal dispute resolution” that would preclude a party from obtaining relief from the UN, the UN could no longer claim its immunity from suit under Article 2. *Brzak*, 597 F.3d at 112. This Court disagreed, holding that “crediting this argument would read the word ‘expressly’ out of the [General Convention].” *Id.* The *Brzak* decision therefore reaffirmed that the UN “enjoys absolute immunity” regardless of whether a party would have adequate recourse under Section 29 to alternate claims resolution procedures. *Id.*

The district court below, in applying the *Brzak* decision to the instant case, noted that the language in Section 29

may suggest that section 29 is more than merely aspirational—that it is obligatory and perhaps enforceable. But even if that is so, the use of the word “shall” in section 29 cannot fairly be read to override the clear and specific grant of “immunity from every form of legal process”—absent an express waiver—in section 2, as construed by the Second Circuit.

SA 6; see also *Bisson v. UN*, 2007 WL 2154181, at *9 (S.D.N.Y. July 27, 2007) (recommendation by magistrate judge, adopted, 2008 WL 375094 (S.D.N.Y. Feb. 11, 2008)) (“[S]ection 29(a) of the [General] Convention does not contain any language effecting an express waiver under any circumstances. Even assuming arguendo that the UN and the [World

Food Programme] have failed to provide an adequate settlement mechanism for Bisson's claims, such a failure does not constitute the equivalent of an express waiver of immunity. An express waiver may not be inferred from conduct."'). Therefore, the existence or adequacy of an alternative remedy is irrelevant to a court's immunity analysis.

* * * *

3. The Drafting History of the General Convention Confirms that the UN's Immunity is Unconditional

Although the text of the treaty makes clear that the UN enjoys absolute immunity, the drafting history confirms that the UN's immunity is not contingent on whether or how it settles disputes. As the district court correctly held, "the [Convention's] drafting history . . . does not, as Plaintiffs argue, indicate the intent that such a mechanism is required in order for the UN to claim immunity in any particular case;" instead, it indicates "at most the commitment . . . that the UN will provide a dispute resolution mechanism for private claims." SA 6 (emphasis in original; citing *Tachiona*, 386 F.3d at 216).

The United States representative to the UN understood, from the date that the UN Charter was signed, that

[t]he United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the Organization. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat.

Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945), *reprinted in* 13 Digest of Int'l Law 37 (1963).

Thus, the work of building on the privileges and immunities provisions of the UN Charter, including the statement that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes," Charter § 105(1), was undertaken with the understanding—at least as far as the United States was concerned—that the UN would be absolutely immune from the jurisdiction of all of its members.

Before the Preparatory Commission transmitted a draft convention to the General Assembly for its consideration, the Commission studied a set of precedents for the UN's privileges and immunities. See Preparatory Commission Report, Chapter VII, Annex to Study of Privileges and Immunities. The Commission evaluated approaches ranging from absolute immunity subject only to waiver, to immunity provisions that would permit lawsuits in the national courts under various circumstances. See *id.* The General Assembly, in approving the General Convention, chose absolute immunity.

Appellants have not identified anything in the drafting history of the General Convention that would suggest that the drafters of the General Convention intended that compliance with Section 29 is a precondition to an assertion of immunity under Section 2. For example, the isolated statements culled by Appellants from the Report of the Executive Committee of the Preparatory Commission refer alternately to the immunities requested by diplomats, Ap. Br. at 16 (quoting A-203 (the Study on Privileges & Immunities, PC/EX/113/Rev.1, at 70, Nov. 12, 1945, ¶ 7)), and to the immunities and privileges of "specialized agencies" such as the

International Monetary Fund and the International Bank for Reconstruction and Development, which operate independently of the UN and whose privileges and immunities are the subject of a separate treaty, Ap. Br. at 16 (quoting A-203 ¶ 5). Not only do these passages not address the immunity of the UN itself, neither of these selections so much as refers to alternate dispute procedures, let alone indicates that the establishment of such procedures is a precondition to immunity.

Similarly inapposite is the statement by the UN's Executive Committee of the Preparatory Commission to the effect that, when the UN enters into contracts with private individuals or corporations, "it should include in the contract an undertaking to submit to arbitration disputes arising out of the contract, if it is not prepared to go before the Courts." Ap. Br. at 28 (quoting A-203 ¶ 7) (first emphasis added). The use of the word "should" is hortatory and undermines Appellants' position that the UN's immunity is conditioned upon providing a dispute resolution mechanism.

Nor do drafts of the General Convention state that providing access to alternative methods of dispute resolution is a "critical pre-condition to . . . immunity," as Appellants argue. Ap. Br. at 29. There is no suggestion in the drafting history that the UN's immunity would be abrogated if the UN does not comply with another provision of the General Convention. To the contrary, the provisions for UN immunity and dispute resolution mechanisms consistently remained in separate articles and sections of the draft convention, without any link between them.

