Chapter 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITY

1. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611, provides that, subject to international agreements to which the United States was a party at the time of enactment in 1976, a foreign state is immune from the jurisdiction of courts in the United States unless one of the specified exceptions in the statute applies. A foreign state is defined to include its agencies and instrumentalities but not the individual actors. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Before the enactment of the FSIA, courts abided by "suggestions of immunity" from the State Department. When no suggestion was filed, however, the courts would make the determination by applying principles derived from State Department practice.

In the FSIA Congress codified the "restrictive" theory of sovereign immunity, under which a state is entitled to immunity with respect to its sovereign or public acts, but not those that are private or commercial in character. The United States had previously adopted the restrictive theory in the "Tate Letter" of 1952, reproduced at 26 Dep't State Bull. 678 at 984–85 (1952). *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–15 (1976).

From the outset, the FSIA has recognized exceptions to immunity, notably commercial activity. Over time, amendments to the FSIA incorporated additional exceptions, including one enacted in 1996 for acts of terrorism in certain circumstances, which was repealed in 2008 and replaced with a more expansive provision. The FSIA's various statutory exceptions, set forth at 28 U.S.C. §§ 1605(a)(1)–(6) and § 1605A, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of 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 participates, if at all, as *amicus curiae*.

The following items describe a selection of the significant proceedings that occurred during 2009.

a. Scope of application of the FSIA

On February 10, 2009, the U.S. Court of Appeals for the Sixth Circuit withdrew a 2008 opinion and issued an amended opinion affirming a district court order dismissing some claims and allowing others to proceed in a putative class action against the Holy See. *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009). Although the United States recognizes the Holy See as a foreign government, the plaintiffs, who alleged sexual abuse by Catholic priests in the United States, argued that they could invoke federal jurisdiction over the Holy See without relying on the FSIA by virtue of the Holy See's status as the head of the Roman Catholic Church. On appeal, the plaintiffs also alleged that the FSIA was unconstitutional as applied to the Holy See.

The United States participated in the appeal as *amicus curiae* to defend the executive branch's recognition of the Holy See as a foreign government and to argue that the Holy See can be sued only as authorized by the FSIA. The United States also intervened in the litigation to defend the constitutionality of the FSIA, as applied to the Holy See. *See* 28 U.S.C. § 2403(a). The U.S. brief, filed on September 17, 2007, is available at *www.state.gov/s/l/c8183.htm*.

In affirming the district court, the Sixth Circuit rejected the plaintiffs' argument that they could sue the Holy See outside the FSIA and also determined that the plaintiffs had waived their constitutional challenge by failing to present it to the district court. Excerpts from the court's opinion follow, providing factual background and analyzing the applicability of the FSIA generally. (Footnotes and citations to other submissions in the case are omitted.) For the court's analysis in holding that, while the commercial activity exception of the FSIA did not apply to the case, certain portions of the plaintiffs' claims fell within the non-commercial tort exception of the FSIA, see A.1.b.(1)(i) and A.1.b.(2)(i) below, respectively. The Supreme Court denied certiorari on October 5, 2009. *O'Bryan v. Holy See*, 130 S. Ct. 361 (2009).

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On June 4, 2004, plaintiffs, who claim to have been victims of sexual abuse by Roman Catholic clergy, filed a class action suit against the Holy See. The Holy See is both a foreign state and an unincorporated association and the central government of an international religious organization, the Roman Catholic Church. . . .

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Plaintiffs' claims regarding the liability of the Holy See stem, in large part, from their allegations regarding the purported policy of the Holy See towards accusations of sexual abuse leveled against clergy:

> [T]he Holy See has mandated that all allegations of childhood sexual abuse be kept under a cloak of complete secrecy, even if that secrecy violated state, federal, or international law. In March, 1962, the Holy See privately circulated a document containing a set of procedural norms for dealing with the solicitation of sex in confession, clergy sex with minors, homosexual relations, and bestiality. This document [the "1962 Policy"]—an official legislative text issued by the Congregation of the Holy Office and specifically approved by Pope John XXIII—imposes the highest level of secrecy on the handling of clergy sexual abuse matters. . . . This secret document was first discovered and made public in July, 2003 by news media in the United States and throughout the world. The policies of the Holy See expressed in this and other documents require bishops in the United States to, among other things, refuse to report childhood sexual abuse committed by priests to criminal or civil authorities, even where such failure to report would itself be a criminal offense.

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In this case, there is no dispute that the United States recognized the Vatican in 1984, and there is no dispute between the parties that the *State of the Vatican* is a foreign state within the meaning of [the] FSIA. . . .

Plaintiffs, however, contend that the "Holy See . . . . *as the head of the Roman Catholic Church*, . . . has no defined territory and no permanent population, and thus does not" satisfy the definition of "foreign state" under the Restatement's standard.

Plaintiffs' argument remains somewhat obscure. . . . The first possible interpretation of plaintiffs' argument is that they ask this court to conceive of the Holy See as two separate entities—first, a foreign sovereign, recognized by the United States government, and second, an unincorporated head of an international religious organization. Alternatively, they ask this court not to consider the Holy See, a single entity, a foreign sovereign in this case because the Holy See was acting in a non-sovereign capacity when it engaged in the conduct alleged in plaintiffs' complaint.

Plaintiffs' argument fails under either construction. With respect to the first alternative—the two-entity alternative—the district court correctly noted that "[p]laintiffs cite no authority for the proposition that the Holy See may be sued in a separate, non-sovereign function as an unincorporated association and as head of an international religious organization." *O'Bryan* [*v. Holy See*], 490 F. Supp 2d [826,] 830 [(W.D. Ky. 2005)]. To the contrary, courts have generally treated the Holy See as a foreign state for purposes of the FSIA. . . . Consequently, we reject plaintiffs' contention that they are not suing the Holy See that has been recognized by the United States government, but a parallel non-sovereign entity conjured up by the plaintiffs.

The structure and intent of the FSIA also counsel us to reject the plaintiffs' alternative capacity approach. As the Supreme Court has explained, by enacting [the] FSIA, Congress intended to adopt the "restrictive theory" of sovereign immunity, "under which 'the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).'" *Permanent Mission of India to the U.N. v. City of New York*, 127 S. Ct. 2352, 2357 (2007) (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976)).

In order to implement the "restrictive theory" of sovereign immunity and limit immunity to sovereign acts but not private acts, Congress crafted exceptions to [the] FSIA. *See* 28 U.S.C. 1605(a). . . . In this way, Congress constructed the FSIA to immunize foreign sovereigns acting in a

public capacity, while ensuring that essentially private activities would be actionable under the FSIA exceptions.

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. . . [I]f plaintiffs believe that the Holy See acted in a private capacity, then the plaintiffs are limited to arguing that an exception to the FSIA applies; such claims cannot serve as reasons to avoid the FSIA altogether. The exceptions to FSIA capture all instances where Congress has deemed conduct, if pursued by a foreign sovereign, sufficiently private so as to eliminate foreign sovereign immunity. In turn, the alternative-capacity argument can only succeed to the extent that it identifies conduct that fits within one of the exceptions outlined under FSIA. *See* 28 U.S.C. § 1605(a).

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b. Exceptions to immunity

(1) 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 upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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."

(i) O'Bryan v. Holy See

In *O'Bryan v. Holy See*, discussed in A.1.a. *supra*, the U.S. Court of Appeals for the Sixth Circuit held that the commercial activity exception to state immunity did not provide jurisdiction in a suit brought against the Holy See in connection with alleged sexual abuse by Catholic priests in the United States. Excerpts follow from the court's analysis in finding the commercial activity exception inapplicable (footnote omitted).

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. . . "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). In addition, "the commercial activity relied upon by plaintiff for jurisdictional purposes must be also the activity upon which the lawsuit is based; that is, there must be a connection between that activity and the act complained of in the lawsuit." *Gould*[,

Inc. v. Pechiney Ugine Kuhlmann], 853 F.2d[, 445,] 452 [(6th Cir. 1988)] (citing *Riedel v. Bancam, S.A.*, 792 F.2d 587, 591 (6th Cir. 1986)).

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The analysis in [*Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992)] and [*Saudi Arabia v. Nelson*, 507 U.S. 349 (1993)] points to two distinct limitations on the application of the commercial activity exception. First, the activity must be of the type in which private individuals engage; if the activities in question are not private, but sovereign in nature, then the commercial activity exception will not apply. . . .

Second, the *Weltover* and *Nelson* cases also instruct courts to avoid the artful pleading of plaintiffs and look to the core of the activities alleged to be commercial in nature. . . .

