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CHAPTER 10

Privileges and Immunities

A. AMENDMENTS TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

1. Justice Against Sponsors of Terrorism Act

The Justice Against Sponsors of Terrorism Act (“JASTA”) amended both the Foreign Sovereign Immunities Act (“FSIA”) and the Anti-Terrorism Act. JASTA’s amendment to the FSIA contains an exception to the immunity of foreign states from the jurisdiction of courts in the United States in certain terrorism-related cases, regardless of whether the foreign state has been designated a state sponsor of terrorism. In particular, the exception applies in cases in which money damages are sought against a foreign state “for physical injury to person or property or death occurring in the United States and caused by (1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.” The Executive Branch opposed JASTA when it was under consideration. On July 14, 2016, State Department Legal Adviser Brian Egan provided a statement to the House Judiciary Committee’s Subcommittee on the Constitution and Civil Justice regarding JASTA. Mr. Egan’s testimony appears below and is also available at <https://judiciary.house.gov/wp-content/uploads/2016/07/Egan-Testimony-07142016.pdf>.

* * * *

Thank you, Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee. I appreciate the opportunity to appear before you with my colleague, Assistant Secretary Anne Patterson, to discuss the views of the Department of State on the Justice Against Sponsors of Terrorism Act.

At the outset, I would like to express my deep sympathy for the families whose loved ones perished in the attacks on September 11. I grew up in a bedroom community in New Jersey that was deeply affected by the World Trade Center attacks. For much of my career in government, at the Departments of State and Treasury and the National Security Council, I have worked on mechanisms that enable our government to confront terrorism, including financial sanctions and the use of military force where appropriate.

I will focus my comments today on the importance of the concept of sovereign immunity to the United States, and our concern that passage of JASTA will lead to harmful, reciprocal legislation and lawsuits against the United States overseas.

The principle of sovereign immunity, which restricts lawsuits against foreign governments, is well accepted in international law and was long recognized by U.S. courts as a matter of common law. The United States benefits greatly from the protection afforded by foreign sovereign immunity, and the Department of Justice regularly and vigorously defends our sovereign immunity overseas. Over the years, Congress and the Executive Branch have worked together to approach issues of foreign sovereign immunity and its exceptions with great caution.

The Foreign Sovereign Immunities Act, or FSIA, was enacted in 1976 following many years of study and consultation between Congress and the Executive Branch, academics, the American Bar Association, and private practitioners. The Act focuses on the narrow instances in which a foreign state's immunity is denied: for example, a foreign state's commercial activities in the United States or having direct effects here. The narrow non-commercial tort exception to immunity was aimed primarily at the problem of traffic accidents, and it provides jurisdiction for torts committed by foreign governments inside the United States that result in injuries here. Later enacted provisions relating to terrorism prudently restrict the ability to sue foreign governments in U.S. courts for acts undertaken abroad to those States that have been designated by the Executive branch as state sponsors of terrorism—currently Iran, Sudan, and Syria.

JASTA would represent a significant departure from this carefully crafted framework. JASTA would strip any foreign government of its sovereign immunity and expose the relevant country to lawsuits in U.S. courts based on allegations in the lawsuit that the country's actions abroad made it responsible for an attack on U.S. soil. As Ambassador Patterson noted, a number of U.S. partners and allies have raised concerns about the potential consequences of this change.

The adoption of legislation like JASTA likely would have reciprocal consequences for the United States and increase our country's vulnerability to lawsuits overseas. Reciprocity plays a substantial role in foreign relations. JASTA could encourage foreign courts to exercise jurisdiction over the United States or U.S. officials for allegedly causing injuries overseas through groups we support as part of our counter-terrorism efforts—circumstances in which we properly would consider ourselves to be immune.

Notwithstanding the care with which the United States operates to ensure that its actions overseas are appropriately calibrated, exposing U.S. national security-related conduct and decision-making to scrutiny in foreign courts would present significant concerns. Such litigation would have the potential for intrusive requests for sensitive U.S. documents and witnesses that we would not be willing to provide. There is a risk of sizeable monetary damages awards in such cases, which could then lead to efforts to attach U.S. government property in far-flung places. Given the broad range of U.S. activities and presence around the world, the United States is a much larger target for such litigation than any other country.

We stand ready to work with this subcommittee and other members of Congress to consider these important issues further. I look forward to taking your questions.

* * * *

As Mr. Egan mentioned, Ambassador Anne W. Patterson, Assistant Secretary of State for Near Eastern Affairs, also provided a statement to the House subcommittee on July 14. Ambassador Patterson's testimony appears below and is also available at <https://judiciary.house.gov/wp-content/uploads/2016/07/Patterson-Testimony-07142016.pdf>.

* * * *

Chairman Franks, Ranking Member Cohen, Members of the Subcommittee, thank you for inviting us to appear before you today to discuss the Justice Against Sponsors of Terrorism Act. I welcome the opportunity to testify with my colleague, Brian Egan, the Department of State's Legal Adviser.

I understand the motivation for the Justice Against Sponsors of Terrorism Act, and all of us in the Administration deeply sympathize with victims of terror and with their families. The State Department has long supported efforts to obtain compensation for U.S. terrorism victims, while also leading international efforts to combat terrorism and prevent more attacks against the homeland and our citizens abroad. I can personally attest that enormous focus and resources have been dedicated to addressing this threat so no other Americans will suffer the same fate as the victims of the September 11th attacks. From the successful efforts against Al Qaeda leadership in the Pakistan-Afghanistan border area, to the vast improvement in our intelligence about terrorist leaders; to the increasingly close and mutually beneficial cooperation with allies; and to our successes in rooting out sources of funding for terrorists, we have worked every day to protect America.

We know that the families of the 9/11 victims have suffered grievously. From the establishment of the original U.S. government compensation fund to today, we have been resolute in uniting to protect our country and to bring to justice those responsible for the attacks. The 9/11 attacks were, and have continued to be, the subject of intense and exhaustive investigation by U.S. government agencies and commissions.

While all of these efforts will continue, I am here today to explain the Administration's strong conviction that JASTA is not the right path forward. Most importantly, the passage of JASTA could undermine our critical fight against terrorism and particularly against ISIL by limiting our flexibility in operating overseas. It could potentially expose the U.S. government to billions of dollars in claims; it raises serious foreign policy concerns; and it could lead to a slowdown of foreign investments in the United States.

The current version of JASTA represents a sea change in longstanding principles which could have serious implications for U.S. interests. JASTA would allow private litigation against foreign governments in U.S. courts based on allegations that such countries' actions abroad made them responsible for terrorism-related injuries on U.S. soil. This legislation would allow suits against countries that have neither been designated by the Executive Branch as state sponsors of terrorism nor taken direct actions in the United States to carry out an attack here. JASTA would

hinder our ability to protect our national security interests by damaging relationships with countries that are important partners in combating terrorism, at a crucial time when we are trying to build coalitions, not create divisions. We cannot win the fight against ISIL without full international cooperation to deny ISIL safe haven, disrupt its finances, counter its violent messaging, and share intelligence on its activities. Our close and effective cooperation with other countries, both bilaterally and through multilateral vehicles such as the 66-member Global Coalition to Counter-ISIL, could be seriously hindered.

With the broad reach of JASTA, there is the likelihood that some of our critical allies, such as the United Kingdom or other European governments, could face lawsuits in U.S. courts, which could affect their cooperation with us, as well as their broader bilateral relationship with us.

Numerous European and Middle Eastern governments have reached out to the Department to express their concerns about the bill. The parliament in the Netherlands unanimously passed a motion on July 6 calling JASTA a “breach of Dutch sovereignty” that could expose the Netherlands to “astronomically high damages” via exposure to liability in U.S. courts and called on the government to potentially convey its concerns about JASTA to the United States. A British Member of Parliament, Thomas Tugendhat, in an opinion piece last month in the UK’s Telegraph newspaper, wrote that the bill “could also have serious unintended consequences for Britain. The act would expose the British government to the possibility of revealing the secrets of intelligence operations in open court, or paying damages over alleged failures to prevent terrorist attacks. Either outcome would put the special relationship under severe strain.” He expressed the view that it might be used by U.S. citizens to bring suit against the British government for failure “to tackle Islamic radicalism in earlier decades” by not addressing the problem of radical Islamic preachers in the UK, which he notes some say spawned terrorism.

The bill also poses a serious threat to U.S. interests overseas. I have seen firsthand throughout my career at my postings around the world that the United States benefits significantly from the protection afforded by foreign sovereign immunity given its extensive diplomatic, security, and assistance operations. As members of this committee know from their extensive travels abroad, some actions the United States takes overseas are controversial with local citizens and foreign governments. If JASTA is enacted, it could erode our sovereign immunity protections abroad, as some foreign governments will rush to pass similar legislation to allow claims against the United States and its property, and in some cases, even against U.S. officials. Even if they are not eager to do so—in many cases foreign governments are fully supportive of steps the United States has taken—such governments will come under intense public pressure to create rights for their citizens to sue the United States. As the world’s largest economy, the United States has extensive operations overseas, including property ownership, and thus is particularly vulnerable to asset seizures abroad.

The United States funds, trains, or equips numerous counter-terrorism, military, intelligence and law enforcement groups around the world. These groups are essential partners for the United States. As I saw first-hand when I served as Ambassador to Pakistan and Colombia such groups have been courageous in confronting terrorists in Pakistan and in uncovering terrorists and combatting narco-traffickers in Colombia. Likewise they are bravely fighting ISIL in Iraq right now. Exposing the United States to lawsuits in foreign courts with regard to the actions of such groups could open the door to intrusive litigation seeking billions of dollars of claims against the U.S. government and could reduce our ability to work with groups

that have been vital to achieving our national security goals. U.S. counterterrorism strikes that have been a crucial and successful component of our counter-Al Qaeda and counter-ISIL efforts do occasionally, tragically and despite all our safeguards, cause civilian casualties. If foreign courts were to take a JASTA-like approach in the country where such a strike took place, they might allow suits to be brought against the United States for such actions. Additionally, men and women working on such operations could face the risk of being brought to trial or compelled to provide evidence if they traveled to the country where the operation occurred.

We have deep concerns about exposing this broad range of U.S. national security-related conduct to scrutiny in foreign courts. These risks could ultimately have a chilling effect on our own counter-terrorism efforts.

In the course of my 42-year career, I have encountered a number of situations in which legislation like JASTA could have interfered with important U.S. government efforts overseas. Notwithstanding the care that we take in designing our training programs, I have seen abuses committed by rogue elements of groups we have trained which resulted in civilian casualties; I have worked with courageous Americans and others associated with the U.S. government who were involved in dangerous and risky operations. The U.S. military supports allied efforts, which, at times, have regretfully resulted in civilian casualties, which some may allege were wrongful. Perhaps more common than actual abuses, I have heard frequent claims that the U.S. government “should have known” about some abuse that took place, given its allegedly close relationship with elements of the local government or the alleged reach of its intelligence operation. If the principle of sovereign immunity is eroded, foreign courts could enter into an extensive range of suits and discovery against the United States, putting U.S. personnel and property in a precarious situation.

Finally, I want to mention the possibility that JASTA may cause foreign governments to hesitate to invest or maintain their funds in the United States. The administration actively encourages foreign investment in the United States, as high-profile events like Select USA demonstrate. We have the world’s largest and most open economy and take pride in the preeminence of New York as a financial center. Opening up U.S. courts to JASTA-type cases may cause foreign states to think twice about their investments here because they may have concerns that their money would be at risk of being attached in connection with a lawsuit. Foreign governments may simply decide to avoid this risk by keeping their assets outside of the U.S. financial system or avoiding dollar denominated transactions. This is what happened in in 2007 when Iraq threatened to remove its assets from the United States in response to a provision in the NDAA that would have exposed Iraq to potential liability. That prompted a Presidential veto and a later Congressional response adding a waiver for Iraq.

In sum, JASTA could have a serious negative impact on U.S. efforts to fight terrorism and could expose our allies and partners to lawsuits in U.S. courts, which could reduce their willingness to cooperate with us on crucial issues of U.S. national security. I am fully sympathetic to the desire of victims of terrorism to gain justice for their loved ones. However, this bill is not the solution. Before proceeding with the legislation, we believe there needs to be additional, careful consideration of the potential unintended consequences of its enactment. We welcome opportunities to engage with this Subcommittee on that discussion. I also want to thank this Subcommittee for your ongoing support as we continue to advance our national security interests and I look forward to answering your questions.

* * * *

On September 9, 2016 JASTA received approval in the U.S. House of Representatives and on September 12 it was presented to the President. On September 23, 2016, President Obama vetoed JASTA and provided the following message to the Senate regarding his veto. The President's veto message is available at <https://www.whitehouse.gov/the-press-office/2016/09/23/veto-message-president-s2040>.

* * * *

I am returning herewith without my approval S. 2040, the "Justice Against Sponsors of Terrorism Act" (JASTA), which would, among other things, remove sovereign immunity in U.S. courts from foreign governments that are not designated state sponsors of terrorism.

I have deep sympathy for the families of the victims of the terrorist attacks of September 11, 2001 (9/11), who have suffered grievously. I also have a deep appreciation of these families' desire to pursue justice and am strongly committed to assisting them in their efforts.

Consistent with this commitment, over the past 8 years, I have directed my Administration to pursue relentlessly al Qaeda, the terrorist group that planned the 9/11 attacks. The heroic efforts of our military and counterterrorism professionals have decimated al-Qaeda's leadership and killed Osama bin Laden. My Administration also strongly supported, and I signed into law, legislation which ensured that those who bravely responded on that terrible day and other survivors of the attacks will be able to receive treatment for any injuries resulting from the attacks. And my Administration also directed the Intelligence Community to perform a declassification review of "Part Four of the Joint Congressional Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11," so that the families of 9/11 victims and broader public can better understand the information investigators gathered following that dark day of our history.

Notwithstanding these significant efforts, I recognize that there is nothing that could ever erase the grief the 9/11 families have endured. My Administration therefore remains resolute in its commitment to assist these families in their pursuit of justice and do whatever we can to prevent another attack in the United States. Enacting JASTA into law, however, would neither protect Americans from terrorist attacks nor improve the effectiveness of our response to such attacks. As drafted, JASTA would allow private litigation against foreign governments in U.S. courts based on allegations that such foreign governments' actions abroad made them responsible for terrorism-related injuries on U.S. soil. This legislation would permit litigation against countries that have neither been designated by the executive branch as state sponsors of terrorism nor taken direct actions in the United States to carry out an attack here. The JASTA would be detrimental to U.S. national interests more broadly, which is why I am returning it without my approval.

First, JASTA threatens to reduce the effectiveness of our response to indications that a foreign government has taken steps outside our borders to provide support for terrorism, by taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts.

Any indication that a foreign government played a role in a terrorist attack on U.S. soil is a matter of deep concern and merits a forceful, unified Federal Government response that considers the wide range of important and effective tools available. One of these tools is designating the foreign government in question as a state sponsor of terrorism, which carries with it a litany of repercussions, including the foreign government being stripped of its sovereign immunity before U.S. courts in certain terrorism-related cases and subjected to a range of sanctions. Given these serious consequences, state sponsor of terrorism designations are made only after national security, foreign policy, and intelligence professionals carefully review all available information to determine whether a country meets the criteria that the Congress established.

In contrast, JASTA departs from longstanding standards and practice under our Foreign Sovereign Immunities Act and threatens to strip all foreign governments of immunity from judicial process in the United States based solely upon allegations by private litigants that a foreign government's overseas conduct had some role or connection to a group or person that carried out a terrorist attack inside the United States. This would invite consequential decisions to be made based upon incomplete information and risk having different courts reaching different conclusions about the culpability of individual foreign governments and their role in terrorist activities directed against the United States—which is neither an effective nor a coordinated way for us to respond to indications that a foreign government might have been behind a terrorist attack.

Second, JASTA would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests. The United States has a larger international presence, by far, than any other country, and sovereign immunity principles protect our Nation and its Armed Forces, officials, and assistance professionals, from foreign court proceedings. These principles also protect U.S. Government assets from attempted seizure by private litigants abroad. Removing sovereign immunity in U.S. courts from foreign governments that are not designated as state sponsors of terrorism, based solely on allegations that such foreign governments' actions abroad had a connection to terrorism-related injuries on U.S. soil, threatens to undermine these longstanding principles that protect the United States, our forces, and our personnel.

Indeed, reciprocity plays a substantial role in foreign relations, and numerous other countries already have laws that allow for the adjustment of a foreign state's immunities based on the treatment their governments receive in the courts of the other state. Enactment of JASTA could encourage foreign governments to act reciprocally and allow their domestic courts to exercise jurisdiction over the United States or U.S. officials—including our men and women in uniform—for allegedly causing injuries overseas via U.S. support to third parties. This could lead to suits against the United States or U.S. officials for actions taken by members of an armed group that received U.S. assistance, misuse of U.S. military equipment by foreign forces, or abuses committed by police units that received U.S. training, even if the allegations at issue ultimately would be without merit. And if any of these litigants were to win judgments—based on foreign domestic laws as applied by foreign courts—they would begin to look to the assets of the U.S. Government held abroad to satisfy those judgments, with potentially serious financial consequences for the United States.

Third, JASTA threatens to create complications in our relationships with even our closest partners. If JASTA were enacted, courts could potentially consider even minimal allegations accusing U.S. allies or partners of complicity in a particular terrorist attack in the United States

to be sufficient to open the door to litigation and wide-ranging discovery against a foreign country—for example, the country where an individual who later committed a terrorist act traveled from or became radicalized. A number of our allies and partners have already contacted us with serious concerns about the bill. By exposing these allies and partners to this sort of litigation in U.S. courts, JASTA threatens to limit their cooperation on key national security issues, including counterterrorism initiatives, at a crucial time when we are trying to build coalitions, not create divisions.

The 9/11 attacks were the worst act of terrorism on U.S. soil, and they were met with an unprecedented U.S. Government response. The United States has taken robust and wide-ranging actions to provide justice for the victims of the 9/11 attacks and keep Americans safe, from providing financial compensation for victims and their families to conducting worldwide counterterrorism programs to bringing criminal charges against culpable individuals. I have continued and expanded upon these efforts, both to help victims of terrorism gain justice for the loss and suffering of their loved ones and to protect the United States from future attacks. The JASTA, however, does not contribute to these goals, does not enhance the safety of Americans from terrorist attacks, and undermines core U.S. interests.

For these reasons, I must veto the bill.

* * * *

On September 26, 2016, Secretary of Defense Ashton Carter responded to a September 23 letter from Chairman of the Armed Services Committee William M. Thornberry with a letter urging Congress to respect the President’s veto of JASTA. Secretary Carter’s letter is excerpted below. Notwithstanding the President’s veto, both the House and Senate voted on September 28, 2016, by more than the required two-thirds majority, to pass JASTA, which became Public Law No. 114-222.

* * * *

...While we are sympathetic to the intent of JASTA, its potential second- and third-order consequences could be devastating to the Department and its Service members and could undermine our important counterterrorism efforts abroad.

In general terms, JASTA would allow lawsuits in U.S. Federal Courts against foreign states for actions taken abroad that are alleged to have contributed to acts of terrorism in the United States, notwithstanding long-standing principles of sovereign immunity. Under existing law, similar lawsuits are available for actions taken abroad only by designated state sponsors of terrorism. JASTA extends the stripping of immunity to states that are not designated sponsors of terrorism, potentially subjecting many of the United States’ allies and partner nations to litigation in U.S. courts.

JASTA has potentially harmful consequences for the Department of Defense and its personnel. Adoption of JASTA might result in reciprocal treatment of the United States and other countries could create exceptions to immunity that do not directly mirror those created by JASTA. This is likely to increase our country’s vulnerability to lawsuits overseas and to encourage foreign governments or their courts to exercise jurisdiction over the United States or

U.S. officials in situations in which we believe the United States is entitled [to] sovereign immunity. U.S. Service members stationed here and overseas, and especially those supporting our counterterrorism efforts, would be vulnerable to private individuals' accusations that their activities contributed to acts alleged to violate a foreign state's law. Such lawsuits could relate to actions taken by members of armed groups that received U.S. assistance or training, or misuse of U.S. military equipment by foreign forces.

First, whether the United States or our Service members have *in fact* provided support for terrorist acts or aided organizations that later commit such acts in violation of foreign laws is irrelevant to whether we would be forced to defend against lawsuits by private litigants in foreign courts. Instead, the mere allegation of their involvement could subject them to a foreign court's jurisdiction and the accompanying litigation and intrusive discovery process that goes along with defending against such lawsuits. This could result in significant consequences even if the United States or our personnel were ultimately found not to be responsible for the alleged acts.

Second, there would be a risk of sizeable monetary damage awards in such cases, which could lead to efforts to attach U.S. Government property to satisfy those awards. Given the broad range of U.S. activities and robust presence around the world, including our Department's foreign bases and facilities abroad, we would have numerous assets vulnerable to such attempts.

Third, it is likely that litigants will seek sensitive government information in order to establish their case against either a foreign state under JASTA in U.S. courts or against the United States in a foreign court. This could include classified intelligence data and analysis, as well as sensitive operational information. While in the United States classified information could potentially be withheld in certain narrow circumstances in civil lawsuits brought by private litigants against our allies and partners, no legislation specifically protects classified information in civil actions (unlike protections afforded in criminal prosecutions) or under JASTA. Furthermore, if the United States were to be sued in foreign courts, such information would likely be sought by foreign plaintiffs, and it would be up to the foreign court whether classified or sensitive U.S. Government information sought by the litigants would be protected from disclosure. Moreover, the classified information could well be vital for our defense against the accusations. Disclosure could put the United States in the difficult position of choosing between disclosing classified or otherwise sensitive information or suffering adverse rulings and potentially large damage awards for our refusal to do so.

Relatedly, foreign lawsuits will divert resources from mission crucial tasks; they could subject our Service members and civilians, as well as contractor personnel, to depositions, subpoenas for trial testimony, and other compulsory processes both here and abroad. Indeed, such personnel might be held in civil or even criminal contempt if they refused to appear or to divulge classified or other sensitive information at the direction of a foreign court.

Finally, allowing our partners and allies—not just designated state sponsors of terrorism—to be subject to lawsuits inside the United States will inevitably undermine the trust and cooperation our forces need to accomplish their important missions. By damaging our close and effective cooperation with other countries, this could ultimately have a chilling effect on our own counterterrorism efforts.

* * * *

2. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act

The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act was signed into law on December 16, 2016. Pub. L. No. 114-319. The Act was a response to a federal court decision, *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005); 517 F. Supp. 2d 322 (D.D.C. 2007), in which the court held that the presence in the United States of art on loan for temporary exhibit may satisfy one of the requirements for jurisdiction under the expropriation exception to immunity in the Foreign Sovereign Immunities Act (“FSIA”) in a suit against the lender, even if the art itself is subject to immunity from seizure pursuant to 22 U.S.C. § 2459. For background on *Malewicz* and 22 U.S.C. § 2459, see *Digest 2004* at 792-96; *Digest 2005* at 776-77; *Digest 2007* at 742-44. The expropriation exception provides that a foreign state is not immune from any suit “in which rights in property taken in violation of international law are in issue” and a specified commercial activity nexus to the United States is present. 28 U.S.C. § 1605(a)(3). The Act clarifies that the commercial activity nexus is not satisfied in an action against a foreign sovereign art lender for claims related to the alleged taking of artwork based solely on the presence of the artwork protected under the immunity from seizure statute (§ 2459) in the United States for a temporary exhibit or display.

In particular, the Act adds new sub-section (h) to § 1605 of the FSIA, providing that a foreign state’s activities in the United States associated with the temporary exhibit or display of § 2459-protected works “shall not be considered to be commercial activity for purposes of subsection (a)(3).” However, sub-section (h)(2) provides for two exceptions if a court determines that such activities do amount to “commercial activity” within the meaning of the FSIA and the case involves: (A) certain Nazi-era claims; or (B) certain actions “based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group.”

B. FOREIGN SOVEREIGN IMMUNITIES ACT LITIGATION

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs 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 2016 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Application of the FSIA in Enforcement of ICSID Arbitration Awards

On March 30, 2016, the United States submitted a memorandum brief as *amicus curiae* to the U.S. Court of Appeals for the Second Circuit in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, Docket No. 15-707. Mobil sought recognition in U.S. court of an arbitral award against Venezuela rendered pursuant to the Convention on the Settlement of Investment Disputes (the “ICSID Convention”). That arbitral award was conditioned on Mobil repaying amounts that another Mobil entity had recovered in a related arbitration from the International Court of Arbitration of the International Chamber of Commerce (“ICC”). The Second Circuit requested the State Department’s views on three questions:

1. Does the enabling statute for the ICSID Convention, 22 U.S.C. § 1650a, embody a grant of subject matter jurisdiction over an action to enforce an International Centre for the Settlement of Investment Disputes (“ICSID”) award against a foreign sovereign that is outside the scope of the FSIA, or does the FSIA provide the sole source of subject matter jurisdiction over such an action? ...
2. Does either the ICSID Convention’s enabling statute or the FSIA permit a federal court to “borrow” procedural rules of the forum state...?
3. Does the ICSID Convention’s enabling statute permit a federal district court to modify, under 28 U.S.C. § 1961, the interest rate adopted by an ICSID arbitral panel to be paid on an ICSID award?

The U.S. brief takes the positions that: (1) The FSIA is the sole source of subject matter jurisdiction over an action to enforce an ICSID award against a foreign sovereign and its rules must be followed; (2) Neither the ICSID Convention’s enabling statute nor the FSIA permits a federal court to “borrow” procedures from state law that permit an *ex parte* proceeding; (3) The district court correctly held that the interest rate provided in the ICSID award is a pecuniary obligation that must be enforced. The brief is excerpted below (with some footnotes omitted) and available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. The FSIA Governs an Action to Recognize and Enforce a Valid ICSID Award Against a Foreign Sovereign

A. *The FSIA is the sole source of a federal court’s jurisdiction to recognize and enforce a valid ICSID award against a foreign state*

The district court erred in holding that the ICSID implementing legislation, 22 U.S.C. § 1650a, provides an exception to the FSIA’s exclusive grant of subject matter jurisdiction. The FSIA, enacted by Congress in 1976, “contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.” *Verlinden*, 461 U.S. at 488. As the

Supreme Court has stated numerous times, the FSIA is the exclusive source of subject matter jurisdiction for actions against foreign states. See *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393-94 (2015); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (“[T]he text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”). Accordingly, the FSIA “must be applied by the District Courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.” *Verlinden*, 461 U.S. at 493.

As the Supreme Court held in *Amerada Hess*, the FSIA’s grant of jurisdiction supplants earlier-enacted grants of subject-matter jurisdiction that might have applied to an action against a foreign state. 488 U.S. at 438, 443 (holding that, following enactment of FSIA, a federal court could not exercise jurisdiction over a foreign sovereign under the Alien Tort Statute). Thus, although 22 U.S.C. § 1650a(b) gives federal district courts (and the U.S. Court of Federal Claims) “exclusive jurisdiction over actions and proceedings [to enforce an ICSID award], regardless of the amount in controversy,” that grant of jurisdiction does not apply to actions against foreign sovereigns after the passage of the FSIA. Section 1650a retains its effect “with respect to defendants other than foreign states,” *Amerada Hess*, 488 U.S. at 438, supplying a district court’s subject matter jurisdiction over actions to enforce ICSID arbitral awards against private parties. The ICSID enabling statute provides the substantive right and the applicable legal standard, and it also requires that all enforcement actions be brought in federal, rather than state, courts. But following the enactment of the FSIA, the ICSID enabling statute cannot be the basis for a federal court’s exercise of jurisdiction over a foreign sovereign.²

The district court suggested that the FSIA might be inapplicable because the ICSID Convention comes within 28 U.S.C. § 1604’s proviso that its grant of sovereign immunity is “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.” (JA 506). But the Supreme Court made clear in *Amerada Hess* that §1604’s treaty exception applies only “when international agreements expressly conflict with the immunity provisions of the FSIA.” 488 U.S. at 442 (quotation marks and alterations omitted, emphasis added). Nothing in the ICSID Convention contradicts the FSIA’s immunity rules. To the contrary, the Convention expressly notes that it has no effect on domestic law regarding the immunity of foreign states. ICSID Convention art. 55 (“Nothing in Article 54 [governing

² The legislative history of the ICSID enabling statute indicates that before the FSIA was enacted—contrary to the district court’s assumption that the ICSID Convention and statute “contemplated domestic lawsuits against foreign sovereigns” without overcoming a foreign state’s immunity—Congress understood that the ICSID statute itself would not provide jurisdiction over a foreign sovereign. (JA 506-07). As the Deputy Legal Adviser of the Department of State—which negotiated the Convention for the United States, along with the Department of the Treasury—testified:

Basically what this convention says is that the district court shall have jurisdiction over the subject matter. As to whether it has jurisdiction over a party, there is nothing in the convention that will change the defense of sovereign immunity. If somebody wants to sue Jersey Standard in the United States, on an award, no problem. If somebody wants to sue Peru or the Peruvian Oil Institute, why it would depend on whether in the particular case that entity would or would not be entitled to sovereign immunity.

(JA 302 (*Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int’l Orgs. and Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 57 (1966) (statement of Andreas F. Lowenfeld, Deputy Legal Adviser, Dep’t of State))).

recognition or enforcement of an award] shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”). Thus, there is no implied exception to the FSIA’s exclusivity as the source of jurisdiction over actions for recognition of an ICSID award against foreign sovereigns.

B. An action against a foreign sovereign to recognize and enforce an ICSID arbitral award must comply with the FSIA’s service and venue requirements

The district court also held that even if the exclusive means to bring an action to enforce an ICSID arbitral award against Venezuela is under the FSIA, Mobil was not required to comply with the FSIA’s service of process or venue requirements. That too was error.

In addition to setting out the exclusive terms upon which a U.S. court can exercise subject matter jurisdiction in an action against a foreign state, the FSIA provides that a court has personal jurisdiction over a foreign state only if an exception to immunity in § 1605 applies and the plaintiff has effectuated service pursuant to § 1608. *See* 28 U.S.C. § 1330(b). Section 1608(a) specifies four methods for serving process on a foreign state: first, by “delivery of a copy of the summons and complaint in accordance with any special arrangement[s]” between the parties; or, if no special arrangements exist, by delivery “in accordance with an applicable international convention on service of judicial documents.” 28 U.S.C. § 1608(a)(1), (2). If service cannot be made by either of these methods, the clerk of court may mail a copy of the summons and complaint and a notice of suit to the foreign state’s foreign minister; and finally, if service cannot be made within thirty days by that method, the clerk of court may send copies of those same documents to the Department of State, which transmits them “through diplomatic channels to the foreign state.” 28 U.S.C. § 1608(a)(3), (4). These procedures, which are construed strictly and applied sequentially, are the sole means for serving process on a foreign state. *Magness v. Russian Fed’n*, 247 F.3d 609, 615 (5th Cir. 2001) (citing H.R. Rep. No. 94-1487, at 24 (1976)); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154-55 (D.C. Cir. 1994).