Although Appellants claim that such a link can be found in the title of a draft of a predecessor to Section 29, that title referred to the "Control of Privileges and Immunities of Officials[.]" and not the UN itself. . . . More importantly, the draft of that section said nothing about any pre-conditions to the UN's immunity. See A-303-304. In any event, the language regarding "[c]ontrol" disappeared in subsequent drafts of the General Convention. See A-317-328. What is constant throughout all the drafts of the General Convention is that they provide for absolute immunity for the UN, subject only to express waiver. . . . As the district court correctly held, . . . the drafting history does not reflect any intent to make the UN's immunity in any particular case legally contingent on the UN providing a dispute resolution mechanism.

4. The UN's Immunity Has Been Consistently Recognized by Foreign and International Authorities

In interpreting a treaty, the "opinions of our sister signatories . . . are entitled to considerable weight." *Abbott v. Abbott*, 560 U.S. 1, 16 (2010). Yet neither Appellants nor the putative Amici Curiae can cite to a single case in which a foreign or international court failed to recognize the UN's immunity from suit under the General Convention, let alone found that the UN's purported failure to provide alternative remedies served to abrogate the UN's immunities under the General Convention. To the contrary, the opinions of other member states to the General Convention is in accord with, and thus reinforces, the United States' reading of the treaty.

Member states have recognized the UN's absolute immunity from suit. See, e.g., *Stavrinou v. United Nations* (1992) CLR 992, ILDC 929 (CU 1992) (Sup. Ct. Cyprus 17 July 1992). Indeed, many of the cases cited by Appellants and Amici themselves upheld the UN's immunity from suit. See *Perez v. Germany*, 2015 Eur. Ct. H.R. ¶¶ 78, 86 (upholding Germany's decision to grant immunity to the UNDP, even where UN's employment dispute resolution process appeared to violate the German constitution); *Stichting Mothers of Srebrenica Ass'n v. Netherlands*, 2013 Eur. Ct. H.R., 40 ¶ 155 (Sup. Ct. Netherlands 2012) (noting that "the question

of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations” (further citations omitted)); *Stavrinou*, (1992) CLR 992, ILDC 929 (CU 1992).

* * * *

5. Appellants Are Not Entitled To Assert Breach of the Treaties

Recasting this same argument in a different form, Appellants argue in the alternative that, even if Section 29 is not a precondition to immunity, the UN nonetheless cannot invoke the protections of Section 2 if it is in breach of Section 29 because “a material breach of a treaty by one party excuses performance by the other parties.” Ap. Br. at 37. Yet this principle of international law is of no assistance to Appellants, as they are not parties to the relevant treaties. The obligations under the General Convention and the SOFA are owed to the parties to those agreements. It is those parties, and not Appellants, that have a right to invoke an alleged breach and seek an appropriate remedy from among those legally available. Because Appellants are not a party to either the General Convention or the SOFA, they may not independently assert an alleged breach and insist upon their own preferred remedy.

Because “a treaty is an agreement between states forged in the diplomatic realm and similarly reliant on diplomacy (or coercion) for enforcement,” courts have “recognize[d] that international treaties establish rights and obligations between States-parties and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty’s existence.” *Mora v. New York*, 524 F.3d 183, 200 (2d Cir. 2008). As the Supreme Court explained:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Edye v. Robertson, 112 U.S. 580, 598 (1884), quoted in *Mora*, 524 F.3d at 200. Because “the nation’s powers over foreign affairs have been delegated by the Constitution to the Executive and Legislative branches of government,” the Supreme Court “has specifically instructed courts to exercise ‘great caution’ when considering private remedies for international law violations because of the risk of ‘impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.’ ” *Mora*, 524 F.3d at 200 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727- 28 (2004)).

Any claim regarding a purported breach of Section 29 therefore belongs exclusively to the parties to the General Convention. “[E]ven where a treaty provides certain benefits for nationals of a particular state, . . . any rights arising out of such provisions are, under international law, those of the states[.]” *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (finding the fact that no state party argued that the United States violated the United Nations Charter was “fatal” to appellant’s claim of violation of the treaty; “the failure of Bolivia or Argentina to object to [the U.S. actions] would seem to preclude any violation of international law”).

Here, both the General Convention and the SOFA provide methods by which the member states or Haiti, respectively, may dispute the UN's interpretation of the UN's obligations under these agreements. The General Convention and the SOFA provide that any dispute between a state party and the UN shall be submitted to the International Court of Justice, see General Convention, art. VIII, § 30; SOFA art. VIII, § 58; and the SOFA provides that any dispute between MINUTSAH and the Government of Haiti shall be submitted to arbitration, see SOFA art. VIII, § 57. Accordingly, the treaties provide that the sovereign states—not private parties—can seek redress for any purported breach of the General Convention or of the SOFA. Because Appellants are private parties, they cannot prevail on arguments based on breaches of the provisions of the General Convention or the SOFA. See *Lujan*, 510 F.2d at 67.