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Both limiting principles apply to plaintiffs' attempt to invoke the commercial activity exception . . . . On one front, all of the claims advanced by plaintiffs stem from the promulgation of the purported 1962 Policy by the Holy See. Indeed, . . . plaintiffs themselves emphasize the force of the purported policy and the potential for sanction if Holy See employees chose not to comply.

In addition, the gravaman of plaintiffs' claims is the tortious conduct of priests which was allegedly facilitated by the tortious conduct of Holy See employees. Thus to allow plaintiffs to obtain jurisdiction under the commercial activity exception through a semantic ploy would allow them to "obtain jurisdiction over a claim that Congress did not intend to be brought against a foreign sovereign." *See Leutwyler* [*v. Office of Her Majesty Queen Rania Al Abdullah*], 184 F. Supp. 2d [277,] 299 [(S.D.N.Y. 2001)]. We therefore conclude that the commercial activity exception does not apply.

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(ii) Swarna v. Al-Awadi

See discussion below in B.2.b.(1).

(iii) Cause of action under customary international law

On November 20, 2009, the U.S. District Court for the District of Columbia issued its decision in long-running litigation arising from a claim that Iran expropriated property belonging to an American company during the 1979 Revolution. *McKesson Corp. v. Islamic Republic of Iran,* 2009 U.S. Dist. LEXIS 109368 (D.D.C. 2009). McKesson originally brought suit in 1982 alleging that Iran had unlawfully expropriated its dividends and interests in Pak Dairy, an Iranian dairy company. In 2008 the U.S. Court of Appeals for the District of Columbia Circuit held that McKesson did not have a cause of action under the U.S.-Iran Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, 8 U.S.T. 899, 903 ("Treaty of Amity") and remanded the case to the district court to address three issues: (1) whether

McKesson had a cause of action under Iranian law; (2) whether, in light of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), McKesson had a cause of action under customary international law; and (3) whether the act of state doctrine applied. *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485 (D.C. Cir. 2008). The D.C. Circuit also held that the district court properly found jurisdiction under the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2). *Id*. For additional background on the litigation, see *Digest 2002* at 219-26 and 519-22; *Digest 2003* at 258-67; and *Digest 2008* at 155-58.

On September 28, 2009, at the request of the court, the United States filed a Statement of Interest in the case. Noting the FSIA's legislative history and the text of the commercial activities exception, the United States recommended that the court find that "a plaintiff may not maintain a federal common law cause of action based on customary international law in a suit where jurisdiction is premised on the commercial activities exception within the FSIA." The U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

In its November 2009 decision, the D.C. District Court disagreed with the United States and held that McKesson had "an implied cause of action under customary international law for expropriation." *McKesson Corp. v. Islamic Republic of Iran*, 2009 U.S. Dist. LEXIS 109368, at *19. In reaching that conclusion the court stated, "Congress enacted the commercial activities exception [of the FSIA] on an understanding that courts would apply causes of action based on customary international law." *Id*. at *13. The court also held that McKesson had a cause of action under Iranian law and that the act of state doctrine did not apply. *Id*. at *19. As of the end of 2009, further proceedings remained ongoing before the district court.

(2) Non-commercial tort exception

Section 1605(a)(5) of the FSIA provides that a foreign state is not immune from suit in any case:

> not otherwise encompassed in [the exception for commercial activity], in which money damages are sought against a foreign state 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 that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) O'Bryan v. Holy See

In *O'Bryan v. Holy See*, discussed in A.1.a. and A.1.b.(1)(i) *supra*, the U.S. Court of Appeals for the Sixth Circuit held that the non-commercial tort exception of the FSIA provided jurisdiction over certain claims in a suit brought against the Holy See in connection with alleged sexual abuse by Catholic priests in the United States. Excerpts follow from the court's analysis of the elements of the non-commercial tort exception to immunity (footnotes omitted). *See also* the discussion of *Swarna v. Al-Awadi* in B.2.b.(1).

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i. Elements of the Tortious Act Exception

(a) "Occurring in the United States"

"Section 1605(a)(5) is limited by its terms . . . to those cases in which the damage to or loss of property occurs in the United States." *Amerada Hess Shipping Corp.*, 488 U.S. at 439 (emphasis omitted). Thus, in contrast to the commercial activity exception, a tortious act having "direct effects" in the United States will not satisfy the requirements of the tortious activity exception. *Id*. at 441. . . .

We join the Second and D.C. Circuits in concluding that in order to apply the tortious act exception, the "entire tort" must occur in the United States. This position finds support in the Supreme Court's decision in *Amerada Hess Shipping*: "the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States." 488 U.S. at 441. Moreover, the purpose of the tortious activity exception is limited: "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Id*. at 439–40 (citing H.R. Rep., at 14). Thus, it seems most in keeping with both Supreme Court precedent and the purposes of the FSIA to grant subject matter jurisdiction under the tortious activity exception only to torts which were entirely committed within the United States.

(b) Caused by an Act or Omission

In Kentucky, "[l]iability for a negligent act follows a finding of proximate or legal cause," which is defined as "a finding of causation in fact, i.e., substantial cause, and the absence of a public policy rule of law which prohibits the imposition of liability." *Deutsch v. Shein*, 597 S.W.2d 141, 143–44 (Ky. 1980). . . .

(c) Official or Employee of a Foreign State

Kentucky law appears to have adopted the Restatement (Third) of Agency § 7.07 definition of employee when addressing claims of vicarious liability: "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work . . . ." *Papa John's Int'l, Inc. v. McCoy*, 2008 Ky. LEXIS 16, at *16 (Ky. 2008) (quoting Restatement (Third) of Agency § 7.07). . . .

(d) Scope of Employment

"State law, not federal common law, governs whether an officer's or employee's action is within the scope of employment in determining the applicability of the FSIA." *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994). . . . Because the conduct alleged by the named plaintiffs occurred in Kentucky, Kentucky law applies to the instant case.

Under Kentucky law, for alleged conduct to be considered within the scope of employment "the conduct must be of the same general nature as that authorized or incidental to the conduct authorized." *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000). Thus, "[u]nder the doctrine of respondeat superior, an employer can be held vicariously liable for an employee's tortious actions if committed in the scope of his or her employment." *Papa John's Int'l*, 2008 Ky. LEXIS 16, at *28–*29. "In the area of intentional torts, the focus is consistently on the purpose or motive of the employee in determining whether he or she was acting within the scope of employment." *Id*. at *29. However, "[a] principal is not liable under the doctrine of respondeat superior unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment." *Osborne*, 31 S.W.3d at 915. Applying these principles, the Kentucky Supreme Court ruled that a priest's adulterous conduct could not be considered within the scope of his employment, even though the underlying conduct was intentional. *Osborne*, 31 S.W.3d at 915.

ii. Exceptions to the Tortious Act Exception

(a) Discretionary Function Exception to the Tortious Act Exception

The FSIA does not define "discretionary functions." To interpret the FSIA's discretionary function exception, courts typically apply the interpretation of the discretionary function exception of the Federal Tort Claims Act (the "FTCA"), because "[n]ot only does the language of the FSIA discretionary function exception replicate that of the [FTCA], 28 U.S.C. § 2680(a), but the legislative history of the FSIA, in explaining section 1605(a)(5)(A), directs us to the FTCA." *Olsen* [*v. Gov't of Mexico*], 729 F.2d [641,] 646 [9th Cir. 1984) (abrogated on other grounds by *Joseph v. Consulate General of Nig.*, 830 F.2d 1018, 1026 (1987)] (citing H.R. Rep. at 21); *see also Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 8 (1st Cir. 2002); *Office of Consulate Gen. of Nig.*, 830 F.2d at 1026 (9th Cir. 1987).

In determining whether particular conduct falls under the FTCA's, and in turn under the FSIA's, discretionary function exception, courts apply the . . . *Berkovitz* test:

> The first inquiry is whether the challenged action involved an element of choice or judgment, for it is clear that the exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." If choice or judgment is exercised, the second inquiry is whether that choice or judgment is of the type Congress intended to exclude from liability—that is,

whether the choice or judgment was one involving social, economic or political policy.

Vickers v. United States, 228 F.3d 944, 949 (9th Cir. 2000) (internal citations omitted) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)); *Rodriguez*, 297 F.3d at 9 (applying the two-part *Berkovitz* test to the FSIA's discretionary function exception). . . .

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(b) Arising Out of Misrepresentation or Deceit Exceptions to the Tortious Act Exception

The scope of the misrepresentation or deceit exception to the tortious act exception is an unsettled matter. Courts generally have looked to the definition of misrepresentation in the FTCA as a guide for defining the term under the FSIA, relying on the legislative history of the FSIA for such comparison. *See, e.g.*, *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 200 n.4 (2d Cir. 1999) ("The FSIA House Report provides that 'the exceptions provided in subparagraph[] . . . (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the [FTCA], 28 U.S.C. 2680(a) and (h).") (quoting H.R. Rep. at 21); *see also De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1398 (5th Cir. 1985).