Furthermore, 28 U.S.C. § 1391(f) imposes venue requirements for suits under the FSIA. An action (except a suit in admiralty) against a foreign state must be brought either in the district court for the District of Columbia, or in a judicial district in “which a substantial part of the events or omissions giving rise to the claim occurred, or [where] a substantial part of property that is the subject of the action is situated.” 28 U.S.C. § 1391(f)(1).

The district court reasoned that these requirements do not apply in actions to recognize ICSID awards. According to the court, the FSIA’s treaty exception and the FSIA’s use of terms that “presuppose” litigation over contested issues demonstrate that “Congress did not have ICSID award recognition in mind when it prescribed service, venue, and other requirements for lawsuits against sovereigns.” (JA 512). Neither of those arguments is persuasive.

First, as noted above, the treaty exception only applies “when international agreements expressly conflict with the immunity provisions of the FSIA.” *Amerada Hess*, 488 U.S. at 442 (quotation marks and alterations omitted). As the district court itself recognized, the exception is “addressed to the existence of immunity, not the mechanics by which an action is to be brought against a non-immune sovereign.” (JA 512). The district court nevertheless construed § 1604 to “fairly reflect[] an intention not to revise existing law or practice in an area governed by treaty.” (JA 512). But the mechanics of enforcing ICSID awards are not and never were governed by treaty. Rather, the ICSID Convention reserves the means of enforcement to member states, which enforce awards in the same way that they enforce domestic judgments. ICSID Convention art. 54(1). Article 54(1) thus clearly envisions that domestic law and procedures will apply to enforcement proceedings. In a U.S. court, actions to enforce arbitral awards against foreign

sovereigns must conform to the requirements of the FSIA. The treaty exception thus provides no support for the district court's conclusion that Congress did not intend for the FSIA to apply in the ICSID award recognition context. (JA 512).

The district court further reasoned that the FSIA presupposes contested litigation, and thus does not apply to "the non-substantive, mechanistic context of ICSID award recognition." (JA 513). But the fact that the FSIA refers to certain types of contested matters (such as personal injury actions) or refers to limitations on discovery does not imply that other types of actions are excluded from the FSIA. Indeed, the FSIA expressly encompasses actions to enforce international arbitral awards, *see* 28 U.S.C. § 1605(a)(6), which typically are not fully contested litigation. In enacting that provision, Congress provided no exception to the FSIA's other requirements, including that the foreign state defendant be served in accordance with § 1608. Once again, the FSIA is the comprehensive and exclusive statutory scheme for bringing suit against a foreign state in U.S. courts. *Verlinden*, 461 U.S. at 488.

Notably, bringing an action under the FSIA to recognize an ICSID award rendered against a foreign state is not an overly burdensome process, and does not interfere with the recognition or enforcement of such awards as envisioned by the Convention. The award creditor files a complaint, serves the debtor in one of the manners permitted under § 1608, and then, after the debtor has had the opportunity to respond, seeks a judgment by filing a motion on the pleadings or a motion for summary judgment as permitted by the Federal Rules of Civil Procedure. Because an ICSID award is binding on the parties and not subject to review (except within ICSID), the award debtor may raise no substantive defenses and discovery is unnecessary. Courts may employ case management techniques as necessary to further expedite enforcement proceedings, and ensure that frivolous defenses and dilatory tactics are not allowed to unduly delay the enforcement of an ICSID award.

Finally, the district court reasoned that it was not required to have personal jurisdiction over Venezuela under 28 U.S.C. § 1330(b), and hence Mobil was not required to comply with the service requirements in 28 U.S.C. § 1608, because "[p]ersonal jurisdiction ordinarily is not required in recognition proceedings." (JA 529 n.36). But the federal requirements for exercising jurisdiction over a foreign state in U.S. courts preempt any inconsistent state-law principles governing personal jurisdiction over out-of-state defendants. As explained above, the service requirements of § 1608 must be complied with in every action against a foreign sovereign and are strictly construed. *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154-55. These statutory provisions, rather than any inconsistent procedural rules of the forum state, govern the process for initiating an action to enforce an ICSID award against a foreign sovereign.

II. Neither the ICSID Convention's enabling statute nor the FSIA permits a federal court to "borrow" procedural rules of the forum state that permit *ex parte* proceedings

For much the same reasons, the district court was not permitted to "borrow" state-law procedures that permit *ex parte* proceedings to recognize an arbitral award against a foreign state and enter a U.S. judgment against that foreign state. As explained above, *ex parte* proceedings with no notice to the foreign state defendant conflict with the FSIA. The proper procedure for the recognition and enforcement of an ICSID award in the United States is through the commencement of an action that complies with the FSIA.

The district court concluded that borrowing state-law *ex parte* procedures was necessary because requiring plenary actions would be "in tension" with the ICSID Convention and its enabling statute. (JA 514). But there is no such tension: neither the Convention nor the statute

requires or forbids any particular set of procedures for the enforcement of an ICSID award. To the contrary, in providing that enforcement mechanisms may differ in contracting states (including those with federal systems of government), the Convention recognizes that enforcement will be a matter of domestic law. As the drafters of the ICSID Convention explained at the time of adoption, “[b]ecause of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.” *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965) ¶ 42, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf; see *Air France v. Saks*, 470 U.S. 392, 396, 400 (1985) (“In interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation.”). That conclusion accords with the Supreme Court’s repeated observation that “absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.” *Breard v. Greene*, 523 U.S. 371, 375 (1998); accord *Medellín*, 552 U.S. at 517; *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351 (2006).

Equally, the legislative history of the ICSID Convention’s enabling statute, 28 U.S.C. § 1650a(a), does not support the district court’s conclusion that Congress intended for ICSID awards to be enforced through an “automatic” *ex parte* process. (JA 521). As the General Counsel of the Department of the Treasury (which, along with the Department of State, negotiated the ICSID Convention on behalf of the United States) testified to Congress, “[t]o give full faith and credit to an arbitral award as if it were a final judgment of a court of one of the several States means that an action would have to be brought on the award in a U.S. district court to enforce the final judgment of a State court.” (JA 288 (*Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int’l Orgs. and Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 43 (statement of Fred B. Smith, General Counsel, Department of the Treasury))). The same understanding is reflected in the House and Senate Committee Reports regarding the enabling statute. H.R. Rep. No. 89-1741, at 3-4 (1966) (“If an action is brought in a U.S. district court to enforce the final judgment of State court, it is, of course, given full faith and credit in the Federal court. Section 3(a) would give the same status to an arbitral award.”); (JA 331, S. Rep. 89-1374, at 4 (1966) (same)). The legislative history does not suggest that enforcement of ICSID awards in the United States must be “automatic” or *ex parte*, which would represent a departure from what appears to have been prevailing federal court practice with respect to the enforcement of state court judgments.

Likewise, the district court erred in its interpretation of the “full faith and credit” obligation in § 1650a. Under § 1650a, the pecuniary obligations of an ICSID arbitral award “shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.” According to the district court, the phrase “full faith and credit” in § 1650a means that an *ex parte* registration process can be used. In the district court’s view, Congress’s use of this term of art is significant because “[u]nder the full faith and credit doctrine, for a sister state’s judgment to be recognized, it is not necessary that there be personal jurisdiction over the judgment debtor in the recognizing court”; instead, “a mechanistic process of interstate registration is commonly used.” (JA 521-23). But the district court appears to have conflated the full-faith-and-credit doctrine with the procedures for registering and enforcing a state-court judgment in another state under the Uniform

Enforcement of Judgments Act. The full-faith-and-credit doctrine simply requires that final judgments rendered in one state have preclusive effect and be immune from collateral attack in every other state. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). It does not require the adoption of practices as to the “time, manner, and mechanisms for enforcing judgments.” *Id.* at 235.

In addition, contrary to the district court’s view that an action under the FSIA—which allows the defendant to respond prior to judicial recognition of the award—would serve no purpose but delay, there are practical benefits to requiring the use of such a process. While district courts may be unable to substantively review ICSID awards, they can be called upon to consider certain limited procedural issues in connection with their enforcement. And in such situations, giving the award debtor notice of the recognition action and an opportunity to respond before the judgment is entered is both efficient and necessary to protect the rights of foreign governments. In *Blue Ridge Investments, LLC v. Republic of Argentina*, 735 F.3d 72, 77-78 (2d Cir. 2013), for example, the plaintiff did not attempt to employ *ex parte* procedures when seeking recognition of its award, and instead provided notice to the award debtor, Argentina. This allowed the foreign state to assert certain procedural defenses to enforcement, including that the plaintiff, an assignee of the award creditor, lacked standing to enforce the award; that the action on the award was barred by *res judicata*; and that the action to enforce the award was time-barred. Here, providing notice to Venezuela under the FSIA would have allowed the foreign state to raise, before entry of judgment, the issue of whether it was appropriate to enforce the face value of the arbitral award without taking into account the amounts that Mobil apparently received under the ICC arbitral award. Furthermore, Venezuela could have requested that the district court stay entry of the judgment until the ICSID tribunal ruled on Venezuela’s application to revise the award. None of these issues relates to attachment or execution on the award, and it is uncertain whether Venezuela would have been permitted to raise them in a future proceeding in which Mobil sought to execute on or attach Venezuela’s property.

Finally, adhering to the FSIA’s requirements and declining to allow state-law rules inconsistent with those requirements to be borrowed in this context gains support from Congress’s desire to avoid “disparate treatment of cases involving foreign governments,” as this “may have adverse foreign relations consequences.” H.R. Rep. 94-1487, at 13 (1976) (report accompanying FSIA). Indeed, the United States proposed the language incorporated into Article 54(1) that permits the enforcement of an ICSID award in federal courts “in order to be able to provide in the United States for a uniform procedure for enforcement” of ICSID awards. (JA 331, S. Rep. 89-1374, at 4 (1966)). Congress followed suit by giving federal district courts exclusive jurisdiction over actions to enforce ICSID awards, *see* 22 U.S.C. § 1650a(b), and requiring that they be treated like state court judgments, *id.* § 1650a(a), thus ensuring a uniform system of enforcement. Borrowing state-law rules to permit *ex parte* proceedings would undermine that consistent scheme.

III. The ICSID Convention’s enabling statute does not permit a federal district court to modify the interest rate adopted by an ICSID arbitral panel

The district court correctly rejected Venezuela’s attempt to modify the interest rate that applies to the Award. The Award states that Venezuela must pay Mobil \$1,600,042,482 plus 3.25% interest, compounded annually, from June 27, 2007, “up to the date when payment of this sums [*sic*] has been made in full.” ... The ICSID Convention and the ICSID enabling statute both require that courts enforce the “pecuniary obligations” imposed by ICSID awards. ICSID Convention art. 54(1); 22 U.S.C. § 1650a(a). The enabling statute also provides that ICSID

awards “create a right arising under a treaty of the United States.” 22 U.S.C. § 1650a(a). The rate of interest applied to the principal of the Award is “pecuniary” as it translates directly into an amount of money Venezuela must pay. Indeed, the modification of that rate could lessen the total amount of the Award by millions of dollars.

* * * *

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.”

a. *Odhiambo v. Kenya*

In *Odhiambo v. Kenya*, No. 14-1206, a case involving the commercial activity exception, the United States filed an *amicus* brief in the U.S. Supreme Court in response to the Court’s invitation and recommended that *Odhiambo*’s petition for certiorari be denied. *Odhiambo* sought review of the decision of the Court of Appeals for the D.C. Circuit, which held that none of the three clauses of the commercial activity exception provided jurisdiction over an action claiming that the Republic of Kenya breached a contract by failing to pay a reward to a Kenyan whistleblower and failing to keep his identity confidential in Kenya. The Court of Appeals found that the action was not “based upon a commercial activity carried on in the United States” by Kenya or upon any alleged act performed in the United States in connection with Kenya’s commercial activity, and that neither the alleged failure to make payments nor the breach of a promise of confidentiality caused a direct effect in the United States. The U.S. brief, excerpted below (with most footnotes omitted), asserts that review of the court of appeals’ rulings was not warranted. The Supreme Court denied the petition for certiorari.

* * * *

A. Further Review Of The Court Of Appeals’ Rulings On Clause One And Clause Two Of The Commercial-Activity Exception Is Not Warranted

1. The court of appeals correctly decided that neither clause one nor clause two of the FSIA’s commercial-activity exception applies in this case.¹

¹ Although the parties did not litigate the question in the court of appeals, see Pet. App. 14a n.1, there is substantial reason to doubt that the Kenyan reward program is properly regarded as “commercial activity” under the FSIA. That

a. Clause one provides that a foreign state is not immune from jurisdiction when “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)—that is, upon “commercial activity carried on by such state and having substantial contact with the United States,” 28 U.S.C. 1603(e). In *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), this Court held that “an action is ‘based upon’ the ‘particular conduct’ that constitutes the ‘gravamen’ of the suit.” *Id.* at 396 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 356- 358 (1993)). Determining the “gravamen” requires a court to “zero[] in on the core of the[] suit.” *Ibid.*; see *ibid.* (looking to “acts that actually injured” the plaintiff).

As the court of appeals ruled, petitioner’s suit is not based upon “the meetings that Kenyan officials held with him in the United States to discuss the disputed rewards” (or any other “instances of commercial activity by Kenya” in this country). Pet. App. 13a. The gravamen of petitioner’s claims—the particular acts as to which he is aggrieved—are the Kenyan government’s alleged failure to pay the promised reward in Kenya and to keep his identity confidential in Kenya, not any meetings that its officials attended later to discuss petitioner’s grievances. See *id.* at 13a-14a.

To be sure, the court of appeals applied a more permissive interpretation of “based upon” than *Sachs* later adopted. The court asked only whether the activity “establishe[d] one of the ‘elements of [the] claim that, if proven, would entitle a plaintiff to relief.’ ” Pet. App. 13a (quoting *Nelson*, 507 U.S. at 357). Under *Sachs*, “the mere fact that the [commercial activity] would establish a single element of a claim is insufficient.” 136 S. Ct. at 395. Still, having failed to satisfy the lenient understanding of “based upon” applied by the court below, petitioner cannot meet the more demanding standard dictated by *Sachs*.

b. As the court of appeals explained, petitioner’s “clause two argument falters on the same grounds as his clause one argument: [h]is breach-of-contract claim[s] [are] not *based upon* any alleged ‘act performed in the United States in connection with’ Kenya’s commercial activity.” Pet. App. 16a (quoting 28 U.S.C. 1605(a)(2)). In reaching that conclusion, the court ruled that “the virtually identical statutory text and structure of clauses one and two lead [it] to conclude that ‘based upon’ means the same thing in both clauses.” *Ibid.* Petitioner does not appear to contest that ruling. Pet. 24-26.

c. Petitioner’s arguments that the court of appeals erred lack merit.

i. Petitioner primarily contends (Pet. 12-13, 35) that the D.C. Circuit and other courts of appeals have erred in holding that the “substantial contact” standard for determining whether a foreign state has “carried on” commercial activity in the United States under clause one requires a more extensive connection to this country than the “minimum contacts” standard for personal jurisdiction. But, as to the only relevant activity petitioner identified in the district court, the court of appeals’ ruling that clause one is inapplicable to this case has nothing to do with any question of “substantial contact.” Pet. App. 13a-16a. No one disputes that the meetings between petitioner and Kenyan officials were held in the United States. The court’s ruling turned instead on the determination that those activities were not the foundation of petitioner’s breach-of-contract claims within the meaning of the separate “based upon” requirement. *Id.* at 13a- 14a. It

program offers monetary rewards as part of a scheme to identify tax evaders and take law-enforcement action, and Kenyan officials have statutory discretion to decline to pay a reward. See D. Ct. Doc. 14-2, Ex. 1 (July 23, 2012). Government efforts to enforce tax laws, and officials’ discretionary decisions about treatment of informants, do not appear to be the “type of actions by which a private party engages in ‘trade and traffic or commerce.’ ” *Republic of Arg. v. Weltover*, 504 U.S. 607, 614 (1992) (citation omitted); but see *Guevara v. Republic of Peru*, 468 F.3d 1289, 1298-1305 (11th Cir. 2006).

is irrelevant to that ruling whether “substantial contact” is different from or equivalent to “minimum contacts.”

ii. Perhaps petitioner also means to contend (Pet. 23-25) that the court of appeals was wrong to reject his argument that the entire Kenyan reward program “constitutes a commercial activity” that “had substantial contact with the United States because of his meetings with Kenyan officials in the United States.” Pet. App. 14a. But the court held that petitioner “failed to raise this argument in the district court and therefore has forfeited it.” *Ibid.* The “substantial contact” issue embedded in that argument is therefore not properly presented in this Court. See *Sachs*, 136 S. Ct. at 397-398.

In any event, as the court of appeals also pointed out (Pet. App. 14a-16a), the argument is wrong. *Sachs* establishes that a suit is “based upon” the “particular conduct” at the “core of the[] suit” that forms the gravamen of a plaintiff’s claim. 136 S. Ct. at 396; see *Nelson*, 507 U.S. at 356. The specificity that *Sachs* contemplates makes it inappropriate to treat petitioner’s claims as “based upon” Kenya’s reward program as a whole. Such an approach would allow courts to conclude that the “based upon” requirement is satisfied whenever a foreign state’s commercial activity involves some domestic conduct, even if the “core of the[] suit” consists exclusively of overseas conduct. That would permit plaintiffs to evade the FSIA’s restrictions through the sort of “artful pleading” that this Court was careful to guard against in *Sachs*. 136 S. Ct. at 396. And it would be a far more expansive approach than is employed to assess personal jurisdiction, since it would eliminate the requirement that a claim arise out of or relate to contacts with the relevant forum (as is required for specific jurisdiction) or that the defendant have its home base in that forum (as is required for general jurisdiction). See generally *Daimler AG v. Bauman*, 134 S. Ct. 746, 754-755, 761 (2014); see also Pet. App. 14a-15a.

Moreover, even if Kenya’s entire reward program could be deemed the “commercial activity” on which petitioner’s claims are based, the isolated meetings in the United States alleged here do not give an activity otherwise conducted overseas the requisite “substantial contact” with this country. See Pet. App. 14a; accord *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1133, 1137 (9th Cir. 2012), cert. denied, 134 S. Ct. 64 (2013); *Gerding v. Republic of Fr.*, 943 F.2d 521, 527 (4th Cir. 1991), cert. denied, 507 U.S. 1017 (1993). That conclusion would hold true even if “substantial contact” were interpreted to require nothing more than the sort of “minimum contacts” that suffice for personal jurisdiction purposes. See *Gerding*, 943 F.2d at 527; see also, e.g., *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 722-723 (6th Cir. 2000); pp. 14-15, *infra*.

iii. Finally, petitioner argues (e.g., Pet. 26, 30) that Kenya’s alleged failure to satisfy its obligations while he was living in the United States is an “act” in the United States upon which his suit is based for purposes of clause two. That argument is incorrect. Kenya maintains that it has no performance obligations in the United States, and it has never made a payment to petitioner that was not issued in Kenya and paid in Kenyan shillings. See Pet. App. 26a-27a. Under those circumstances, the Kenyan government’s alleged decision not to perform is an act in Kenya, not an act in the United States. See *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 137-138 (2d Cir. 2012).

2. Contrary to petitioner’s assertions (Pet. 11-17, 20, 25), the court of appeals’ decision that clause one and clause two of the commercial-activity exception are inapplicable to this case does not conflict with any decision of another court of appeals or of this Court.

Petitioner primarily argues that the decision below contributes to a circuit conflict concerning the proper interpretation of the term “substantial contact” in 28 U.S.C. 1603(e). As explained above, however, that issue is not presented in this case, see pp. 11-12, *supra*; nor has petitioner shown that application of a “minimum contacts” standard would alter the outcome here.

In any event, no such disagreement exists. Every court of appeals that has analyzed the issue has correctly concluded that “substantial contact” requires a more extensive showing than the “minimum contacts” that suffice to establish personal jurisdiction. See *Shapiro v. Republic of Bol.*, 930 F.2d 1013, 1019 (2d Cir. 1991); *Gerding*, 943 F.2d at 527; *Sachs v. Republic of Austria*, 737 F.3d 584, 598 (9th Cir. 2013) (en banc) (“It is generally agreed that [substantial contact] sets a higher standard for contact than the minimum contacts standard for due process.”), rev’d on other grounds *sub nom. Sachs, supra*; see also *BP Chems. Ltd. v. Jiangsu SOPO Corp.*, 420 F.3d 810, 818 n.6 (8th Cir. 2005) (FSIA requirements “probably exceed the constitutional standard”); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).

Petitioner’s insistence that the issue is the subject of a complex, multi-part division of authority seems to be grounded, at least in part, in a mistaken conflation of the separate “based upon” and “substantial contact” concepts. Thus, petitioner relies (Pet. 13-17) on decisions that use the term “nexus” to refer generally to the requirement under all three clauses that the action be based upon an act or activity with a connection to the United States, see *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int’l & Foreign Courts*, 727 F.3d 10, 25-27 (1st Cir. 2013); *Haven v. Polska*, 215 F.3d 727, 736 (7th Cir.), cert. denied, 531 U.S. 1014 (2000); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-273 (3d Cir. 1980), or that describe confusion about the meaning of “based upon” that pre-dates this Court’s decisions in *Nelson* and *Sachs*, see *Vencedora Oceanica Navigacion, S.A. v. C.N.A.N.*, 730 F.2d 195, 199-202 (5th Cir. 1984) (per curiam). Those decisions do not establish any disagreement between the court below and other courts of appeals. Petitioner also cites (Pet. 20, 25) this Court’s decisions in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992)—but none of those decisions resolves how the FSIA term “substantial contact” compares to the due process standard.

B. Further Review Of The Court Of Appeals’ Ruling On Clause Three Of The Commercial-Activity Exception Is Not Warranted

1. The court of appeals was also correct to conclude that petitioner’s action does not fall within clause three of the commercial-activity exception.

a. Clause three applies to an action that is based upon “an act outside the territory of the United States in connection with a commercial activity of the foreign state” if “that act causes a direct effect in the United States.” 28 U.S.C. 1605(a)(2). In *Weltover*, this Court held that “an effect is ‘direct’ ” under clause three “if it follows ‘as an immediate consequence of the defendant’s . . . activity.’ ” 504 U.S. at 618 (citation omitted). The claims in *Weltover* were based upon Argentina’s failure to pay government bonds that provided for payment “through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor.” *Id.* at 609-610. Because the bondholder had chosen New York, the Court concluded that “New York was * * * the place of performance for Argentina’s ultimate contractual obligations.” *Id.* at 619. Argentina’s nonpayment therefore “necessarily” created the requisite direct effect: “[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming.” *Ibid.*

Following *Weltover*, it is plain that breach-of-contract claims based on nonpayment have the requisite “direct effect” in the United States if the contract designates the United States as the place of payment or if the payee has the right to designate the United States as the place of payment and exercises that right. See, e.g., *Hanil Bank v. PT. Bank Negara Indon.*, 148 F.3d 127, 129-130, 132 (2d Cir. 1998); *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 729 (9th Cir. 1997); see also *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002), abrogated on other grounds by *Samantar v. Yousuf*, 560 U.S. 305 (2010). If the contract does not designate or give the payee the right to designate the United States as a place of payment, however, nonpayment does not create a direct effect in the United States simply because the financial harm is felt by an entity in the United States. See, e.g., *Rogers*, 673 F.3d at 139-140; *Lu v. Central Bank of Republic of China (Taiwan)*, 610 Fed. Appx. 674, 675 (9th Cir. 2015); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232, 1237-1238 (10th Cir. 1994), cert. denied, 513 U.S. 1112 (1995).

b. As the court of appeals correctly ruled, in this case there was no “direct effect” in the United States from the alleged breach of contract. The court found that the alleged agreement between the parties did not designate the United States as the place of payment or give petitioner the right to do so. See Pet. App. 23a-24a. To the contrary, Kenya’s description of the reward program as involving payment in Kenyan shillings suggested that the place of payment would be Kenya. *Ibid.* Moreover, the court noted, Kenya refused to issue payments outside of that country, and petitioner received certain additional payments after he moved to the United States “only through an intermediary in Kenya who obtained the payments in Kenya and then sent them to [petitioner].” *Id.* at 26a; see *id.* at 25a; cf. *United World Trade*, 33 F.3d at 1239. And the court found no indication that Kenya ever agreed to modify the place of performance. The facts thus failed to establish a “direct effect” in the United States.

As to petitioner’s claim of breach of a promise of confidentiality, that alleged act did not “cause[] a direct effect in the United States,” 28 U.S.C. 1605(a)(2), merely because petitioner ultimately resettled here. See Pet. App. 27a-28a. According to petitioner’s allegations, it was not until after he decided to publicize his own story through a newspaper that the threats against him became sufficiently serious that he decided to seek asylum. See *id.* at 145a-148a. And although the Kenya National Commission on Human Rights supported petitioner’s asylum application, that conduct was quintessentially sovereign, not commercial. See *id.* at 111a n.6. The panel majority properly rejected a rule that “refugees * * * be allowed to bring suits in U.S. courts against their former sovereigns if those sovereigns played a role in the refugees’ relocation to the United States.” *Id.* at 27a.

2. Petitioner contends that the court of appeals erred by “engraft[ing]” onto clause three “the very ‘requirement of “foreseeability” that *Weltover* rejected.’ ” Pet. 27 (quoting Pet. App. 38a (Pillard, J., dissenting in part)). But *Weltover* itself looked to place of performance, see 504 U.S. at 619—not because it demonstrated foreseeability, but because it went to the directness of the harm. If a payee has no right to payment in the United States, then any harm here is likely the “result of some intervening event.” Pet. App. 19a.

Petitioner also contends that the court of appeals’ analysis erroneously requires “ex ante contractual designation of the United States as the place of performance.” Pet. 27 (quoting Pet. App. 38a (Pillard, J., dissenting in part)). That is incorrect. The court recognized that a direct effect exists if the payee exercises a contractual right to elect the United States as one of several payment locations. Pet. App. 18a. The same result may well obtain if the payee has the contractual right to select a payment location of its choice and selects the United States, even if

the United States is not specifically named in the contract. See *Hanil Bank*, 148 F.3d at 132; *DRFP L.L.C. v. Republica Bolivariana de Venez.*, 622 F.3d 513, 516 (6th Cir. 2010), cert. denied, 132 S. Ct. 1140 (2012).

Finally, petitioner asserts that the decision below does not sufficiently examine “all relevant facts, including course of dealing,” in making the “direct effect” determination. Pet. 29 (quoting Pet. App. 36a (Pillard, J., dissenting in part)). But the majority did indeed consider a variety of facts—including Kenya’s course of conduct of making payments only in that country—in considering whether payment was supposed to be made in the United States. See, e.g., Pet. App. 26a. The court thus appropriately recognized that determining whether a “direct effect” exists requires an examination of the facts of the particular case.

3. There is no relevant conflict among the circuits about the meaning of “direct effect.” As noted above, courts of appeals applying clause three of the commercial-activity exception in breach-of-contract cases involving nonpayment have consistently looked to whether the plaintiff has a right to payment in the United States. See pp. 16-17, *supra*.

Petitioner contends (Pet. 18-19) that the Fifth Circuit took a different approach in *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir.), cert. denied, 525 U.S. 1041 (1998), which stated that “a financial loss incurred in the United States by an American plaintiff may constitute a direct effect that supports jurisdiction.” *Id.* at 893. There is no inconsistency. The contract at issue in *Voest-Alpine* was silent as to place of payment; the Fifth Circuit found that nonpayment had a direct effect in this country because “it [was] the [defendant’s] customary practice to send payments on a letter of credit to wherever the presenting party specifies,” the plaintiff specified payment in the United States, and no account outside the United States that was to receive payments had been identified. *Id.* at 896. In this case, by contrast, Kenya consistently refused to perform the alleged contract anywhere except Kenya. See Pet. App. 26a-27a. Accordingly, applying the reasoning of *Voest-Alpine* would not result in a different outcome here.

Petitioner also mistakenly asserts (Pet. 17-18, 29 & n.8) that the decision below conflicts with decisions of the First, Second, and Sixth Circuits. In *Universal Trading*, *supra*, the First Circuit found a direct effect in the United States where the facts established that the defendant “would have performed its obligations under the Agreements in Massachusetts.” 727 F.3d at 26. In *Hanil Bank*, *supra*, the Second Circuit found a direct effect in the United States where the plaintiff asserting breach of contract “was entitled under the letter of credit to indicate how it would be reimbursed, and it designated payment to its bank account in New York.” 148 F.3d at 132. And in *DRFP*, *supra*, the Sixth Circuit found a direct effect in the United States where the defendant allegedly failed to pay even though “under the terms of the notes,” including Swiss law incorporated into the notes, “the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere, including, perforce, Columbus, Ohio.” 622 F.3d at 516-517. Petitioner’s case involves a distinct fact pattern.

Finally, petitioner claims (Pet. 26-29) that the decision below conflicts with various decisions of this Court. But those decisions either support the decision below, see *Weltover*, 504 U.S. at 609-610, 618-619, or are irrelevant to its holding, see *Verlinden*, 461 U.S. at 482, 490, 497-498 (stating that the FSIA does not restrict “the citizenship of the plaintiff”); *Burger King*, 471 U.S. at 475-478, 487. For instance, while petitioner argues that the D.C. Circuit’s analysis conflicts with *Verlinden* by creating “a proscribed class of ‘contract victim[s]’ who ‘move to the United States,’” Pet. 27 (citation omitted), the decision below accepts that plaintiffs who move to

the United States and assert breach-of-contract claims can successfully meet the “direct effect” requirement under certain circumstances.

C. Finding The Commercial-Activity Exception Applicable To Petitioner’s Claims Would Threaten Adverse Treatment Of The United States In Foreign Courts

Petitioner contends (Pet. 31) that the issues he raises “present recurring questions of national importance.” Given that the court of appeals correctly interpreted the FSIA and that the decision below does not conflict with the decisions of other courts, petitioner is mistaken. A contrary holding, moreover, could substantially harm the United States by leading foreign courts to take reciprocal action that second-guesses decisions on the implementation of U.S. reward programs. *Contra* Pet. App. 47a (Pillard, J., dissenting in part).

The United States has various reward programs that provide payments to individuals who furnish information to the government. For instance, the State Department administers programs such as Rewards for Justice (targeting terrorists and war criminals) and the Narcotics Rewards Program (targeting narcotics traffickers), both of which give the Secretary of State “discretion” to decide whether to reward an informant. 22 U.S.C. 2708(b). The Department of Defense likewise administers a reward program targeting terrorism that gives the Secretary of Defense discretion to determine whether a reward is warranted. See 10 U.S.C. 127b(a). Under those programs, the government’s decision about provision of a reward is not subject to judicial review. See 22 U.S.C. 2708(j); 10 U.S.C. 127b(g); see also 26 U.S.C. 7623 (establishing tax-related reward program and permitting appeals to the United States Tax Court).