* * * *

II. Secretary-General Ban And Assistant Secretary-General Mulet Enjoy Immunity From Suit

The district court correctly held that Secretary-General Ban and Assistant Secretary-General Mulet are immune from suit. Federal courts, including the Second Circuit, have repeatedly recognized the immunity of UN officials pursuant to the General Convention, incorporating the immunities of the Vienna Convention. See, e.g., *Brzak*, 597 F.3d at 113 (noting that, under the Vienna Convention, “current diplomatic envoys enjoy absolute immunity from civil and criminal process”).

Article V, Section 19 of the General Convention provides that “the Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law.” *Id.* art. V, § 19. The privileges and immunities enjoyed by diplomats are governed by the Vienna Convention. 23 U.S.T. 3227, TIAS No. 7502, 500 U.N.T.S. 95. Article 31 of the Vienna Convention provides that diplomatic agents “enjoy immunity from the civil and administrative jurisdiction” of the receiving State—here, the United States—with a few exceptions that do not apply to this case. See *id.* art. 31; see also *Swarna v. Al-Awadi*, 622 F.3d 123, 134 (2d Cir. 2010) (the purpose of diplomatic immunity is “‘to ensure the efficient performance of the functions of diplomatic missions as representing States’” (quoting Vienna Convention preamble cl. 4)).

Moreover, Secretary-General Ban's and Assistant Secretary-General Mulet's immunity will continue beyond their terms as Secretary-General and Assistant Secretary-General, respectively. Although a diplomatic agent's privileges and immunities cease soon after the diplomatic agent's functions cease, immunity continues “with respect to acts performed by such a person in the exercise of his functions as a member of the mission . . .” Vienna Convention, art. 39(2). Article V, Section 18(a) of the General Convention likewise provides that UN officials are “immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity . . .” General Convention, art. V, § 18(a). Accord 22 U.S.C. § 288d(b) (IOIA provision conferring upon officers and employees of international organizations “immun[ity] from suit and legal process relating to acts performed by them in their official capacity and falling within their functions”).

Here, Secretary-General Ban and Assistant Secretary-General Mulet are currently serving as diplomatic envoys, . . . and are therefore entitled to diplomatic immunity under the Vienna Convention. Further, because Appellants have sued Secretary-General Ban and Assistant Secretary-General Mulet for acts taken in their official capacity as UN officials, see Complaint

¶¶ 21-22, they are immune for those actions on that basis as well. Because the UN has not waived, but rather has expressly asserted the immunity of Secretary-General Ban and Assistant Secretary-General Mulet in this matter, see A-129-135, they both enjoy immunity from this suit.

Appellants point to no support for their novel theory that the UN's purported breach of the General Convention or the SOFA renders void the Secretary-General and Assistant Secretary-General's immunity. To the contrary, this Court has recognized that, under the Vienna Convention, subject only to exceptions that do not apply in this case, "current diplomatic envoys enjoy absolute immunity from civil and criminal process . . ." *Brzak*, 597 F.3d at 113. Because such immunity is absolute, it is necessarily not contingent on the UN's provision of dispute resolution mechanisms. Accordingly, this Court should likewise affirm the district court's decision that Secretary-General Ban and Assistant Secretary-General Mulet are immune from this lawsuit.

III. Appellants' Constitutional Arguments Fail

Appellants' argument that the UN's immunity deprives United States citizens of their constitutional right of access to the courts has already been considered and rejected by this Court. As this Court previously recognized when last confronted with this issue, Appellants' constitutional arguments "do[] no more than question why immunities in general should exist." *Brzak*, 597 F.3d at 114. Yet the existence of various types of immunities, which have been enshrined in the common law since this country was founded, have never been held to violate the Constitution. Appellants' argument is therefore without merit.

In *Brzak*, the plaintiffs, one of whom was a United States citizen, argued that granting the UN absolute immunity would violate their procedural due process right to litigate the merits of their case and their substantive due process right to access the courts. See 597 F.3d at 113. This Court disagreed, noting: "The short—and conclusive—answer is that legislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law." *Id.* The Court concluded that "[i]f appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist," and accordingly upheld the UN's immunity from suit. *Id.*

Appellants attempt to distinguish *Brzak*, noting that plaintiffs there had access to an internal UN redress process. . . . But the existence—or lack thereof—of any redress process was irrelevant to the Court's Constitutional analysis.

* * * *

... Accordingly, this Court should adhere to its prior ruling in *Brzak*, and affirm the dismissal of Appellants' constitutional claims.

