UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BURMA TASK FORCE, HITAY LWIN OO, AND JOHN DOES,

Plaintiffs,

v.

THEIN SEIN, WUNNA MAUNG LWIN, THEIN HTAY, KHIN YI, MAUNG OHN, KO KO,

Defendants.

No. 15 Civ. 7772 (LGS)

SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA

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In accordance with 28 U.S.C. § 517, the United States of America (the "Government"), by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully informs the Court of the Government's interest in this pending lawsuit against President Thein Sein and Foreign Minister Wunna Maung Lwin, who are, respectively, the President and Foreign Minister of Burma.[1] The United States further informs the Court that President Thein Sein and Foreign Minister Wunna Maung Lwin are immune from this suit.[2] In support of its interest and determination, the United States sets forth the following:

1. The United States has an interest in this action because President Thein Sein is the sitting head of a foreign state and Foreign Minister Wunna Maung Lwin is the sitting foreign minister of that same foreign state. Accordingly, this lawsuit raises the question of President Thein Sein's and Foreign Minister Wunna Maung Lwin's immunity from the Court's jurisdiction for suits brought while in office. The Constitution assigns to the President of the United States, and to the President alone, responsibility for representing the nation in its foreign relations. That power gives the Executive Branch authority to determine the immunity of sitting heads of state and foreign ministers from suit. After considering the relevant principles of customary international law, the implementation of the United States' foreign policy, and the potential implications for international relations, the Executive Branch has decided to recognize President Thein Sein's and Foreign Minister Wunna Maung Lwin's immunity from this suit. 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 or foreign minister to suit after the Executive Branch has

[1] Section 517 of Title 28 of the United States Code provides in relevant part that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

[2] In this Suggestion of Immunity, the United States expresses no view on the merits of Plaintiffs' claims.

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 Government of Burma has formally requested that the Government of the United States "take the steps necessary to have this action dismissed as against" President Thein Sein and Foreign Minister Wunna Maung Lwin "on the basis of their immunity from jurisdiction as a sitting foreign head of state and a sitting foreign minister, respectively." Letter from Katherine D. McManus to Benjamin C. Mizer, dated February 4, 2016 (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 Thein Sein as a sitting head of state and of Foreign Minister Wunna Maung Lwin as a sitting foreign minister from the jurisdiction of the United States District Court in this suit." *Id.*

3. Historically, the Executive Branch determined the immunity of both foreign states and foreign officials, and courts deferred completely to those 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 ("FSIA"), 28 U.S.C. §§ 1330, 1602–11, 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 DIPLOMATIC PRACTICE 9 (Lord Gore-Booth ed., 5th ed. 1979). Although the doctrine is referred to as "head-of-state immunity," it applies to heads of government and foreign ministers as well. Longstanding authority provides that a foreign minister is entitled to immunity by virtue of his or her office because of that official's inherent role in acting as a representative of the state. *See Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (noting that *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), "generally viewed as the source of our foreign sovereign immunity jurisprudence," found that "members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign"). *Accord* Restatement (Second) of Foreign Relations Law §§ 65, 66 (1965) (noting that the immunity of a foreign state is enjoyed by heads of state, heads of government,

and foreign ministers); *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 20–21 (Feb. 14) (Merits) (holding that heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction of foreign states). Thus, U.S. courts, beginning with the Supreme Court in *Schooner Exchange*, have specifically recognized the immunity of sitting foreign ministers based on their status. *Rhanime v. Solomon*, No. 01 Civ. 1479 (RWR), slip op. at 6 (D.D.C. May 15, 2002) ("Being a foreign minister is one of the two traditional bases for a recognition or grant of head-of-state immunity." (internal quotation marks omitted)) (attached as Exhibit B); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296–97 (S.D.N.Y. 2001) (extending head-of-state immunity to Zimbabwe's foreign minister), *rev'd in part on other grounds*, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

6. In the United States, head-of-state immunity determinations are made by the Department of State, exercising the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Republic of Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Republic of Peru*, the Supreme Court decided, in the context of pre-FSIA foreign state immunity, that "[u]pon recognition and allowance of the [immunity] claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the [matter] and remit the libelant to the relief obtainable through diplomatic negotiations." 318 U.S. at 588; *see also id.* at 589 ("The certification and the request [of immunity] . . . must be accepted by the courts as a conclusive determination by the political arm of the Government."). Such deference to the Executive Branch's 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) ("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.").