In addition, both the Second and Ninth Circuits have dismissed claims against foreign sovereigns where the foreign sovereign allegedly provided false or misleading information regarding the whereabouts of the plaintiffs' relatives. *See Cabiri*, 165 F.3d 193, 200 (dismissing claim "for emotional injury caused by the refusal of a foreign state, however nefarious, to give its citizens in the United States full or truthful information concerning its operations"); *Kozorowski v. Russian Fed'n*, No. 93-16388, 1997 U.S. App. LEXIS 26266 (9th Cir. Sept. 19, 1997) (dismissing claims of intentional infliction of emotional distress, fraud and deceit, conspiracy and other claims because they were premised on the Soviet Union's failure to disclose its role in the 1940 massacre of Polish soldiers and therefore arose out of misrepresentation and deceit).

iii. Application of the Tortious Act Exception to the Instant Case

The difficulty in applying the elements of the tortious act exception to plaintiffs' complaint is the manner in which plaintiffs have pled their claims. In their complaint, plaintiffs advance the following claims: violation of customary international law of human rights, negligence, breach of fiduciary duty, tort of outrage/infliction of emotional distress, deceit and misrepresentation. In each of their claims, plaintiffs base their theories of liability not only on the actions of the Holy See itself, but also on the acts of the Holy See's agents and employees. As a result, we must analyze each claim to see not only which claims survive, but which *parts* of each claim survive.

Looking first to the fourth requirement for the application of the tortious act exception, the Kentucky Supreme Court's holding in *Osborne*, 31 S.W.3d at 915, leads to the inescapable conclusion that the alleged acts of sexual abuse were not done while the alleged tortfeasors were acting within the scope of their employment. Thus, the tortious act exception to the FSIA's grant of immunity cannot apply to permit suit against the Holy See for sexual abuse by its clergy, even if the other requirements for its application are met.

Furthermore, as per the FSIA's explicit terms, in order for the tortious act exception to apply, the tortious acts in question must have occurred in the United States. Therefore, any portion of plaintiffs' claims that relies upon acts committed by the Holy See abroad cannot survive. . . .

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. . . [T]he portions of plaintiffs' claims that are based upon the conduct of bishops, archbishops and Holy See personnel while supervising allegedly abusive clergy satisfy all four requirements of the tortious act exception: this conduct served as a substantial cause of the alleged abuse; the conduct occurred in the United States; the conduct was within the scope of employment; and these individuals were, according to the pleadings, Holy See employees.

However, although the four requirements are met for these claims, we must still consider whether either of the two exceptions to the tortious act exception applies and prevents its application: the discretionary-function exception and the arising-out-of-misrepresentation-or-deceit exception.

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1) **Violation of Customary International Law of Human Rights** . . . : Plaintiffs plead this claim against the Holy See itself, stating that

> [t]he instructions, mandates and dictates of the Defendant, Holy See in the United States prohibiting the disclosure of the identity and existence of pedophiles and sexual predators under its control, thereby placing children in a position of peril, is a gross violation of well-established, universally recognized norms of international law of human rights.

This claim does not survive against the Holy See as it pertains to the actual promulgation of the 1962 Policy because the promulgation itself occurred abroad. However, this claim does survive against the Holy See as it pertains to the conduct of its employees who, pursuant to the 1962 Policy, violated the terms of the relevant international laws through their tortious supervisory conduct over the allegedly abusive clergy.

2) **Negligence** . . . : Plaintiffs present three grounds for negligence in their complaint: failure to provide "safe care"; failure to "warn"; and failure to report. The failure to warn and failure to report prongs of the negligence claim survive because they are premised on the conduct of Holy See employees who were allegedly negligent in their supervision of abusive clergy. However, the claims of negligence against the Holy See for its own conduct cannot survive because such negligence would not have occurred in the United States. Furthermore, the claim of failure to provide safe care does not survive. As the district court noted, the failure to provide safe care amounts to a claim for negligent hiring. *O'Bryan II*, 471 F. Supp 2d at 793. And, as outlined above, claims of negligent hiring fall within the discretionary function exception. . . .

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3) **Breach of Fiduciary Duty** . . . : Plaintiffs plead this claim against the Holy See itself, stating that "a special legal relationship existed between the Plaintiffs and the Defendant Holy See, in the nature of a fiduciary relationship, which was carried out by and through priests, clerics, and administrators under the absolute control of the Defendant . . . ." In turn, plaintiffs contend that the "Defendant breached fiduciary duties owed to the Plaintiffs," premised upon the "duty to warn parents" and the "duty to report known or suspected perpetrators.["] This claim survives against the Holy See for the actions of its supervising employees occurring in the United States. As has already been emphasized, the claim cannot survive against the Holy See itself for its own failures to warn or report because such tortious conduct would have occurred abroad.

4) **Tort of Outrage/Infliction of Emotional Distress** . . . . This claim cannot survive against the Holy See as it pertains to the actual promulgation of the 1962 Policy because the promulgation itself occurred abroad. In addition, it cannot survive against the Holy See for the conduct of its allegedly abusive priests because the acts of alleged abuse did not occur within the scope of employment. In contrast, this claim does survive against the Holy See as it pertains to the conduct of its employees who, pursuant to the 1962 Policy, violated the terms of the relevant international laws through their tortious supervisory conduct over the allegedly abusive clergy.

We next turn to considering whether the surviving theories of liability, as outlined above, are precluded by the other exception to the tortious act exception: whether they arise out of misrepresentation or deceit.

In contrast to *Cabiri* and *Kozorowski*, plaintiffs' claims are not best characterized as stemming directly from the misinformation disseminated by the Holy See. Instead, plaintiffs' claims are more akin to claims of negligent supervision as employees of the Holy See are alleged to have provided inadequate supervision over those under its care. In this way, these claims resemble other negligent supervision claims more than they resemble claims brought by the plaintiffs in *Cabiri* and *Kozorowski*. . . . We therefore conclude that, at this stage of the litigation, the plaintiffs' claims of violation of customary international law of human rights, negligence, and breach of fiduciary duty should not be dismissed for "arising out of . . . misrepresentation [or] deceit." *See* 28 U.S.C. § 1605(a)(5)(B). We do however dismiss the last two claims advanced by plaintiffs in their complaint . . . as they do arise out of misrepresentation or deceit.

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(ii) Federal Insurance Co. v. Kingdom of Saudi Arabia

> In May 2009, at the invitation of the Court, the United States filed a brief in the Supreme Court opposing a petition for writ of certiorari by persons injured in the September 11, 2001 attacks, the families and representatives of decedents, and insurers, who alleged, among other things, that Saudi Arabia and several high-ranking Saudi officials bore responsibility for the attacks because they had funded ostensible charities they knew were diverting funds to al Qaeda. *Federal Insurance Co. v. Kingdom of Saudi Arabia*, Case No. 08-640. The United States argued that the Supreme Court should not grant review of the case because "[t]he lower courts correctly concluded that Saudi Arabia and its officials are immune from suit for governmental acts outside the United States." As to the claims against Saudi Arabia itself, while agreeing with the lower courts that the petitioners' claims did not fall within the non-commercial tort exception of the FSIA, the United States disagreed with the courts' analysis in reaching that conclusion. The United States argued that plaintiffs can bring terrorism-related claims against foreign states under either the terrorism or the tort exception rather than the terrorism exception only, as the court of appeals held. Nonetheless, the United States stated that the court of appeals' holding on this issue did not warrant the Court's review. The government's arguments on another issue the case presented, concerning the source of

foreign officials' immunity for acts within their official capacity, are discussed below in A.3. On June 29, 2009, the Supreme Court denied certiorari. *Federal Insurance Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009).

Additional excerpts below from the U.S. brief elaborate on the government's arguments. (One footnote and citations to other submissions in the case are omitted.) The full text of the U.S. brief is available at *www.justice.gov/osg/briefs/2008/2pet/6invit/2008-0640.pet.ami.inv.html*.