* * * *

2. *All Craft Fabricators, Inc. v. ATC Associates Inc.*

On January 13, 2015, the United States submitted a statement of interest in *All Craft Fabricators, Inc. v. ATC Associates Inc.*, No. 156899/2013, asserting the immunity and inviolability of UN property, including documents, from legal process. The case involves

allegations that contractors for a project at the UN contaminated plaintiffs' facilities and offices with asbestos contained in wood panels and doors that were removed from the UN during the project. Plaintiffs propounded discovery requests seeking documents that are the property of the UN. The U.S. statement of interest includes as an exhibit the note verbale from the UN dated December 5, 2014, addressed to the United States Mission to the UN, requesting that the United States Government "take appropriate steps to ensure that the privileges and immunities of the United Nations are respected in this matter." As explained in the vote verbale, the documents requested include drawings and plans of non-public spaces in the UN. Excerpts follow from the U.S. statement of interest, which is available, along with the note verbale, at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The Property of the UN (Including Its Proprietary Documents), Wherever Located and by Whomsoever Held, Is Immune from Legal Process

The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment [sic] of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN adopted shortly after the UN Charter, defines the UN's privileges and immunities, and specifically provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2; *see* Ex. 1. Moreover, "[t]he property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action." General Convention, art. II, § 3. Finally, "[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located." General Convention, art. II, § 4.

As courts have long recognized, the United States is a party to the General Convention. *See, e.g., Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010); *Sadikoglu v. United Nations Development Programme*, No. 11 Civ. 0294(PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 371 (S.D.N.Y. 1996); *Shamsee v. Shamsee*, 74 A.D.2d 357, 361 (N.Y. App. Div. 1980); *Hunter v. United Nations*, 800 N.Y.S.2d 347, 2004 WL 3104829, at*2-3 (N.Y. Sup. Ct. Nov. 15, 2004). Moreover, numerous New York courts have acknowledged the need to respect and enforce the UN treaty obligations of the United States. *See, e.g., Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 230 (N.Y. 1990) (noting that "[t]he Supremacy Clause provides that 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land'" and analyzing the applicability of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Cooper v. Ateliers de la Motobecane*, 57 N.Y. 2d 408, 410-15 (N.Y. 1982) (enforcing the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Hunter*, 2004 WL 3104829, at *2-6 (because of the immunities conferred by the UN Charter and General Convention, dismissing claims against the UN, a UN agency, and UN officials); *Curran v. City of New York*,

77 N.Y.S.2d 206, 211-12 (N.Y. Sup. Ct. 1947) (analyzing plaintiff's allegations in light of the provisions of and immunity conferred by the UN Charter).

The United States understands the General Convention, Article II sections 2, 3, and 4, to mean what they unambiguously say: all property of the UN, *wherever located and by whomsoever held*, enjoys absolute immunity from legal process except where expressly waived. To the extent there could be any alternative reading of the General Convention's text, the Court should defer to the Executive Branch's reasonable interpretation. *See Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight.") (internal citation and quotation marks omitted); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) (interpreting the General Convention and noting, "in construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch'" (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999))); *Keesler v. Fuji Heavy Indus., Ltd.*, 862 N.Y.S.2d 815, 2008 WL 860116, at *2 (N.Y. Sup. Ct. Mar. 28, 2008) (Courts are required to 'give great weight to treaty interpretations made by the Executive Branch'" (quoting Restatement (Third) of Foreign Relations Law of the United States § 326(2) (1986))); *Curran*, 77 N.Y.S. 2d at 208-09 (deferring to the executive branch's determination regarding the immunity of the UN and the UN Secretary-General). Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference.

Consistent with the applicable treaty language and the Executive Branch's and the UN's views, federal and state courts have repeatedly declined to subject the property, assets, or documents of the UN, wherever located or by whomsoever held, to legal process or other judicial orders. *See, e.g., United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063, at *1-3 (S.D.N.Y. Feb. 26, 2007) (in a case involving a subpoena *duces tecum* to the UN, denying a motion to compel the production of documents from the UN, citing the UN's immunity under, *inter alia*, the General Convention, and observing that the UN had voluntarily agreed to produce some documents); *Paris v. Dep't of Nat'l Store Branch 1 (Vietnam)*, No. 99 Civ. 8607 (NRB), 2000 WL 777904, at *1-5 (S.D.N.Y. June 15, 2000) (citing the UN Charter and the General Convention in vacating a restraining notice on funds held in an account at Banque National de Paris, where the account was governed by an agreement between the bank and the UN providing that the funds are "specifically-identified assets held by the United Nations"); *Shamsee*, 74 A.D.2d at 361-62 (holding that moneys held in a UN pension fund are immune from process pursuant to, *inter alia*, the General Convention).