7. For the same reason, courts have also routinely deferred to the Executive Branch's head-of-state immunity determinations. *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." (internal quotations marks 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."); *see also 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" and that "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 makes a head-of-state immunity determination, judicial deference to that determination is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Ye*, 383 F.3d at 626; *see also Spacil*, 489 F.2d at 619.[3] As noted above, in no case has a court subjected a sitting head of

[3] As other courts have explained, the Executive Branch possesses substantial institutional resources and extensive experience with which to conduct the country's foreign affairs, and the judiciary does not. *See, e.g., Spacil*, 489 F.2d at 619. Furthermore, "in the chess game that is diplomacy[,] only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Id.*

state or foreign minister to suit after the Executive Branch has determined that the head of state or foreign minister is immune.[4]

9. Under the customary international law principles accepted by the Executive Branch, head-of-state immunity attaches to a president's or a foreign minister's status as the current holder of either of those offices. In this case, the Executive Branch has determined that President Thein Sein and Foreign Minister Wunna Maung Lwin, as the sitting President and Foreign Minister of Burma, respectively, enjoy head-of-state immunity from the jurisdiction of U.S. courts. [5]

Accordingly, President Thein Sein and Foreign Minister Wunna Maung Lwin are entitled to immunity from this suit, and the Court lacks jurisdiction over them.

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[4] Indeed, courts have dismissed a number of cases against heads of state and/or foreign ministers. *See, e.g., Tawfik v. al-Sabah*, 2012 WL 3542209, at *3–*4 (S.D.N.Y. Aug. 16, 2012); *Manoharan v. Rajapaksa*, 845 F. Supp. 2d 260, 263 (D.D.C. 2012), *aff'd*, 711 F.3d 178 (D.C. Cir. 2013); *Habyarimana v. Kagame*, 821 F. Supp. 2d 1244, 1263–64 (W.D. Okla. 2011) ("Where the United States' Executive Branch has concluded that a foreign head of state is immune from suit, and where it has urged the Court to take recognition of that fact and to dismiss the suit pending against said head of state, the Court is bound to do so."), *aff'd*, 696 F.3d 1029 (10th Cir. 2012); *Rhanime*, No. 01 Civ. 1479 (RWR), slip op. at 6; *Leutwyler v. Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (holding that the Executive Branch's immunity determination on behalf of the Queen of Jordan "is entitled to conclusive deference from the courts"); *Tachiona*, 169 F. Supp. 2d at 297 (dismissing a suit against the President and Foreign Minister of Zimbabwe based upon a Suggestion of Immunity filed by the Executive Branch).

[5] Even if President Thein Sein or Foreign Minister Wunna Maung Lwin leaves office before this Court dismisses the claims against them, they would remain immune from this lawsuit. Once the Executive Branch submits a suggestion of immunity, "the district court surrender[s] its jurisdiction." *Samantar*, 560 U.S. at 311; *see also Peru*, 318 U.S. at 588. Moreover, the President and Foreign Minister's immunity from suit would preclude any effort to serve them with process while they are still in office. *See Wei Ye*, 383 F.3d at 622, 628 (holding that the executive's "power to recognize the immunity of a foreign head of state includes the power to preclude service of process in that same suit on the head of state").

CONCLUSION

For the foregoing reasons, the United States respectfully submits to the Court that President Thein Sein and Foreign Minister Wunna Maung Lwin are immune from this action.