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2. The court of appeals held that "claims based on terrorism must be brought under the Terrorism Exception, and not under any other FSIA exception." In fact, contrary to the court's analysis, the tort and terrorism exceptions are not mutually exclusive. But the court was correct that the tort exception's territorial limitation cannot be avoided by pleading the kind of "material support" claim that falls within the terrorism exception when brought against a country designated by the Secretary of State. To satisfy the domestic tort exception, petitioners must allege that Saudi Arabia, its officials, or employees, committed tortious acts within the United States. Petitioners' complaints do not satisfy that requirement. The court of appeals' decision is the first to consider the interplay of the domestic tort and terrorism exceptions in circumstances such as these, and its holding on this question does not warrant this Court's review.

a. The domestic tort exception is not categorically unavailable for claims that might be brought under the terrorism exception if the foreign state were designated by the Secretary of State. The court of appeals' reliance on language that the terrorism exception applies only in a "case not otherwise covered by this chapter," 28 U.S.C. 1605A(a)(1), was misplaced. The court reasoned from this language that "there would be no need for plaintiffs ever to rely on the Terrorism Exception" unless that provision were exclusive. But that conclusion is mistaken, because the tort exception is more limited than the terrorism exception in a critical respect. The tort exception "covers only torts occurring within the territorial jurisdiction of the United States," *Amerada Hess*, 488 U.S. at 441. By contrast, the terrorism exception contains no geographic limitation. This difference provides the key to understanding Congress's passage of the terrorism exception. As reflected in the legislative history of earlier versions of the legislation, Congress's concern was not to impose new limits on the domestic tort exception, but instead to expand jurisdiction to cover a narrow class of claims based on conduct abroad. See, *e.g.*, H.R. Rep. No. 702, 103d Cong., 2d Sess. 3, 5 (1994) (explaining that the bill would "expand" jurisdiction to include claims by "an American who is grievously mistreated abroad by a foreign government"). The court erred in concluding that Congress intended in 1996 to narrow the tort exception so as to exclude from its scope acts of terrorism committed within the United States.

b. The United States agrees with the court of appeals, however, that the FSIA should not be construed to allow circumvention of the important limitations Congress imposed on both the domestic tort and the terrorism exceptions to immunity. Petitioners do not allege that officials or employees of the Kingdom of Saudi Arabia personally committed tortious acts in the United States or directed others to do so. The act of Saudi Arabia that forms the central basis of petitioners' claims is that, outside the United States, it donated funds to ostensible charities. Such acts taken by a foreign government outside the United States, without more, would fall outside the scope of the domestic tort exception. Petitioners seek to overcome the territorial limit on the tort exception by

alleging that Saudi Arabia funneled money through those charities to al Qaeda, thereby providing "material support to [the] terrorists" who committed the September 11 attacks in the United States. Such allegations of "material support" could establish jurisdiction under the terrorism exception over a state designated as a state sponsor of terrorism by the Secretary of State. But as the court of appeals recognized, if all allegations of extraterritorial "material support" by a state to a terrorist organization were permitted to satisfy the domestic tort exception, "[a]n important procedural safeguard [of the terrorism exception]—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated."

The domestic tort exception, moreover, requires not merely that the foreign state's extraterritorial conduct have some causal connection to tortious injury in the United States, but that "the tortious act or omission of that foreign state or of any official or employee" be committed within the United States. 28 U.S.C. 1605(a)(5). . . . The tort exception's territorial limitation protects against conflict that would arise from asserting jurisdiction over a foreign government's actions taken in its own territory, and also serves to deter foreign courts from exercising jurisdiction over the United States for actions taken in the United States.

Accordingly, the courts of appeals have recognized that jurisdiction under the tort exception must be based entirely on acts of the foreign state within the United States. . . .

Petitioners do not argue that jurisdiction under the tort exception could be premised entirely on acts by Saudi Arabia and its officers or employees in the United States . . . . Rather, petitioners contend that the domestic acts of the September 11 hijackers should be ascribed to Saudi Arabia under a concerted-action theory. Jurisdiction under the tort exception, however, cannot be based on the tortious acts of third parties, even if the applicable substantive law would permit holding the foreign state liable for those acts under a theory of secondary liability. The jurisdictional inquiry is one of federal law, and the FSIA tort exception strips foreign states of immunity only for injuries "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). It is the foreign state's act or omission—not that of any third party—that must occur in the United States.

. . . Although the court of appeals' analysis has certain flaws, the court correctly identified the danger that a complaint making this kind of allegation would evade the limitations of the domestic tort and terrorism exceptions. Most important, the court's conclusion that petitioners had not overcome Saudi Arabia's immunity was correct. Further review by this Court is therefore unwarranted.

* * * *

(3) Acts of terrorism

Section 1083(b) of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 343, repealed 28 U.S.C. § 1605(a)(7), and § 1083(a) of the NDAA replaced it with a new exception to immunity under the FSIA relating to support of terrorism, 28 U.S.C. § 1605A. For background on the legislation and related developments, see *Digest 2008* at 457-63. During 2009, as the examples below discuss, federal courts interpreted the scope of the new terrorism exception and

other issues arising from U.S. nationals' claims against states for allegedly supporting terrorism.

(i) Effect of executive and legislative action: Republic of Iraq v. Beaty

On June 8, 2009, the Supreme Court reversed two federal appellate courts' decisions and held that the President's 2003 exercise of his statutory authority to make inapplicable with respect to Iraq provisions of law that applied to countries that have supported terrorism included § 1605(a)(7), the former exception to immunity under the FSIA for state sponsors of terrorism, making that exception inoperative against Iraq. *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2195 (2009). The President acted in 2003 pursuant to authority provided in § 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 579. Excerpts follow from the Court's analysis in reaching the conclusion that "[w]hen the President exercised his authority [in 2003] to make inapplicable with respect to Iraq all provisions of law that apply to countries that have supported terrorism, the exception to foreign sovereign immunity for state sponsors of terrorism became inoperative as against Iraq. As a result, the courts below lacked jurisdiction; we therefore need not reach Iraq's alternative argument that the NDAA subsequently stripped jurisdiction over the cases." (Footnotes are omitted.) The Court's opinion was consistent with views the United States expressed in an *amicus curiae* brief filed in December 2008, which *Digest 2008* discusses at 464-71 and is available at *www.usdoj.gov/osg/briefs/2008/2pet/6invit/toc3index.html*.

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* * * *

III

A

Section 1503 of the EWSAA consists of a principal clause, followed by eight separate proviso clauses. The dispute in these cases concerns the second of the provisos. The principal clause and that proviso read:

> "The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: . . . *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism . . . ." 117 Stat. 579.

Iraq and the United States both read the quoted proviso's residual clause as sweeping in the terrorism exception to foreign sovereign immunity. Certainly that reading is, as even the *Acree* Court acknowledged, "straightforward." [*Acree v. Republic of Iraq*, 370 F.3d 41, 52 (D.C. Cir. 2004).]

Title 28 U.S.C. § 1605(a)(7)'s exception to sovereign immunity for state sponsors of terrorism stripped jurisdictional immunity from a country unless "the foreign state was not designated as a state sponsor of terrorism." . . . Because the President exercised his authority with respect to "all" provisions of law encompassed by the second proviso, his actions made § 1605(a)(7) "inapplicable" to Iraq.

To a layperson, the notion of the President's suspending the operation of a valid law might seem strange. But the practice is well established, at least in the sphere of foreign affairs. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322–324 (1936) (canvassing precedents from as early as the "inception of the national government"). The granting of Presidential waiver authority is particularly apt with respect to congressional elimination of foreign sovereign immunity, since the granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch. See, *e.g.*, *Ex parte Peru*, 318 U.S. 578, 586–590 (1943). It is entirely unremarkable that Congress, having taken upon itself in the FSIA to "free the Government" from the diplomatic pressures engendered by the case-by-case approach, *Verlinden* [*B.V. v. Central Bank of Nigeria*], 461 U.S. [480,] 488 [(1983)], would nonetheless think it prudent to afford the President some flexibility in unique circumstances such as these.

B

The Court of Appeals in *Acree* resisted the above construction, primarily on the ground that the relevant text is found in a proviso. . . .

* * * *

. . . . [A] proviso is sometimes used "to introduce independent legislation." [*United States v. Morrow*,] 266 U.S. [531,] 535 [(1935)]. We think that was its office here. The principal clause granted the President a power; the second proviso purported to grant him an *additional* power. It was not, on any fair reading, an exception to, qualification of, or restraint on the principal power.

* * * *

Even if the best reading of the EWSAA proviso were that it encompassed only statutes that impose sanctions or prohibit assistance to state sponsors of terrorism, see *Acree*, 370 F.3d, at 54, we would disagree with the Court of Appeals' conclusion that the FSIA exception is not such a law. Allowing lawsuits to proceed certainly has the extra benefit of facilitating the compensation of injured victims, but the fact that § 1605(a)(7) targeted only foreign states designated as sponsors of terrorism suggests that the law was intended as a sanction, to punish and deter undesirable conduct. Stripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of munitions (both of which are explicitly mandated by § 586F(c) of the Iraq Sanctions Act). The application of this sanction affects the jurisdiction of the federal courts, but that fact alone does not deprive it of its character as a sanction.