If the United States permits suit against foreign sovereigns based on a claimed failure to pay a reward under a government program, despite the fact that such a program is best regarded as sovereign rather than commercial activity, see note 1, *supra*, then foreign states may reciprocate by permitting similar claims against the United States in their tribunals. See, e.g., *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984). But serious problems would arise if decisions about U.S. reward programs were subject to review in foreign courts. Foreign courts cannot be counted upon to be sensitive to the concerns that inform decisions by U.S. officials whether to pay a reward, including national security interests. And foreign courts might well seek to inquire into what precisely a confidential informant told U.S. law-enforcement officials and how that information did (or did not) satisfy the terms of the reward program. Courts in other countries may also be unsympathetic to U.S. efforts to invoke the law-enforcement privilege or to resist the disclosure of classified information.

* * * *

b. Helmerich & Payne v. Venezuela

In 2016, the United States filed an *amicus* brief in response to the Supreme Court’s invitation in another case involving the interpretation of the commercial activity exception at the petition stage: *Helmerich & Payne Int’l Drilling Co., et al. v. Venezuela et al*, No. 15-698. The Court of Appeals for the D.C. Circuit held that the third clause of the FSIA’s commercial activity exception did not provide jurisdiction over claims brought by Helmerich & Payne International Drilling Company (“H&P-IDC”), a United States company, and its Venezuelan subsidiary, Helmerich & Payne de Venezuela, C.A. (“H&P-

V”), relating to the alleged breach of oil drilling contracts between H&P-V and a Venezuelan state-owned corporation. The U.S. brief, excerpted below (with most footnotes omitted), expresses the view that the claimed failure to make payments to H&P-V under the contracts did not have a “direct effect” in the United States and that review of the appeals court’s dismissal of the contract claims was not warranted. The Supreme Court held this petition for certiorari because it partially granted a separate petition for certiorari filed by the Venezuelan government defendants seeking review of the appeals court’s ruling relating to the companies’ claims under the expropriation exception, which is discussed *infra*.

* * * *

... This Court’s recent decision in *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), which issued after the decision below, reinforces the lower court’s conclusion here, and a remand for further consideration in light of *Sachs* would serve no purpose. Accordingly, further review is not warranted.

A. Further Review Of The Court Of Appeals’ Ruling As To Which Act Might Give Rise To A Direct Effect In The United States Is Not Warranted

1. a. The petition asks this Court to address whether, under the third clause of the FSIA’s commercial-activity exception, “a breach-of-contract action” is based upon “any act necessary to establish an element of the claim, including acts of contract formation or performance, or solely those acts that breached the contract.” ... The third clause states that a foreign state shall not be immune from suit if “the action is based 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.” 28 U.S.C. 1605(a)(2). This Court’s decision in *Sachs* governs the analysis of which “act” the breach-of-contract claims in this case are “based upon” for purposes of that exception.

In *Sachs*, a case involving the first clause of the commercial-activity exception, the Court rejected the argument that a plaintiff’s personal-injury suit relating to a train accident in Austria was “based upon” the foreign state’s sale of a train pass to the plaintiff in the United States. 136 S. Ct. at 393-394. The plaintiff contended that the sale was sufficient to satisfy the “based upon” requirement because it established one element of her claim. See *id.* at 394. This Court ruled that “the mere fact that the sale of the * * * pass would establish a single element of a claim is insufficient to demonstrate that the claim is ‘based upon’ that sale for purposes of § 1605(a)(2).” *Id.* at 395.

In reaching that conclusion, the Court explained that the “one-element approach” was “flatly incompatible,” 136 S. Ct. at 396, with the Court’s prior decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). *Nelson* involved an action against a foreign state for wrongful arrest and torture; the plaintiff argued that the action was based upon commercial activities that the state had earlier carried out in the United States when it recruited him. *Id.* at 353-354, 358. The *Nelson* Court explained that the “based upon” inquiry requires a court to “identify[] the particular conduct on which the [plaintiff’s suit] is ‘based.’ ” *Id.* at 356. That, in turn, requires consideration of the “basis” or the “foundation” of the claim—“those elements of a claim that, if

proven, would entitle a plaintiff to relief under his theory of the case.” *Id.* at 357; see *ibid.* (“focus should be on the ‘gravamen of the complaint’ ”) (citation omitted). The Court held in *Nelson* that the plaintiff’s suit seeking recovery for “personal injuries” was not “based upon” the alleged commercial activity that preceded infliction of those injuries. *Id.* at 358.

Sachs explained that *Nelson*’s reference to the “elements” of the plaintiff’s claim should not be misunderstood as endorsing a one-element test for determining whether the “based upon” requirement in the commercial-activity exception has been satisfied. *Sachs*, 136 S. Ct. at 395-396; see *id.* at 394, 396-397 (“based upon” requirement is not met merely because a foreign state’s commercial activity is “connected with the conduct that gives rise to the plaintiff’s cause of action”) (citation omitted). Rather, “an action is ‘based upon’ the ‘particular conduct’ that constitutes the ‘gravamen’ of the suit”—and determining the “gravamen” requires “zero[ing] in on the core of the[] suit,” by looking to the “acts that actually injured” the plaintiff. *Id.* at 396.

In *Sachs*, the “gravamen” of the plaintiff’s claims involved “wrongful conduct and dangerous conditions in Austria.” 136 S. Ct. at 396. Because there was “nothing wrongful about the sale of the [train] pass standing alone,” *ibid.*, the Court ruled that the plaintiff’s claim was not “based upon” that commercial activity, *id.* at 397; see *id.* at 396-397 (cautioning against “allow[ing] plaintiffs to evade the Act’s restrictions through artful pleading,” as by “recast[ing]” a “claim of intentional tort” in Austria as a “claim of failure to warn” at the point of the ticket sale).

b. In this case, the court of appeals did not expressly analyze any “based upon” question; instead, it simply stated in a single sentence of its opinion that, in applying the third clause of the commercial-activity exception, any “ ‘direct effect’ in the United States must arise from the foreign state’s allegedly unlawful act—here, the breach of contract.” Pet. App. 20a; see *id.* at 18a (stating without discussion that “our analysis focuses on * * * whether Venezuela’s breach of the drilling contracts” gave rise to a direct effect in the United States). Nevertheless, to the extent that the court’s decision embodies the conclusion that the breach-of-contract claims in this case are “based upon” the alleged breach rather than on some other aspect of the contract or the parties’ relationship, that conclusion is correct and fully consistent with this Court’s decision in *Sachs*.

The gravamen of the breach-of-contract claims in this case is [the respondents’ (state-owned corporations *Petróleos de Venezuela, S.A.* and *PDVSA Petróleo*), or] *PDVSA*’s alleged breach—a failure to pay amounts that *PDVSA* owed *H&P-V* under the contracts for work that *H&P-V* performed. . . . The complaint alleges that *PDVSA*’s “failure to timely and completely pay [*H&P-V*] as required” by the contracts “directly harmed” *H&P-V* and gave rise to damages. . . . The complaint also alleges that *PDVSA* acknowledged its debt to *H&P-V*, even while refusing to pay. . . . And, notably, the complaint does *not* allege that there was anything “wrongful” (*Sachs*, 136 S. Ct. at 396) about the formation of the contracts or about *PDVSA*’s performance under those contracts apart from the non-payment of amounts owed. Under those circumstances, the foundation of the claim is the alleged breach itself, and not any acts that led up to the breach or otherwise were merely connected in some way with the parties’ contracts or the performance of their contractual obligations. . . .

2. a. Petitioners suggest that the Court grant, vacate, and remand to give the court of appeals the opportunity to consider the “based upon” issue in light of *Sachs*. . . . They assert that if the court were to apply *Sachs* here it would ask whether the formation of *H&P-V*’s contracts with *PDVSA* or the parties’ course of performance under those contracts is part of the core of the relevant claims, and “would likely conclude that the ‘gravamen’ of *H&P-V*’s breach-of-contract

claims includes more than PDVSA's breach." ... Indeed, petitioners assert, "the dispute in breach-of-contract cases often focuses on the meaning and enforceability of each party's contractual obligations in light of the language of the contract and the course of performance." ...

But even assuming the accuracy of that statement in some cases, petitioners do not explain how the dispute in *this* case can be said to have that kind of focus. H&P-V is suing for PDVSA's failure to make payments owed under the contracts. ... It is not attempting to recover for any acts PDVSA took with respect to third-party suppliers, or taking issue with prior payments PDVSA made in the United States, or claiming that it was induced to enter into the contracts in the first place by some misrepresentation or other wrongful act by PDVSA. Moreover, in this case there appears to be no dispute regarding "the duty that was owed" ...to make payments for H&P-V's work. Thus, the acts of contract formation and performance to which petitioners point are not the conduct at the core of the breach-of-contract claims. Because the outcome of the "based upon" analysis in this case under *Sachs* is clear, the remand that petitioners suggest would serve no useful purpose.

b. Alternatively, petitioners contend ... that the Court should grant the petition to address the application of *Sachs* to breach-of-contract cases more generally. According to petitioners, while *Sachs* "provides important guidance on the application of the 'based upon' test to tort claims," ... it does not resolve a pre-existing difference of opinion about whether a breach-of-contract claim may be considered to be "based upon" contract formation or performance, rather than on the alleged breach itself, for purposes of the commercial-activity exception ... This Court's review of that issue is not warranted here.

Even assuming that petitioners were correct about the existence of a split in authority that pre-existed *Sachs* and is not fully resolved by that decision, this case would be a poor vehicle for considering how to apply the "based upon" requirement in breach-of-contract cases. First, as noted above, the court of appeals did not directly analyze that requirement. ... While the court did state that it would consider only effects linked to the alleged breach, whether the court understood that limitation to derive from the "based upon" language (and, if so, what its reasoning was) is unclear. See, e.g., *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) ("Applying our analysis * * * to the facts of a particular case without the benefit of * * * lower court determinations is not a sensible exercise of this Court's discretion."). Second, even if contract formation or performance might be said to be the gravamen of some breach-of-contract claims, petitioners' claims do not appear to be among them. ...Further consideration of that issue therefore would be highly unlikely to change the result in this case. Third, to the extent that the courts of appeals disagreed before *Sachs* about how to apply the "based upon" requirement in breach-of-contract cases, the courts should be given an opportunity to consider the matter further in light of *Sachs*. That consideration could result in changed or refined views that would obviate any disagreement.

* * * *

B. Further Review Of The Court Of Appeals' Ruling On Whether Nonpayment Caused A "Direct Effect" In The United States Is Not Warranted

1. Clause three of the commercial-activity exception applies to an action that is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state" if "that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). In *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), this Court held that "an effect is

‘direct’ ” under clause three “if it follows ‘as an immediate consequence of the defendant’s . . . activity.’ ” *Id.* at 618 (citation omitted).

* * * *

The conclusion of the court of appeals in this case that PDVSA’s alleged failure to pay on the contracts did not have a “direct effect” in the United States . . . is fully consistent with *Weltover*. Unlike the bonds in *Weltover*, the contracts here did not give the payee the unqualified right to demand payment in the United States. Instead, under the contracts, “PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its ‘exclusive discretion’ and ‘judgment,’ it ‘deem[ed] it discretionally convenient.’ ” . . . Because the “alleged effect” in this case of non-receipt of payment in the United States thus “depends solely on a foreign government’s discretion,” the court correctly concluded that the effect cannot be said to be “direct” within the meaning of the third clause— that is, to “flow[] in a straight line without deviation or interruption,” . . .

* * * *

2. Petitioners express concern that the court of appeals’ decision will permit foreign states to “evade the jurisdiction of U.S. courts by including in the contract an escape clause reserving some unexercised discretion to perform elsewhere,” even “where the parties’ course of dealing indicates that performance was in fact reasonably expected to be made in the United States.” But a company wishing to ensure that a foreign state’s failure to make contractually required payments may be litigated in the United States need only insist upon a contract provision requiring payment in the United States. Thus, no change in the law is necessary to avoid “gamesmanship and abuse” . . . or to give companies entering into contracts with foreign states “assurance that relief may be available in U.S. courts in predictable circumstances” . . .

* * * *

3. Expropriation Exception to Immunity: Standard for Establishing Jurisdiction

The expropriation exception to immunity in the FSIA provides that a foreign state is not immune from any suit “in which rights in property taken in violation of international law are in issue” and a specified commercial-activity nexus to the United States is present. 28 U.S.C. 1605(a)(3). In 2016, the United States filed briefs as *amicus curiae* both at the petition stage and on the merits in the Supreme Court of the United States in *Venezuela v. Helmerich & Payne Int’l Drilling Co., et al.*, No. 15-423. This petition sought review of the Court of Appeals for the D.C. Circuit’s decision to allow expropriation claims by H&P-IDC and H&P-V to proceed under the expropriation exception, including the court’s conclusion that it was sufficient at the jurisdictional stage for plaintiffs to come forward with merely “non-frivolous” allegations that the case places in issue “rights in property taken in violation of international law”. The U.S. *amicus* brief filed on May 24, 2016, advocating a partial grant of the petition of Venezuela limited to the question of the

proper standard for adjudicating the jurisdictional requirements, is excerpted below (with most footnotes omitted).

* * * *

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE PROPER STANDARD FOR ESTABLISHING JURISDICTION UNDER THE FSIA'S EXPROPRIATION EXCEPTION

A. The Court Of Appeals' Decision Is Wrong

1. The FSIA provides that the district courts shall have jurisdiction over actions against a foreign state for "any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. 1330(a). Sections 1605-1607, in turn, set forth the specific standards governing whether a foreign nation is entitled to sovereign immunity. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488, 497 (1983). Thus, "subject matter jurisdiction" in any action against a foreign state "depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Id.* at 493; see *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (same); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (same).

For that reason, "[a]t the threshold of every action in a District Court against a foreign state, * * * the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden*, 461 U.S. at 493-494. When the foreign state moves to dismiss on the ground that the claim, as pleaded, does not satisfy the requirements of the relevant exception to immunity, the court must determine whether the allegations are legally sufficient to satisfy those requirements. In *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007) (*Permanent Mission*), for instance, this Court determined whether, as a matter of law, the plaintiff's claim to enforce a tax lien under New York law fell within Section 1605(a)(4), which creates an exception to immunity for suits "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). The Court first determined the scope of Section 1605(a)(4)'s reference to "rights in * * * property," concluding that it extended to non-ownership and non-possessory interests. *Permanent Mission*, 551 U.S. at 198-199. The Court then analyzed the content of the lien right asserted under New York law, concluding that the tax lien encumbered the right to convey the property at issue. *Ibid.* The Court accordingly held that the lien-enforcement suit "implicates 'rights in immovable property' " within the meaning of the FSIA exception. *Id.* at 199. The Court thus determined that the claim pleaded in the complaint was legally sufficient to fulfill Section 1605(a)(4)'s requirements.

2. Using language parallel to that of Section 1605(a)(4), at issue in *Permanent Mission*, the expropriation exception to foreign sovereign immunity permits a suit against a foreign state in any case "in which rights in property taken in violation of international law are in issue," and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3). Apart from the nexus requirement, which is not at issue in this case, Section 1605(a)(3) contains two primary substantive requirements. First, the case must be one in which "rights in property" are "in issue"—in other words, the complaint must identify the plaintiff's property rights that serve

as the basis for its claims. See *Permanent Mission*, 551 U.S. at 198-199. Second, there must have been a “tak[ing] in violation of international law.” For a court to “satisfy itself” that a claim comes within Section 1605(a)(3), *Verlinden*, 461 U.S. at 494, it must determine that the plaintiff’s allegations fulfill those requirements, *Permanent Mission*, 551 U.S. at 198-199.

Accordingly, a court evaluating its jurisdiction under Section 1605(a)(3) must make a legal determination that the complaint places “in issue” property rights that were “taken in violation of international law.” The court must verify that the complaint contains allegations that describe a taking prohibited by international law. If the allegations are legally insufficient to describe such a violation—if, for instance, the alleged taking constitutes only a violation of municipal law—then the complaint has not placed “in issue” rights in property “taken in violation of international law.” Similarly, if the allegations are legally insufficient to establish that the plaintiff seeks to vindicate its own rights in property, the complaint has not placed “in issue” “rights in property.” In either scenario, the allegations in the complaint do not satisfy Section 1605(a)(3)’s jurisdictional requirements.

3. The court of appeals did not undertake the required analysis. Instead of determining whether H&P-V’s allegations actually state a violation of international law or H&P-IDC’s allegations actually place its own “rights in property” in issue, the court examined only whether respondents’ allegations on those points were “wholly insubstantial or frivolous.” Pet. App. 11a (citation omitted); *id.* at 16a, 20a. The court thus failed to conduct the legal analysis necessary to determine whether the action falls within Section 1605(a)(3)’s exception to immunity. *Verlinden*, 461 U.S. at 493-494.

In framing the question as whether respondents’ expropriation claims were frivolous, the court of appeals relied on *Bell v. Hood*, 327 U.S. 678 (1946). There, this Court construed 28 U.S.C. 41(1) (1940), which conferred on federal courts jurisdiction over any action that “arises under” the Constitution, treaties, or laws of the United States. 28 U.S.C. 41(1) (1940); see 28 U.S.C. 1331. As the Court explained, a claim “arises under” federal law if the claim will be “sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.” *Bell*, 327 U.S. at 685; see *Merrill Lynch v. Manning*, No. 14-1132 (May 16, 2016), slip op. 8-10 (describing “arising under” jurisdiction). Thus, the federal-question statute has been understood to separate the jurisdictional inquiry from any examination of the legal sufficiency of the claim: a claim may “arise[] under” federal law even if the court’s ultimate construction of federal law will defeat the plaintiff’s claim. The Court applied that principle in *Bell*, holding that “the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.” 327 U.S. at 682. The Court also explained, however, that a suit asserting an “alleged claim under the Constitution or federal statutes” that “is wholly insubstantial and frivolous” may be “dismissed for want of jurisdiction.” *Id.* at 682-683.

The D.C. Circuit has understood *Bell* to establish a general rule, equally applicable to the FSIA as to Section 1331, that “jurisdiction . . . is not defeated . . . by the possibility that” a complaint “might fail to state a cause of action.” Pet. App. 11a (quoting *Bell*, 327 U.S. at 682); see *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 528 F.3d 934, 940 (D.C. Cir. 2008) (*Chabad*). The D.C. Circuit has accordingly held that whenever, as in this case, “the plaintiff’s claim on the merits directly mirror[s] the jurisdictional standard” set forth in the FSIA, the court

should find the jurisdictional standard satisfied so long as the plaintiff's claim is not frivolous. *Simon v. Republic of Hung.*, 812 F.3d 127, 140 (2016).⁵

That approach is founded on a misunderstanding of the scope of *Bell*. Rather than announcing a general rule that would apply to other jurisdictional grants without regard to their text, *Bell* rested on an interpretation of the specific language of the federal-question statute. Under that statute, jurisdiction does not turn on the legal sufficiency of the claim; rather, the legal sufficiency of the claim is purely a merits question. ... *Bell*'s rule that a purported federal claim may be dismissed for lack of jurisdiction only if it is frivolous preserves the independence of the jurisdictional and legal-merits inquiries by ensuring that they do not collapse into one another.

Bell's frivolousness standard has no application to the FSIA. Assessing whether a claim falls within a particular statutory grant of jurisdiction is a question of statutory construction. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21-22 (1983). Unlike the federal-question statute, the FSIA establishes substantive federal immunity standards that the court must apply in order to determine whether it has jurisdiction. *Verlinden*, 461 U.S. at 497; see pp. 7-10, *supra*; cf. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-515 (2006) (explaining that Congress may condition subject-matter jurisdiction on satisfying a substantive requirement). In the case of the expropriation exception, one of those substantive standards is whether the case involves "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). The expropriation exception therefore requires a legal inquiry that the federal-question statute eschews: jurisdiction under Section 1605(a)(3) turns on the legal sufficiency of the plaintiff's claim that the alleged taking violated international law.

That conclusion adheres to the political Branches' judgment that foreign states should not be subjected to the burden of litigation unless a court "appl[ies] the detailed federal law standards set forth in the Act" and "satisf[ies] itself that one of the exceptions [to immunity] applies." *Verlinden*, 461 U.S. at 494. But the court of appeals' application of the *Bell* standard effectively nullifies the expropriation exception's requirements. Congress would not have anticipated that foreign states would be subject to the burdens of suit for expropriation claims in every case in which the plaintiff makes merely a non-frivolous assertion that the state's conduct violated international law.

B. The Proper Standard For Establishing Jurisdiction Under The Expropriation Exception Warrants This Court's Review

1. The courts of appeals disagree on how to evaluate a district court's jurisdiction over an expropriation claim against a foreign state.

The Second Circuit has held, contrary to the decision below, that the court must determine whether the complaint's allegations set forth a taking that, if proven, would violate international law. *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251-252 (2000) (holding that "breach of a commercial contract alone does not constitute a taking pursuant to international law"). In a subsequent decision, the Second Circuit expressly affirmed that courts

⁵ *Simon* reaffirmed the D.C. Circuit's reliance on *Bell* in cases like this one, in which both jurisdiction under the expropriation exception in the FSIA and the legal sufficiency of the plaintiff's claim on the merits turn on whether international law prohibited the alleged taking. 812 F.3d at 140. *Simon* clarified, however, that the court will not apply the *Bell* standard in cases in which the plaintiff's claim on the merits does not rely on international law and therefore "the jurisdictional and merits inquiries do not overlap." *Id.* at 141. In *Simon*, the court declined to apply *Bell* because the plaintiffs asserted common-law conversion claims on the merits, and they alleged a taking that violated international law only to establish jurisdiction. *Ibid.*

must undertake that legal inquiry in determining jurisdiction. See *Robinson v. Government of Malay.*, 269 F.3d 133, 143 (2001); accord *id.* at 147 (Sotomayor, J., concurring in the judgment). In discussing *Zappia*, the court explained that “the applicability of the ‘expropriation’ exception to the FSIA * * * require[s] a determination whether the defendant’s conduct violated ‘international law’ ” as a legal matter, even though “the same question—the liability under international law of the foreign government for the behavior of the corporation—would have been presented on the merits.” 269 F.3d at 143.

The Fifth, Seventh, and Eleventh Circuits similarly assess the legal sufficiency of the plaintiff’s jurisdictional allegations. See, e.g., *de Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385, 1396, 1395-1397 (5th Cir. 1985) (relevant question is “whether any generally accepted norm of international law prohibits” the foreign state’s alleged expropriation; “[i]f not, * * * the foreign state is immune”) (emphasis omitted); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679- 685 (7th Cir. 2012) (plaintiffs’ complaint did not contain the elements that the court concluded were necessary to allege a taking in violation of international law); *Mezerhane v. República Bolivariana de Venez.*, 785 F.3d 545, 548-551 (11th Cir. 2015) (foreign state was immune because the alleged expropriation of the property of its national does “not constitute a ‘violation of international law’ ”), cert. denied, 136 S. Ct. 800 (2016).

By contrast, the Ninth Circuit, like the D.C. Circuit, has held that, “[a]t the jurisdictional stage,” the court “need not decide,” as a legal matter, “whether the taking actually violated international law” to determine whether a claim comes within the expropriation exception. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 711 (1992), cert. denied, 507 U.S. 1017 (1993). Rather, “as long as a ‘claim is substantial and non-frivolous, it provides a sufficient basis for the exercise’ ” of jurisdiction. *Ibid.* (citation omitted).

2. This Court should grant review to resolve the conflict among the courts of appeals. That conflict undermines the FSIA’s purpose of fostering the “ ‘develop[ment of] a uniform body of law’ concerning the amenability of a foreign sovereign to suit in United States courts.” *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976)). The disagreement may also encourage forum-shopping. Federal venue provisions permit any plaintiff to bring suit against a foreign state in the District of Columbia. 28 U.S.C. 1391(f)(4). The court of appeals’ decision therefore may encourage plaintiffs to file expropriation claims in that court so that they may benefit from the D.C. Circuit’s permissive approach to jurisdiction.

The appropriate standard for establishing jurisdiction under Section 1605(a)(3) is important. Recognizing that “[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States,” *Verlinden*, 461 U.S. at 493, Congress carefully crafted the FSIA’s exceptions to immunity to reflect prevailing customary international-law standards of foreign state immunity, *id.* at 487-488. Section 1605(a)(3) provides a narrow exception to immunity for claims involving “rights in property taken in violation of international law,” where there is a specified commercial-activity nexus to the United States. The D.C. Circuit’s use of the frivolousness standard, however, effectively nullifies key elements of the immunity analysis whenever the plaintiff’s claim purports to rely on international law and the plaintiff can muster a non-frivolous argument that international law recognizes the claim. That permissive approach may result in adverse foreign-relations consequences and reciprocal adverse treatment of the United States in foreign courts. See *National City Bank v. Republic of China*, 348 U.S. 356, 362 (1955).

In addition, the court of appeals' approach may extend to other FSIA exceptions that contain requirements that parallel the legal merits of the plaintiff's claim. For instance, the terrorism exception provides both an exception to immunity and a right of action for claims for personal injury or death "that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking." 28 U.S.C. 1605A(a)(1) and (c). One district court, relying on *Chabad and Simon*, has applied the *Bell* standard to claims brought under that provision. See *Owens v. Republic of Sudan*, No. 01-2244, 2016 WL 1170919, at *22-*25 (D.D.C. Mar. 23, 2016) (plaintiffs need only make non-frivolous allegations of legal causation). In addition, the tort exception's requirements may overlap with the merits in some cases, as that exception applies to a claim for personal injury or death "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); see *Robinson*, 269 F.3d at 143-144 (discussing overlap between jurisdictional and merits inquiries in cases brought under Section 1605(a)(5)).

II. THE COURT OF APPEALS' CONCLUSION THAT RESPONDENTS' EXPROPRIATION CLAIMS ARE NOT FRIVOLOUS DOES NOT WARRANT REVIEW

Petitioners also challenge (Pet. 11-26) the court of appeals' holdings that both H&P-V's and H&P-IDC's claims fell within the expropriation exception. Contrary to petitioners' characterization (Pet. 12, 18), the court's conclusions were not based on a determination that respondents' allegations described conduct that actually constituted a taking that was prohibited by international law. Instead, the court held only that respondents' claims were not frivolous. Pet. App. 17a, 22a. Those conclusions do not warrant this Court's review.

A. The First Question Presented, Concerning Whether H&P-V's Allegations Satisfy Section 1605(a)(3), Does Not Warrant Review

1. H&P-V argues that its expropriation claim satisfied Section 1605(a)(3)'s requirement of a "tak[ing] in violation of international law" because international law prohibits taking the property of a domestic corporation to discriminate against the corporation's foreign shareholders. Pet. App. 13a-17a. Petitioners contend (Pet. 12) that the court of appeals held that respondents' claim "does state a [violation of] international law." To the contrary, the court held only that H&P-V's argument was "non-frivolous." Pet. App. 17a. The court based that conclusion primarily on a single fifty-year-old appellate decision. *Id.* at 13a (citing *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), rev'd on other grounds by 376 U.S. 398 (1964)), reaff'd on remand by *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 185 (2d Cir. 1967). In *Sabbatino*, the Second Circuit held that "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders," a court may disregard "the 'nationality' of the corporate fiction." 307 F.2d at 861.

Rather than asking only whether H&P-V's claim was frivolous, the court of appeals should have determined whether a "generally accepted norm" of international expropriation law does prohibit taking a domestic corporation's property to discriminate against foreign shareholders. *de Sanchez*, 770 F.2d at 1396 (emphasis added). In the view of the United States, the answer to that question is no. The international law of expropriation generally imposes no limits on a state's taking of its own national's property. See Restatement (Third) of Foreign Relations of the United States § 712(1) (1987) (requiring without exception that a "taking by the state" must be "of the property of a national of another state" before the taking state is "responsible under international law"); see also *United States v. Belmont*, 301 U.S. 324, 332 (1937) (recognizing domestic-takings rule); *Mezerhane*, 785 F.3d at 546, 549-551; *Siderman de*

Blake, 965 F.2d at 711. *Sabbatino* is the sole authority that suggests otherwise—but that decision rested on the incorrect premise that international law disregards the nationality of the corporation when it is different from that of most of the shareholders. See 307 F.2d at 861; but cf. *Case Concerning the Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3 (Feb. 5), ¶¶ 9, 41 (*Barcelona Traction*) (holding, in case involving alleged expropriation of the property of a Canadian corporation whose shareholders were mostly Belgian nationals, that the corporation was to be treated as a national of its state of incorporation, not the state of its shareholders).

2. The court of appeals’ holding that H&P-V’s claim is not frivolous does not warrant review.

Petitioners assert (Pet. 12) that the decision below created a circuit split as to whether “pleading a foreign state’s discriminatory expropriation of the property of its own nationals *does* state a [violation of] international law.” But the decision did not create any such split, because the court of appeals did not actually render such a holding.

The court of appeals did err in permitting H&P-V’s claim to proceed under the expropriation exception. But that error stemmed from its use of the frivolousness standard, not definitive legal conclusions about the conduct prohibited by international law. This Court should therefore review the proper standard for establishing jurisdiction under Section 1605(a)(3). See Pt. I, *supra*. Regardless of how the Court disposes of the frivolousness question, the question whether H&P-V’s claim satisfies Section 1605(a)(3)’s requirements does not warrant review at this time.

If the Court grants review of the frivolousness question and concludes that Section 1605(a)(3) requires a court to determine whether the plaintiff’s allegations actually set forth a violation of international law, that will mean that the court of appeals did not evaluate H&P-V’s claim under the correct standard. Rather than granting certiorari now to conduct that inquiry in the first instance, the better course would be to permit the court of appeals to determine whether H&P-V’s allegations do state a “tak[ing] in violation of international law.” See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“[W]e are a court of review, not of first view.”). Because respondents’ briefing before the court of appeals focused solely on demonstrating that H&P-V’s claim was not frivolous, Resps. C.A. Br. 34-44, the parties should have the opportunity to litigate the jurisdictional question under the correct standard.

Conversely, if this Court concludes that the frivolousness standard is correct (or denies certiorari on that question, thereby leaving the frivolousness standard in place), then there is no need for this Court to review the court of appeals’ application of that standard to respondents’ complaint. The question whether H&P-V’s allegations are frivolous lacks significance beyond this case. The general standard of frivolousness is one that lower courts have ample experience applying in a range of contexts. See, e.g., *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015). In addition, reviewing H&P-V’s allegations would not provide this Court with an opportunity to decide whether international law actually prohibits discriminatory takings of a national’s property in some circumstances.

B. The Second Question Presented, Concerning Whether H&P-IDC’s Allegations Satisfy Section 1605(a)(3), Does Not Warrant Review

1. In addressing the second question presented, the court of appeals held only that H&P-IDC’s claim that its own “rights in property” were “in issue,” 28 U.S.C. 1605(a)(3), was not frivolous. Pet. App. 22a; but cf. Pet. 18. The court acknowledged that because “the corporation and its shareholders are distinct entities,” a shareholder generally does not have an ownership

interest in the corporation’s property. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-475 (2003). But the court nonetheless held that H&P-IDC “may have rights in” H&P-V’s property. Pet. App. 20a. The court did not examine the source or scope of those potential rights. *Id.* at 20a-22a. The court then concluded, without analysis, that whatever rights H&P-IDC possessed might be “rights in property” for purposes of Section 1605(a)(3), because that provision does not contain any express “limitation” on what constitutes a “right[] in property.” *Id.* at 19a.