Therefore, the property of the UN (including its documents), wherever located and by whomsoever held, is immune from legal process absent an express waiver. Accordingly, an order requiring the production of any UN proprietary documents would be contrary to the UN's rights, and the obligations of the United States, under the General Convention. As described herein, however, the UN has expressed its willingness to assess, within the framework of its privileges and immunities, whether it is in a position voluntarily to authorize the release of documents at issue in this matter, and continues to engage in discussions with the defendants on this issue.

3. *Gallo v. Baldini*

On February 23, 2015, the United States submitted a statement of interest to the U.S. District Court for the Southern District of New York concerning the immunity of Roberta Baldini, a UN official, from legal process in a defamation lawsuit brought against her by UN employee Peter Gallo. Along with the statement, the United States provided letters from UN legal counsel and the UN Office of Legal Affairs confirming Ms. Baldini's immunity. Excerpts follow from the U.S. statement of interest, which is also available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

A. Ms. Baldini Is Immune from Legal Process in the Present Suit

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According to the UN, Ms. Baldini is an official of the UN within the meaning of Article V of the General Convention. *See* January 7 Letter at *2 (Ms. Baldini “is a United Nations staff member and is not assigned to hourly rates”); *see also* G.A. Res. 76(I), U.N. Doc. A/116, at 139 (Dec. 7, 1946). Absent a waiver of her immunity, she is immune from legal process with respect to all words spoken or written and acts performed by her in her official capacity. *See* General Convention, Art. V, § 18(a).

Plaintiffs suit against Ms. Baldini relates entirely to words allegedly spoken or written and actions allegedly undertaken by Ms. Baldini in her official capacity as a UN staff member in the Office of Internal Oversight Services and as Plaintiff's supervisor at the UN. Plaintiff's suit centers on his employment with the UN, namely the alleged retaliatory misconduct of his former supervisor. ... Courts have routinely held that defendants in such employment related disputes are immune from legal process because they were UN officials acting in their official capacity. *See Van Aggelen v. United Nations*, 311 F. App'x 407,409 (2d Cir. 2009) ...; *McGehee v. Albright*, 210 F. Supp. 2d 210, 217-18 (S.D.N.Y. 1999) ...; *D'Cruz v. Annan*, No. 05 Civ. 8918 (DC), 2005 WL 3527153, at*1 (S.D.N.Y. Dec. 22, 2005) ...; *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 72 (E.D.N.Y. 1987) ... Accordingly, absent a waiver by the UN Secretary General, Article V, § 18(a) of the General Convention grants immunity to Ms. Baldini in this matter.

B. Ms. Baldini's Immunity Has Not Been Waived

As noted above, the UN Secretary General may “waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.” General Convention, Art. V, § 20. Here, the UN has expressly sought to preserve Ms. Baldini's immunity. In its December 17 Letter, the UN explained that it is “expressly asserting the immunity of [Defendant] in relation to [Plaintiffs suit].” December 17 Letter at *2. Similarly, in its January 7 Letter, the UN stated that it “expressly maintains the immunity of the United Nations, and specifically, the immunity accorded to [Defendant].” January 7 Letter at *2. In both letters, the UN also requested that the

United States Government “take the appropriate steps with a view to ensuring that the privileges and immunities of the United Nations and its officials are maintained in respect of this legal action.” December 17 Letter at *2; January 7 Letter at *2. Accordingly, because the UN Secretary General has not waived the immunity of Ms. Baldini, she is immune in the present action.

C. Plaintiff's Allegations Concerning the Location of the Alleged Misconduct and the UN's Internal Grievance Procedures Have No Bearing on the Immunity of Ms. Baldini

Plaintiff's Complaint suggests two reasons that this Court has jurisdiction over this matter. Both are mistaken. First, Plaintiff alleges that this Court has jurisdiction because some of the alleged misconduct occurred “within the City of New York, not on United Nations property,” and outside the UN Headquarters District. *See* Cplt. at 146-48. However, the unambiguous text of the General Convention makes clear that Ms. Baldini, as a UN official acting in her official capacity, and regardless of the location of her official acts, is immune from legal process absent a waiver by the UN Secretary General. *See* General Convention, Art. V, § 18(a) (applying, without limitation, to “words spoken or written and all acts performed by [officials] in their official capacity”). *Cf. Askir v. Boutros-Ghali*, 933 F. Supp. 368, 370-73 (S.D.N.Y. 1996) (recognizing immunity of UN officials where alleged misconduct involved the “unauthorized and unlawful possession” of plaintiffs real property located in Somalia).