It may well be that when Congress enacted the EWSAA it did not have specifically in mind the terrorism exception to sovereign immunity. The Court of Appeals evidently found that to be of some importance. *Id.*, at 56 (noting there is "no reference in the legislative history to the FSIA"). But the whole value of a generally phrased residual clause, like the one used in the second proviso, is that it serves as a catchall for matters not specifically contemplated . . . . If Congress wanted to limit the waiver authority to particular statutes that it had in mind, it could have enumerated them individually.

We cannot say with any certainty (for those who think this matters) whether the Congress that passed the EWSAA *would have wanted* the President to be permitted to waive § 1605(a)(7). Certainly the exposure of Iraq to billions of dollars in damages could be thought to jeopardize the statute's goal of speedy reconstruction of that country. At least the President thought so. And in the "vast external realm, with its important, complicated, delicate and manifold problems," *Curtiss-Wright Export Corp.*, 299 U.S., at 319, courts ought to be especially wary of overriding apparent statutory text supported by executive interpretation in favor of speculation about a law's true purpose.

* * * *

D

We must consider whether anything in the subsequent NDAA legislation changes the above analysis. In particular, § 1083(c)(4) of that statute specifically says that "[n]othing in section 1503 of the [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States." 122 Stat. 343. . . .

* * * *

In § 1083(d)(1) of the NDAA, the President was given authority to "waive any provision of this section with respect to Iraq." 122 Stat. 343. The President proceeded to waive "all" provisions of that section as to Iraq, including (presumably) § 1083(c)(4). 73 Fed. Reg. 6571. The Act can therefore add nothing to our analysis of the EWSAA. . . . Section 1083(c)(4) could change our interpretation of the disputed EWSAA language only if it has some *substantive* effect, changing what would otherwise be the law. And if the President's waiver does anything, it eliminates any substantive effect that the NDAA would otherwise have on cases to which Iraq is a party.

IV

Having concluded that the President did render 28 U.S.C. § 1605(a)(7) "inapplicable with respect to Iraq," and that such action was within his assigned powers, we consider respondents' argument that the inapplicability of the provision does not bar their claims, since they arise from Iraq's conduct *prior* to the President's waiver. . . .

* * * *

As a textual matter, the proffered definition of "inapplicable" is unpersuasive. If a provision of law is "inapplicable" then it cannot be applied; to "apply" a statute is "[t]o put [it] to use." Webster's New International Dictionary 131 (2d ed. 1954). When the District Court exercised jurisdiction over these cases against Iraq, it surely was putting § 1605(a)(7) to use with respect to that country. Without the *application* of that provision, there was no basis for subject-matter jurisdiction. 28 U.S.C. §§ 1604, 1330(a). If Congress had wanted to authorize the President merely to cancel Iraq's designation as a state sponsor of terrorism, then Congress could have done so.

* * * *

As for the judicial presumption against retroactivity, that does not induce us to read the EWSAA proviso more narrowly. Laws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases. Foreign sovereign immunity "reflects current political realities and relationships," and its

availability (or lack thereof) generally is not something on which parties can rely "in shaping their primary conduct." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004); see also *id.*, at 703 (SCALIA, J., concurring).

In any event, the primary conduct by Iraq that forms the basis for these suits actually occurred prior to the enactment of the FSIA terrorism exception in 1996. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993). That is, Iraq was immune from suit at the time it is alleged to have harmed respondents. The President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts.

V

Accordingly, the District Court lost jurisdiction over both suits in May 2003, when the President exercised his authority to make § 1605(a)(7) inapplicable with respect to Iraq. At that point, immunity kicked back in and the cases ought to have been dismissed . . . .

In respondents' view, that is not fatal to their claims. They point to the eighth proviso in § 1503 of the EWSAA:

> "*Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first." 117 Stat. 579.

The effect of this provision, they contend, is that the EWSAA waiver expired in 2005, and that when it did so § 1605(a)(7) was revived, immunity was again stripped, and jurisdiction was restored. . . .

The premise, however, is flawed. . . .

We think the better reading of the eighth EWSAA proviso (the sunset clause) is that the powers granted by the section could be exercised only for a limited time, but that actions taken by the President pursuant to those powers (*e.g.*, suspension of the Iraq Sanctions Act) would not lapse on the sunset date. If it were otherwise, then the Iraq Sanctions Act—which has never been repealed, and which imposes a whole host of restrictions on relations with Iraq—would have returned to force in September 2005. Nobody believes that is so.

* * * *

(ii) Private right of action: Roeder v. Islamic Republic of Iran

> On April 21, 2009, the United States, as an intervenor, filed a motion in the U.S. District Court for the District of Columbia to dismiss a suit that former hostages held at the U.S. Embassy in Tehran from 1979 to 1981 and their family members brought against Iran. *Roeder v. Islamic Republic of Iran*, No. 08-0487 (EGS) (D.D.C. 2009). In 2000 the plaintiffs brought a previous suit against Iran, which was dismissed for lack of a private right of action against Iran. *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 146 (D.D.C. 2002), *aff'd*, *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C.

Cir. 2003) (collectively "*Roeder I*"). For additional background on *Roeder I*, see *Digest 2002* at 523–27; *Digest 2003* at 537 and 547; and *Digest 2004* at 504 and 554.

In their second suit, the plaintiffs relied on § 1083 of the NDAA, which, as the United States explained, "in specified circumstances creates a private right of action against foreign governments that engage in terrorism." The U.S. motion to dismiss, excerpted below, argued that § 1083 did not create a cause of action for the plaintiffs or expressly abrogate the Algiers Accords, which barred their suits. (Some footnotes and citations to other filings are omitted.) The full texts of the U.S. motion, the U.S. reply, and the U.S. response to plaintiffs' memorandum regarding supplemental authority are available at *www.state.gov/s/l/c8183.htm*.

. . . The gratitude of the United States for the service and dedication of [the plaintiff hostages] cannot be overstated, nor can the suffering and abuse they endured on behalf of this country be exaggerated; these matters are beyond dispute.

To obtain the release of the plaintiff hostages, the United States, through an international agreement known as the Algiers Accords, agreed to preclude the prosecution of any claims against Iran arising out of the hostage taking. That binding international commitment must be honored by the United States unless and until Congress (1) abrogates the Algiers Accords expressly in conjunction with relevant legislation, or (2) unambiguously creates a cause of action for the embassy hostage plaintiffs against Iran. Congress has done neither. Accordingly, plaintiffs have failed to state a claim upon which relief can be granted. The United States has sought intervention in this case, and now moves to dismiss, in order to carry out its obligations under the Algiers Accords.

* * * *

I. Section 1083 Does Not Expressly Abrogate the Accords

Section 1083 does not explicitly abrogate the Algiers Accords. Indeed, it says nothing at all about them, by name or by description. The courts have made clear that Congress must act with clarity and specificity if it intends to supersede United States' treaty obligations. *See*, *e.g.*, *U.S. v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1469 (S.D.N.Y. 1988) (noting that where potential conflict between treaty and subsequent statute was foreseeable, it was "especially important . . . for Congress to give clear, indeed unequivocal guidance" as to any intention to supersede treaty obligations). . . .

Congress was well aware of this requirement generally, therefore, before it enacted Section 1083, and this Court's confirmation of this requirement as regards these very plaintiffs and these very claims in *Roeder I* left no doubt that anything short of a clear expression of intent to revoke the Algiers Accords would have that effect. *See Roeder I*, 195 F. Supp. 2d at 175–84. No such clarity of purpose to revoke the Algiers Accords can be derived from the provisions of Section 1083, which is completely silent about the Accords. *Roeder I*, 195 F. Supp. 2d at 175 ("'[L]egislative silence is not sufficient to abrogate a treaty,' *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 . . . (1984), or a bi-lateral executive international agreement.' *See Weinberger v. Rossi*, 456 U.S. 25, 32 . . . (1982).").

Although the requisite clear statement must be found, if at all, in the statutory text, there is no support for the plaintiffs' position even in the legislative history of Section 1083, which fails to mention the Algiers Accords. . . .

. . . [T]he scant legislative history on Section 1083 fails to acknowledge the Accords or express Congress' collective will to terminate them. *See Roeder I*, 195 F. Supp. 2d at 182.

Because the legislative history is sparse, the Court must be "even more vigilant in its refusal to draw inferences . . . that would fill in the gaps in congressional logic." *Roeder I*, 195 F. Supp. 2d at 183. . . .

In light of the lack of a clear Congressional intent to abrogate the Algiers Accords, Section 1083 should not be interpreted to create a cause of action for plaintiffs against Iran. *See Roeder I*, 195 F. Supp. 2d at 175 (citing *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. at 252 ("When a later statute conflicts with an earlier agreement, and Congress has neither mentioned the agreement in the text of the statute nor in the legislative history of the statute, the Supreme Court has conclusively held that it can not find the requisite Congressional intent to abrogate.")). As the Court concluded in *Roeder I*, "[u]nless and until Congress expresses its clear intent to overturn the provisions of a binding agreement between two nations that has been in effect for over twenty years, this Court can not interpret these statutes to abrogate that agreement." *Roeder I*, 195 F. Supp. 2d at 177.