Date: February 12, 2016
New York, NY

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York

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United States Department of State

Washington, D.C. 20520

February 4, 2016

Benjamin C. Mizer
Principal Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: *Burma Task Force et al. v. Thein Sein et al.*, No. 15-cv-7772 (S.D.N.Y.)

Dear Mr. Mizer:

The above-referenced suit names as defendants, among others, Thein Sein and Wunna Maung Lwin, who are currently the President and Foreign Minister, respectively, of Burma. In light of President Thein Sein's current status as the Head of State of Burma and Foreign Minister Wunna Maung Lwin's current status as Foreign Minister of Burma, the Government of Burma has asked the Department of State to take the steps necessary to have this action dismissed as against them on the basis of their immunity from jurisdiction as a sitting foreign head of state and a sitting foreign minister, respectively.

The Department of State recognizes and allows the immunity of President Thein Sein as a sitting head of state and of Foreign Minister Wunna Maung Lwin as a sitting foreign minister from the jurisdiction of the United States District Court in this suit. Under common law principles of immunity articulated by the Executive Branch in the exercise of its Constitutional authority over foreign affairs and informed by customary international law, President Thein Sein, as the sitting head of state of a foreign state, and Foreign Minister Wunna Maung Lwin, as a sitting foreign minister of a foreign state, are immune while in office from the jurisdiction of the United States District Court in this suit.

I would emphasize the particular importance of obtaining the prompt dismissal of the proceedings as against President Thein Sein and Foreign Minister Wunna Maung Lwin in view of the significant foreign policy implications, particularly since both officials are expected to attend a diplomatic summit meeting in the United States scheduled for February 15 and 16, 2016. Accordingly, the Department of State requests that the Department of Justice submit a suggestion of immunity to the district court at the earliest opportunity.

Sincerely,

Katherine D. McManus

Katherine D. McManus
Deputy Legal Adviser

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDELKADER RHANIME,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 01-1479 (RWR)**
	)	
GERALD B. H. SOLOMON, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Abdelkader Rhanime, has filed suit against defendants Gerald B. H. Solomon, The Solomon Group LLC and H. E. Mohamed Benaissa seeking damages for two newspapers' use of excerpts from a letter written by Solomon and the Solomon Group LLC. Benaissa has moved to dismiss as to him for lack of personal jurisdiction. Because the Department of Justice has filed a suggestion of immunity stating that it would be incompatible with U.S. foreign interests to permit this action to proceed against Benaissa, his motion will be granted.

Plaintiff, a citizen of the Kingdom of Morocco who resides in the United States, alleges that defendants entered into an agreement to silence plaintiff's criticisms of defendant Benaissa, Morocco's foreign minister. (Compl. ¶ 12.) Pursuant to this agreement, Solomon and the Solomon Group LLC allegedly

delivered a letter, which included statements that plaintiff alleges are defamatory and present him in a false light, to two newspapers in Casablanca, Morocco. The newspapers published excerpts of the letters. (Id. ¶¶ 15, 16, 37, 38.) Plaintiff, filed suit in the United States, and Benaissa has moved to dismiss for lack of personal jurisdiction.

After this motion was filed, the Department of Justice filed a suggestion of immunity pursuant to 28 U.S.C. § 517 (West 2000)[1] stating that "permitting this action to proceed against Foreign Minister Benaissa would be incompatible with the United State's [sic] foreign policy interests." (Suggestion of Immunity ¶ 1.)

The Supreme Court has clearly stated that suggestions of immunity from the executive are to be conclusive and binding on courts. Once the executive properly submits a suggestion of immunity to a court, it "must be accepted by [a court] as a conclusive determination by the political arm of the government" that allowing the suit to go forward would interfere with the proper conduct of our foreign relations. Ex Parte Republic of Peru, 318 U.S. 578, 589 (1943). The executive's determination is binding because "[i]t is . . . not for the courts to deny an

[1]28 U.S.C. § 517 provides that an officer of the Department of Justice "may be sent by the Attorney General to any . . . district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

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." Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945). This immunity doctrine is commonly called "head-of-state immunity."