Second, Plaintiff emphasizes that the UN's internal procedures have failed to effectively address his grievances. *See* Cplt. at 143, 162. In its December 17 Letter and its January 7 Letter, the UN stated that “there is an available forum and process for dealing with such workplace disputes at the United Nations.” December 17 Letter at *2; January 7 Letter at *2. Nevertheless, whether the UN's internal procedures have been or will be able to adequately address Plaintiff's grievances has no bearing on Ms. Baldini's immunity under Article V, § 18(a) of the General Convention. *See Brzak*, 597 F.3d at 112-13 (holding the UN and its officials immune despite plaintiffs' contention that the UN's dispute mechanisms were inadequate); *McGehee*, 210 F. Supp. 2d at 212, 218 (dismissing claim against immune defendant, notwithstanding plaintiffs allegations that the UN's administrative tribunal “abused its discretion, violated its own rules, and denied her due process in rendering its decision” regarding her reinstatement).

D. Deference Should Be Granted to the Executive Branch's Reasonable Interpretation of the General Convention

To the extent there could be any alternative reading of the General Convention's text, the Court should defer to the Executive Branch's reasonable interpretation.

* * * *

4. *Zuza v. Office of the High Representative*

On November 20, 2015, the United States filed a statement of interest in *Zuza v. Office of the High Representative*, No. 14-01099 (D.D.C.). The United States District Court for the District of Columbia had requested the views of the United States on whether defendants the current and former High Representatives of OHR enjoyed immunity under section 8(a) of the International Organizations Immunities Act (“IOIA”). The U.S. statement of interest, explaining that the individual defendants were immune under the IOIA, is excerpted below and available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The IOIA confers immunity from suit for qualifying “international organizations” and officers and employees of such organizations. Pub. L. No. 291, 59 Stat. 669 (1945) (codified as amended at 22 U.S.C. §§ 288-288f-7). Under the IOIA, a qualifying international organization “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity.” 22 U.S.C. § 288a(b). As for “officers and employees of such organizations,” they “shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the . . . international organization concerned.” *Id.* § 288d(b).

In 2010, the IOIA was amended to authorize the President to extend the provisions of the statute to the Office of the High Representative for Bosnia and Herzegovina (“OHR”) and its officers and employees. Pub. L. 111-177, 124 Stat. 1260 (2010) (codified at 22 U.S.C. § 288f-7). In 2011, the President used this authority to order that “all privileges, exemptions, and immunities provided by the International Organizations Act be extended to the Office of the High Representative in Bosnia and Herzegovina and to its officers and employees.” Exec. Order No. 13,568, 76 Fed. Reg. 13,497 (Mar. 8, 2011).

As a result of this Executive Order, OHR enjoys the same protections from suit as other qualifying international organizations under the IOIA. For this reason, the Court held that OHR is immune from plaintiff’s lawsuit. Mem. Op. Granting Defendants’ Motion to Dismiss (“Mem. Op.”) (ECF 18) at 7-12 (court lacks subject matter jurisdiction over plaintiff’s suit against the OHR); 22 U.S.C. § 288a(b) (qualifying international organization under the IOIA “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments”).

Officers and employees of OHR also enjoy immunity with respect to their official acts under the IOIA, but they must satisfy the requirements of section 8(a) of the statute, which provides:

No person shall be entitled to the benefits of this subchapter, unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or servant, of one of the foregoing accepted or designated representatives, officers, or employees.

22 U.S.C. § 288e(a). In the Court’s Request for Statement of Interest, it asked for the views of the United States “regarding whether Defendants Inzko and Ashdown satisfy the requirements set forth at section 8(a) of the IOIA,” “or, more generally, the interpretation of that statutory provision, specifically the language ‘duly notified to and accepted by the Secretary of State as a representative, officer, or employee.’” Request for Statement of Interest at 2.

II. ASHDOWN AND INZKO HAVE BEEN FORMALLY NOTIFIED AND ACCEPTED WITHIN THE MEANING OF SECTION 8(a) OF THE IOIA

In response to the Court's Request, the United States confirms that both individual defendants satisfy section 8(a)'s requirements. On November 20, 2015, the Department of State's Acting Deputy Director of the Office of Foreign Missions certified that both Inzko and Ashdown have been notified to the Department and accepted as the current and former High Representative, respectively, of the OHR. *See* November 20, 2015 Certification from Clifton Seagroves, Acting Deputy Director of the Office of Foreign Missions (Exhibit A).

Thus, section 8(a)'s requirements are satisfied with respect to Inzko and Ashdown and they are entitled to the immunity conferred by section 7(b) of the IOIA and Executive Order No. 13,568. This immunity extends to all "acts performed by them in their official capacity and falling within their functions. . . except insofar as such immunity may be waived by the...international organization concerned." 22 U.S.C. § 288d(b). As the Court correctly determined, Ashdown and Inzko carried out the actions on which plaintiff's complaint is based in their official capacity as officers of the OHR, Mem. Op. at 16; *see also* Compl. ¶ 6, and OHR has not waived Ashdown's and Inzko's immunity. Accordingly, section 7(b) of the IOIA and Executive Order No. 13,568 render the individual defendants immune from plaintiff's suit.