Because the court of appeals employed the incorrect frivolousness standard, it failed to determine whether respondents’ allegations were legally sufficient to place H&P-IDC’s “rights in property” in issue. The court should have first examined whether the law of the state of H&P-V’s incorporation—Venezuela—gave H&P-IDC, as its shareholder, any direct rights. Municipal law generally accords shareholders “direct rights” related to the corporation that are independent of the rights of the corporation, such as the right to receive dividends or to share in assets upon liquidation. *Barcelona Traction*, 1970 I.C.J. 3, ¶ 47. The court then should have considered whether any such rights constitute “rights in property” for purposes of Section 1605(a)(3). See *Permanent Mission*, 551 U.S. at 198-199 (analyzing rights under New York law and then considering whether they were “rights in immovable property” for purposes of Section 1605(a)(4)). Finally, the court should have determined whether the complaint sufficiently alleges that petitioner’s actions constituted a “tak[ing] in violation of international law.” 28 U.S.C. 1605(a)(3). While a shareholder’s direct rights generally are not implicated by state action that depreciates the value of a corporation’s shares, even severely, actions such as taking the shareholder’s shares will implicate a shareholder’s direct rights. See generally *Barcelona Traction*, 1970 I.C.J. 3, ¶¶ 44, 47-49.

2. The question whether H&P-IDC’s claim is frivolous does not warrant review. Like the question concerning H&P-V’s takings claim, the deficiencies in the court of appeals’ analysis stem from its use of the frivolousness standard, not from any actual determination of the scope of H&P-IDC’s rights in property or any conclusion about what constitutes “rights in property” for purposes of Section 1605(a)(3). And like the question concerning H&P-V’s claim, regardless of how the Court disposes of the pleading-standard question, the court of appeals’ holding that H&P-IDC’s claim could proceed under Section 1605(a)(3) does not warrant review at this time.

* * * *

The following is the summary of the argument section from the U.S. *amicus* brief on the merits, filed on August 26, 2016, after the Supreme Court granted Venezuela’s petition in part on June 28, 2016, to review the question concerning the standard for establishing jurisdiction under the FSIA’s expropriation exception. The Supreme Court heard argument in the case on November 2, 2016.

* * * *

Section 1605(a)(3) of the Foreign Sovereign Immunities Act creates a narrow exception to foreign sovereign immunity in certain cases “in which rights in property taken in violation of international law are in issue.” 28 U.S.C. 1605(a)(3). Like the FSIA’s other exceptions to immunity, the expropriation exception “codifies the standards governing foreign sovereign

immunity as an aspect of substantive federal law.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). And “whether statutory subject-matter jurisdiction exists under the [FSIA] entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies.” *Id.* at 497-498. The court of appeals erred in holding that merely non-frivolous allegations regarding the substantive requirements of an immunity exception were sufficient to establish jurisdiction—a standard that the court itself described as “exceptionally low.” Pet. App. 11a.

For a case to come within the scope of Section 1605(a)(3), the complaint must assert a claim that is legally sufficient to satisfy the provision’s substantive requirements. When the foreign state challenges the legal sufficiency of the complaint’s jurisdictional allegations under Federal Rule of Civil Procedure 12(b)(1), the district court must determine whether the plaintiff’s allegations, if true, actually describe a “tak[ing] in violation of international law”—that is, conduct that is prohibited by international expropriation law—and identify “rights in property” that were impaired as a result of the foreign state’s conduct. If those substantive requirements are not satisfied, the foreign state is immune from suit both federal and state courts, the district court lacks subject-matter jurisdiction, and the claim must be dismissed.

That conclusion is dictated by the FSIA’s text and purposes, as well as by this Court’s precedent. The FSIA calls for courts to decide a foreign state’s “entitle[ment]” to immunity, not to hypothesize about what the outcome of that analysis could conceivably be. 28 U.S.C. 1330(a); see 28 U.S.C. 1602. Section 1605(a)(3) requires that “rights in property taken in violation of international law are in issue”—not that such rights may be in issue, or that there may have been a taking that international law might proscribe. 28 U.S.C. 1605(a)(3). And requiring a legal determination of immunity at the “threshold” of the action, *Verlinden*, 461 U.S. at 493-494, is necessary to ensure that the foreign state actually receives the protections of immunity if no exception applies, to preserve the dignity of the foreign state and comity between nations, and to safeguard the interests of the United States when it is sued in foreign courts. This Court has made just such an analysis of legal sufficiency when considering the application of other FSIA exceptions, including the exception for cases “in which * * * rights in immovable property situated in the United States are in issue.” 28 U.S.C. 1605(a)(4); see *Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 198-199 (2007).

In holding otherwise, the court of appeals relied only on this Court’s decision in *Bell v. Hood*, 327 U.S. 678 (1946), which construed the “aris[ing] under” requirement in the federal-question jurisdictional statute. But the *Bell* standard, which is derived from a statute that does “nothing more than grant jurisdiction over a particular class of cases,” *Verlinden*, 461 U.S. at 496-497, has no application in the FSIA context, where Congress—impelled by foreign relations concerns that are specific to suits against foreign sovereigns—made foreign states presumptively immune and imposed substantive preconditions to the existence of jurisdiction that must be satisfied in every case.

The court of appeals failed to assess whether respondents’ allegations were legally sufficient to establish that petitioners’ alleged actions violated international law or that H&P-IDC’s own rights in property were in issue. Accordingly, the judgment should be vacated and the case remanded for further consideration under the proper standard.

* * * *

4. Exceptions to Immunity from Jurisdiction: Torts and Terrorism

The tort exception to immunity in the FSIA provides that a foreign state is not immune in actions “for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission” of a foreign state. 28 U.S.C. § 1605(a)(5). The FSIA’s definitions section specifies that “[t]he ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.” *Id.* § 1603(c).

The terrorism exception applies, *inter alia*, to cases in which money damages are sought for “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act . . . engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.” 28 U.S.C. § 1605A(a)(1). The provision further specifies that “[t]he court shall hear a claim under this section if” certain additional requirements are met, *id.* § 1605A(a)(2), including that “the foreign state was designated as a state sponsor of terrorism at the time the act [at issue] occurred, or was so designated as a result of such act, and . . . either remains so designated when the claim is filed . . . or was so designated within the 6-month period before the claim is filed” *Id.* § 1605A(a)(2)(A)(i).

The United States filed a statement of interest on November 21, 2016 in U.S. district court in the District of Columbia in *Schermerhorn v. Israel*, No. 16-0049, a case in which plaintiffs asserted jurisdiction under the FSIA tort and terrorism exceptions. Plaintiffs sought compensation for injuries they allegedly sustained when Israel Defense Forces (“IDF”) intercepted their U.S.-flagged ship on the high seas during the Gaza Flotilla incident of May 31, 2010. Plaintiffs claimed that a tort occurring on a U.S.-flagged vessel occurs in the United States for the purposes of the FSIA’s tort exception and that the terrorism exception applies to any foreign state whether or not it has been designated as a state sponsor of terrorism. Excerpts follow (with most footnotes omitted) from the U.S. statement of interest, which is available in full at <http://www.state.gov/s/l/c8183.htm>.*

* * * *

Plaintiffs contend that the tort exception provides jurisdiction in this case because a U.S.-flagged vessel sailing on the high seas is “territory . . . subject to the jurisdiction of the United States.” . . . In support of their position, plaintiffs point to statements in various cases indicating that “[t]he deck of a private American vessel . . . is considered, for many purposes, constructively as territory of the United States.” . . .

* Editor’s note: The district court dismissed the case for lack of jurisdiction on January 25, 2017, and the plaintiffs filed a notice of appeal on February 15, 2017.

Plaintiffs' argument lacks merit. Interpretation of a statute begins with its plain meaning. See *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 22 (D.C. Cir. 2010). The plain meaning of "territory" signifies land, not the deck of a ship. The root of the term "territory" is "terra," meaning "earth" or "land," and "territory" is defined as "the extent of the land under the jurisdiction of a ruler, state, city, etc." THE OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH 839 (3d ed. 1999) (emphasis added); see e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1329 (1st ed. 1976) (defining "territory" as "[a]n area of land; a district; region" and "[t]he land and waters under the jurisdiction of a state, nation, or sovereign"). Moreover, in FSIA, Congress specified that it was referring to "continental or insular" territory, 28 U.S.C. § 1603(c), making clear that the scope of the term "territory" is limited to U.S. land areas and does not extend to the various locations of all U.S.-flagged vessels at any given moment.

In a case involving a similar issue, the Supreme Court "construe[d] the modifying phrase 'continental and insular' to restrict the definition of United States," for purposes of FSIA's tort exception, "to the continental United States and those islands that are part of the United States or its possessions." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). "[A]ny other reading," the Court explained, "would render this phrase nugatory." *Id.* Although *Amerada Hess* addressed the applicability of the tort exception to injuries sustained on board a Liberian-flagged vessel on the high seas, as opposed to a U.S.-flagged vessel, the Supreme Court's conclusion that the high seas are not "territory" within the meaning of FSIA's tort exception is equally applicable here.

Other courts have strictly construed the scope of the phrase "in the United States" for purposes of FSIA's tort exception as well. In *Persinger v. Islamic Republic of Iran*, the D.C. Circuit held that injuries sustained on the premises of U.S. embassies abroad do not occur "in the United States" as required by the exception. 729 F.2d 835, 839 (D.C. Cir. 1984). The court noted that it is insufficient that the United States has some jurisdiction over its embassies abroad. The modifying phrase "continental or insular," the Court explained, "is rather clearly intended to restrict the definition of the United States to the continental United States and such islands as are part of the United States or are its possessions." *Id.* "The ground upon which our Embassy stands in Tehran does not fall within that definition." *Id.*; see also *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (same).

Plaintiffs' attempt to overcome the plain meaning of the statute by pointing to various statements that, for some purposes, a ship is said to be "part of the territory" of the country whose flag it flies, *i.e.*, "a kind of floating island," Pls.' Opp'n at 12, is unavailing. The "metaphor" or "fiction" of the floating island, as the Supreme Court has called it, *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123-124 (1923), does not signify that Congress intended FSIA's tort exception to extend to U.S.-flagged ships on the high seas. Indeed, the Supreme Court has rejected the same argument plaintiffs make here when interpreting other provisions of law.

In *Cunard*, for example, the Supreme Court held that a U.S.-flagged vessel was not "territory" for purposes of the Eighteenth Amendment's prohibition on the sale or transportation of intoxicating liquors to or from "territory subject to the jurisdiction" of the United States. 262 U.S. at 121-23. The Court explained that the statement "that a merchant ship is a part of the territory of the country whose flag she flies . . . is a figure of speech, a metaphor," and "[t]he immediate context and the purport of the [Eighteenth Amendment] show[s] that the term ['territory'] is used in a physical and not a metaphorical sense—that it refers to areas or districts having fixity of location and recognized boundaries." *Id.* at 122-23; see also *Scharrenberg v.*

Dollar S. S. Co., 245 U.S. 122, 127 (1917) (“It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative, and to expand the doctrine to the extent of treating seamen employed on [a U.S.-flagged ship] as working [in the United States] is quite impossible[,] . . . fanciful and unsound and must be denied.” (internal citation omitted)); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 246 (2d Cir. 1996) (concluding bombing of Pan American Flight 103 over Scotland did not fit within FSIA’s tort exception: “[e]ven if we assume, without deciding, that for some purposes an American flag aircraft is like an American flag vessel, the fact that a location is subject to an assertion of United States authority does not necessarily mean that it is the ‘territory’ of the United States for purposes of the FSIA.” (internal citation omitted)).

The same reasoning applies here. There is no indication that Congress intended to adopt a figurative or metaphorical meaning of “territory” when it enacted FSIA, particularly in light of Congress’ specification that the territory to which it was referring is “continental or insular” territory. See, e.g., *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (Before a word will be assumed to have a meaning broader than or different from its ordinary meaning, “there must be some indication Congress intended such a result.”); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (“The plain meaning of legislation should be conclusive, except in the ‘rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’”). Plaintiffs have not pointed to any legislative history to suggest that Congress intended anything other than the literal meaning of “territory,” or that Congress intended the tort exception to extend to U.S.-flagged ships on the high seas. The tort exception “was designed primarily to remove immunity for cases arising from traffic accidents.” *MacArthur Area Citizens Ass’n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987); see H.R. REP. NO. 94-1487, at 20-21 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6618-20. Although the exception is cast in general terms and thus not limited solely to traffic accidents, this purpose “counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law.” *MacArthur Area Citizens Ass’n*, 809 F.2d at 921. It would be inconsistent with Congress’ purpose (and the plain language of the statute) to extend the exception to provide jurisdiction over cases involving U.S.-flagged vessels on the high seas.³

³ Testimony from one of the principal draftsmen of FSIA further confirms that Congress intended the ordinary, geographic meaning of “territory:”

We would like, based on our experience as a litigant abroad to subsume to the jurisdiction of our domestic courts foreign governments and foreign entities who engage in certain activities *on our territory* to the same extent that the U.S. Government is already at the present time subject to the jurisdiction of foreign courts, when it engages in certain activities *on their soil*.

...

[W]e would like to afford our local citizens and entities who deal with foreign governments *in the United States* effective redress through the instrumentality of our courts. If a dispute arises as a result of an activity which a government carries on *in this country*, the most appropriate place to resolve such a dispute would be through the courts, which are, after all, designed to do just that: to resolve the dispute *which has arisen here*.

Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 29 (1973) (testimony of Bruno Ristau, Chief of the Foreign Litigation Unit in the Department of Justice) (emphasis added).

Furthermore, even under plaintiffs' proposed interpretation, the deck of a U.S.-flagged ship would only be "territory" for purposes of FSIA's definition of "United States" if it were sailing on the high seas; the moment the ship entered the territorial waters of another country, it would lose its status as "territory." See Pls.' Opp'n at 12, 16 & n.12. The Supreme Court has "never engaged" in the sort of "interpretive contortion" that would be necessary to "giv[e] the same word, in the same statutory provision, different meanings in different factual contexts." *United States v. Santos*, 553 U.S. 507, 522 (2008). And this Court should decline to do so here. It is simply improbable that Congress meant to adopt an understanding of the word "territory" that would change based on the location of a ship, particularly without Congress saying so.

Indeed, "[w]hen it desires to do so, Congress knows how to place the high seas," and/or U.S.-flagged ships sailing on them, "within the jurisdictional reach of a statute." *Amerada Hess*, 488 U.S. at 440. For example, in providing jurisdiction over certain criminal acts, Congress has created the "special maritime and territorial jurisdiction of the United States," which expressly extends to, among other things, "[t]he high seas, . . . and any vessel belonging in whole or in part to the United States or any citizen thereof . . . when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." 18 U.S.C. § 7(1); see also *id.* § 2280(b)(1)(A) (providing jurisdiction over the crime of violence against maritime navigation when it is committed, among other things, "against or on board a vessel of the United States"). Similarly, Congress has explicitly empowered the Coast Guard to search and seize vessels "upon the high seas and waters over which the United States has jurisdiction" for "prevention, detection, and suppression of violations of laws of the United States." 14 U.S.C. § 89(a). The absence of similar language in FSIA's tort exception demonstrates that Congress did not intend to remove immunity for alleged torts committed aboard U.S.-flagged vessels on the high seas.

* * * *

Plaintiffs maintain that FSIA's terrorism exception provides jurisdiction for the torture claim raised by one of the U.S. citizen plaintiffs. . . . Plaintiffs acknowledge that Israel is not currently, and never has been, designated as a state sponsor of terrorism by the Executive Branch, but they argue that the requirements in § 1605A(a)(2) are merely sufficient—to remove immunity under the terrorism exception. . . . Plaintiffs' proffered reading of the statute hinges on changes Congress made to the wording of the terrorism exception in 2008. . . . The prior version of the exception stated that "the court shall decline to hear a claim . . . if the foreign state was not designated as a state sponsor of terrorism," Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 221, 110 Stat. 1214 (1996), whereas the 2008 amendment that created § 1605A provides that "[t]he court shall hear a claim . . . if . . . the foreign state was designated a state sponsor of terrorism," 28 U.S.C. § 1605A(a)(2)(A)(i). According to plaintiffs, the new provision allows a claim to proceed against a designated state sponsor of terrorism but, unlike the prior version, does not require that all claims meet this criterion to go forward. . . .

Plaintiffs' contention does not withstand scrutiny. The structure of FSIA provides a presumption of immunity: "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Therefore, a plaintiff must show that one of the Act's exceptions affirmatively authorizes the court to hear its claim in order to overcome the baseline of immunity provided in

§ 1604. The terrorism exception permits a court to hear a claim “if . . . the foreign state was designated a state sponsor of terrorism,” and does not provide jurisdiction in the absence of such a designation. *Id.* § 1605A. For this reason, courts, including the D.C. Circuit, repeatedly and uniformly have held that designation as a state sponsor of terrorism is a prerequisite to establishing jurisdiction under FSIA’s terrorism exception. . . .

Although none of these courts specifically addressed the novel argument plaintiffs make here, the plain meaning of § 1605A is that a court shall hear a claim under the terrorism exception to immunity “if . . . the foreign state was designated as a state sponsor of terrorism.” 28 U.S.C. § 1605A(a)(2)(A)(i) (emphasis added). To assert that this condition is merely an additional basis to allow a claim to proceed is specious. There would be no need for this condition if the general exception to immunity for the specified acts already extended to all foreign states. . . . Moreover, there is no reason to think Congress would have set forth the specific and detailed requirements contained in § 1605A(a)(2) if it had intended those provisions to be merely permissive. Indeed, plaintiffs do not identify what, if any, other requirements might be sufficient for a plaintiff to invoke the terrorism exception if the criteria detailed in § 1605A(a)(2) are not necessary. And, contrary to the premise of plaintiffs’ argument, plaintiffs appear to acknowledge that at least some of the requirements in § 1605A(a)(2) are necessary: plaintiffs only advance the terrorism exception as a basis for jurisdiction for a U.S. citizen plaintiff’s torture claim and not the torture claim of the Belgian plaintiff, presumably because the latter would not satisfy the requirement of U.S. nationality set forth in § 1605A(a)(2)(A)(ii). . . .

In addition, it is improbable that Congress made such a drastic change in sovereign immunity principles without acknowledging that it was doing so. . . . Plaintiffs do not point to any legislative history to suggest that Congress intended to remove the designation requirement from FSIA’s terrorism exception. In fact, the House Report accompanying the 2008 amendments explains that § 1605A was intended, among other things, to “consolidate provisions relating to the exception to sovereign immunity for state sponsors of terrorism” and thus to “permit claims to be brought for money damages, including punitive damages, *against a foreign state designated as a state sponsor of terrorism.*” H.R. REP. NO. 110-477, at 1000-01 (2007) (Conf. Rep.) (emphasis added); see also *id.* at 1001 (“Courts would have jurisdiction to hear a claim brought against a foreign state that was designated as a state sponsor of terrorism . . .”).

Because Israel is not (and never has been) designated a state sponsor of terrorism, FSIA’s terrorism exception also does not provide a basis for jurisdiction over defendants in this case.

* * * *

Finally, in describing the standard to be applied in determining whether plaintiffs’ claims fit within the FSIA exceptions, plaintiffs assert that they “need only show that their claim is ‘non-frivolous’ at the jurisdictional stage and need not definitively prove [their] claim as they would at the merits stage.” Pls.’ Opp’n at 7. The D.C. Circuit, however, has applied this non-frivolous standard only in cases involving FSIA’s expropriation exception, which removes immunity in cases in which, among other things, “rights in property taken in violation of international law are in issue.” 28 U.S.C. § 1605(a)(3); see, e.g., *Simon v. Republic of Hungary*, 812 F.3d 127, 140-41 (D.C. Cir. 2016).

In any event, even with respect to the expropriation exception, the “non-frivolous” standard has been applied only where “the plaintiff’s claim on the merits directly mirror[s] the jurisdictional standard” set forth in FSIA. *Simon*, 812 F.3d at 140. When the “jurisdictional and

merits inquiries” are not “fully overlap[ping],” the court must undertake a more stringent inquiry that asks “whether plaintiffs’ allegations satisfy the jurisdictional standard.” *Id.* at 141.

Here, the merits of plaintiffs’ claims do not mirror the relevant jurisdictional inquiries. The challenged jurisdictional elements are whether a U.S.-flagged ship sailing on the high seas is “in the United States” within the meaning of FSIA’s tort exception and whether FSIA’s terrorism exception provides a basis for jurisdiction over claims against foreign states that have not been designated state sponsors of terrorism. Neither of these inquiries are elements of the common law torts plaintiffs allege. ... Therefore, it is not sufficient for plaintiffs to make non-frivolous arguments that their claims satisfy the requirements of the tort or terrorism exceptions. Rather, the Court must resolve the legal questions discussed above to determine whether this case actually satisfies the relevant jurisdictional requirements. ...

* * * *

5. Service of Process

a. *Harrison v. Sudan*

As discussed in *Digest 2015* at 386-89, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit on a petition for rehearing in *Harrison v. Sudan*, asserting that service on a foreign sovereign via delivery of a summons and complaint to its embassy in the United States addressed to its foreign minister 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”). The Second Circuit issued its decision on September 22, 2016, denying the petition for rehearing, confirming its earlier opinion that service of process addressed to Sudan’s foreign minister via the Sudanese Embassy in Washington, D.C. was valid under the FSIA and did not violate the VCDR. 838 F.3d 86 (2d. Cir. 2016). The Court’s clarification of its opinion in relation to a provision of the FSIA concerning execution is discussed in section 6, *infra*.^{**}

b. *Court practice of mailing documents to the Mexican Embassy*

On March 7, 2016, Principal Deputy Assistant Attorney General Benjamin C. Mizer sent statements of interest on behalf of the United States to several county clerks’ offices in Delaware regarding multiple cases proceeding in those counties’ courts involving private Mexican nationals and residents in which the court had adopted the practice of mailing legal documents to the Mexican Embassy in Washington, D.C. in an attempt to effect service of process on those individuals. The U.S. statement of interest explaining the impropriety of this form of attempted service is excerpted below (with some footnotes omitted) and available at <http://www.state.gov/s/l/c8183.htm>.

^{**} Editor’s note: On March 9, 2017, the Republic of Sudan filed a petition in the U.S. Supreme Court for a writ of certiorari.

* * * *

As set forth further below, delivery of legal papers to a foreign state’s diplomatic mission in the United States is not a proper means of effecting service upon residents or nationals of the foreign state, and this practice is also inconsistent with the inviolability of the mission under the Vienna Convention on Diplomatic Relations. Under that Convention, to which both the United States and Mexico are parties, embassies are inviolable. Courts considering the issue have generally held that this status prevents service of process on the embassy either as an agent for a private, non-immune party or as service on the foreign government. Moreover, the United States regularly objects when a foreign court attempts to serve U.S. persons via U.S. embassies abroad, and thus has strong reciprocity interests at stake. The United States therefore respectfully requests that the Court recognize the inviolability of the Embassy and require that service on Mexican residents or nationals be effected in an alternative manner.

As a general matter, the United States would note that Mexico is a party to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters, as well as the Inter-American Convention on Letters Rogatory and its Additional Protocol. Both instruments provide mechanisms for the service of legal documents upon individuals in Mexico. The United States would further note that, in cases involving child custody or the termination of parental rights where one or both of the parents resides in Mexico at an unknown address, either the litigants or the court may reach out informally to Mexico’s consulates or to the Embassy. In such cases, it is possible that the consulates or Embassy may be able to assist in identifying potential avenues for locating an address for the individual.

BACKGROUND

Since April 2015, the U.S. Department of State has received over a dozen diplomatic notes from the Mexican Embassy in Washington, D.C. informing the Department that it received legal documents intended for Mexican residents or nationals who were defendants or respondents in various Delaware family court cases, including the four cases listed above, and requesting that the Department return the papers to the relevant court.

DISCUSSION

I. THE MEXICAN EMBASSY IS INVIOABLE AND AS SUCH MAY NOT SERVE AS AN AGENT FOR SERVICE OF PROCESS

The Vienna Convention on Diplomatic Relations (“VCDR”) provides in relevant part that “the premises of [a] mission shall be inviolable.” 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. Although the treaty does not define “inviolable,” courts have held that this principle must be construed broadly, and is violated by service of process—whether on the inviolable entity for itself or as an agent for the foreign government or a private, non-immune party. *See Tachiona v. United States*, 386 F.3d 205, 222, 224 (2d Cir. 2004) (holding that the VCDR precludes service of process on inviolable persons entitled to diplomatic immunity where such persons are served on behalf of a non-immune, private entity); *Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) (“[S]ervice through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law.”); *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 979–81 (D.C. Cir. 1965) (holding that the inviolability principle precludes service of process on a diplomat as agent of a foreign government); *767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301 (2d Cir.

1993) (approvingly citing 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) (“[W]rits may not be served, even by post, within the premises of a mission . . .”).

In analogous circumstances, the U.S. Court of Appeals for the Second Circuit rejected an attempt to serve process on the President of Zimbabwe and the Zimbabwean Foreign Minister as agents of a private political party while they visited New York City as delegates to the United Nations Millennium Summit. *Tachiona*, 386 F.3d at 209. The court explained that under the VCDR, these persons were “inviolable,” a principle it considered “advisedly categorical” and “strong,” and thus the court held that the VCDR protected the president and foreign minister from service of process either in their own capacity or as agents for the political party. *Id.* at 221–22, 24.

In the family court cases at issue here, just as in *Tachiona*, service on a private party has been attempted by way of an entity protected by inviolability pursuant to the VCDR. The inviolability of the embassy should be as broadly construed in these circumstances as it was in *Tachiona*. Moreover, the legislative history of the Foreign Sovereign Immunities Act, which governs suits against foreign governments, explicitly recognized that service on an embassy would be at odds with the VCDR. The House Report for the FSIA states that “A second means [of service], of questionable validity, involves the mailing of a copy of the summons and complaint to the diplomatic mission of the foreign state. Section 1608 [of the FSIA] precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations. . . . Service on an embassy by mail would be precluded under this bill.” H.R. Rep. 1487, 94th Cong., 2d sess., reprinted in 1976 U.S.C.C.A.N. 6604, 6625. The House Report also approvingly references cases in which courts recognized the impropriety of service on inviolable diplomatic representatives. *See id.* at 21, 1976 U.S.C.C.A.N. at 6620 (“It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965)).²

Furthermore, permitting courts in the United States to treat foreign embassies as a forwarding agent for purposes of litigation that does not involve the foreign government itself would result in the diversion of embassy resources to determine the significance of a

² The United States maintains that service on an embassy is improper in all circumstances. The Second Circuit has permitted such service in one limited circumstance, not applicable to the above-referenced cases. In *Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015), the plaintiffs brought suit against Sudan and thus were required to effect service on the foreign state by following the steps outlined in the FSIA. The relevant provision of that statute states that, if other options are unavailable, foreign states may be served by the clerk of the court mailing the summons and complaint “to the head of the ministry of foreign affairs of the foreign state concerned.” 28 U.S.C. § 1608(a)(3). The plaintiffs in *Harrison* attempted to comply with the statute through a mailing of the summons and complaint to the Sudanese Embassy in Washington, D.C. addressed to Sudan’s Minister of Foreign Affairs, rather than mailing the papers to the Ministry of Foreign Affairs in Sudan’s capital, Khartoum. The Second Circuit determined that, because the statute was silent as to the address required for the mailing, the summons could be mailed to the Minister of Foreign Affairs via the embassy. The court further concluded that this was not inconsistent with the VCDR and the FSIA’s legislative history because service was not *on* the embassy, but only “*via or care of*” the embassy. *Harrison*, 802 F.3d at 405. “Moreover,” the court noted, “Sudan has not sought to rely on this legislative history.” *Id.* The court’s reasoning in *Harrison* was in apparent conflict with the Second Circuit’s earlier decision in *Tachiona*, and the United States disagreed with the *Harrison* decision on a number of grounds and has supported Sudan’s petition for rehearing, which remains pending. In any event, the decision in *Harrison* rests on an interpretation of the proper method of serving a foreign *state* under a specific provision of the FSIA, which is inapplicable where, as here, private parties rather than foreign states are being served.

transmission from the court, and to assess whether or how to respond. Indeed, the Mexican Embassy has been served in more than a dozen cases from Delaware state courts alone in less than a year, demonstrating the significant impact that allowing such service would have. Moreover, the United States has strong reciprocity interests at stake. The United States has long maintained that its embassies abroad are not agents for service of process. When a foreign court or litigant purports to serve a U.S. resident or national through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the embassy is not an agent for service of process and therefore that service on the individual has not been effected. If the VCDR were interpreted to permit courts in the United States to serve papers through an embassy, it could make U.S. embassies abroad vulnerable to similar treatment in foreign courts, contrary to the government's consistently asserted view of the law. *See e.g., Medellin 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").

CONCLUSION

The United States has a substantial policy and legal interest in assuring that the inviolability of embassies under the VCDR is correctly construed and applied. In accordance with that interest and the authorities set forth herein, the United States respectfully urges the Court to recognize the impropriety of service on Mexican nationals or residents via the embassy and require that service be effected in an alternate manner.

* * * *

c. **Fu Yu Xia v. Parkinson**

On August 2, 2016, the United States submitted a statement of interest in state court in New York in *Fu Yu Xia v. Samuel Parkinson*, No. 7573/2016, explaining that plaintiff's attempt to effectuate service by way of personal delivery of the summons and complaint to the Consulate General of the People's Republic of China in New York was improper under both the FSIA and the Vienna Convention on Consular Relations ("VCCR"). Plaintiff alleged that a consulate security guard injured him on a sidewalk in front of the Chinese consulate. The U.S. statement of interest is excerpted below (with footnotes omitted) and available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The FSIA is "the sole basis for obtaining jurisdiction over a foreign state" in United States courts. *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)); *see also Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir. 2006). A lawsuit against a consulate is considered a suit against the foreign state itself for purposes of the FSIA. *See, e.g., Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 385 (S.D.N.Y. 2006); *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 345 (9th Cir. 1993). Personal jurisdiction exists under the FSIA where there is both subject matter jurisdiction and proper service. *See* 28 U.S.C. § 1330(a)–(b); *U.S. Titan, Inc. v.*

Guangzhou Zhen Hua Shipping Co., Ltd., 241 F.3d 135, 151 (2d Cir. 2001) (“[S]ubject matter jurisdiction plus service of process equals personal jurisdiction under the FSIA.”).

The FSIA sets out, in hierarchical order, four exclusive methods for service of process on foreign states in 28 U.S.C. § 1608. The first two procedures allow for service according to a special arrangement between the parties or “an applicable international convention on service of judicial documents.” 28 U.S.C. § 1608(a)(1)–(2). If service cannot be made using either of these methods, it may be accomplished by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned. *Id.* at § 1608(a)(3). If service cannot be accomplished in that fashion within thirty days, it must be done under section 1608(a)(4), which provides for service

by sending two copies of the summons and complaint and a notice of suit together with a translation of each into the official language of the foreign state by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

Id. at § 1608(a)(4). None of these options, however, permits personal delivery of a summons and complaint to a foreign state’s consulate in the United States. Plaintiff therefore has failed to comply with the FSIA’s requirements in this case.