II. Section 1083 Creates No Clear Cause of Action for Plaintiffs Against Iran for the Hostage Taking

Section 1083 also cannot be said to unambiguously create a cause of action for plaintiffs against Iran. While it purports to create a cause of action against foreign states, it does not indisputably create a private right of action against Iran for claims arising from the 1979 hostage taking. The statute is anything but a model of clarity. Section 1083(a)(1) incorporates a new section to be codified at 28 U.S.C. § 1605A. The only source of any potential cause of action for this case is within that new section. Specifically, whether a cause of action exists depends on whether the foreign state is "a state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)]." 28 U.S.C. § 1605A(c). Thus, in the present case, plaintiffs have a cause of action only if Iran is "a state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)(II)]."[7]

The description of a state sponsor of terrorism in 28 U.S.C. § 1605A(a)(2)(A)(i)(II) involves a two-pronged inquiry. Section 1605A(a)(2)(A)(i)(II) refers to a foreign state that, [1] "in the case of an action that . . . is filed under this section by reason of section 1083(c)(3) of [the National Defense Authorization Act for Fiscal Year 2008]," [2] "was designated as a state sponsor of terrorism when . . . the related action under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II). The first inquiry under this standard is whether this case was filed "by reason of" Section 1083(c)(3). The term "by reason of" is not defined. However, Section 1083(c)(3) authorizes the filing of an action (such as this case) which arises out of the "same act or incident" that is the basis for another ("related") action which has been timely commenced under 28 U.S.C. § 1605(a)(7).[8] Because *Roeder I* was timely filed under 28 U.S.C. § 1605(a)(7), and both *Roeder I*

[7] . . . 28 U.S.C. § 1605A(a)(2)(A)(i)(I) does not create a cause of action for purposes of this case because Iran was not designated as a state sponsor of terrorism at the time the act of hostage taking occurred or as a result of that act. Therefore, the question is whether 28 U.S.C. § 1605A(a)(2)(A)(i)(II) creates a cause of action for plaintiffs.

[8] Section 1083(c)(3) ("Related Action") states in relevant part as follows:

and this case arise out of the 1979 Iranian hostage taking, it can be assumed, at least for the sake of argument, that this case was, strictly in a procedural sense, filed "by reason of" Section 1083(c)(3), as plaintiffs allege.

The second inquiry is whether Iran was "a state sponsor of terrorism when . . . the related action under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II). . . .

The phrase "related action" refers back to its usage in Section 1083(c)(3), which is entitled "Related Cases" and is cited earlier in the same sentence (*i.e.*, a state sponsor of terrorism as described in 28 U.S.C. § 1605A(a)(2)(A)(i) is a foreign state that, "in the case of an action that . . . is filed under this section by reason of *section 1083(c)(3)* of [the National Defense Authorization Act for Fiscal Year 2008]," "was designated as a state sponsor of terrorism when . . . *the related action* under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (emphasis added)). Section 1083(c)(3) is a subsection of Section 1083(c), which is entitled "Application to *Pending* Cases" (emphasis added). These both fall under Section 1083, which bears the general heading "Terrorism Exception to Immunity." This structure of the statute therefore indicates that the terrorism sovereign immunity exception for foreign states created by Section 1083 applies to a subset of "pending cases," namely the "related cases" described in Section 1083(c)(3). Thus, to be considered "related" to this case (which "arises out of" it, as described in section 1083(c)(3)), *Roeder I* must have been pending at the time of enactment of Section 1083. *Roeder I*, however, was dismissed in 2003, and therefore it was not pending in January 2008 when Section 1083 was passed.[10]

The use of the present perfect tense in section 1083(c)(3), to the effect that "[i]f an action arising out of an act or incident *has been* timely commenced," also indicates that a new action cannot be deemed "related" unless the original action (*Roeder I*) was pending at the time of enactment of Section 1083. (Emphasis added). This meaning is reinforced by the more recent decision in *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), in which the Court construed Section 1083, 28 U.S.C. § 1605A(a)(2)(A)(i)(II), as signifying that a new action could be considered "'filed . . . by reason of section 1083(c)(3)' if a *pending* 'related action' had been timely commenced." *Simon*, 529 F.3d at 1193 (emphasis added); *see also id*. at 1191 ("Plaintiffs with 'pending cases' may invoke new § 1605A in certain circumstances."). Because *Roeder I* was dismissed in 2003 and was not pending when Section 1083 was enacted in January 2008, the present case is not "related" to *Roeder I* within the meaning of 28 U.S.C. § 1605A(2)(a)(i)(II). Given that no "related action" exists as defined in the statute, it is impossible for Iran to have been designated as a state sponsor of terrorism when "the related action" was filed. Therefore, Iran is not a "state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)]," 28 U.S.C. § 1605A(c), and plaintiffs have no private right of action against Iran.

> If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code . . . any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—(A) the date of entry of judgment in the original action; or (B) the date of the enactment of this Act.

[10] Section 1083 was relevant to numerous other cases still pending against Iran, Cuba, and Libya as of January 2008, when it was passed. There is thus no reason to believe that Congress intended *sub silentio* to create a cause of action for plaintiffs in this case.

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c. Execution of judgments and other post-judgment actions

(1) Terrorism Risk Insurance Act

(i) Blocked assets and waiver of right of attachment: Ministry of Defense v. Elahi

On April 21, 2009, the Supreme Court reversed the U.S. Court of Appeals for the Ninth Circuit's 2007 judgment in a suit by a U.S. victim of terrorism who had sought to attach Iranian property in the United States to enforce a wrongful death default judgment he held against Iran. *Ministry of Def. & Support v. Elahi*, 120 S. Ct. 1732 (20109). *See Digest 2007* at 477–85; *see also Digest 2006* at 612–21; *Digest 2005* at 549–55; and *Digest 2004* at 516–17 for prior developments in the litigation. The Iranian property at issue was a $2.8 million arbitral award Iran had obtained in a contract dispute against a U.S. company, concerning military equipment Iran ordered in 1977 ("Cubic judgment"). The plaintiff sought to attach the Cubic award under § 201(a) of the Terrorism Risk Insurance Act ("TRIA"), which permits persons with terrorism-related judgments against a designated state sponsor of terrorism to attach "blocked assets" of that state, including its agencies and instrumentalities. Pub. L. No. 107–297, codified at 28 U.S.C. § 1610 note.

In its decision, excerpted below, the Court agreed with two arguments the United States had presented in an *amicus curiae* brief submitted in September 2008 at the Court's invitation (citations to other submissions omitted). *See Digest 2008* at 484–89; the brief is available at *www.usdoj.gov/osg/briefs/2008/3mer/1ami/2007-0615.mer.ami.html*. First, the Court accepted the U.S. argument that the Ninth Circuit had erred in holding that the Cubic judgment was a "blocked" asset because the executive branch, following the Algiers Accords that resolved the 1979-1981 Tehran hostage crisis, had failed to "unblock" export-controlled Iranian military assets the United States had frozen. The Ninth Circuit's holding was contrary to a key U.S. position in a claim pending before the Iran-U.S. Claims Tribunal (Case B/61). (The tribunal's partial award in Case B/61, issued after the Court's decision in this case, is discussed in Chapter 8.A.) The Court declined to decide whether or not the assets in question were now blocked by the State Department's October 25, 2007 designation, pursuant to Executive Order 13382, of the Iranian Ministry of Defense as a proliferator of weapons of mass destruction. Because of the timing of the designation, this particular issue had not been before the Ninth Circuit. While the Court noted that in such a situation it would usually remand the issue to permit the lower court to decide it, in this case, because of its finding on the second argument presented by the United States (on the

question of relinquishment), it was unnecessary to remand the 2007 blocking issue for further consideration.

Second, the Court reversed the appeals court and held that the plaintiff had relinquished his right to attach the property when he elected to receive a payment from the U.S. Treasury under the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA" or "VPA"), Pub. L. No. 106-386, 114 Stat. 1541. The VTVPA provides that, in electing to receive payment from the Treasury, a claimant gives up his or her right to attach Iranian property that is at issue in a claim against the United States before an international tribunal. As the Court noted, this holding made it "unnecessary to remand the [2007] blocking question for further consideration."