* * * *

On February 4, 2016 the district court issued its decision, agreeing with the United States that Paddy Ashdown and Valentin Inzko satisfied the requirements of section 8(a) of the IOIA and were immune from suit. Excerpts follow (with footnotes omitted) from the court's memorandum opinion. Plaintiff has appealed the court's decision to the United States Court of Appeals for the District of Columbia Circuit.

* * * *

...Zuza argues that the Court erroneously disregarded section 8(a) of the IOIA, which states that an individual must be "duly notified to and accepted by the Secretary of State as a representative, officer, or employee" before he can enjoy IOIA immunity. 22 U.S.C. § 228e(a). The parties' supplemental briefs and the United States' statement of interest address this issue at length. ...

a. The United States' Statement of Interest

The government's statement of interest states that "the United States confirms that both individual defendants satisfy section 8(a)'s requirements." Statement of Interest 3. In support, the United States attached a signed letter from Clifton Seagroves, the Department of State's Acting Deputy Director of the Office of Foreign Missions. *See* Statement of Interest Ex. A, ECF No. 41-1. According to that letter, "[t]he official records of the Department of State" indicate that Inzko and Ashdown "have been notified to the Secretary of State and accepted by the Director of the Office of Foreign Missions, acting pursuant to delegated authority from the Secretary of State." *Id.*

b. Notification and Acceptance Shown

With the government’s statement of interest and Seagroves’s signed letter, it is clear that Inzko and Ashdown meet 29 U.S.C. § 288e(a)’s requirements. Seagroves’s letter expressly confirms that Inzko and Ashdown have been “notified to” and “accepted by” the Secretary of State, just as § 288e(a) prescribes. ...And Zuza himself implies that a certificate or letter from the Department of State is sufficient to show acceptance. See Pl.’s Suppl. Brief 2, 11–15.

* * * *

Zuza’s evidentiary objections lack merit, and Zuza makes no arguments disputing the relevant facts: Inzko and Ashdown were notified under 29 U.S.C. § 288e(a) to the Secretary of State, and the Secretary of State accepted them under § 288e(a) as appropriate recipients of IOIA immunity. Inzko and Ashdown therefore meet the requirements set forth in § 288e(a). On this front, Zuza has not shown a “need to correct a clear error” of law. *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004); see also *Kittner v. Gates*, 783 F. Supp. 2d 170, 172 (D.D.C. 2011) (placing the burden of proof for a Rule 59(e) motion on the movant).

c. Retroactive Notification and Acceptance Permissible

Even if Inzko and Ashdown did not meet 29 U.S.C. § 288e(a)’s requirements at the time Zuza’s complaint was filed, that would not bar their IOIA immunity now. The IOIA itself states that, once individuals merit IOIA immunity, they are immune not just “from suit,” but also from “legal process.” 22 U.S.C. § 288d(b). And the weight of relevant case law favors finding that if international officials acquire immunity during the pendency of a suit, the suit must be dismissed. See generally *Abdulaziz v. Metro. Dade Cnty.*, 741 F.2d 1328, 1329–30 (11th Cir. 1984) (discussing diplomatic immunity and holding that it “serves as a defense to suits already commenced”); *Fun v. Pulgar*, 993 F. Supp. 2d 470, 474 (D.N.J. 2014) (same); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 799 (N.D. Cal. 1987) (same). The Supreme Court, in discussing foreign sovereign immunity, has stated that “such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present ‘protection from the inconvenience of suit as a gesture of comity.’” *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004). More broadly, the D.C. Circuit has explained that, for parties who merit IOIA immunity, the IOIA creates a “baseline” of “absolute immunity” to all kinds of suits. *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998).

These authorities persuade the Court that the IOIA, like diplomatic immunity and foreign sovereign immunity, can serve as a defense to suits already commenced. As this Court has noted before, IOIA immunity “is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.” *Garcia v. Sebelius*, 919 F. Supp. 2d 43, 47 (D.D.C. 2013) (internal quotation marks omitted) (quoting *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)).

Because IOIA immunity can apply retroactively, 22 U.S.C. § 288e(a)’s requirements will not bar Inzko and Ashdown’s IOIA immunity, even if they first satisfied those requirements after Zuza filed his complaint in this case. Thus, § 288e(a) is not a reason for the Court to disturb its decision to find Inzko and Ashdown immune from suit.