Those protected by head-of-state immunity are not subject to personal jurisdiction in United States courts unless that immunity has been waived by a United States statute or by the foreign government. See Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994); see also Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988), rev'd on other grounds, 886 F.2d 438 (D.C. Cir. 1989) (holding that defendant entitled to head-of-state immunity is immune from the court's jurisdiction); Lafontant v. Aristide, 844 F. Supp. 128, 140 (E.D.N.Y. 1994) (holding that the court could not "exercise in personam jurisdiction over defendant because of his head-of-state immunity").

Plaintiff offers two arguments for why a suggestion of immunity would not be conclusive here.[2] First, he claims that

[2]Plaintiff's opposition to Benaissa's motion was filed before the Department of Justice filed its suggestion of immunity and plaintiff never sought leave to respond to the suggestion of immunity. However, two of the arguments advanced in plaintiff's opposition to Benaissa's motion to dismiss are applicable to the suggestion of immunity.

the doctrine of head-of-state immunity, Ex Parte Repulic of Peru and Hoffman were all preempted by the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1602 et seq. (West 2000). His second argument is that even if head-of-state immunity still exists, Benaissa, as a foreign minister, does not qualify for its protections. (Pl.'s Mem. in Opp'n to Mot. to Quash Service and to Dismiss the Compl. at 5-8.) Neither of these arguments is persuasive.

The FSIA "is the 'sole basis for obtaining jurisdiction over a foreign state in our courts.'" El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp. 2d 69, 73 (D.D.C. 1999), rev'd on other grounds, 216 F.3d 29 (D.C. Cir. 2000). The Act "evinces a central concern with the adjudication of claims of sovereign immunity asserted in legal disputes arising from the commercial activities of states, their governmental agencies or public trading companies." Tachiona v. Mugabe, 169 F. Supp. 2d 259, 290 (S.D.N.Y. 2001). Because the central concern of the FSIA is not suits against individuals, "courts uniformly have continued to recognize an exception from application of the FSIA in cases dealing with actions brought against sitting heads-of-state on whose behalf the United States intercedes to confer immunity." Id. at 288; see also Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001)

(noting that Queen Rania was dismissed from the suit pursuant to a suggestion of immunity filed by the executive branch); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 24 (D.D.C. 1998) (recognizing head of state immunity and acknowledging that the decision as to whether an individual qualifies for head of state immunity "is a decision committed exclusively to the political branches and the judiciary is bound by their determinations"); First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (explaining that "the enactment of the FSIA was not intended to affect the power of the State Department on behalf of the President as Chief Executive, to assert immunity for heads of state or for diplomatic and consular personnel"); Lafontant, 844 F. Supp. at 131-34 (noting that "[r]ecognition of a government and its officers is the exclusive function of the Executive Branch" and that such recognition results in absolute immunity, unless immunity has been waived by statute or by the foreign government); Saltany, 702 F. Supp. at 320 (D.D.C. 1988) (holding that the court was required to accept as conclusive the Department of State's suggestion of immunity).

Ample authority supports the continuing existence of head-of-state immunity, and plaintiff's argument that head-of-state immunity has been preempted by the FSIA is simply not supported by the case law.

Finally, Benaissa, as foreign minister of the Kingdom of Morocco, is eligible for head-of-state immunity. Being a foreign minister is one of "the two traditional bases for a recognition or grant of head-of-state immunity." Republic of Philppines v. Marcos, 665 F. Supp. 793, 797 (N.D. Cal. 1987); see also Tachiona, 169 F. Supp. 2d at 296-97 (holding that foreign minister was immune because a suggestion of immunity was filed on his behalf by the State Department). Accordingly, it is hereby

ORDERED that Benaissa's motion to dismiss for lack of personal jurisdiction [20] be, and hereby is, GRANTED.[3]

SIGNED this 15th day of May, 2002.

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RICHARD W. ROBERTS
United States District Judge

[3]Given this disposition, Benaissa's other grounds for seeking dismissal and for seeking to quash service need not be addressed.