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* * * *

Since Iran is a sovereign nation, Elahi cannot attach the Cubic Judgment unless he finds an exception to the principle of sovereign immunity that would allow him to do so. See *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 546 U.S. 450 (2006) *(per curiam)*. As the case reaches us, the Terrorism Risk Insurance Act of 2002 (TRIA), § 201(a), 116 Stat. 2337, note following 28 U.S.C. §1610, provides the sole possible exception. That Act authorizes holders of terrorism-related judgments against Iran, such as Elahi, to attach Iranian assets that the United States has *"blocked."* *Ibid.* (emphasis added). . . .

Even if the Cubic Judgment is a blocked asset, however, Elahi still cannot attach it if he waived his right to do so. . . .

* * * *

II

A

We turn first to the question whether the Cubic Judgment was a "blocked asset." . . .

* * * *

In 1981, the Treasury Department issued an order that authorized "[t]ransactions involving property in which Iran . . . has an interest" where "*[t]he interest in the property . . . arises after January 19, 1981*." 31 CFR § 535.579(a)(1) (emphasis added). As the Court of Appeals itself pointed out, Iran's interest in the Cubic Judgment arose "on December 7, 1998, when the district court confirmed the [arbitration] award." 385 F.3d, at 1224. Since it arose more than 17 years "after January 19, 1981," the Cubic Judgment falls within the terms of Treasury's order. And that fact, in our view, is sufficient to treat the Judgment as unblocked.

Iran's interest in the property that underlies the Cubic Judgment also arose after January 19, 1981. As the International Court of Arbitration held, Cubic and Iran entered into their initial contract before 1981. But they later agreed to discontinue (but not to terminate) the contract. They agreed that Cubic would try to sell the system elsewhere. And they further agreed that they would take "final decisions" about who owed what to whom "only . . . once the result of Cubic's attempt to resell the System" was "known."

Cubic completed its sale of the system (to Canada) in October 1982. And the arbitrators referred to October 1982 as "the date the Parties had in mind when they agreed to await the

outcome of Cubic's resale attempts." Only then was Cubic "in a position to reasonably, comprehensively and precisely account for the reuse of components originally manufactured for Iran and for any modification costs." For those reasons, and in light of the arbitrators' findings, we must conclude that October 1982 is the time when Iran's claim to proceeds arose.

The upshot is that, whether we consider Iran's "interest in property" as its interest in the Cubic Judgment itself or its underlying interest in the proceeds of the Canadian sale, the interest falls within the terms of the Treasury Department's general license authorizing "[t]ransactions involving property in which Iran . . . has an interest" where "[t]he interest in the property . . . arises after January 19, 1981." 31 CFR § 535.579(a). And, as we said, that fact is sufficient for present purposes to treat the asset as having been unblocked at the time the Ninth Circuit issued the decision below.

Finally, even if we were to assume (as the Ninth Circuit held) that the relevant asset were Iran's pre-1981 interest in the air combat training system itself, we should still conclude that that asset was not "blocked" at the time of the decision below. As the Government points out, such an interest falls directly within the scope of Executive Order No. 12281, an unblocking order that required property owned by Iran to be transferred "as directed . . . by the Government of Iran." See also 31 CFR § 535.215(a). . . .

* * * *

III

. . . [T]he second question concerns Elahi's waiver of his right to attach the Cubic Judgment. In 2000, Congress enacted a statute that offers some compensation to certain individuals, including Elahi, who hold terrorism-related judgments against Iran. VPA § 2002, as amended by TRIA § 201(c). The Act requires those who receive that compensation to relinquish "*all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal,* [or] that is the subject of awards rendered by such tribunal." § 2002(a)(2)(D), 114 Stat. 1542; see also § 2002(d)(5)(B), as added by TRIA § 201(c)(4) (cross referencing § 2002(a)(2)(D)). In 2003 the Government paid Elahi $2.3 million under the Act as partial compensation for his judgment against Iran. And at that time, Elahi signed a waiver form that mirrors the statutory language.

The question is whether the Cubic Judgment "is at issue in claims" against the United States before an "international tribunal," namely the Iran–U.S. Claims Tribunal. If so, the Cubic Judgment falls within the terms of Elahi's waiver. . . .

A review of the record in Iran–U.S. Claims Tribunal Case No. B61 leads us to conclude that the Cubic Judgment is "at issue" before that Tribunal. In Case No. B61 Iran argued that, between 1979 and 1981, the United States had wrongly prevented the transfer of Cubic's air combat training system to Iran. Iran asked the Tribunal, among other things, to order the United States to pay damages. In its briefing before the Tribunal, Iran acknowledged that any amount it recovered from Cubic would "be recuperated from the remedy sought" against the United States. And Iran sent a letter to the United States in which it said that any amounts it actually received from Cubic would be "recouped from the remedy sought against the United States in Case B61." *But* Iran added that the Cubic Judgment could *not* be used as a setoff *insofar as it had been attached by creditors*.

Meanwhile, in a rebuttal brief before the Tribunal, the United States, while arguing that in fact it owed Iran nothing, added that at the very least Iran must set off the amount "already . . . awarded" by the International Court of Arbitration (namely, the $2.8 million awarded to Iran from

Cubic) against any money awarded by the Tribunal. And the United States' demand for a setoff applies even if third parties have attached the Cubic Judgment.

The upshot is a dispute about the Cubic Judgment. . . .

To put the matter in terms of the language of Elahi's waiver, one can say for certain that the Cubic Judgment is "property." And Case No. B61 itself is a "clai[m] against the United States before an international tribunal." We can also be reasonably certain that how the Tribunal should use that property is also under dispute or in question in that claim. Moreover, since several parties other than Elahi have already attached the Cubic Judgment, the question whether an attached claim can be used as a setoff is potentially significant, irrespective of Elahi's own efforts to attach the judgment.

Are these circumstances sufficient to place the Cubic Judgment "at issue" in Case No. B61? . . . Iran and the United States do not dispute the Cubic Judgment's validity; they do not dispute the Cubic Judgment's ownership; and they do not dispute the fact that the United States' asset freeze had no adverse effect on the Cubic Judgment or on Iran's entitlement to the Cubic Judgment. As the dissent correctly points out, the Judgment is not "at issue" in any of these senses. The Judgment will neither be suspended nor modified by the Tribunal in Case No. B61, nor is the Judgment property claimed by Iran from the United States in that case.

But that does not end the matter. The question is whether, for purposes of the VPA, a judgment can nevertheless be "at issue" before the Tribunal *even* when it will not be suspended or modified by the Tribunal and when it is not claimed by Iran from the United States. Here, a significant dispute about the Cubic Judgment still remains, namely a dispute about whether it can be used by the Tribunal as a setoff. And in our view, that dispute is sufficient to put the Judgment "at issue" in the case.

For one thing, we do not doubt that the setoff matter is "under dispute" or "in question" in Case No. B61, and those words typically define the term "at issue." Black's Law Dictionary 136 (8th ed. 2004). In the event that the Tribunal finds the United States liable in Case No. B61, the total sum awarded to Iran by the Tribunal will depend on whether the Judgment is used as a setoff. And whether the Judgment can be so used depends, in turn, on whether the United States is right that an attached judgment should be set off or whether Iran is right that it should not be—a matter in question before the Tribunal. In that sense, the Judgment is "under dispute." We recognize that the dispute is over the *use* of the Judgment, not the validity of the Judgment. But we do not see how that fact matters.

For another thing, ordinary legal disputes can easily encompass questions of setoff. . . .

Further, the language of the statute suggests that Congress meant the words "at issue" to carry the ordinary meaning just described. . . . [T]he statute says that judgment creditors such as Elahi must

> "relinquis[h] all rights to execute against or attach property [1] that is *at issue in claims* against the United States before an international tribunal *[or]* [2] that *is the subject of awards* rendered by such tribunal." VPA § 2002(a)(2)(D), 114 Stat. 1542 (emphasis added); see also § 2002(d)(5)(B), as added by TRIA § 201(c)(4) (cross-referencing § 2002(a)(2)(D)).

Had Congress wanted to limit the property to which it first refers (namely, property that is "*at issue*" in a claim) to property that is *the subject* of a claim, it seems likely that Congress

straightforwardly would have used the words "subject of"—words that appear later (in respect to awards rendered) in the very same sentence.

Finally, the statute's purpose leans in the direction of a broader interpretation of the words "at issue" than that proposed by Elahi. . . . The statute authorizes the attachment of blocked assets, and it provides partial compensation to victims to be paid (in part) from general Treasury funds. But it does so in exchange for a right of subrogation, VPA § 2002(c), and for the victim's promise not to pursue the balance of the judgment by attaching property "at issue" in a claim against the United States before the Tribunal. VPA §§ 2002(a)(2)(D), (d)(5)(B), as added by TRIA § 201(c)(4). The statute thereby protects property that the United States might use to satisfy its potential liability to Iran.