* * * *

5. Immunity of UN in Bankruptcy Proceeding

On December 11, 2015, the United States filed a statement of interest asserting the immunity of the UN in the U.S. Bankruptcy Court for the District of Delaware. *In re: Altegrity, Inc.*, No. 15-10226. Altegrity filed for bankruptcy in the Delaware court and part of the reorganization plan it filed included rejection of a contract entered into by the UN with Altegrity's subsidiary, Kroll, for the design of a security system at UN Headquarters. Excerpts follow (with footnotes omitted) from the U.S. statement of interest, which is available in full (with its Exhibit, a letter from the UN Office of Legal Affairs) at <http://www.state.gov/s/l/c8183.htm>.

* * * *

Absent an express waiver, the UN is absolutely immune from suit and all legal process. *E.g.*, *Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010); *Van Aggelen v. United Nations*, No. 06 Civ. 8240, 2007 WL 1121744, at *1 (S.D.N.Y. April 12, 2007). Article 105 of the UN Charter provides that the UN “shall enjoy . . . such privileges and immunities as are necessary for the fulfillment of its purposes.” UN Charter, art. 105.1-2, June 26, 1945, 59 Stat. 1031. Article II, Section 2 of the General Convention, adopted February 13, 1946, and acceded to by the United States in 1970, defines the UN’s privileges and immunities by providing that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” General Convention, art. II, § 2. Article II, Section 3 of the General Convention further provides that “[t]he property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.” *Id.* art. II, § 3. These immunities apply without limitation to contractual disputes. *Sadikoglu v. United Nations Dev. Programme*, No. 11 CIV. 0294 PKC, 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011).

The United States understands the provisions of these treaties to mean what they unambiguously state: the UN and its property and assets enjoy immunity from the effects of this Court’s Order confirming the joint plan and its purported rejection of the executory Contract between the UN and Kroll. Issuance of the Order constitutes a form of legal process. See *Shamsee v. Shamsee*, 74 A.D.2d 357, 361 (N.Y. App. Div. 1980) (vacating sequestration order against former UN employee and relying primarily on Article II, Section 2 of the General Convention), *aff’d*, 421 N.E.2d 848 (N.Y. 1981). Further, interpreting “legal process” in this manner comports with the legal definition of that term as understood at the time of the General Convention’s adoption in 1946 and accession by the United States in 1970. See Black’s Law Dictionary 1370 (4th ed. 1951) (stating that the term “legal process” “properly [] means a writ, warrant, mandate, or other process issuing from a court of justice, such as an attachment, execution, injunction, etc.”); Black’s Law Dictionary 1370 (4th ed. rev. 1968) (same). Accordingly, pursuant to Article II, Section 2 of the General Convention, the UN and its property and assets—specifically, its rights under the Contract—are immune from the effects of the Court’s Order. Similarly, notwithstanding the Court’s Order purporting to confirm the debtors’

rejection of the Contract and thereby purporting to limit the UN's contractual rights, the Court should avoid engaging in a "form of interference" by "judicial [] action" from which the UN's property and assets are immune under Article II, Section 3 of the General Convention.

To the extent there could be any alternative reading of the applicable treaties, the Court should defer to the Executive Branch's reasonable interpretation. See *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (citation omitted)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) (interpreting the General Convention and noting, "in construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch'" (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999))).

Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the UN, and its views are entitled to deference. The Court should also defer to the Executive Branch's interpretation in this case because the interpretation is shared by the UN. See Ex. A. Cf. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.").

Therefore, absent waiver, the UN is immune from legal process in this matter, including the Court's Order dated August 14, 2015.

II. The UN Has Not Waived Its Immunity.

Any waiver of the UN's absolute immunity from suit or legal process must be "express[]." General Convention, art. II, § 2; see also *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) ("Under the Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases."). "Express waiver requires a clear and unambiguous manifestation of the intent to waive." *United States v. Chalmers*, No. S5 05 CR 59, 2007 WL 624063, at *2 (S.D.N.Y. Feb. 26, 2007).

There is no indication that the UN has expressly waived its immunity here. To the contrary, the UN has expressly sought to preserve its immunity. In its Note Verbale, the UN "confirm[ed] that the Secretary-General has not waived, and is expressly maintaining, the privileges and immunities of the United Nations in this matter." Ex. A, at 3. The UN also requested that the Government "take appropriate steps with a view to ensuring that the privileges and immunities of the United Nations are maintained in respect of this matter." *Id.* Accordingly, because the UN has not waived its immunity, it was and is immune from any legal process and from what would otherwise be the effects of the Court's Order on its executory Contract with Kroll. ...

* * * *

Cross References

Meshal case regarding extraterritoriality, **Chapter 5.A.1.**

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

ILC's work on immunity, **Chapter 7.D.2.**

Statement of interest in Holocaust claims litigation, **Chapter 8.C.**

Diplomatic relations, **Chapter 9.A.**

Weinstein case regarding internet names as property under FSIA, **Chapter 11.G.4.**

COMMISA v. PEP, **Chapter 15.C.1.a.**

Salini v. Morocco, **Chapter 15.C.1.b.**