Moreover, under the FSIA, unless service is pursuant to a special arrangement between the parties or accomplished in accordance with the requirements of an applicable international convention, the summons and complaint must be translated into the official language of the foreign state, and that state must be provided sixty days after service has been made to answer or otherwise respond to the complaint. 28 U.S.C. §§ 1608(a)(3)–(4), 1608(d). The twenty-day limit Plaintiff here has attempted to impose does not comply with these requirements. Courts have made clear that section 1608(a) “mandate[s] strict adherence to its terms, not merely substantial compliance.” *Finamar Investors, Inc. v. Republic of Tajikistan*, 889 F. Supp. 114, 117 (S.D.N.Y. 1995); *see also Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); *Transaero, Inc. v. La Fuerza Boliviano*, 30 F.3d 148, 154 (D.C. Cir. 1994); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983).

In addition, both China and the United States are parties to the VCCR, which provides that “[c]onsular premises shall be inviolable.” 21 U.S.T. 77, art. 31. Courts have held that service of process on consular premises is contrary to this inviolability. *See Swezey v. Merrill Lynch*, 997 N.Y.S.2d 45, 47 (N.Y. App. Div. 2014); *Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012); Restatement (Third) of Foreign Relations Law § 466, note 2 (1987) (“Service of process at diplomatic of consular premises is prohibited.”). Thus, under both the FSIA and the VCCR, the attempted personal service on the Chinese Consulate in this case is inappropriate and ineffective.

The United States has strong reciprocity interests in the enforcement of the applicable rules governing service of process on sovereign states, including application of and strict adherence to the requirements of the FSIA and the VCCR. The United States has long

maintained that the United States must be served in a manner consistent with international law when it is sued abroad, and the United States regularly objects when such service does not take place. If the FSIA and VCCR were interpreted to permit parties in the United States to serve papers personally on a consulate, it could make U.S. consulates abroad vulnerable to similar treatment by foreign courts, contrary to the United States' consistently asserted view of the law.

Absent service in strict compliance with the FSIA, 28 U.S.C. § 1608(a), this Court does not have personal jurisdiction over the People's Republic of China in this case.

* * * *

d. Hmong I v. Lao People's Democratic Republic

On February 12, 2016, the United States filed a suggestion of immunity on behalf of President Choummaly Sayasone and Prime Minister Thongsing Thammavong of Laos in a case in federal district court in the Eastern District of California. The portions of the U.S. submission addressing the immunity of the foreign official defendants are discussed in section C of this chapter, *infra*. Excerpts follow from the portion of the U.S. submission regarding plaintiffs' purported service on Laos. The submission in its entirety is available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The United States also has an important interest in preserving the inviolability of diplomatic missions and ensuring that foreign states do not have to respond or appear in U.S. courts without proper service of process. These interests are based, in part, on considerations of reciprocity. The Department of State regularly objects to attempts by foreign courts or litigants to serve American diplomatic missions overseas with any type of order directing the United States to respond or appear in litigation. Ensuring that service upon foreign states in U.S. courts complies with domestic and international law encourages other nations to accord the United States the same consideration in their judicial systems.

Here, the record shows that the plaintiff's attempt to serve the Lao People's Democratic Republic was improper. In particular, the plaintiff's service on the Lao embassy was inconsistent with the FSIA and the VCCR.

I. The FSIA does not allow the plaintiff to serve Laos by delivering a copy of the summons and complaint to the Lao ambassador at the Lao embassy in Washington.

The FSIA establishes "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Personal jurisdiction exists under the statute where there is both subject matter jurisdiction and proper service. *See* 28 U.S.C. § 1330(a)–(b). Section 1608(a) of the act contains the four exclusive means of service of process on a foreign state, and specifies the order in which they must be attempted. *See id.* § 1608(a); *accord Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010). These methods include (1) service according to a "special arrangement between the plaintiff and the foreign state," (2) service under "an applicable international convention on service," (3) service by mail to the foreign minister of the foreign

state, or (4) service by transmission of process to the State Department, which will forward necessary papers “through diplomatic channels to the foreign state.” 28 U.S.C. § 1608(a). Consistent with the United States’ position, most courts have required “strict compliance” with § 1608(a). *See, e.g., Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2010); *Transaero, Inc. v. La Fuerza Aérea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). The Ninth Circuit, by contrast, has held that “substantial compliance” will do. *Peterson*, 627 F.3d at 1129.

Even under a more liberal substantial compliance standard, however, the plaintiff’s attempt to serve Laos was ineffective to satisfy any of § 1608(a)’s four methods of service. Subsection (a)(1) is inapposite, because there is no suggestion in the record of a “special arrangement” between the plaintiff and Laos. Subsection (a)(2) is similarly inapplicable, because there are no international treaties on service of process in force between the United States and Laos.

Plaintiff’s purported service also failed to “substantially comply” with subsection (a)(3). To satisfy that provision, a plaintiff must:

send[] a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. § 1609(a)(3). But here, the summons and complaint were not sent via the clerk of the court. They did not include a “notice of suit”—a particular legal document whose components are specified in 22 C.F.R. § 93.2. They were not translated into Lao. And they were not addressed to the Lao minister of foreign affairs. *See* Affidavit of Process Server.

Finally, the plaintiff has made no attempt to effect service under subsection (a)(4) by requesting the clerk of the court to dispatch the requisite documents to the Secretary of State for transmission through diplomatic channels.

The plaintiff’s efforts to serve Laos by delivering papers to its embassy, addressed to the ambassador, cannot satisfy any of § 1608(a)’s requirements. Congress considered and rejected this very method of service in enacting the FSIA, particularly given its concern that such service would be inconsistent with the inviolability of embassy guaranteed by the VCDR (discussed in greater detail below). *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007) (citing H.R. Rep. No. 94-1487, at 26 (1976)). For the foregoing reasons, the plaintiff’s purported service was ineffective under the FSIA, and the Court lacks personal jurisdiction over Laos.

II. The plaintiff’s service of process was inconsistent with the VCDR’s recognition that foreign embassies and foreign ambassadors are “inviolable.”

The VCDR, to which both the United States and Laos are parties, provides that the premises of a diplomatic mission are “inviolable.” VCDR art. 22, 23 U.S.T. at 3237–38, 500 U.N.T.S. at 106–08. So is “[t]he person of a diplomatic agent.” *Id.* art. 29, 23 U.S.T. at 3240, 500 U.N.T.S. at 110. As several courts have recognized, efforts to serve legal documents upon an embassy or ambassador as an agent of a foreign state are contrary to this inviolability. *See, e.g., Autotech*, 499 F.3d at 748; *Tachiona v. United States*, 386 F.3d 205, 221–24 (2d Cir. 2004); *see also* Restatement (Third) of the Foreign Relations Law of the United States §§ 464–66 n.2 (1987). The fact that validating the plaintiff’s service in this case would be inconsistent with the United States’ treaty obligations further informs the proper understanding of the FSIA — and provides an additional reason why the plaintiff has failed to properly serve Laos.

As noted above, the United States has strong reciprocity interests at stake in this matter. 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. If U.S. courts were to allow plaintiffs themselves to directly serve papers on an embassy, the United States could be vulnerable to similar treatment in foreign courts — contrary to the United States' consistently asserted view of the law.

* * * *

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

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

(1) Calderon-Cardona v. Deutsche Bank Trust Co. Americas

On July 20, 2016, the United States filed a statement of interest in *Calderon-Cardona v. Deutsche Bank Trust Co. Americas*, No. 11-3288 (S.D.N.Y.), regarding judgment holders' attempt to attach blocked assets to collect on a judgment against North Korea for providing material support for acts of terrorism that impacted their families. See *Digest 2012* at 302-05 for background on the case and discussion of the U.S. *amicus* brief filed in the Court of Appeals for the Second Circuit. Excerpts follow (with footnotes omitted) from the statement of interest, available in full at <http://www.state.gov/s/l/c8183.htm>. In response to the statement of interest, petitioners withdrew their request for turnover of the Deutsche Bank accounts, without prejudice to renewal.

* * * *

A. Petitioners Have Not Shown That the Blocked Assets Are Subject to Attachment Under FSIA Section 1610

First, petitioners have not sufficiently shown that the assets held in the DBTCA blocked accounts are subject to attachment under FSIA § 1610. In actions under the FSIA, a judgment creditor bears the burden of identifying particular property to be executed against and proving that it falls within a statutory exception to immunity. See *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011); see also, e.g., *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785-86 (7th Cir. 2011). Petitioners here bear the burden of establishing that the blocked accounts are the property of [Korea Foreign Insurance Corporation, or] KFIC, that KFIC is an agency or instrumentality of North Korea, and that KFIC engages in commercial activity in the United States. They have not demonstrated that any of these requirements are met.

The FSIA authorizes in appropriate circumstances the attachment of “the property of a foreign state . . . and the property of an agency or instrumentality of such a state.” 28 U.S.C. § 1610(g)(1) (emphases added). This textual requirement that the property to be attached must be “of” the foreign state (or agency or instrumentality) in question unmistakably requires actual ownership; indeed, the Supreme Court has held that, in this context, “the use of the word ‘of’ denotes ownership.” *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (internal quotation marks omitted). This statutory language is also notably narrower than the language used in OFAC’s blocking regulations themselves, which, though codified separately as to separate nations or other subjects of sanctions, generally apply not only to property of the foreign state at issue, but also to that state’s “interests in property.” *See, e.g.*, 31 C.F.R. § 510.201(a). If Section 1610(g) were intended to extend to all blocked assets, it could have been drafted to include broader language referencing “interests in property,” but instead it includes narrower language requiring an ownership interest. *See* 28 U.S.C. § 1610(g)(1).

A number of policy reasons support the conclusion that attachment pursuant to the FSIA applies only to property of a foreign state (or agency or instrumentality of that state), rather than to all property and interests in property. First, an interpretation that permits attachment of blocked assets that the foreign state does not own would have the perverse effect of subsidizing states with outstanding terrorism-related judgments by permitting judgments against them to be satisfied by collections of assets that the state (or its agency or instrumentality) does not own, and that instead are owned by potentially innocent third parties. *See Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 939-40 (D.C. Cir. 2013) (concluding that Congress could not have intended that potentially innocent parties pay some part of a Section 1605A judgment debt). Second, there is a strong public interest in preserving the President’s ability to use blocked assets as a tool of foreign policy. A rule that allowed plaintiffs to attach blocked assets that are not owned by the sanctions target would drain the pool of blocked assets, thereby reducing the leverage that these assets provide in the President’s conduct of foreign policy. *See Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 441 (D.D.C. 2012) (“Plaintiffs’ sweeping interpretation would effectively—through future attachments and executions—eliminate the President’s ability to use blocked assets as bargaining chips in solving foreign policy disputes.”), *aff’d*, 735 F.3d 934 (D.C. Cir. 2013); *Villoldo v. Castro Ruz*, 821 F.3d 196, 203 (1st Cir. 2016) (same).

Petitioners have not shown that the assets in the DBTCA blocked accounts are owned by North Korea, or by an agency or instrumentality of North Korea, as the FSIA requires. Indeed, petitioners do not even specifically contend in the DBTCA Stipulation that the blocked assets are the property of KFIC. *See* Dkt. No. 75. Importantly, the Second Circuit’s specific holding in this case with respect to the ownership of EFTs blocked midstream does not bear on the ownership of the assets in the DBTCA accounts. The Second Circuit held, with reference to New York law, that where a foreign state itself (or an agency or instrumentality of that state) directly transmitted an EFT to the intermediary bank where that blocked EFT now resides, the EFT is the property of that transmitting state. *Calderon-Cardona II*, at 1001-02; *see supra* Section B.3 (Background). In contrast, the funds held in the blocked DBTCA accounts are, apparently, “completed funds transfers, not midstream EFTs,” and no party claims that the funds were directly transmitted by North Korea or by an agency or instrumentality of North Korea; rather, they were transmitted by General Re. . . .

The United States does not take a position as to the ownership of the assets held in the DBTCA blocked accounts. However, petitioners have set forth almost no facts, and no legal analysis, to support the proposition that the funds in the DBTCA accounts are the property of North Korea or of an agency or instrumentality of North Korea, and are therefore otherwise subject to attachment under section 1610(g). For example, the details of the relevant agreements between General Re and DBTCA, pursuant to which DBTCA presumably created at least some of the blocked accounts, are not in the record, and it is therefore not clear whether KFIC in fact has any possessory rights to the blocked assets. Nor is it known whether, for example, any entity may have any setoff rights as to the blocked assets. The record also does not reflect the account names under which the blocked accounts are held; this could bear on the ownership of the accounts, as courts in this Circuit have noted that “under New York law, an account is presumed to be the property of the entity in whose name it is held.” *Villoldo v. Ruz*, No. 1:14-mc-0025, 2016 WL 81492, at *15 (N.D.N.Y. Jan. 7, 2016) (internal quotation marks omitted); *see also, e.g., Karaha Bodas Co., LLC v. Pertamina*, 313 F.3d 70, 86 (2d Cir. 2002) (“when a party holds funds in a bank account, possession is established, and the presumption of ownership follows”). The ownership of the funds in the DBTCA accounts may also turn on whether the accounts are “general” or “special” under New York law; if the accounts are special, ownership of the funds therein may rest with General Re, because “when funds are deposited into a special account . . . the title . . . remain[s] with the [depositor].” *D.C. Precision, Inc. v. United States Gov’t*, 73 F. Supp. 2d 338, 343 (S.D.N.Y. 1999).

Petitioners also have not shown that KFIC is an agency or instrumentality of North Korea, as required to attach KFIC’s assets pursuant to FSIA § 1610(g). KFIC is not on OFAC’s Special Designated Nationals (“SDN”) list, and petitioners have failed to demonstrate how KFIC qualifies as an agency or instrumentality of a foreign state within the meaning of FSIA § 1603(b).

In addition, petitioners have not demonstrated that KFIC engages in commercial activity in the United States, as required by FSIA § 1610(b). FSIA § 1610(g) does not create an independent, freestanding exception to the baseline immunity from attachment of foreign state property, without need to meet the other requirements of Section 1610. Rather, Section 1610(g) authorizes “attachment in aid of execution, and execution, upon that judgment *as provided in this section.*” 28 U.S.C. § 1610(g)(1) (emphasis added); *see also, e.g., Rubin v. Islamic Republic of Iran*, ___ F.3d ___, No. 14-1935, 2016 WL 3903409, at *9 (7th Cir. July 19, 2016). Therefore, attachment pursuant to FSIA § 1610(g) must also satisfy the other provisions within Section 1610 governing the exceptions to a foreign state’s immunity from attachment and execution on judgments under the terrorism exception set forth in Section 1605A, including the “commercial activity” requirement in Section 1610(b). *See id.* at *13 (holding that “Section 1610(g) is not itself an exception to execution immunity for terrorism-related judgments,” and that “terrorism victims with unsatisfied § 1605A judgments against foreign states . . . must satisfy an exception to execution immunity found elsewhere in § 1610—namely, subsections (a) or (b).”); *but see Bennett v. Islamic Republic of Iran*, 817 F.3d 1131, 1141 (9th Cir. 2016) (holding that section 1610(g) contains a freestanding exception to execution immunity).

In sum, petitioners have not met their burden to demonstrate that the assets held in the DBTCA blocked accounts may be attached pursuant to FSIA § 1610(g).

B. FSIA Section 1610(g) Does Not Permit the Turnover of the Blocked Assets Without an OFAC License

Second, irrespective of whether petitioners have complied with any other provision of the FSIA, and regardless of whether the funds in the DBTCA blocked accounts are subject to attachment, those funds may not be turned over without an OFAC license, which petitioners have not obtained. The North Korean Sanctions Regulations provide that any attachment or judgment concerning any property or interest in property blocked pursuant to those regulations and to Executive Order 13,466, “[u]nless licensed pursuant to this part” by OFAC, is “null and void.” 31 C.F.R. §§ 510.202(c), (e); *see supra* Section A.1 (Background). The United States has consistently stated that, 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 the United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502, ECF No. 105 (D.D.C. Jan. 23, 2015), at 18. *See also* Amicus Brief of the United States, *Harrison v. Republic of Sudan*, No. 14-121, ECF No. 101 (2d Cir. Nov. 6, 2015), at 7-8 (same); Statement of Interest of the United States, *Martinez v. Republic of Cuba*, No. 07 Civ. 6607, ECF No. 79 (VM) (S.D.N.Y. Oct. 16, 2015), at 15 n.10 (same); *Martinez v. Republic of Cuba*, No. 10-CV-22095, at *2 (EGT) (FAM) (S.D. Fla. Aug. 22, 2011) (“Plaintiff cannot satisfy the default judgment that she obtained against the Government of Cuba by garnishing payments owed by the listed air charter companies. Since Plaintiff does not have the required license from [OFAC], the writs of garnishment are null and void.”).

The license requirement of FSIA section 1610(g) contrasts with TRIA, as to which the United States has not required an OFAC license to attach blocked assets of a terrorist party. *See, e.g.*, Amicus Brief of the United States, *Harrison v. Republic of Sudan*, No. 14-121, at 7. The terms of TRIA permit attachment of blocked assets in specified circumstances “[n]otwithstanding any other provision of law.” TRIA § 201(a); *see supra* Section A.3 (Background). FSIA § 1610(g), by contrast, contains no such “notwithstanding clause,” and does not override other applicable rules of the North Korean Sanctions program, including the need to obtain an OFAC license. While FSIA § 1610(g)(2) provides that foreign state property “shall not be immune from attachment” to satisfy a judgment under Section 1605A “because the property is regulated by the United States Government by reason of action taken against that foreign state under . . . [IIEPA],” that provision, consistent with the paragraph’s title (“United States sovereign immunity inapplicable”), simply removes a specific sovereign immunity defense. 28 U.S.C. § 1610(g)(2).

In its recent ruling in *Harrison*, the Second Circuit suggested that no OFAC license needs to be obtained in order to attach foreign property pursuant to *both* TRIA and FSIA § 1610(g). *See Harrison v. Republic of Sudan*, 802 F.3d 399, 407-08 (2d Cir. 2015). Respectfully, the United States disagrees with that conclusion and has so advised the Second Circuit in that case. In *Harrison*, both the district court and the court of appeals relied on previous Statements of Interest filed by the United States in TRIA cases, where the United States stated that attachment pursuant to TRIA does not require an OFAC license, but did not reference any Statement of Interest or amicus brief addressing FSIA § 1610(g) and the OFAC license requirement. *Id.* at 406-09. The panel in *Harrison* incorrectly applied, without separate analysis, the Government’s construction of TRIA to FSIA § 1610(g). The United States has pointed out this error to the Second Circuit in its Amicus Brief in support of panel rehearing or rehearing *en banc* in *Harrison*. *See* Amicus Brief of the United States, *Harrison v. Republic of the Sudan*, ECF No. 101, at 7-8. The petition for rehearing in *Harrison*, filed by appellant the Republic of Sudan, is still pending.

Accordingly, it remains the Government’s position that any attachment of funds in the DBTCA blocked accounts pursuant to FSIA § 1610(g)—apart from any other issue relating to petitioners’ compliance with that statute—requires a license from OFAC.

* * * *

On November 30, 2016, the United States provided the court with a further submission to follow-up on its July 20, 2016 statement of interest. The November 30 filing, available at <http://www.state.gov/s/l/c8183.htm>, adds to the U.S. statement opposing turnover of funds pursuant to § 1610 of the FSIA absent a license by informing the Court that the petitioners’ application for a license had been denied by OFAC. On December 9, 2016, the court issued the following order:

On November 30, 2016, the Office of Foreign Assets Control (OFAC) denied the petitioners application for a license to unblock funds that are presently blocked pursuant to North Korea Sanctions Regulations, 31 C.F.R. Part 510. ...[T]he Government submitted a letter opposing the petitioners November 7 turnover motion due to OFAC’s denial of the license. ...[T]he Court ordered the petitioners to show cause by December 8 why the turnover motion for the blocked accounts should not be denied and this action on remand closed. No cause having been shown, it is hereby ORDERED that petitioners November 7 turnover motion is denied. IT IS FURTHER ORDERED that the Clerk of Court shall close this case and all related actions.

(2) Harrison v. Sudan

In *Harrison*, discussed in section 5.a., *supra*, the Court’s September 22, 2016 opinion denying rehearing also addresses whether execution of a judgment against a state sponsor of terrorism through the turnover of blocked assets is possible without an OFAC license. Excerpts follow from that portion of the opinion.

* * * *

The United States also seeks to clarify the Panel Opinion with respect to when a license from OFAC is required. In the Panel Opinion, we held that the District Court did not err in issuing turnover orders without first obtaining either an OFAC license or a Statement of Interest from the Department of Justice. *See Harrison*, 802 F.3d at 406- 07. This holding was based on the United States’ position in previous Statements of Interest that § 201(a) of the Terrorism Risk Insurance Act (“TRIA”), Pub. L. No. 107–297, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), permits a 28 U.S.C. § 1605A judgment holder to attach assets that have been blocked pursuant to certain economic sanctions laws without obtaining an OFAC license. The Panel Opinion included language, however, that may have suggested that § 1610(g) of the FSIA might permit a person holding a judgment under § 1605A to attach blocked assets without an

OFAC license. *Harrison*, 802 F.3d at 407-08. This is not the case and thus we now clarify our ruling.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the “terrorism exception,” 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to “give American Citizens an important economic and financial weapon against . . . outlaw states” that sponsor terrorism. H.R. Rep. No. 104–383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the State Department as “state sponsor[s] of terrorism.” See *Calderon–Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 996 (2d Cir. 2014).

The TRIA was enacted to aid victims of terrorism in satisfying judgments against foreign sponsors of terrorism. Section 201(a) of the TRIA, which governs post judgment attachment in some terrorism cases, provides, in relevant part:

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 a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality 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 been adjudged liable.

TRIA § 201(a) (codified at 28 U.S.C. § 1610 note) (emphasis added).

Sudanese assets in the United States are subject to such a block, pursuant to sanctions that began with Executive Order 13067 in 1997 and are now administered by OFAC and codified at 31 C.F.R. Part 538. Ordinarily, unless a plaintiff obtains a license from OFAC, he is barred from attaching assets that are frozen under such sanctions regimes. The Panel Opinion held that, based on previous statements of interest made by the United States, blocked assets that are subject to the TRIA may be distributed without a license from OFAC. *Harrison*, 802 F.3d 408-09.

The Panel Opinion framed the issue, however, as “whether § 201(a) of the TRIA and § 1610(g) of the FSIA, which authorize the execution of § 1605A judgments against state sponsors of terrorism, permit a § 1605A judgment holder to attach blocked Sudanese assets without a license from OFAC. *Id.* at 407-08.

The Panel Opinion should not have included the reference to § 1610(g) of the FSIA. Section 1610(g)(2) of the FSIA, while providing that certain property “shall not be immune from attachment,” does not contain the TRIA’s same broad “notwithstanding any other provision of law” language. Therefore, it does not override other applicable requirements, such as the requirement of an OFAC license before the funds may be transferred. To be clear, when the TRIA does not apply and the funds at issue are attachable by operation of the FSIA alone, an OFAC license is still required.

In this case, plaintiffs obtained a terrorism judgment from the D.C. District Court pursuant to § 1605A of the FSIA. The Southern District of New York then issued three turnover orders. The first two orders specified that they were issued pursuant to 28 U.S.C. § 1610(g) but did not mention the TRIA. Only the third order specified that assets were “subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002.” Joint App. at 76. While the district court did not explicitly discuss whether the funds at issue in the December 12 and 13, 2013 orders were subject to turnover pursuant to the TRIA, based on our review of the record,

which includes the complaint and judgment in the D.C. District Court proceedings, and the turnover petition and orders in the proceedings below, we conclude that the funds were subject to turnover pursuant to the TRIA. Plaintiffs have “obtained a judgment against a terrorist party on a claim based upon an act of terrorism,” the blocked assets are the assets of that terrorist party, and, accordingly, those assets “shall be subject to execution or attachment in aid of execution in order to satisfy [plaintiffs’] judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.” See TRIA § 201(a) (codified at 28 U.S.C. § 1610 note). Because the funds at issue in all three turnover orders were subject to turnover pursuant to the TRIA, plaintiffs were not required to obtain an OFAC license before seeking distribution.

* * * *

(3) Baker v. Nat’l Bank of Egypt

On September 28, 2016, the United States filed a statement of interest in *Baker v. Nat’l Bank of Egypt*, No. 12-7698 (S.D.N.Y.). The plaintiffs sought to attach blocked electronic fund transfers (“EFTs”) under TRIA in order to execute on a default judgment awarding compensation for a 1985 terrorist incident in which three Americans were shot and thrown from an Egypt Air plane onto a tarmac. The United States argued that plaintiffs’ “quitclaim” theory was contrary to applicable law. Excerpts follow from the U.S. statement of interest, which is available in full at <http://www.state.gov/s/l/c8183.htm>.^{***}

* * * *

The Second Circuit has held that, under New York property law principles, TRIA and/or the FSIA may permit attachment of EFTs that have been blocked midstream, but only if the foreign state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block. See *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1002 (2d Cir. 2014); see also *Hausler v. JP Morgan Chase, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014). Accordingly, under *Calderon-Cardona* and *Hausler*, Petitioners must establish that the foreign government or agency or instrumentality thereof transmitted the EFTs sought to be attached directly to a garnishee bank in order to show that the assets are attachable property under TRIA and the FSIA. As both parties agree, Petitioners cannot make such a showing here.

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].” See *Vera* Slip Op. at 2. 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. *Id.* at 2. HSBC stated that the blocked transfer was initiated by a Cuban bank, Banco Internacional de

^{***} Editor’s note: On March 8, 2017, the court issued an order denying the turnover petition, on the ground that the applicant did not satisfy the requirements that the Second Circuit has clearly recognized for turnover of EFTs.

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”). *Id.* at 3. 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. *Id.* at 4. Neither BICSA nor ING responded to the interpleader petition. *Id.* at 3.

In opposing the attachment motion in *Vera*, HSBC argued 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. *Vera Slip Op.* at 4-5. 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 or of its agency or instrumentality 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.*

The *Vera* court’s rejection of this argument was erroneous. The *Vera* 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.” Ex. A at 6. The court further 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.” *Id.* Thus, *Vera* appears to be premised on the unsupported assumption that where originating and intermediary banks “disclaim” interests 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. *Id.*

The reasoning in *Vera* conflicts with governing OFAC regulations, which the *Vera* opinion does not address. Under the Cuban Asset Control Regulations that governed in *Vera*, 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 section 515.310, 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.

The same holds true under the SSR, whose relevant provisions are functionally identical to those in the CACR described above. See 31 C.F.R. §§ 542.201(a) (prohibiting transfers involving property of Syria or its agencies or instrumentalities); 542.317 (defining “transfer” as including, among other things, the “surrender” or “release,” directly or indirectly, of any interest with respect to any property); 542.202(a) (any such attempted surrender or release would be “null and void”). Petitioners raise the same incorrect argument that Judge Hellerstein adopted in *Vera*—namely, that the originating banks waived their interest by failing to respond to the interpleader petition, that Commerzbank disclaimed any interest in the accounts Petitioners seek to attach here, and that this disclaimer renders the accounts attachable under TRIA and the FSIA. The United States takes no position as to whether Commerzbank ever purported to disclaim any interest in the EFTs at issue here, but, even if it did, then under the SSR, Commerzbank cannot surrender or release its interests in the blocked EFTs, nor can the originating banks waive their interest, as any attempt to do so would be “null and void.” See 31 C.F.R. § 542.202(a). Thus, the reasoning in *Vera* should not be adopted and applied here. *Vera* did not consider or analyze the impact of the CACR on intermediary banks’ purported attempt to “disclaim” or waive an interest in an asset subject to the regulations. The result it reached is erroneous, and contrary to the United States’ important interest in guarding against unauthorized dissipation of assets that are properly subject to its international sanctions programs.

* * * *

(4) Bennett v. Bank Melli

As discussed in *Digest 2015* at 396–400, in *Bennett v. Bank Melli*, Nos. 13-15442, 13-16100 (9th Cir. 2015), the United States filed a brief in response to a request for the United States’ views, which supported a petition for 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 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 owed to Bank Melli (an instrumentality of Iran) and held by institutions in the United States. The district court denied Bank Melli’s

motion to dismiss and a panel of the Ninth Circuit affirmed. In February 2016, the Ninth Circuit denied the petitions for rehearing or rehearing *en banc*, but issued a new, divided opinion affirming the court’s prior holding but with revised analysis and with one judge dissenting. Bank Melli again sought rehearing, and that petition was also denied in July 2016, although the majority issued another amended opinion. 825 F.3d 949 (9th Cir. 2016).****

(5) Weinstein v. Iran

As explained in *Digest 2015* at 497-502, the *Weinstein* case, before the U.S. Court of Appeals for the D.C. Circuit, raised the question of whether country-code top-level domains (“ccTLDs”) 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. Excerpts follow from the opinion of the court, issued August 2, 2016, affirming the district court’s dismissal of efforts to attach the ccTLDs. *Weinstein v. Iran*, 831 F.3d 470 (D.C. Cir. 2016). Additional excerpts appear in Chapter 11.

* * * *

[The Internet Corporation for Assigned Names and Numbers or] ICANN contends that, because the plaintiffs did not adequately establish an exception to attachment immunity under the FSIA, 28 U.S.C. §§ 1609–1611, the district court lacked subject matter jurisdiction to “execute against” the defendant sovereigns’ property. Appellee’s Br. at 39–40. ICANN is mistaken, however, about the jurisdictional nature of attachment immunity. Although the Supreme Court has never expressly addressed whether attachment immunity is jurisdictional, it has in dicta suggested otherwise. . . . In *NML Capital*, the Court referred to the first “kind of immunity” as “jurisdictional immunity” and the latter as both the “immunity defense” and “execution immunity.” 134 S.Ct. at 2256. We are without “substantial reason for disregarding” this distinction, *see ACLU of Ky.*, 607 F.3d at 447, and the majority of our sister circuits that have considered the issue are in accord, *see Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010) (“[S]overeign immunity from execution does not defeat a court’s jurisdiction”); *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 800 (7th Cir. 2011) (same). We follow suit and reject ICANN’s challenge to the district court’s subject matter jurisdiction.

**** Editor’s note: The Ninth Circuit’s holding in *Bennett* that §1610(g) contains “a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities,” 825 F.3d at 959, conflicts with the U.S. government view articulated in its *amicus* brief, as well as with the Seventh Circuit’s 2016 decision interpreting §1610(g), *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (2016). Petitions for writs of certiorari to the U.S. Supreme Court have been filed in both *Bennett* and *Rubin*. On January 9, 2017, the Court invited the Acting Solicitor General to file briefs in the two cases expressing the views of the government as to whether to grant those petitions.

* * * *

.... We assume without deciding that local law applies to the determination of the “attachability” of the defendant sovereigns’ ccTLDs. In addition, we assume without so holding that local law does not operate to bar attachment of the defendant sovereigns’ ccTLDs.

C. FSIA’S EXEMPTIONS TO EXECUTION IMMUNITY

Although attachment immunity is not “jurisdictional,” it is nonetheless a “default presumption” that the judgment creditor must defeat at the outset. *See Rubin*, 637 F.3d at 800; *see also Peterson*, 627 F.3d at 1125 (execution immunity begins with “presumption that a foreign state is immune and then the plaintiff must prove that an exception to immunity applies”); *see also* 28 U.S.C. § 1609 (defendant sovereign’s property “shall be immune ... *except* as provided in sections 1610 and 1611” (emphases added)). In particular, the plaintiffs *now* rely on one or more of three exceptions. The first is the terrorist activity exception, which provides in relevant part that

[T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g). The second is the commercial activity exception, which provides in relevant part that

The property in the United States of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State ... if the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

28 U.S.C. § 1610(a)(7). And the third exception the plaintiffs press to us is section § 201 of the Terrorism Risk Insurance Act (TRIA), which provides in relevant part that

[I]n 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 a terrorist party is not immune under section 1605A of [the FSIA] ..., 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 been adjudged liable.

28 U.S.C. § 1610 note.

To preserve an argument on appeal a party must raise it both in district court and before us. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 35 (D.C. Cir. 2014) (“[Plaintiff] does not renew [his FSIA exception] argument on appeal, so we do not consider it.”). The party must brief the issue with specificity. *See Railway Labor Executives' Ass'n v. U.S. R.R. Retirement Bd.*, 749 F.2d 856, 859 n.6 (D.C. Cir. 1984).

Regarding the terrorist activity exception, the plaintiffs made minimal reference thereto both in district court and in their opening appellate brief. In its motion opposing extended discovery, ICANN argued that “the FSIA divests this Court of subject matter jurisdiction,” ICANN’s Opp. to Pls.’ Mot. for Six-Month Discovery at 8, to which the plaintiffs responded, *inter alia*, that “Section 1610(g) [removes immunity from] property of a foreign state against which judgment is entered under 1605A,” and that “ICANN completely ignores Section 1610(g).” Reply in Supp. of Pls.’ Mot. for Discovery 19 & n.13. On appeal the plaintiffs noted that we have “federal question jurisdiction” under “28 U.S.C. § 1610” and included as an addendum the text of section 1610(g). Appellants’ Br. at 1, a3.

...Once a section 1605A judgment is obtained, section 1610(g) strips execution immunity from *all* property of a defendant sovereign. There is no genuine dispute that four of the plaintiffs’ judgments were entered or converted under 1605A. Granted, the plaintiffs must show that the assets in question are “property of” the foreign sovereign, 28 U.S.C. § 1610(g), whether Iran, North Korea or Syria. In our view, there is no additional “argument” that must be preserved. *See Odhiambo*, 764 F.3d at 35. To the extent the plaintiffs must establish that the data at issue are “property” that each defendant has at least *some* ownership interest in, those matters were the subject of additional discovery requests (ultimately deemed moot by the district court) and so it would be premature for us to decide that their attachability is forfeited on that basis. On appeal the plaintiffs included the exception in their opening brief addendum and this was sufficient to put both us and ICANN on notice that they continued to rely on that exception.

Four of the seven underlying judgments, *Haim II*, 784 F.Supp.2d 1 (D.D.C. 2011); *Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258 (D.D.C. 2003) (*Rubin*); *Wyatt v. Syrian Arab Republic*, 908 F.Supp.2d 216 (D.D.C. 2012); *Calderon–Cardona v. Democratic People’s Republic of Korea*, 723 F.Supp.2d 441 (D.P.R. 2010), were entered under section 1605A. ICANN, however, argues that “the plaintiffs presented no explanation or evidence” regarding these judgments. Appellee Br. at 49 (quotation marks omitted). We are at a loss to discern what “evidence” the plaintiffs would be required to show under ICANN’s approach, particularly given that ICANN does not appear to dispute that four judgments were entered under section 1605A. *Id.* at 50 (“[The terrorist activity exception] is clearly inapplicable to three of the seven underlying judgments at issue here.”). Therefore, the plaintiffs have not forfeited reliance on the terrorist activity exception to attachment immunity regarding the *Haim II*, *Wyatt*, *Rubin* and *Calderon–Cardona* judgments.

The two remaining exceptions are easily disposed of. There is no reference to the commercial activity exception in the plaintiffs’ opening brief notwithstanding ICANN vigorously contested in district court whether the three ccTLDs were “used for a commercial activity in the United States.” 28 U.S.C. § 1610(a); *see* ICANN’s Mot. to Quash at 18 (“ICANN is aware of no evidence that the [] ccTLDs are used for commercial activity of the defendants in the United States.”). The plaintiffs rebutted this assertion in district court, ... but on appeal they failed even to reference their objection in their opening brief. *See* Appellants’ Br. at 1–2 (“[I]ssues presented” includes only whether the assets are attachable property under D.C. law,

whether the district court erroneously failed to allow additional discovery and whether we should pursue certification to the D.C. Court of Appeals). Their failure to brief the issues in their opening brief amounts to forfeiture. *Odhiambo*, 764 F.3d at 35. Their reliance on the TRIA exception likewise merits no close analysis. Notwithstanding the section 1605A plaintiffs need only to identify “the blocked assets” of the defendant sovereigns under this exception, 28 U.S.C. § 1610 note, they failed to raise the issue in district court.

Finally, we consider the plaintiffs’ claim to the IP addresses under all of the three exceptions. The district court did not reach the IP addresses. The plaintiffs contend that its silence amounts to an abuse of discretion but the district court’s failure to discuss the IP addresses is easily explained. In their self-styled “preliminary response” to ICANN’s motion to quash and their accompanying motion for extended discovery, the plaintiffs only twice referenced the IP addresses—once to claim “ICANN has presented virtually no facts concerning its role in the distribution of IP addresses or the ownership and value of IP addresses” and once to claim that “ICANN’s Motion to Quash does not address the economic value of IP addresses.” By contrast, the plaintiffs’ same submissions (their preliminary response and their discovery motion) referenced the ccTLDs times, replete with allegations regarding ownership, monetary value and ICANN’s administrative role. In light of the plaintiffs’ omission of *any* argument touching on the IP addresses, the district court did not abuse its discretion in omitting to discuss them. On appeal, Amicus United States expressly doubted whether the plaintiffs had “preserved ... arguments about IP addresses,” Br. for United States as *Amicus Curiae* at 19, which assertion the plaintiffs left rebutted, *see* Br. for Appellants in Response to the United States as *Amicus Curiae*. We consider it waived on appeal. *See United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the *intentional relinquishment or abandonment of a known right.*”) (emphasis added and internal quotations omitted).

To sum up, those plaintiffs seeking to attach the underlying judgments in *Haim I*, *Weinstein* and *Stern* have forfeited their claims *in toto*. Those plaintiffs seeking to attach the underlying judgments in *Haim II*, *Rubin*, *Wyatt* and *Calderon–Cardona* have forfeited all but their claim grounded in the terrorist activity exception to attachment immunity.

* * * *

b. Post-judgment discovery into foreign state assets: Chabad

On February 3, 2016, the United States filed another statement 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 2015* at 419, *Digest 2014* at 410-13, *Digest 2012* at 319-23, and *Digest 2011* at 445-47 for discussion of previous statements of interest. 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 to Chabad. In 2013, the court imposed monetary contempt sanctions for Russia’s failure to make the transfer. In

2015, the court granted Chabad’s motion for an interim judgment of accrued sanctions of \$43.7 million.

The 2016 U.S. statement of interest pertains to efforts by Chabad to obtain discovery regarding Russian assets. Excerpts follow (with footnotes omitted) from the statement of interest, which is available in full (along with exhibits) at <http://www.state.gov/s/l/c8183.htm>.

* * * *

The discovery now being sought by Chabad about Russian assets is improper because it would not lead to the identification of any executable assets and thus is irrelevant as a matter of law. Moreover, efforts toward enforcement of monetary contempt sanctions, such as the restraint of funds, even temporarily, could cause significant harm to the foreign policy interests of the United States.

A. Discovery about Russian assets would not lead to the identification of any executable assets and is therefore improper

Discovery about Russian assets for purposes of enforcing the sanctions judgment is impermissible because Chabad is unable to attach any Russian assets held in the United States or abroad to satisfy that judgment, thereby rendering information about those assets irrelevant to post-judgment proceedings. A party is permitted to obtain through discovery only information that is “relevant” to its claim or defense. Fed. R. Civ. P. 26(b)(1); see also Fed. R. Civ. P. 69(a)(2) (allowing a judgment creditor to seek discovery “[i]n aid of the judgment or execution” but only “as provided in these rules or by the procedures of the state where the court is located”). As the Supreme Court has recognized, “information that could not possibly lead to executable assets is simply not ‘relevant’ to execution in the first place.” *NML Capital*, 134 S. Ct. at 2257 (2014). Subpoenas seeking information about a foreign sovereign’s assets that are immune from attachment should therefore not be enforced. See *id.*

Here, Chabad cannot execute against any Russian assets because (1) U.S. law precludes the enforcement of monetary contempt sanctions against a foreign state and (2) such contempt sanctions cannot be enforced outside of the United States. Accordingly, Chabad should not be permitted to seek discovery into Russian assets which, as a categorical matter, it is unable to attach.

1. U.S. law does not authorize enforcement of monetary contempt sanctions against a foreign state

Chabad should not be permitted to take discovery about Russian assets located in the United States because the FSIA does not authorize attachment of those assets for purposes of satisfying the sanctions judgment. The FSIA provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in United States courts. See *Arg. Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). “After the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.” *NML Capital*, 134 S. Ct. at 2256 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)).

A foreign state's property located in the United States is immune from attachment, arrest, or execution unless one of the narrow exceptions enumerated in the FSIA apply. See 28 U.S.C. § 1609; §§ 1610-11 (listing exceptions). The FSIA "explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution," *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). Indeed, this Court previously has noted that there is a distinction between the imposition of a sanctions order and a court's ability to enforce such an order, observing that the latter "is carefully restricted by the FSIA." See Mem. Op. on Contempt Sanctions, ECF No. 116 at 6; see also *FG Hemisphere*, 637 F.3d at 377 ("[I]t is not anomalous to divide . . . the question of a court's power to impose sanctions from the question of a court's ability to enforce that judgment through execution."). The limited nature of execution immunity under the FSIA reflects a deliberate policy choice on the part of Congress, which in enacting the FSIA "was primarily codifying pre-existing international and federal common law." See *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1234 (2d Cir. 1995). "Prior to the enactment of the FSIA, the United States gave absolute immunity to foreign sovereigns from the execution of judgments. This rule required plaintiffs who successfully obtained a judgment against a foreign sovereign to rely on voluntary repayment by that State." *Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007); see also *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) (noting that pre-FSIA practice "left the availability of execution totally up to the debtor state"). The narrow exceptions to execution immunity further reflect Congress' awareness that, "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002).

None of the exceptions to execution immunity set forth in the FSIA permit execution against Russian assets for purposes of satisfying the sanctions judgment; indeed, absent a specific waiver of immunity by a foreign state, it is doubtful that any order of monetary contempt sanctions could fall within any of the exceptions. Russia has not waived the immunity of its property from execution to allow enforcement of a sanctions judgment, rendering the exception at 28 U.S.C. § 1610(a)(1) inapplicable. . . . The sanctions judgment at issue here, as to which Chabad seeks discovery in aid of execution, while resulting from Russia's non-compliance with a default judgment ordering it to return certain property to Chabad, does not in and of itself grant any property rights to Chabad. Instead, it simply sanctions Russia for its non-compliance with the Court's specific performance order.

Accordingly, none of the FSIA exceptions to execution immunity permit attachment of Russian assets in the United States. See *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006), cert. dismissed, 549 U.S. 1275 (2007) (noting that §§ 1610-11 "do not present a situation in which the order [for monetary sanctions] could stand"). And because the FSIA precludes Chabad from being able to attach any Russian assets located in the United States, discovery into these assets should not be permitted. See *NML Capital*, 134 S. Ct. at 2257; *id.* at 2259 (Ginsburg, J., dissenting) (summarizing the majority's holding as prohibiting "inquiry into a foreign sovereign's property in the United States" where no immunity exception applies because such an inquiry does not satisfy the Rule 26(b)(1) relevancy requirement).

2. *The enforcement of monetary sanctions against Russia would not be permitted overseas*

Even assuming that it is appropriate for a litigant to use the U.S. legal system's discovery tools to locate extraterritorial assets of a foreign government to satisfy a judgment that is unenforceable in the United States, such discovery would be unwarranted in this case. Chabad should not be allowed to seek discovery through U.S. courts about Russian assets located abroad because attachment of those assets would be inconsistent with international practice. As the party seeking discovery, Chabad bears the burden of demonstrating that the information it seeks is relevant. . . . Chabad therefore must show that it would be permitted to execute on Russian assets located in other countries. International law and practice, however, do not support the imposition of penalties on foreign states for noncompliance with a court order, let alone permit litigants to take measures to enforce such penalties. Any effort by Chabad to attach Russian assets held abroad would be inconsistent with this widespread practice.

To the United States' knowledge, no foreign state has permitted enforcement of a sanctions judgment against property of another foreign state within the first state's territory. On the contrary, several countries have entered into international agreements affording foreign states broad grants of immunity or have enacted sovereign immunity laws on their own which bar the imposition of civil contempt sanctions. For example, thirty-four states—including Russia—have signed or ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property. That Convention states that “[a]ny failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act . . . shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.” U.N. 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) (emphasis added). Although the Convention has not yet entered into force, many of its immunity provisions, including Article 24, reflect current international norms and practice, and Article 24 was uniformly supported by the member states that helped negotiate the Convention. See Int'l Law Comm'n, Jurisdictional Immunities of States and Their Property, Comments and Observations received from Governments, U.N. GAOR Supp. No. 10, U.N. Doc. A/CN.4/410 (Feb. 17, 1988), available at http://legal.un.org/ilc/documentation/english/a_cn4_410.pdf. Similarly, the European Convention on State Immunity prohibits all execution against the property of a contracting state within the territory of another contracting state except where the former has “expressly consented thereto in writing in any particular case.” European Convention on State Immunity, Article 23 (E.T.S. No. 074) (entered into force on June 11, 1976). Nine states have ratified this Convention. *Id.*

In addition to these multilateral immunity agreements, some foreign states have codified laws placing restrictions on the execution of property of a foreign state and/or have enacted specific prohibitions on imposing sanctions on foreign sovereigns for failure to comply with an injunctive order. In total, more than forty states have affirmatively expressed support for a general prohibition on monetary contempt sanctions or non-consensual execution against property of foreign states, whereas no state has ever supported such an action, let alone permitted execution of monetary contempt sanctions to proceed. Given this uniformity in international practice, any effort by Chabad to identify and attach Russian assets located in foreign states on the basis of this Court's sanctions judgment would find no support in international practice. Consequently, Chabad should not be permitted to use discovery in this case—including the five

subpoenas it issued in December 2015—to obtain information about any assets that Russia may hold abroad.

B. Attempts to enforce monetary contempt sanctions could have significant adverse consequences for U.S. foreign policy interests

Not only would the discovery sought by Chabad be legally improper and irrelevant, but such enforcement efforts could have significant adverse consequences for the foreign policy interests of the United States. These efforts implicate “particular question[s] of foreign policy,” to which deference is owed to “the considered judgment of the Executive.” See *Republic of Austria v. Altman*, 541 U.S. 677, 702 (2004); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting that “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”). Indeed, this Court recently acknowledged “the serious impact which the outcome of this case could have on the foreign policy interests of the United States,” see Order Soliciting Views of the United States, *Chabad v. Russian Federation*, Misc. Case No. 15-01153-RCL (D.D.C.), ECF No. 27, and the discovery sought by Chabad, as well as any other enforcement efforts, could have significant adverse consequences for the foreign policy interests of the United States.

Judicial seizure of a foreign state’s property “may be regarded as ‘an affront to its dignity and may affect our relations with it.’” *Republic of Phil. v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Republic of Mex. v. Hoffman*, 324 U.S. 30, 35-36 (1945)). Indeed, the international community views “execution against a foreign state’s property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action.” *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d at 255-56. Any restraint of the assets of a foreign state, its agencies or instrumentalities, or its officials, in and of itself, can reasonably be expected to cause disruption to the activities of the entities whose assets are at issue and result in immediate and significant interference in U.S. relations with that foreign state.

Permitting Chabad to proceed with its present discovery efforts, or any other effort to enforce this Court’s judgments, would also result in other more specific harms. Such efforts are antithetical to the goal of securing the return of the Collection to Chabad, open the doors to reciprocal measures being taken against the United States by Russia, and would be out of step with international practice such that they could cause considerable friction with other foreign governments.

This Court previously has noted the difference between the entering of a sanctions order against a foreign state and enforcement of such an order. Mem. Op. on Contempt Sanctions, ECF No. 116 (observing that “the latter is carefully restricted by the FSIA”); see also Mem. Op. on Pl.’s Mot. for Interim J., ECF No. 143, at 3-5. Absent any restriction placed on Chabad, the enforcement stage of this proceeding is imminent. As noted above, on January 27, 2016, Chabad registered its interim judgment for \$43.7 million in sanctions accrued in the Southern District of New York, which positions Chabad to take immediate steps in that jurisdiction to enforce the sanctions order, including steps that do not require any further involvement of this Court. Under New York law, a judgment creditor such as Chabad is able to issue a restraining notice to a judgment debtor that prevents the debtor from transferring up to twice the judgment amount for as long as one year. See N.Y. Civ. Practice Law and R. § 5222(a)-(b). The process for issuing a restraining notice is similar to that for issuing a subpoena and does not require further litigation. *Id.* Thus, if Chabad were to obtain information about accounts held in the United States by any of the entities or individuals listed in the subpoenas, it may attempt to issue unilaterally a restraining notice temporarily freezing the transfer of money from such accounts. Given the broad

sweep of the subpoenas, it appears Chabad could seek to restrain accounts belonging not only to the Defendants but also to a wide array of Russian government instrumentalities, government officials, non-governmental entities, and Russian individuals that have no involvement in this litigation.

Several potential harms could flow from the restraint of Russian accounts or from Chabad taking any other type of enforcement action. As an initial matter, discovery into assets of Russian entities and individuals, as well as other enforcement steps, will significantly hinder the ability of the United States to facilitate a negotiated transfer of the Collection to Chabad. The United States has invested significant resources in diplomatic efforts over many years to resolve this dispute, and it continues to believe that out-of-court dialogue with Russia, rather than litigation, presents the best opportunity for ultimate resolution. See Letter dated February 2, 2016, from Katherine D. McManus, Deputy Legal Adviser, United States Department of State, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, United States Department of Justice (Attached as Exhibit B). Resolution of a long-standing dispute such as this, in which both sides have entrenched positions, typically takes an extended period of time, with small steps leading to larger breakthroughs and eventually resolution of the dispute. *Id.* at 2. By contrast, blunt coercive instruments, such as restraining Russian assets located in the United States, have the potential to delay resolution for years. *Id.* Indeed, Russian officials regularly have raised the instant litigation with their U.S. counterparts for several years, and they have done so with greater frequency, and at higher levels of the government, since this Court issued the sanctions order in 2013. *Id.* at 3. Russian officials have indicated in these discussions that they considered the sanctions to be a violation of Russian sovereignty and that Russia will not be pressured by such sanctions to enter into negotiations. *Id.* Rather than compelling Russia to return the Collection, enforcement actions are more likely to cause Russia to harden its position against transfer as well as lead to the further deterioration of U.S.-Russian relations overall. *Id.*

Further enforcement efforts, including disclosure of Russian assets in the United States, are likely to prompt Russia to take reciprocal measures against U.S. property and to justify such measures by asserting that U.S. courts violated international law first. As the United States advised the Court during the hearing on Chabad's Motion for Interim Judgment of Accrued Sanctions, see *Mots. Hr'g Tr.* 16:14-23, Aug. 20, 2015 (attached as Exhibit C), the Russian Ministry of Culture and the Russian State Library filed a civil lawsuit in Moscow against the United States and the Library of Congress seeking the return of seven books from the Collection that were lent to the Library of Congress in 1994. In May 2014, the Moscow court entered a judgment ordering the United States and the Library of Congress to return the books and imposing a \$50,000 fee for each day of noncompliance. See *Decision, Case No. A40-82596/13*, slip op. at 11 (Comm'l Ct. of Moscow May 29, 2014) (Russ.) (attached as Exhibit D). Furthermore, following this Court's entry of the interim judgment in September 2015, the Russian government sent a diplomatic note protesting that judgment and warning that any attempts to enforce it would lead to reciprocal countermeasures. See *Ex. B* at 3. It is possible that Russia might rely on recent legislation to take such steps. In November 2015, Russian President Vladimir Putin signed into law a bill concerning the jurisdictional immunity of foreign states and their property in Russia. Although the bill is generally consistent with the restrictive view of sovereign immunity, as reflected in the FSIA and the U.N. Convention on Jurisdictional Immunities of States and their Property, it contains a provision that permits Russian courts to limit the immunities of a foreign state and that state's property on the basis of reciprocity, depending on the treatment of Russia and Russian property in that foreign state. See *Russian*

Federation Federal Law On the Jurisdictional Immunities of Foreign States and the Property of Foreign States in the Russian Federation, art. 4 (attached as Exhibit E).

Finally, were the Court to permit the sweeping discovery into Russian property being sought by Chabad as part of its effort to enforce the sanctions judgment, it likely would cause friction with other foreign governments and could open the door to reciprocal orders being entered against the United States in foreign courts. Any constraint placed on property of the Russian entities named in the subpoenas in the context of this case would isolate the United States in the international community and raise doubts about the United States' respect for other foreign sovereigns. See Ex. B at 3. This friction could in turn embolden foreign courts to permit similar actions against the United States in foreign litigation. *Id.* The United States has a significant presence abroad, is frequently subject to litigation in foreign courts, and may on occasion decline to comply with orders entered by foreign courts for a variety of reasons. *Id.* For example, the United States recently declined to produce post-judgment discovery about its assets after a default judgment was entered by a trial court in Spain. *Id.* Because of this conduct, the Spanish court imposed monetary contempt sanctions and recommended that U.S. officials be subject to criminal proceedings. See *Montasa-Montajes e Instalaciones v. Gobierno Estados Unido de America*, No. 177/1997, slip op. at 2, S. Juz. Prim. (Rota), May 24, 2014 (Spain) (attached as Exhibit F). Although the trial court's decision was reversed on appeal upon a finding that the United States enjoys immunity from such sanctions, see *Montasa-Montajes e Instalaciones v. Gobierno Estados Unidos de America*, No. 177/1997, slip op. at 3, I Instancia n^o 1 Rota, Jan. 22, 2015 (Spain) (attached as Exhibit G), other foreign courts might be less willing to extend immunity if United State courts do not treat foreign states in like fashion. Consequently, allowing discovery here for the purpose of enforcing the monetary contempt sanctions for Russia's non-compliance with the specific performance order risks creating an adverse precedent that could subject the United States to similar adverse treatment abroad. See Ex. B at 3.

* * * *

On March 9, 2016, Chabad filed a motion to strike the February 3 U.S. statement of interest, asserting that the United States lacks standing to prevent its discovery efforts and that the court had rejected similar arguments previously as premature. Excerpts follow (with footnotes omitted) from the March 28, 2016 supplemental U.S. statement of interest responding to Chabad's motion to strike. The supplemental statement of interest is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

For the reasons that follow, the Court should reject Chabad's request for the two types of relief it seeks in its motion. The issues presented in the Statement of Interest are ripe for the Court's consideration and should not be stricken; moreover, the issues raised in the Statement of Interest provide a basis for foreclosing Chabad's discovery efforts. In addition, the Court should make clear that Chabad must comply with the FSIA by obtaining prior judicial authorization before it

attempts to restrain, attach, or execute on any property in connection with the sanctions order, including by issuing restraining notices as to particular accounts in its effort to enforce the sanctions judgment. Finally, should the Court decide to authorize discovery to proceed, the Court should reject Chabad's motion to rescind its prior order requiring Chabad to give the United States notice of its discovery efforts.

A. *The United States' concerns raised in the Statement of Interest are neither foreclosed by the Court's prior orders nor barred by case law*

Chabad contends that the issues raised by the United States in its Statement of Interest are foreclosed by this Court's prior rulings. It further claims that the United States' arguments run counter to the Supreme Court's ruling in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). Neither contention is accurate.

To begin, contrary to Chabad's assertion that the Court has already "authorized Chabad to move forward with discovery," this Court's prior rulings did not resolve questions related to discovery. While the Court has noted its intention to "give plaintiff some of the tools to which it is entitled under law," that statement was made in the context of its decision to issue the sanctions judgment. Mem. Op. in Supp. of Order Granting Mot. for Civil Contempt Sanction, ECF No. 116, at 7. That decision did not address questions relating to the propriety of Chabad's discovery efforts; indeed, that same day, the Court decided to solicit the United States' views before ruling on Sberbabnk USA's pending motion for a protective order, recognizing "the serious impact which the outcome of this case could have on the foreign policy interests of the United States." Order Soliciting Views of the United States, Case No. 1:15-mc-1153, ECF No. 27.

Chabad's contention that the subpoenas fall within the purview of permitted discovery under *Argentina v. NML Capital, Ltd.* is inaccurate. In *NML Capital*, a bondholder (NML) obtained a monetary judgment against Argentina after that country defaulted on its external debt. *NML Capital*, 134 S. Ct. at 2253. NML then served subpoenas on two banks in an effort to locate Argentinian assets, including assets held abroad. *Id.* Argentina moved to quash the subpoenas, contending that discovery into a foreign state's extraterritorial assets was not permitted under the FSIA, because such assets do not meet one of the exceptions to execution immunity delineated in § 1610. *Id.* at 2257. The Court rejected this argument, holding that the FSIA does not "specif[y] a different rule" for post-judgment discovery when the judgment debtor is a foreign state. *Id.* at 2256; see also *id.* n. 6 (noting that "[a]lthough this appeal concerns only the meaning of the [FSIA], we have no reason to doubt that, as NML concedes, 'other sources of law' ordinarily will bear on the propriety of discovery requests of this nature and scope.>").

Contrary to Chabad's assertions, *NML Capital* does not control the analysis of the propriety of Chabad's subpoenas. Unlike in the present case, there was no contention that asset discovery was categorically improper; rather, the question was whether the FSIA limits the scope of such discovery to assets as to which there is a reasonable basis to believe a statutory exception to immunity applies. See *id.* at 2256. By contrast, in this case it is clear that the sanctions judgment itself is unenforceable against any assets, and the contention is that no discovery is proper. In particular, none of the exceptions to execution immunity applies to the sanctions order Chabad is seeking to enforce, and thus the FSIA does not authorize attachment of any foreign state assets in the United States for purposes of satisfying that judgment. See Statement of Interest, ECF No. 151, at 7-11. Nor would enforcement of the sanctions order be permitted in any other country. *Id.* at 11-14. Consequently, because Chabad's subpoenas seek "only information that could not lead to executable assets in the United States or abroad," the

subpoenas here concern information that is not relevant to execution and they are not relevant under Federal Rule of Civil Procedure 26(a) as a result. See *NML Capital*, 134 S. Ct. at 2258.

Chabad erroneously claims that even if it were seeking only information that could not lead to executable assets, in that event, the United States should have no foreign policy concerns. Pl.'s Mot. to Strike at 11. To the contrary, a fishing expedition into a foreign state's assets as well as those of its officials and affiliated entities, in and of itself, can be expected to damage the United States' foreign policy interests, and such concerns are further heightened where the underlying judgment (here, for monetary contempt sanctions) is unenforceable. See Statement of Interest at 14 ("Permitting Chabad to proceed with its present discovery efforts . . . would also result in other more specific harms" to U.S. foreign policy.). As between these competing views of the United States' foreign policy interests, it is only those of the United States to which the Court owes deference. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

B. The United States' concerns are not premature and Chabad should be required to seek prior judicial review of any enforcement steps that would restrain, attach, or execute upon property in connection with enforcement of the sanctions order, including issuance of a restraining notice

The Court's prior decisions also do not fully address the United States' immediate concerns that any assets identified by the subpoenas not be restrained or attached without compliance with the advance judicial approval requirements of the FSIA. To be sure, the Court previously has stressed the difference it sees between issuing a sanctions order and enforcing such an order, noting that the latter is "carefully restricted by the FSIA." Mem. Op. in Supp. of Order Granting Mot. for Civil Contempt Sanction, ECF No. 116, at 6. The Court has also drawn a line demarcating where it views the enforcement stage of the case as commencing, stating that "concerns related to [] enforcement are premature until such time as plaintiff has identified property to attach and execute, provided notice to defendants of such attachment and execution, and given defendants 'reasonable time' to respond." Mem. Op. in Supp. of Order Granting Mot. for Interim J., ECF No. 143, at 4 (citing 28 U.S.C. § 1610(c)).

As set forth in the Statement of Interest, however, if Chabad is permitted to obtain the information it seeks via subpoena, then there is a risk that it could attempt to restrain Russian assets without further judicial consideration, thereby reaching, of its own accord, what the Court has described as the enforcement stage. This issue is properly considered now, before any discovery proceeds, as it may be the last opportunity to address the matter before an actual attempt to restrain assets. Under New York law, a judgment creditor (such as Chabad) is ordinarily able to issue—without a prior court ruling—a restraining notice to a judgment debtor that itself prevents the debtor from transferring funds up to twice the judgment amount for as long as one year. See N.Y. Civ. Practice Law and R. § 5222(a)–(b). Thus, if Chabad is able to obtain information about accounts held in the United States by the Russian entities or individuals listed in the subpoenas, it could invoke this provision of New York law in an attempt to freeze Russian accounts—including accounts belonging to Russian government instrumentalities, individuals, and non-governmental entities that have no involvement in this litigation—with no opportunity to challenge the hold until after the restraint is in place. Chabad acknowledges in its Motion to Strike the availability of restraining notices and avers generally that it intends to comply with the FSIA, but it does not specifically represent that it would refrain from availing itself of the restraining notice procedure without first obtaining court approval. This may therefore be the last opportunity for the Court to address the issues raised in the Statement of Interest, including the validity of the subpoenas, before Chabad seeks to place restraints on

Russian property or on property that is held by a person or entity associated with the Russian government.

Under the FSIA, the Court is obliged to make a determination—*sua sponte*, if necessary—that foreign state property is not immune before any attachment or enforcement can take place. See 28 U.S.C. §§ 1609, 1610(a), (c) (creating a presumption of immunity for foreign state property and requiring judicial review before permitting an order of attachment or execution); H.R. Rep. No. 94-1487, at 8, 27, 30 (1976), reprinted in U.S.C.C.A.N. 6604, 6606, 6626, 6629 (explaining that allowing a judgment creditor to attach or execute on a foreign state’s property simply by applying to the clerk or local sheriff “would not afford sufficient protection to a foreign state”); see also *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785–86 (7th Cir. 2011) (“The presumption of [execution] immunity also requires the court to determine—*sua sponte* if necessary—whether an exception to immunity applies; the court must make this determination regardless of whether the foreign state appears.”); *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) (“In light of the special sensitivities implicated by executing against foreign state property, courts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution *sua sponte*.”).

In a proceeding to obtain the requisite pre-execution court order under § 1610(c) of the FSIA, the judgment creditor bears the burden of identifying the particular property to be executed against and demonstrating that it falls within a statutory exception to immunity from execution. See *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011). Consequently, any attachment of property belonging to the Russian government, or to its agencies or instrumentalities, would be improper absent a prior judicial determination that Chabad has met its burden of demonstrating that such assets are not immune. See, e.g., *Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172 RRM MDG, 2011 WL 5245206, at *5 n.8 (E.D.N.Y. Nov. 2, 2011) (“[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 . . .”).

Particularly relevant to the circumstances of this case, courts have extended the prior-determination requirement to cover the issuance of restraining notices under New York law. See *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 256 (S.D.N.Y. 2000) (vacating restraining notice issued to foreign sovereign where judgment creditor failed first to obtain a § 1610(c) order), *aff’d*, 281 F.3d 48 (2d Cir. 2002); *Ferrostaal Metals Corp. v. S.S. Lash Pacifico*, 652 F. Supp. 420, 423 (S.D.N.Y. 1987) (“The *ex parte* restraining notices served [by the judgment creditor pursuant to N.Y. Civ. Practice Law and R. § 5222] are just the type of restraining notices against which § 1610(c) of the [FSIA] protects foreign states.”); *Trans Commodities, Inc. v. Kazakstan Trading House*, No. 96 CIV. 9782 (BSJ), 1997 WL 811474, at *3 (S.D.N.Y. May 28, 1997) (vacating restraining notice for lack of court order “specifically pass[ing] upon the propriety of the New York Restraining Notice,” even though a state court had issued an order permitting the judgment creditor to generally undertake attachment or execution against the foreign judgment debtor).

Moreover, this Court previously has insisted that “no attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required” See Mem. Op. Granting Mot. for Interim J. of Accrued Sanctions, ECF No. 143, at 3 (quoting 28 U.S.C. § 1610(c)). Thus, the law is clear that Chabad cannot restrain any

assets even temporarily without advance judicial approval. While the United States has not expressly indicated that it will seek a pre-enforcement order pursuant to § 1610(c) as to the propriety of issuing a restraining notice under New York law to restrain particular accounts in its effort to enforce the sanctions judgment. As the United States previously has explained, even a short-term freeze of Russian accounts could have serious repercussions for U.S. foreign policy interests, see Statement of Interest of the United States at 14–20, and there would be no opportunity to challenge the propriety of a restraining notice until after it is already in place. The Court therefore should now address and make clear that Chabad is required to seek judicial authorization in advance of any enforcement steps that restrain, attach, or execute upon Russian property, including the issuance of a restraining notice as to particular accounts.

C. *Chabad should continue to be required to provide the United States with same-day notice of its discovery efforts*

Chabad’s motion not only seeks to have the United States’ Statement of Interest stricken, but further requests that the Court rescind its order from September 10, 2015 requiring Chabad to provide the United States with same-day notice of its discovery efforts in connection with this Court’s judgments in this case. See Order, ECF No. 145, at 1–2. Should the Court be inclined to allow any discovery to proceed, this request should be denied.

The notice requirement is a crucial component of the United States’ ability to stay informed of developments in this case. As the United States previously has informed the Court, discovery into the assets of Russian entities and individuals could significantly hinder the ability of the United States to facilitate a transfer of the Collection to Chabad. See Statement of Interest at 17. In addition, if Chabad were to prevail in its quest for discovery, including by obtaining information about Russian assets in the United States, it would likely prompt Russia to take reciprocal measures against U.S. property held in Russia. *Id.* at 18–19. More broadly, authorizing sweeping discovery such as the subpoenas issued by Chabad here could cause friction with foreign nations other than Russia and could open the door to reciprocal orders being entered against the United States in foreign courts. *Id.* at 19. Notice of Chabad’s discovery efforts is a key mechanism by which the United States is able to stay abreast of any developments and take appropriate steps to seek to prevent or mitigate any harms.

The Court previously has stated that it “is sensitive to the[] foreign policy interests” of the United States in this case. See Mem. Op. in Supp. of Order Granting Mot. For Interim J., ECF No. 143, at 11. Indeed, even prior to the notice requirement being in place, the Court sought to ensure that the United States was aware of all related proceedings and had the opportunity to assert any interest it may have. See Mots. Hr’g Tr., Aug. 20, 2015, ECF No. 151-3, at 11:3–7 (directing Chabad to provide the United States with copies of a subpoena served on Sberbank CIB USA and a motion for a protective order filed by Sberbank CIB because the United States “may want to assert their interest in that as well”). If anything, the importance of notice of discovery efforts in this matter has only increased now that Chabad clearly has begun to move into the execution phase of the proceeding. For these reasons, the Court should retain the requirement of notice to the United States.

C. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

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

2. *Warfaa v. Ali*

As discussed in *Digest 2015* at 420-25, the U.S. Supreme Court denied the third petition for a writ of certiorari in *Samantar*. The Fourth Circuit Court of Appeals issued a decision in *Warfaa v. Ali* on February 1, 2016 that Ali was not immune from suit under the Torture Victim Protection Act ("TVPA") for the alleged torture and attempted extrajudicial killing of Warfaa, while dismissing claims under the Alien Tort Statute ("ATS") for war crimes and crimes against humanity. Ali filed a petition for certiorari, No. 15-1345, on the immunity question and Warfaa filed a conditional cross-petition, No. 15-1464, on the ATS question. On October 3, 2016 the Supreme Court invited the Solicitor General to file briefs on both petitions expressing the views of the United States.

3. Immunity of Former Defense Minister of Israel

On June 10, 2016, the United States filed a suggestion of immunity in the U.S. District Court for the Central District of California in *Doğan et al. v. Barak*, No. 2:15-CV-08130. The United States suggested the immunity of Ehud Barak, former defense minister of Israel. Plaintiffs sued after their son was killed by Israeli Defense Forces ("IDF"), alleging that Barak commanded the attack on the Gaza flotilla that led to their son's death. On October 13, 2016, the district court issued its decision, granting Barak's motion to dismiss the case on immunity grounds. Plaintiffs have appealed. Excerpts follow (with footnotes omitted) from the U.S. suggestion of immunity, which is available in full at <http://www.state.gov/s/l/c8183.htm>. The portions of the suggestion of immunity discussing claims under the Torture Victim Protection Act ("TVPA") are discussed in Chapter 5.

* * * *

In the absence of a controlling statute, the common law governing foreign official immunity constitutes a "rule of substantive law" requiring courts to "accept and follow the executive determination" concerning a foreign official's immunity from suit. *Hoffman*, 324 U.S. at 36; see

also *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (“When the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question.”)

The Court of Appeals for the Ninth Circuit consistently has acknowledged and followed this practice. See, e.g., *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1126 (9th Cir. 2010) (noting that if the Executive Branch filed a Suggestion of Immunity, “the district court dismissed the case for lack of jurisdiction”); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992) (“When the State Department issued a suggestion of immunity in a particular case, the court followed it”); *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990) (discussing pre-FSIA practice and noting that “the courts treated such ‘suggestions’ as binding determinations, and would invoke or deny immunity based upon the decision of the State Department”), abrogated by *Samantar v. Yousuf*, 560 U.S. 305 (2010); *Hassen v. Nahyan*, No. CV 09-01106 DMG MANX, 2010 WL 9538408, at *5 (C.D. Cal. Sept. 17, 2010) (“Because the State Department has [filed a Suggestion of Immunity], [the defendant] is entitled to immunity.”).

This Court should not follow the analysis of the Court of Appeals for the Fourth Circuit in *Yousuf v. Samantar*, which held that that while the Executive Branch’s determination regarding status-based immunity under the common law receives “absolute deference,” the Executive’s determination regarding conduct-based immunity is not controlling, but “carries substantial weight.” 699 F.3d 763, 773 (4th Cir. 2012). The Fourth Circuit’s approach constitutes legal error and cannot be reconciled with the Supreme Court’s decision in *Samantar*, which itself involved conduct-based immunity. The defendant in that case was a former Somali official. See *Samantar*, 560 U.S. at 308-09, 310 n.5. Under international law, former officials enjoy conduct-based immunities for official acts taken while in office. See, e.g., 1 *Oppenheim’s International Law* 1043–44 (Robert Jennings & Arthur Watts, eds., 9th ed. 1996). Yet, in concluding that Congress did not intend to alter “the State Department’s role in determinations regarding individual official immunity,” *Samantar*, 560 U.S. at 323, the Court made no distinction between status- and conduct-based immunity determinations.

And in discussing the Department of State’s historic role, the Supreme Court explained categorically that when the Department of State submitted a Suggestion of Immunity, a “district court surrendered its jurisdiction.” *Id.* at 311. Indeed, two of the cases cited by the Supreme Court in *Samantar* regarding foreign officials—*Heaney v. Government of Spain*, 445 F.2d 501, 504–05 (2d Cir. 1971), and *Waltier v. Thomson*, 189 F. Supp. 319, 320–21 (S.D.N.Y. 1960)—involved consular officials who had only 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, see *Samantar*, 560 U.S. at 322, the Supreme Court cited a third case, *Greenspan v. Crosbie*, ... (1976), in which the district court deferred to the Department of State’s recognition of conduct-based immunity of individual foreign officials...

* * * *

...After careful consideration of this matter, including a full review of the pleadings and other materials relied upon by Plaintiffs, the Department of State has determined that Barak is immune from suit. See Ex. 1 (Letter from Brian J. Egan, 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 Barak). All of Plaintiffs' claims challenge actions undertaken by Barak in his former role as Israeli Minister of Defense. Indeed, Plaintiffs allege that Barak "is sued in his personal capacity for acts taken in his official capacity." Opp'n to Def.'s Mot. to Dismiss at 25 (ECF No. 37) [hereinafter Opposition]. Plaintiffs note in their Complaint that Barak "held the position of Minister of Defense during the planning of the IDF operation," and contend that "[w]hile serving in that position[,] he planned and commanded the attack and interception of the Flotilla"—an operation that allegedly "resulted in the torture and extrajudicial killing of [their son]. ...

* * * *

4. Immunity of Rabbinical Judges and Administrator

As discussed in *Digest 2015* at 425-27, a state court in New Jersey accepted the U.S. suggestion of immunity and dismissed claims 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.). Ben-Haim appealed that decision in the appellate division of the Superior Court of New Jersey. The U.S. brief on appeal is excerpted below (with footnotes omitted) and available at <http://www.state.gov/s/l/c8183.htm>.

* * * *

I. UNDER CONTROLLING SUPREME COURT PRECEDENT, THE SUPERIOR COURT PROPERLY DISMISSED BEN-HAIM'S SUIT PURSUANT TO THE UNITED STATES' SUGGESTION OF IMMUNITY

A. The United States Constitution allocates the Nation's foreign-relations power to the federal government. See *Medellín v. Texas*, 552 U.S. 491, 511 (2008). "Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). And "[a]lthough the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). As an exercise of its foreign-relations powers, the Executive Branch has, historically, defined the principles governing a foreign state's immunity from suit in the United States, taking into account international law and the foreign-relations interests of the United States.

International law is composed, in part, of rules and principles governing the conduct of nation states. Restatement (Third) of the Foreign Relations Law of the United States, § 101 (1987) (Restatement). Although international law may take the form of a treaty or other formal agreement, it also consists of the "law of nations" or "customary international law," *i.e.*, uncodified rules and principles that "result[] from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2).

For centuries, principles of customary international law have specified the circumstances under which a state may be sued in the courts of another state. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (recognizing the immunity of a French warship from suit *in rem* under then-prevailing customary international-law norms). The United States' failure to respect the customary international-law limitations on suits against another state could have serious implications for the Nation's foreign relations. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (discussing category of law of nations "admitting of a judicial remedy and at the same time threatening serious consequences in international affairs"); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 840-41 (D.C. Cir. 1984) (discussing possible foreign policy consequences of overly expansive interpretations of customary international law governing foreign-state immunity). Suits against foreign states therefore directly implicate the federal government's exercise of the Nation's foreign-relations powers. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."). Suits against foreign officials raise the same concerns. See, e.g., *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895) ("[T]he acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.").

* * * *

B. In this case, the State of Israel sent diplomatic correspondence to the State Department, providing its view that Ben-Haim's claims relate to acts the individual defendants took in their capacities as governmental officials, and asking the State Department to recognize the immunity of the defendants from this suit. Pa155 (McLeod Letter). The State Department agreed that Ben-Haim's claims challenge the defendants' exercise of their powers as officials of the Government of Israel. Pa155-Pa156 (McLeod Letter). And, taking into account principles of immunity recognized by the Executive Branch and informed by customary international law, the State Department determined that the defendants are immune from Ben-Haim's suit. Pa156 (McLeod Letter). The United States conveyed that determination to the Superior Court in a suggestion of immunity. Pa147. The Superior Court accepted the immunity determination and dismissed Ben-Haim's suit. Pa162.

The Superior Court's order of dismissal was required by the applicable Supreme Court precedent and should be affirmed. See *Samantar*, 560 U.S. at 323; see also *Hoffman*, 324 U.S. at 35 ("It is * * * not for the courts to deny an immunity which our government has seen fit to allow.").

II. BEN-HAIM'S ARGUMENTS TO THE CONTRARY LACK MERIT

On appeal, Ben-Haim contends that the Superior Court erred in concluding that the United States' suggestion of immunity required dismissal of his suit against the Israeli official defendants, because the Executive Branch's determinations are not controlling if they involve conduct-based immunity or implicate peremptory *jus cogens* norms. Ben-Haim further argues that the State Department's immunity determination was mistaken and failed to take into account an opinion of the Attorney General of Israel, and that he was not permitted to respond to the suggestion of immunity. None of those arguments have merit.

* * * *

2. Ben-Haim further argues (Pb17-Pb20) that the Executive Branch's foreign-official immunity determinations are not binding in suits in which the foreign official is alleged to have violated *jus cogens* norms, *i.e.*, rules of international law that are "peremptory, permitting no derogation." Restatement § 102, cmt. k. Ben-Haim again relies on the Fourth Circuit's *Yousuf* decision for that proposition. After concluding that the Executive Branch's determination was not binding, the Fourth Circuit adopted the categorical rule that foreign officials cannot enjoy immunity for alleged violations of *jus cogens* norms because a state cannot officially authorize a violation of such a norm. *Yousuf*, 699 F.3d at 773-77. Ben-Haim's argument is incorrect for two reasons.

First, even if it were correct that a foreign official could not be immune from suit for an alleged violation of a *jus cogens* norm, Ben-Haim makes no attempt to show that the claims *he* asserts—aiding and abetting kidnapping, defamation, and intentional infliction of emotional distress—allege violations of *jus cogens* norms, nor is there any basis for such a contention. *Jus cogens* is "an elite subset of the norms recognized as customary international law." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992). Customary international law generally is based on state practice and consent: "A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm." *Id.* *Jus cogens* norms, by contrast, are binding on all states, regardless of their consent. *Id.* at 715-16. There are, however, only a very small number of norms that have been recognized by members of the international community as having the status of *jus cogens*, and there is not complete agreement even about which norms qualify. See Restatement § 102, reporters' n. 6 ("Although the concept of *jus cogens* is now accepted, its content is not agreed."). In any event, the norms on which Ben-Haim relies—prohibitions against aiding and abetting kidnapping, defamation, and intentional infliction of emotional distress—are not among the few norms considered by the international community as having *jus cogens* status. See, *e.g.*, Restatement § 702 & reporters' n. 11 (describing as *jus cogens* violations: genocide; slavery or slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination); see also, *e.g.*, *Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007) (holding that "parental child abduction" does not violate a *jus cogens* norm of customary international law).

Second, and fundamentally, the Fourth Circuit's *per se* rule of non-immunity is 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. The Executive Branch has not recognized the categorical rule adopted by the Fourth Circuit. In multiple cases, both before and after the Supreme Court's decision in *Samantar*, the Executive Branch has suggested immunity for foreign officials who were alleged to have committed acts that may constitute *jus cogens* violations. The courts deferred to the Executive Branch's suggestions of immunity in those cases. Accordingly, the Executive Branch's suggestion of immunity is controlling in this suit, regardless of whether Ben-Haim alleged *jus cogens* violations.

B. Ben-Haim's remaining claims are meritless.

1. Ben-Haim argues that the defendants' alleged acts are not official and so cannot be entitled to foreign-official immunity. He contends (Pb20- Pb23, Pb25) that the defendants' acts were taken on behalf of a religious tribunal and not on behalf of the State of Israel. But the State Department considered and rejected that very argument: "Although Plaintiff asserts that the rabbinical courts are religious, rather than judicial, institutions, the orders he complains of were

issued by courts of the State of Israel.” Pa156 (McLeod Letter) (citation omitted); see also Pa155-Pa156 (“By expressly challenging Defendants’ exercise of their official powers as employees of Israel’s rabbinical court system, [Ben-Haim’s] claims challenge Defendants’ exercise of their official powers as officials of the Government of Israel.”) (McLeod Letter). In light of the controlling nature of the Executive Branch’s immunity determination, there is no basis for Ben-Haim to second-guess the State Department’s evaluation of the nature of the defendants’ acts.

2. Ben-Haim contends that the State Department’s determination is mistaken and fails to take into account an opinion filed by the Attorney General of Israel in the Supreme Court of Israel in the litigation between Oshrat and Ben-Haim stemming from the rabbinical courts. ... As Ben-Haim characterizes it, the Israeli Attorney General’s opinion concludes that the defendants “lacked the authority to take the actions that [they] did against [Ben-Haim].” Pb22-Pb23. Those acts were therefore “outside of the law” (Pb23) he contends, and so could not qualify as “official acts” for which defendants could be immune (*id.*). There are two problems with that contention.

First, Ben-Haim mischaracterizes the Israeli Attorney General’s opinion. That opinion does say that the rabbinical courts lack the authority to require sanctions not authorized by statute. Israeli AG Op. ¶ 31. But the opinion expressly considered Ben-Haim’s argument “that the decision of the Rabbinical Court was granted *ultra vires*.” *Id.* ¶ 14. And it concluded that, while the rabbinical court could not require extra-statutory sanctions, “it may provide a non-obligating opinion of Jewish law as for the manner in which [Ben-Haim] should be treated, in light of his refusal to divorce his wife despite the ruling of the Rabbinical Court obliging him to do so.” *Id.* ¶ 7. And that is how the opinion characterized the third sanctions order, which is the basis of Ben-Haim’s current suit. See *id.* ¶ 33 (“Under these circumstances, the official decision of the rabbinical court dated July 31st 2012 must be viewed as a non-binding opinion of the court as to how [Ben-Haim] should be treated in light of [his] refusal to grant his wife a divorce, despite the ruling of the rabbinical court requiring him to do so.”). Thus, the Israeli Attorney General’s opinion on which Ben-Haim relies recognizes the third sanctions order as a valid (though non-binding) order of the rabbinical court.

More importantly, the Government of Israel formally communicated to the State Department its official view “that the claims in this case relate to the acts Defendants performed in their official capacities in the exercise of governmental authority.” Pa155 (McLeod Letter). And, after considering the matter, the State Department accepted that determination. Pa156. (McLeod Letter). Again, Ben-Haim has no basis to second-guess the State Department’s evaluation of the official status of the defendants’ acts.

3. Finally, Ben-Haim argues (Pb26) that he was not given the opportunity to present his views to the State Department, that the Executive Branch did not take into account the Israeli Attorney General’s opinion, and that he was not given an opportunity to respond to the suggestion of immunity. Those assertions, however, are incorrect. As was made clear at the hearing in the Superior Court, Ben-Haim submitted materials he believed relevant to the immunity determination to the State Department—at the State Department’s own invitation. Pa170 (1T13). After the United States filed the suggestion of immunity, the Superior Court continued the hearing to give Ben-Haim an opportunity to respond. Pa197(2T7-2T8). And after Ben-Haim subsequently raised the Israeli Attorney General’s opinion, the State Department reviewed the document and concluded that it did not alter the State Department’s determination concerning the defendants’ immunity from this suit. Pa170(1T14).

* * * *

D. HEAD OF STATE IMMUNITY

1. President and Foreign Minister of Burma

On February 12, 2016, the United States submitted a suggestion of immunity in a lawsuit against President Thein Sein and Foreign Minister Wunna Maung Lwin of Burma. *Burma Task Force v. Thein Sein*, No. 15 Civ. 7772 (S.D.N.Y. 2016). Excerpts follow (with footnotes omitted) from the suggestion of immunity. The submission in its entirety, including the Letter from Deputy Legal Adviser Katherine D. McManus to Principal Deputy Assistant Attorney General Benjamin C. Mizer, dated February 4, 2016, is available at <http://www.state.gov/s/l/c8183.htm>. The district court dismissed claims against the president and foreign minister on March 30, 2016. The court dismissed the entire case on July 21, 2016 after the plaintiffs failed to respond to its June 2, 2016 order to show cause in a written submission, to be filed by July 15, 2016, why the action should not be dismissed.

* * * *

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

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

* * * *

2. President and Prime Minister of Laos

On February 12, 2016, the United States filed a suggestion of immunity on behalf of President Choummaly Sayasone and Prime Minister Thongsing Thammavong of Laos. The portion of the U.S. submission relating to plaintiff's attempt to serve Laos is discussed in the FSIA section, *supra*. Excerpts follow (with footnotes omitted) from the U.S. suggestion of immunity and statement of interest, which is available in full (with referenced exhibits, including the February 8, 2016 letter from Deputy Legal Adviser McManus to Principal Deputy Assistant Attorney General Mizer) at <http://www.state.gov/s/l/c8183.htm>. Portions of the U.S. suggestion of immunity and statement of interest regarding the Laotian officials that are similar to the submission regarding the Burmese officials, which is excerpted above, are omitted below.

* * * *

The United States respectfully informs the Court of its interest in the pending claims against President Choummaly, Laos's sitting head of state, and Prime Minister Thongsing, its sitting head of government, and hereby informs the Court that both officials are immune from suit. 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 the sole authority to determine the immunity from suit of incumbent heads of state and heads of government. The interest of the United States in this matter arises from a determination by the Executive Branch, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, that President Choummaly and Prime Minister Thongsing are immune from this suit while in office. As discussed more fully below, this determination is controlling and is not subject to judicial review. Indeed, the United States is aware of no case in which a court has ever subjected a sitting head of state or head of government to suit once the Executive Branch has determined that he or she is immune.

Here, the Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the government of Laos has formally requested that the United States recognize President Choummaly's and Prime Minister Thongsing's immunity from this lawsuit. *See* Dep't of State Letter, *supra*. 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 Choummaly as a sitting head of state and Prime Minister Thongsing as a sitting head of government from the jurisdiction of the United States District Court in this suit." *Id.*

* * * *

Under the customary international law principles recognized and accepted by the Executive Branch, head of state immunity attaches to a head of state's or head of government's status as the current holder of his or her office. Because the Department of State has determined that President Choummaly and Prime Minister Thongsing enjoy immunity from the jurisdiction of U.S. courts in light of their current status as Laos's head of state and head of government, respectively, the claims against them should be dismissed.

* * * *

3. Emperor and Prime Minister of Japan

On February 11, 2016, the United States filed a suggestion of immunity on behalf of Emperor Akihito and Prime Minister Abe of Japan. *He Nam You v. Japan*, No. 15-03257 (N.D. Cal.). The U.S. submission also addresses service under the FSIA, and discusses the political question doctrine as applied in an earlier case in the D.C. Circuit. On February 26, 2016, the court dismissed as against Japan, the Emperor, and the Prime Minister. Excerpts follow (with footnotes omitted) from the U.S. suggestion of immunity, which is available in full (along with the letter from Deputy Legal Adviser McManus to Principal Deputy Assistant Attorney General Mizer) at <http://www.state.gov/s/l/c8183.htm>. The portions of the U.S. submission addressing the political question doctrine are excerpted in Chapter 5.

* * * *

The United States informs the Court of the interest of the United States in the pending claims against Emperor Akihito, the sitting Head of State of Japan, and Prime Minister Shinzo Abe, the sitting Head of the Government of Japan, and hereby informs the Court that both Emperor Akihito and Prime Minister Abe are immune from this suit. In support of its interest and determination, the United States sets forth as follows:

The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of sitting heads of state and of government. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize Emperor Akihito and Prime Minister Abe's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Thus, no court has ever subjected a sitting head of state or of government to suit once the Executive Branch has determined that he or she is immune.

The Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the Embassy of Japan has formally requested the Government of the United States to determine that Emperor Akihito and Prime Minister Abe are immune from this lawsuit. The Office of the Legal Adviser has further informed the Department of Justice that the

“Department of State recognizes and allows the immunity of Emperor Akihito as a sitting head of state and of Prime Minister Abe as a sitting head of government from the jurisdiction of the United States District Court in this suit.” Letter from Katherine D. McManus to Benjamin C. Mizer (copy attached as Exhibit A).

* * * *

Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state’s or head of government’s status as the current holder of the office. In this case, because the Executive Branch has determined that Emperor Akihito and Prime Minister Abe, as the sitting head of a foreign state and a foreign government, respectively, enjoy immunity from the jurisdiction of U.S. courts in light of their current status, Emperor Akihito and Prime Minister Abe are entitled to immunity from the jurisdiction of this Court over this suit.

* * * *

E. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Foreign Litigation

In 2016, the United States government’s immunity was addressed in multiple legal proceedings initiated by former employees of its consulates and embassies in foreign courts.

In *Andre Bahbah v. the United States*, Israel’s National Labor Court (the highest labor court in Israel), explicitly recognized that Israel’s Foreign State Immunities Act allows for a foreign state to retain immunity in labor cases involving locally engaged staff in “exceptional” circumstances that could change over time. The court found that the employee who brought suit had been dismissed on “authentic” national security grounds and the employee’s position was one of trust that involved sovereign functions. The court also found that such foreign sovereign immunity extends to defamation claims, including those that arise within the context of an employment relationship. Although the court reviewed the strong public policy interest in preserving labor rights, it found a countervailing strong interest, as expressed through the legislative history of the Immunity Law and in customary international law, in protecting sovereign immunity. Consequently, it held that sovereign immunity could apply to labor cases in certain limited circumstances, including when there are “authentic” national security considerations motivating dismissal.

The Vilnius Country Court issued a ruling on October 27, 2016 on a claim brought by former employee Paulius Markevicius against the U.S. Embassy in Lithuania after his security clearance was revoked. In the absence of briefing by the United States, the court looked to the UN Convention on Jurisdictional Immunities of States and Their Property (to which the United States is not a party and which has not yet entered into force) to identify customary international law principles regarding sovereign immunity.

The court reasoned that the nature of the claimant's position and the reason for his termination were related to the security interests of the United States. The court regarded the United States' declining to participate in the proceedings as tantamount to invoking sovereign immunity and that such immunity rendered the claims inadmissible in the court. The court reasoned that the claimant's position as a political specialist at the Embassy "suggests that he was not a technical employee of the embassy. The duties that the claimant performed would satisfy the criteria of a relationship of civil service relating to the exercise of the sovereign powers of the United States of America."

The Court of Cassation in Belgium issued a decision on October 28, 2016 reversing a lower court's decision that diplomatic immunity should not prevent a landlord from seeking payment of allegedly overdue rent and rental damage from the tenant, who was a member of the Permanent Mission of the United States to NATO. The Court of Cassation determined that the European Convention on Human Rights guarantee of access to court is not an absolute right, but can be constrained by the Vienna Convention on Diplomatic Relations and the Ottawa Agreement (The Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff, done at Ottawa, September 20, 1951, 5 UST 1087; TIAS 2992; 200 UNTS 3), which accords privileges and immunities to certain NATO personnel. The Court noted that the extension of privileges and immunities to diplomatic agents is essential for the functioning of diplomatic missions and to promote relations between States.

2. Determinations under the Foreign Missions Act

Effective December 30, 2016, the State Department prohibited entry and access to two facilities owned by the Government of the Russian Federation (one in Maryland and one in New York) pursuant to section 204(b) of the Foreign Missions Act (22 U.S.C. 4304(b)). 82 Fed. Reg. 5628 (Jan. 18, 2017). The denial of access to the two recreational facilities was "part of a comprehensive response to Russia's interference in the U.S. election and to a pattern of harassment of our diplomats overseas that has increased over the last four years, including a significant increase in the last 12 months." State Department December 29, 2016 press statement, available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266145.htm>. The Department also declared 35 Russian officials operating in the United States as *personae non grata* because they "were acting in a manner inconsistent with their diplomatic or consular status." *Id.* As described in the press statement, the harassment that was the basis for the Foreign Missions Act designation:

has involved arbitrary police stops, physical assault, and the broadcast on State TV of personal details about our personnel that put them at risk. In addition, the Russian Government has impeded our diplomatic operations by, among other actions: forcing the closure of 28 American corners which hosted cultural programs and English-language teaching; blocking our efforts to begin the construction of a new, safer facility for our Consulate General in St. Petersburg;

and rejecting requests to improve perimeter security at the current, outdated facility in St. Petersburg.

See Chapter 16 for discussion of sanctions imposed on December 28, 2016 on Russian persons for malicious cyber-enabled activities.

3. Enhanced Consular Immunities

Section 501 of the Department of State Authorities Act, Fiscal Year 2017, P.L. 114-323, codified at 22 U.S.C. §254c, amended the Diplomatic Relations Act (22 U.S.C. §254c) to include permanent authority for the Secretary of State to extend enhanced privileges and immunities to consular posts and their personnel. This authority was provided previously in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L. 114-113) (“FY 2016 SFOAA”). See *Digest 2015* at 436-37. Section 501(b) states:

(1) IN GENERAL.—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 on December 24, 1969.

(2)—CONSULTATION.—Before exercising the authority under paragraph (1), the Secretary of State shall consult with the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate regarding the circumstances that may warrant the need for privileges and immunities providing more favorable or less favorable treatment than is provided in the Vienna Convention.

F. INTERNATIONAL ORGANIZATIONS

1. *Georges v. United Nations*

As discussed in *Digest 2015* at 437-46, the U.S. District Court for the Southern District of New York decided in *Georges v. United Nations*, No. 13-7146 (2015), that the UN and UN officials were immune from a suit alleging their liability for a cholera outbreak in Haiti. See *Digest 2014* at 434-47 for discussion of the U.S. statement of in interest in the case. Plaintiffs appealed the district court’s decision. On August 18, 2016, the U.S. Court of Appeals for the Second Circuit issued its decision affirming the district court. Excerpts follow from the decision (with footnotes omitted).

* * * *

The principal question presented by this appeal is whether the fulfillment by the United Nations (“UN”) of its obligation under Section 29 of the Convention on Privileges and Immunities of the United Nations (the “CPIUN”), Apr. 29, 1970, 21 U.S.T. 1418, to “make provisions for appropriate modes of settlement of” certain disputes is a condition precedent to its immunity under Section 2 of the CPIUN, which provides that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity,” such that the UN’s alleged disregard of its Section 29 obligation “compel[s] the conclusion that the UN’s immunity does not exist.”

We hold that the UN’s fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity. For this reason—and because we find plaintiffs’ other arguments unpersuasive—we **AFFIRM** the January 15, 2015 judgment of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*) dismissing plaintiffs’ action against defendants the UN, the UN Stabilization Mission in Haiti (“MINUSTAH”), UN Secretary-General Ban Ki-moon (“Ban”), and former MINUSTAH Under-Secretary-General Edmond Mulet (“Mulet”) for lack of subject matter jurisdiction.

BACKGROUND

Plaintiffs are citizens of the United States or Haiti who claim that they “have been or will be sickened, or have family members who have died or will die, as a direct result of the cholera” epidemic that has ravaged the Republic of Haiti since October 2010. In this putative class action, plaintiffs seek to hold defendants responsible for their injuries, and to that end, assert various causes of action sounding in tort and contract against them.

Specifically, plaintiffs allege that, in October 2010, “[d]efendants knowingly disregarded the high risk of transmitting cholera to Haiti when ... they deployed personnel from Nepal to Haiti, knowing that Nepal was a country in which cholera is endemic and where a surge in infections had just been reported.” According to plaintiffs, defendants not only failed to test or screen these Nepalese personnel prior to their deployment, allowing them to carry into Haiti the strain of cholera that is the epidemic’s source; they also stationed them at a base on the banks of the Meille Tributary, which flows into the Artibonite River, the primary water source for “tens of thousands” of Haitians. From this base, defendants allegedly “discharged raw sewage” and “disposed of untreated human waste,” which “created a high risk of contamination.” Eventually, plaintiffs contend, “human waste from the base seeped into and contaminated the Meille Tributary” and, ultimately, the Artibonite River, “resulting in explosive and massive outbreaks of cholera... throughout the entire country.”

Defendants did not enter an appearance before the District Court. But on March 7, 2014, the executive branch of the United States government (the “Executive Branch”) submitted a statement of interest pursuant to 28 U.S.C. § 517, in which it took the position that defendants are “immune from legal process and suit” pursuant to the UN Charter, June 26, 1945, 59 Stat. 1031; the CPIUN; and the Vienna Convention on Diplomatic Relations (the “VCDR”), Apr. 18, 1961, 23 U.S.T. 3227.

The District Court agreed with the Executive Branch. Accordingly, on January 9, 2015, it dismissed plaintiffs’ action for lack of subject matter jurisdiction. With respect to the UN and MINUSTAH, the District Court relied on Section 2 of the CPIUN. To reiterate, Section 2 provides that the UN “shall enjoy immunity from every form of legal process except insofar as in

any particular case it has expressly waived its immunity.” The District Court reasoned that, because “no party contend[ed] that the UN ha[d] expressly waived its immunity,” the UN was “immune from [p]laintiffs’ suit.” With respect to Ban and Mulet, the District Court relied on Article 31 of the VCDR, which provides that “[a] diplomatic agent shall enjoy immunity ... from [a receiving State’s] civil and administrative jurisdiction,” except in circumstances undisputedly not presented here. The District Court concluded that, because Ban and Mulet both held diplomatic positions at the time plaintiffs filed their action, they were immune as well.

Plaintiffs timely appealed. Defendants did not enter an appearance before this Court either, but the Executive Branch “submit[t]ed an *amicus curiae* brief, pursuant to 28 U.S.C. § 517 ... , in [their] support.”

DISCUSSION

* * * *

On appeal, plaintiffs raise three principal arguments. First, they argue that the District Court erred in holding that the UN and MINUSTAH are immune because the UN’s fulfillment of its obligation under Section 29 of the CPIUN to provide for appropriate dispute-resolution mechanisms is a condition precedent to its Section 2 immunity. Second, they argue that the District Court’s holding was in error because the UN materially breached the CPIUN by failing to fulfill its Section 29 obligation, such that it is no longer entitled to the benefit of immunity under Section 2. Third, they argue that the District Court’s application of the CPIUN to dismiss their action violated their constitutional right of access to the federal courts. We address each argument in turn.

I. Condition Precedent

Plaintiffs’ first argument requires us to interpret the CPIUN, so we begin by describing the framework that governs any such inquiry. “The interpretation of a treaty, like the interpretation of a statute, begins with its text,” and “[w]here the language of ... [a] treaty is plain, a court must refrain from amending it because to do so would be to make, not construe, a treaty.” Additionally, because “[a]s a general matter, a treaty is a contract ... between nations,” it is “to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals.” Further, “while 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.”

Here, application of two particular “principles which govern the interpretation of contracts” demonstrates why plaintiffs’ first argument is unavailing.

The first such principle is *expressio unius est exclusio alterius*—“express mention of one thing excludes all others”—which is also known as the negative-implication canon. This principle has guided federal courts’ interpretations of treaties for over a century.

As noted above, Section 2 of the CPIUN provides that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” Especially when coupled with the compulsory “shall”—which “is universally understood to indicate an imperative or mandate”—Section 2’s “express mention of” the UN’s express waiver as a circumstance in which the UN “shall [not] enjoy immunity” negatively implies that “all other[]” circumstances, including the UN’s failure to fulfill its Section 29 obligation, are “exclude[d].” It necessarily follows that the UN’s fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity.

This conclusion is buttressed by the second principle of contract interpretation relevant to our analysis—that “conditions precedent to most contractual obligations ... are not favored and must be expressed in plain, unambiguous language.” To manifest their intent to create a condition precedent, “[p]arties often use language such as ‘if,’ ‘on condition that,’ ‘provided that,’ ‘in the event that,’ and ‘subject to.’ ” No such language links Sections 2 and 29 in the CPIUN. Of course, “specific talismanic words are not required.” But “there is [also] no ... [other] language [in the CPIUN] which, even straining, we could read as imposing” the UN’s fulfillment of its Section 29 obligation as a condition precedent to its Section 2 immunity.

It is also significant that the Executive Branch’s interpretation of the CPIUN—an interpretation “entitled to great weight”—accords with our own. The Executive Branch sees “[n]othing in Section 29 ... [that] states, either explicitly or implicitly, that compliance with its terms is a precondition to the UN’s immunity under Section 2.” Neither do we.

Plaintiffs’ arguments to the contrary are unconvincing. For example, plaintiffs argue that “[t]he UN’s post-ratification ... practice pursuant to ... Section 29 ... demonstrates that entitlement to immunity is premised on the provision of alternative dispute settlement.” Plaintiffs’ chief example of this supposed practice is the UN’s statement before the International Court of Justice that the UN’s immunity “*does not leave a plaintiff without remedy* [because] ... in the event that immunity is asserted, a claimant seeking redress against the Organization *shall* be afforded an appropriate means of settlement [under Section 29].” This statement, however, suggests at most that the UN views Section 29 as “more than merely aspirational”—as “obligatory and perhaps enforceable.” It does not in any way suggest that the UN views Section 29 as a condition precedent to Section 2.

Plaintiffs also argue that “foreign signatories to the CPIUN have repeatedly held that the availability of alternative dispute settlement is a material condition to international organizations’ entitlement to immunity,” and that “these foreign courts’ views provide persuasive authority for this case, per the direction of the U.S. Supreme Court.” This argument is misleading. The Supreme Court has indeed held that, “[i]n interpreting any treaty, the opinions of our sister signatories are entitled to considerable weight.” But in so holding, the Court was obviously referring to the opinions of states that are parties to the treaty that is being interpreted *regarding that same treaty*, not the opinions of states that happen to have ratified the treaty at issue *regarding another treaty entirely*. Most of plaintiffs’ examples fall into the latter category—they are cases from the courts of states that have ratified the CPIUN, but they pertain to unrelated agreements, including the agreement between France and the UN Educational, Scientific and Cultural Organization; and the agreement between Italy and the International Plant Genetic Resources Institute regarding its headquarters in Rome. Another of the plaintiffs’ examples appears to have involved the CPIUN, but the portion of the holding relevant to the plaintiffs’ argument is based on an interpretation of the state’s constitution rather than the CPIUN itself.

As we have seen, whether a term constitutes a condition precedent depends on the particular language of the instrument that is being evaluated. For the most part, plaintiffs have not suggested that the aforementioned agreements contain language that is even comparable—much less identical—to that found in Sections 2 and 29 of the CPIUN. Thus, plaintiffs’ reliance on cases interpreting those agreements is misplaced.

Plaintiffs do argue that the agreement between France and UNESCO, at issue in *UNESCO v. Boulois*, Cour d’Appel [CA] [Court of Appeal] Paris (Fr.), June 19, 1998, is “virtually identical” to the CPIUN. Notwithstanding textual similarities between the two treaties,

we do not find the French court's interpretation relevant to this case. The France-UNESCO agreement arose in a materially different context than the CPIUN: it is a bilateral agreement between France and UNESCO whereas the CPIUN is a multilateral treaty signed by a number of countries. That a French court interpreting an agreement between France and a UN agency found that the agreement required the establishment of an alternative forum for dispute resolution has little bearing on the interpretation of the CPIUN in this case.

For these reasons, we hold that the UN's fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity.

II. Material Breach

Plaintiffs next argue that "[t]he District Court's finding of immunity was erroneous ... because Section 29 is a material term to the CPIUN as a whole." According to plaintiffs, the UN's material breach of its Section 29 obligation means that it "is no longer entitled to the performance of duties owed to it under" the CPIUN, including its Section 2 immunity. We need not reach the merits of this argument, however, because plaintiffs lack standing to raise it.

As we have recently reiterated, "absent protest or objection by the offended sovereign, [an individual] has no standing to raise the violation of international law as an issue." The plaintiffs have not identified any sovereign that has objected to the UN's alleged material breach. To the contrary, the United States has asked us to affirm the District Court's judgment, and no other country has expressed an interest in this litigation.

It is true that there is an exception to this rule where a treaty contains "express language" "creat[ing] privately enforceable rights ... , or some other indication that the intent of the treaty drafters was to confer rights that could be vindicated in the manner sought by ... affected individuals," such as plaintiffs in this case. "[B]ut [plaintiffs have] not identified, nor can we locate," any such indication in the CPIUN, and "[s]tanding is therefore lacking."

It is plaintiffs' position that the case law described above is "inapposite." They contend that, "[r]egardless of whether a treaty provides an enforceable private right of action, individuals may invoke breach in a responsive posture." In support of this position, plaintiffs cite a law review article stating that "case law is consistent with [the] understanding that a treaty may be enforced defensively even when there is no private right of action." But the same article makes clear what it means by "defensive enforcement," which it contends "can be found in two types of cases": those in which a private party uses a treaty (1) "to defend against a claim by the United States government" or (2) "to defend against a claim by another private party under state or federal law." Neither of these situations is presented here. No claim has been asserted against plaintiffs; rather, it is plaintiffs who have asserted the claims underlying this action. Accordingly, plaintiffs' argument fails even on its own terms.

III. Right of Access to Federal Courts

Lastly, plaintiffs argue that the District Court erred "because it violated the U.S. citizen Plaintiffs' constitutional rights to access the federal courts by applying immunity in this case." This argument fails to convince.

As we stated in *Brzak v. United Nations*, in which we rejected a virtually indistinguishable challenge to an application of Section 2 of the CPIUN, plaintiffs' argument does little more "than question why immunities in general should exist." But "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." Plaintiffs' argument, if correct, would seem to defeat not only the UN's immunity, but also "judicial immunity, prosecutorial immunity, and legislative immunity."

Plaintiffs do not persuasively differentiate the quotidian and constitutionally permissible application of these doctrines from application of Section 2 of the CPIUN here.

* * * *

2. *Zuza v. OHR*

Zoran Zuza v. Office of the High Representative, et al., No. 16-7027, is before the U.S. Court of Appeals for the District of Columbia. The case concerns the circumstances under which international organizations and their personnel enjoy privileges and immunities under the International Organizations Immunities Act (“IOIA”), codified at 22 U.S.C. §288 et seq. The IOIA confers upon the President the authority to extend certain privileges and immunities to public international organizations. The Office of the High Representative (“OHR”), the Defendant in the lower court, was created as part of the Dayton Accords to help implement certain aspects of the settlement that led to the end of hostilities in Bosnia and Herzegovina. As discussed in *Digest 2015* at 450-53, the United States filed a statement of interest in the district court asserting the immunity of the individual defendants. The U.S. *amicus* brief filed in the Court of Appeals on November 17, 2016 argues that the district court correctly interpreted an amendment to the IOIA (codified at 22 U.S.C. §288f-7) to authorize the President to extend immunity to OHR and its officers and employees; that the President had validly done so by executive order; and that certain named officials of OHR had been duly notified to and accepted by the State Department as officers of the organization. Excerpts follow from the U.S. brief, which is available in full at <https://www.state.gov/s/l/c8183.htm>.

* * * *

A. Pursuant To Specific Statutory Authorization, The President Has Extended To The OHR The Immunity Provisions Of The International Organizations Immunities Act.

In 2010, Congress enacted an amendment to the International Organizations Immunities Act that authorized the President to extend statutory immunity to the Office of the High Representative and its officers and employees, and the President has done so. Analyzing the “plain text” of the 2010 amendment, the district court determined that Congress authorized the President to extend statutory immunity to the Office of the High Representative without requiring participation by the United States. *Zuza*, 107 F. Supp.3d at 95 (JA 9-10). Putting it differently, the court held that the amendment “waived section 1’s ‘participation’ requirement as to OHR.” *Id.* This reading of the statute was well founded and correct.

1. In order to be eligible for designation under the Immunities Act as originally enacted, an entity had to be an international organization in which the United States participates. Section 1 of the statute defines a qualifying “international organization” as “a public international organization” (a) in which “the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for

such participation,” and (b) “which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter.” 22 U.S.C. 288.

However, when Congress authorized the extension of statutory privileges, exemptions, and immunities to the Office of the High Representative in 2010, it exempted OHR from the original statutory participation requirement. The amendment expressly provides that the provisions of the Immunities Act may be extended to the Office of the High Representative “in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates,” and to officers and employees of the organization. 22 U.S.C. 288f-7. Pursuant to that authority, the President extended immunity to the Office of the High Representative by ordering that “all privileges, exemptions, and immunities provided by the International Organizations [Immunities] 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).

2. Mr. Zuza criticizes the district court’s interpretation, arguing principally that the lack of United States participation in the Office of the High Representative means that the Office of the High Representative and its officers and employees cannot be immune under the statute. ...The fact that the Office of the High Representative is not an international organization in which the United States participates ...is the main reason that Congress had to enact a specific provision for extending coverage of the Immunities Act to include the OHR.

The amendment explicitly provides that immunity may be extended to the Office of the High Representative to the same extent as it may be extended “to a public international organization in which the United States participates.” 22 U.S.C. 288f-7. As the district court correctly recognized, that plain language eliminates the participation requirement. Mr. Zuza objects to the district court’s characterization of the language as having “waived” the requirement of United States participation, *Zuza*, 107 F. Supp.3d at 95 (JA 10), and he argues that “Congress did not use the words ‘waive’ or ‘notwithstanding,’” Br. 43. But while Congress did not use the word “waive,” it did authorize immunity to the Office of the High Representative without requiring United States participation in the Office. In doing so, Congress eliminated the participation requirement for the Office. At bottom, Mr. Zuza fails to explain why, if the Office of the High Representative were to remain subject to the requirement in the original statute that the United States participate in the organization, Congress would have enacted a special provision authorizing the extension of immunity that did not change anything.

3. Mr. Zuza also contends that, because the 2010 amendment uses the passive voice (“may be extended”), it does not authorize the President to extend immunity. *Zuza* Br. 38-39. But the passive voice, by definition, has no subject, and if Mr. Zuza were correct, no one could extend the immunity. Indeed, in the Immunities Act, Congress identified the President as the official who extends immunity to an organization only in section 1; in all of the special provisions for organizations in which the United States does not participate (see note 1, *supra*), Congress did not identify the official who may extend the immunities to the organization. This consistent statutory practice confirms the district court’s proper conclusion that it is the President who has the authority to extend statutory immunity to the Office of the High Representative. In short, the district court was correct that the statutory language authorizes the extension of statutory immunity to the defendants in this case.

B. Both The Current And Former High Representatives Were Notified To And Accepted By The State Department.

The district court was also correct in holding that the current High Representative, Valentin Inzko, and the former High Representative, Paddy Ashdown, are immune as officers of the Office of the High Representative.

1. In district court, the United States filed a statement of interest attaching a letter from Clifton Seagroves, Acting Deputy Director of the Office of Foreign Missions at the Department of State, informing the court that both officials “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.” JA 104. That is, both have been “duly notified to and accepted by the Secretary of State as a representative, officer, or employee” of the Office of the High Representative. 22 U.S.C. 288e(a).

The individuals accorded statutory immunity do not have to be formally designated as officers or employees in the corporate sense; the district court was correct to use a functional approach. That approach is properly derived from the statutory language, which refers to the functions of an officer or employee. See 22 U.S.C. 288d(b) (officers and employees “shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions”). Moreover, this Court has previously suggested that a “functional necessity” approach should govern an inquiry into the official-capacity aspect of the statutory standard. *Tuck v. Pan American Health Org.*, 668 F.2d 547, 550 n.7 (D.C. Cir. 1981) (quoting *United States v. Enger*, 472 F. Supp. 490, 502 n.4 (D.N.J. 1978)). The definition of an officer or employee should be similarly accommodating of practical realities. See *Zuza*, 107 F. Supp.3d at 98-99 (JA 14-16). And in any event, whatever the scope of the term “officer,” the term would certainly have to apply to the Office’s chief officer, namely the High Representative.

2. Furthermore, the process of notification and acceptance may occur at any time before or during the litigation; it does not need to be completed before a suit is brought. The statute itself imposes no requirement of advance notification and acceptance. Other types of foreign-official immunity are routinely determined while a suit is pending. See, e.g., *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (per curiam) (determination of foreign head-of-state immunity based on suggestion of immunity filed by State Department after suit was brought). Advance notification and acceptance of all officers and employees of international organizations anywhere in the world would impose a significant burden on the United States government. There are numerous international organizations covered by the Immunities Act, with thousands of officers and employees located around the world, who, in most cases, will never be subject to suit in the United States. If advance notification and acceptance were required, the State Department would have to review notifications and issue acceptances, as appropriate, for all of these employees to confer immunity upon them in the unlikely event they might someday be sued in the United States. Nothing in the statute precludes the State Department from considering their eligibility for immunity only if and when they are actually named in a suit.

As the statement of interest filed in district court demonstrates, the two defendants here, Messrs. Ashdown and Inzko, have both been notified to and accepted by the Secretary of State. This brings them within the immunity provisions of the Immunities Act, absent a waiver of immunity by the Office of the High Representative. There has been no such waiver.

Mr. Zuza complains that the State Department letter is not authenticated ...and worries that private parties can “photoshop factitious contents onto White House letterhead” and fool the courts. ... But that unlikely scenario is not a basis for disturbing the decision here. In this case,

the United States, through counsel authorized to represent it in court, 28 U.S.C. 517, introduced the letter in response to a request from the district court. There can be no serious allegation that this letter is inauthentic.

3. Finally, an officer or employee does not lose statutory immunity after separating from the international organization. The text of the 2010 amendment confirms that the President may provide that statutory immunity of the Office of the High Representative continues even “after that Office has been dissolved.” 22 U.S.C. 288f-7; see also Exec. Order No. 13,568 ... For similar reasons, it is even more obvious that immunity for official acts must continue when the organization still exists and the officer has merely left a position... The notion that Mr. Ashdown’s immunity for official acts ended when he left office runs counter to three district-court decisions that have upheld the immunity of former officers or employees under the International Organizations Immunities Act. See *Zuza*, 107 F. Supp.3d at 99 (citing *Brzak v. United Nations*, 551 F. Supp.2d 313, 319-20 (S.D.N.Y. 2008); *D’Cruz v. Annan*, No. 05-cv-8918, 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534-35 (S.D.N.Y. 1994)). And Mr. Zuza’s reliance on the Supreme Court’s decision in *Samantar v. Yousuf*, 560 U.S. 305 (2010) (Zuza Br. 59), is inapt, because that decision assumed for purposes of argument that the acts of the former official that were at issue were taken in an official capacity. *Id.* at 314 (“The question we face in this case is whether an individual sued for conduct undertaken in his official capacity is a ‘foreign state’ within the meaning of the [Foreign Sovereign Immunities Act].”). Thus, Mr. Ashdown’s status as the former High Representative does not alter the immunity conferred by statute.

* * * *

3. *Koumoin v. Ban Ki-Moon*

On November 29, 2016, the United States government filed a statement of interest in U.S. District Court for the Southern District of New York in *Koumoin v. Ban Ki-Moon*, No. 16-2111, asserting the immunity of the UN and Secretary-General Ban Ki Moon. Plaintiff Koumoin filed the suit alleging discrimination and retaliation in the non-renewal of his employment contract with the UN. Excerpts follow (with footnotes omitted) from the U.S. statement of interest. On December 14, 2016, the district court issued its opinion dismissing the case for lack of subject matter jurisdiction based on the immunity of UN Secretary-General Ban. The statement of interest and opinion are available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

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 connexion [sic] with the Organization.” UN Charter art. 105, § 2. The UN Charter also provides that the UN General Assembly “may propose conventions to the Members of the United Nations” for the purpose of determining the “details” of the immunities enjoyed by the UN, representatives of

member states to the UN, and UN officials. *Id.* art. 105, § 3. The [Convention on the Privileges and Immunities of the United Nations, or] CPIUN, which the UN adopted shortly after the UN Charter, specifically 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. Because the CPIUN “is a self-executing treaty,” its provisions are “binding on American courts.” *Brzak*, 597 F.3d at 113.

In the United States, the privileges and immunities enjoyed by diplomats are governed by the Vienna Convention on Diplomatic Relations, which entered into force with respect to the United States in 1972. 23 U.S.T. 3227, T.I.A.S. 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—except with respect to: (a) privately owned real estate; (b) performance in a private capacity as an executor, administrator, heir, or legatee; and (c) professional or commercial activities outside of official functions. *See id.* art. 31, § 1. The purpose of diplomatic immunity under the Vienna Convention is “to protect the interests of comity and diplomacy among nations.” *Devi v. Silva*, 861 F. Supp. 2d 135, 143 (S.D.N.Y. 2012). Federal courts repeatedly have recognized the immunity of United Nations officials pursuant to the CPIUN and 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”); *Georges*, 84 F. Supp. 3d at 250 (dismissing suit against Secretary-General Ban because he “currently hold[s] [a] diplomatic position[]” and is thus “immune from Plaintiffs’ suit”); *see also* 22 U.S.C. § 254d (“Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, . . . or under any other laws extending diplomatic privileges and immunities, shall be dismissed.”).

Furthermore, Article V, Section 18(a) of the CPIUN 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.” CPIUN art. V, § 18(a). Under this provision, both current and former UN officials, regardless of rank, enjoy immunity from suit for all acts performed in their official capacities. *See Van Aggelen v. United Nations*, 311 F. App’x 407, 409 (2d Cir. 2009) (summary order) (applying this “functional immunity” to a UN official who did not “enjoy full diplomatic immunity”); *McGehee v. Albright*, 210 F. Supp. 2d 210, 218 (S.D.N.Y. 1999) (applying this immunity to then-Secretary-General Kofi Annan), *aff’d*, 208 F.3d 203 (2d Cir. 2000) (summary order); *see also De Luca v. United Nations Org.*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994) (recognizing that UN officials were entitled to immunity), *aff’d mem.*, 41 F.3d 1502 (2d Cir. 1994); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 371-73 (S.D.N.Y. 1996) (dismissing complaint against UN official for lack of subject matter jurisdiction because he was immune from suit under Article V of the CPIUN).

Because none of the three exceptions outlined in the Vienna Convention is relevant in the instant case, and because the UN has not waived the immunity of Secretary-General Ban in this matter, as discussed below, but has expressly asserted it, Secretary-General Ban enjoys immunity from suit, and this action should be dismissed for lack of subject matter jurisdiction.

B. The UN Enjoys Absolute Immunity

Plaintiff’s suit is also barred by absolute immunity if it is construed to be brought against the UN itself. 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 of its purposes.” UN Charter art. 105, § 1. The CPIUN 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.” CPIUN art. II, § 2.

As courts in this district have long recognized, the United States is a party to both the UN Charter and the CPIUN. *See, e.g., Brzak*, 597 F.3d at 111; *Sadikoğlu v. United Nations Dev. Programme*, No. 11 Civ. 0294 (PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011) (“The scope of immunity for the UN and its subsidiary bodies derives primarily from two multilateral agreements to which the United States is a party: the Charter of the United Nations . . . and the Convention on Privileges and Immunities of the United Nations”); *Askir*, 933 F. Supp. at 371. The United States understands Article II of the CPIUN to mean what it unambiguously says: the UN enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity.

To the extent there could be any alternative reading of the CPIUN’s text, the Court should defer to the Executive Branch’s 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 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 CPIUN and noting that, “in construing treaty language, ‘respect 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)) (brackets omitted)).

Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, so its views are entitled to deference. Consistent with the applicable treaty language and the Executive Branch’s views, courts repeatedly have recognized that “the UN is immune from suit unless it expressly waives its immunity.” *Georges*, 84 F. Supp. 3d at 249; *see also, e.g., Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (“Under the [CPIUN] the United Nations’ immunity is absolute, subject only to the organization’s express waiver thereof in particular cases.”); *Askir*, 933 F. Supp. at 371. Controlling Second Circuit authority recognizes the UN’s absolute immunity. *See Brzak*, 597 F.3d at 112 (“[T]he United Nations enjoys absolute immunity from suit unless ‘it has expressly waived its immunity.’” (quoting CPIUN art. II, § 2)).

Therefore, because there was no waiver in this case (as discussed below), the UN enjoys absolute immunity from suit, and this action should be dismissed as against the UN for lack of subject matter jurisdiction. *See Brzak*, 551 F. Supp. 2d at 318 (“[W]here, as here, the United Nations has not waived its immunity, the [CPIUN] mandates dismissal of Plaintiffs’ claims against the United Nations for lack of subject matter jurisdiction.”).

C. Neither Secretary-General Ban Nor the UN Has Waived Immunity

The CPIUN provides that the “Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the courts of justice and can be waived without prejudice to the interests of the United Nations.” CPIUN art. V, § 20. Far from waiving Secretary-General Ban’s immunity, the UN has expressly asserted that immunity this matter. Accordingly, Secretary-General Ban is entitled to immunity. *See, e.g., McGehee*, 210 F. Supp. 2d at 218 & n.7 (noting that the Under-Secretary-General for Legal Affairs for the UN “informed the Court that the United Nations is not waiving

its immunity in this action as to defendant [then-Secretary-General Kofi] Annan” and dismissing lawsuit against him on immunity grounds pursuant to the CPIUN and the IOIA).

Plaintiff argues that the UN, including Secretary-General Ban, has waived its immunity in this case because Plaintiff’s claims were allegedly accepted in a UN Dispute Tribunal and, allegedly, that final judgment is binding upon all parties. *See, e.g.*, Compl. ¶¶ 8-9 (asserting that, “in light of the binding character of the decisions rendered by the United Nations Dispute Tribunal . . . , the United Nations System can no longer claim immunity from service of process and from execution of UN-Tribunal final judgments”). This argument should be rejected.

There has been no express waiver of immunity in this matter. To the contrary, the UN has expressly asserted its absolute immunity and the immunity of Secretary-General Ban. In a letter dated June 20, 2016, Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, asserted with respect to this lawsuit: “Please be advised that the immunity of the Secretary-General has not been waived in respect of [this] case in the United States District Court for the Southern District of New York.” Exhibit A at 2; *see also id.* at 1 (requesting “the competent United States authorities to take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials”).

Plaintiff fails to identify any applicable waiver of immunity. While Plaintiff contends that he participated in an internal UN dispute-resolution process that purportedly resolved in his favor, this allegation is irrelevant to the question of waiver. As established by the CPIUN, any waiver of the UN’s absolute immunity from suit or legal process must be “express[.]” CPIUN art. II, § 2. Even if Plaintiff’s allegation that the UN Dispute Tribunal entered a decision in his favor were accurate, . . . the UN has not expressly waived its immunity with respect to the enforcement of such decisions.

Thus, Plaintiff’s claim that the UN Dispute Tribunal’s judgment was not properly implemented, or that internal UN dispute resolution mechanisms failed to effectively address his grievances, has no bearing on the question of the immunity of the UN and Secretary-General Ban or a waiver of that immunity. *See Brzak*, 597 F.3d at 112 (“Although the plaintiffs argue that purported inadequacies with the United Nations’ internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word ‘expressly’ out of the CPIUN.”); *see also Georges*, 84 F. Supp. 3d at 249 (holding that allegations of inadequacies with a UN dispute resolution program could not subject the UN to plaintiff’s suit, because doing so “would read the strict express waiver requirement out of the CPIUN”); *McGehee*, 210 F. Supp. 2d at 212 n.1, 218 (dismissing claim against immune then-Secretary-General Kofi Annan, notwithstanding the plaintiff’s 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).

The UN has not waived its immunity or that of Secretary-General Ban in this case. Thus, the UN and Secretary-General Ban enjoy immunity from suit, and this action should be dismissed for lack of subject matter jurisdiction.

D. Because Secretary-General Ban and the UN Are Immune, Plaintiff’s Attempted Service Was Ineffective

Consistent with its absolute immunity, the UN is also immune from service of legal process. *See* CPIUN art. II, § 2 (providing that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity”). In addition, the CPIUN specifically provides that the “premises of the United Nations shall be inviolable.” *Id.* art. II, § 3. Moreover, the Agreement Between the United Nations and the United

States Respecting the Headquarters of the United Nations (“Headquarters Agreement”), June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (entered into force Nov. 21, 1947), Article III, Section 9(a), provides that the “service of legal process . . . may take place within the headquarters district only with the consent of and under conditions approved by the [UN] Secretary-General.”

Secretary-General Ban has not consented to Plaintiff’s service of legal process within the headquarters district. Accordingly, Plaintiff’s attempts to serve the UN or Secretary-General Ban in New York, *see* Dkt. No. 10 ¶¶ 9-14, were ineffective, and any attempt to employ an alternative method of service would likewise be ineffectual. Plaintiff has thus failed to effect service on either the UN or Secretary-General Ban in light of their immunity, the inviolability of the premises of the UN, and the inviolability of the UN headquarters district.

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Cross References

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

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

He Nam You v. Japan, **Chapter 5.C.4.**

ILC's work on immunity, **Chapter 7.C.**

IACHR case regarding domestic workers of diplomats, **Chapter 7.D.1.b.**

Holocaust claims litigation (Scalin v. SCNF), **Chapter 8.C.**

Aviation v. United States, **Chapter 8.F.2.a.**

Alimanestianu v. United States, **Chapter 8.F.2.b.**

Diplomatic relations with Russia, **Chapter 9.A.4.**

Weinstein case regarding internet names as property under FSIA, **Chapter 11.G.2.**

Immunity of naval vessels, **Chapter 12.A.3.b.**

Sanctions in response to Russian interference in U.S. election, **Chapter 16.A.11.**