The Cubic Judgment falls into this category. It is property that the United States could use to satisfy its potential liability to Iran, but which may be unavailable for that purpose if successfully attached. With respect to the statute's revenue-saving purpose, it is difficult to distinguish between property that is the subject of a claim before a tribunal and property that is in dispute before the tribunal in respect to its use as an offset.

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(ii) Attachment of diplomatic properties: Bennett v. Islamic Republic of Iran

On March 31, 2009, the U.S. District Court for the District of Columbia granted a U.S. government motion and quashed writs of attachment served against certain Iranian diplomatic properties to enforce a 2007 judgment against Iran and the Iranian Ministry of Information and Security ("MOIS"). *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152 (D.D.C. 2009). The court concluded that the properties at issue were immune from attachment because the United States had used them exclusively for diplomatic purposes since 1980, when President Jimmy Carter severed diplomatic relations with Iran and the State Department took custody of Iran's diplomatic and consular property. In reaching that conclusion, the court analyzed various applicable legal authorities, including § 201 of the TRIA, which specifically excludes diplomatic and consular properties from its definition of "blocked assets." The court also stated that the commercial activity exception to a foreign state property's immunity from attachment and execution was inapplicable. In addition, the court stated that the plaintiffs could not invoke 28 U.S.C. § 1610(g), which § 1083 of the NDAA added to the FSIA and allows holders of judgments in suits under new § 1605A to attach properties of the foreign state defendants or their agencies or instrumentalities, because the plaintiffs' judgment was rendered under former FSIA § 1605(a)(7). The court also stated that even if the plaintiffs could invoke § 1083 as a general matter, § 1610(g) does not permit the attachment of diplomatic property. "[N]othing in 1610(g) indicates that Congress intended to strip away the immunity long afforded to diplomatic properties," the court stated, adding that

> in other enactments under the FSIA, such as the TRIA and the VTVPA [Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1541], Congress has clearly and directly addressed the issue of whether and to what extent diplomatic properties of terrorist states should be afforded immunity from attachment and execution. Congress' complete silence on the matter in this most recent enactment indicates that they did not intend to pare back the immunity that they have long afforded to diplomatic properties.

Bennett, 604 F. Supp. 2d at 170. On May 4, 2009, the plaintiffs appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

On November 30, 2009, the United States filed a brief in the D.C. Circuit, addressing the question presented: "whether the district court properly concluded that the properties at issue are excluded from TRIA's definition of 'blocked assets,' and thus unavailable for attachment." Excerpts below from the U.S. brief summarize the government's arguments in support of affirmance of the district court's judgment (citations to other submissions in the case omitted). The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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. . . The United States emphatically condemns the acts of terrorism that gave rise to this judgment, and has deep sympathy for plaintiffs' suffering. The United States remains committed to disrupting terrorist financing and to pursuing those responsible for terrorist acts against U.S. nationals.

Attachment of the properties targeted by plaintiffs' writs is not permitted under the laws of the United States, however, and would be inconsistent with obligations set out in the Vienna Convention on Diplomatic Relations. Because the relations among nations are by nature reciprocal, the position urged by plaintiffs could have significant implications for U.S. foreign policy and international relations. In the past, similarly situated plaintiffs have sought to attach many of the same properties at issue here, and courts have repeatedly determined that these properties are not subject to attachment. The district court here reached the same conclusion, and quashed appellants' writs of attachment. That judgment was proper, and should be affirmed.

Plaintiffs do not press the various arguments they advanced in the district court. They now argue that the properties qualify as attachable "blocked assets" within the meaning of the TRIA. Their argument on appeal is sufficiently distinct from anything articulated in the district court that it may be considered waived. In any event, the argument fails on its merits because TRIA specifically excludes from its definition of "blocked assets" any "property subject to the Vienna Convention on Diplomatic Relations . . . [that] is being used exclusively for diplomatic or consular purposes." TRIA § 201(d)(2)(B)(ii), 116 Stat. at 2340.

As the State Department has determined and as prior cases reflect, the properties at issue in this case all fall within the statutory definition of "propert[ies] subject to the Vienna Convention on Diplomatic Relations." *Id.* § 201(d)(3), 116 Stat. at 2340. Plaintiffs readily concede that this is true of four of the five properties at issue, but argue that the fifth—3410 Garfield Street, N.W.—is not

subject to the Vienna Convention. This is a new development on appeal: plaintiffs did not previously so argue. The argument is thus waived. And, in any event, it is without merit. The district court found, based on undisputed evidence, that the Garfield Street property was, prior to 1979, a diplomatic residence. By its terms, the Vienna Convention makes clear that, whether or not it is part of the premises of the mission, the residence of diplomatic staff enjoys the same protections as the premises of the mission. VCDR, arts. 1(e), 30(1). Moreover, courts have concluded that deference is owed the State Department on questions of whether a particular property is protected by the Vienna Convention, and the Garfield Street property has consistently been recognized as such.

Further, all five subject properties are in the protective custody of the Department of State. Acting pursuant to a broad delegation of authority and discretion, the Department protects and preserves the properties in satisfaction of international obligations and to advance long-term U.S. foreign policy objectives. Plaintiffs nonetheless argue that the properties are not "'being used exclusively for diplomatic and consular purposes.'" They neither suggest that the United States, as custodian of the properties, seeks to achieve any non-diplomatic objective, nor otherwise dispute that the United States' sole purpose in maintaining the properties is diplomatic. Rather, they maintain that TRIA requires a separate and independent assessment of the "the properties' use," and suggest that the leasing of property is necessarily not diplomatic.

Plaintiffs made no argument of this sort in district court. Even if this Court elects to consider it, plaintiffs' position does not find support in TRIA's "plain language," as they now contend. In fact, their view rests on a misreading of the statute—one that treats Section 201(d)(2)(B)(ii) as if it establishes distinct requirements of "diplomatic uses" and "diplomatic purposes." Plaintiffs' approach is fundamentally problematic. Contrary to accepted canons of statutory construction, plaintiffs read TRIA to require, rather than avoid, violations of international treaty obligations. Moreover, plaintiffs seek to replace the State Department's lawful exercise of authority (which reflects powers constitutionally vested in the Executive branch and discretion expressly afforded by Congress) with judicial determinations on matters of foreign policy.

Finally, even plaintiffs' erroneous reading of the statute does not establish any basis for relief in this case. They have not identified any manner in which the property is "being used" that renders it attachable. Plaintiffs cannot overcome the presumption of immunity to which property of a foreign state is entitled where they identify no basis for an exception.

* * * *

f. Plaintiffs ultimately suggest that, by enacting TRIA § 201(d)(2)(B)(ii), Congress intended to abrogate the obligations of the United States under the Vienna Convention on Diplomatic Relations. They insist that any other reading would undermine Congressional intent.

The plain terms of TRIA refute that proposition, however. Pursuant to Section 201(d)(2)(B)(ii), property cannot be attached if attachment "would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations," § 201(d)(3), 116 Stat. at 2339 (defining "property subject to the Vienna Convention on Diplomatic Relations"), unless the United States has elected to abandon its treaty obligations. *Id.* § 201(d)(2)(B)(ii), 116 Stat. at 2340. Congress thus chose to structure the statute so as to *avoid* treaty violations, not to require them (as plaintiffs urge). *See also, e.g.*, *Weinberger v. Rossi*, 465 U.S. 25, 32 (1982) (It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, [6

U.S.] 2 Cranch 64, 118 (1804), that 'an act of congress ought never be construed to violate the laws of nations, if any other possible construction remains.'").[12]

The necessary consequence of a successful attachment of the properties sought by plaintiffs is that the United States would be unable to fulfill its obligation to "respect and protect" the premises of Iran's mission. *See, e.g.*, *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53, 60–61 (D.D.C. 2003). Indeed, it would require the United States to renege on its assurance to Algeria that it would "retain custody of these properties until Iran releases to the custody of the Government of Switzerland Protecting Power the diplomatic and consular properties owned by the United States in Iran." Because the plaintiffs' interpretation of Section 201(d)(2)(B)(ii) would lead to a violation of the United States' treaty obligations under the Vienna Convention, the district court correctly rejected it. *Cf. Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237–38 (D.C. Cir. 2003) (noting that "neither a treaty nor an executive agreement will be considered 'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed,'" and on this basis concluding that an amendment to the FSIA did not abrogate the Algiers Accords) (citations omitted).

* * * *

(2) Presumption of immunity for foreign state property

On June 25 and 26, 2009, the United States filed briefs in the U.S. Courts of Appeals for the Seventh and Ninth Circuits as *amicus curiae* in cases arising from the efforts of U.S. victims of terrorism to satisfy their judgments against Iran. *Rubin v. Islamic Republic of Iran*, No. 08-2805 (7th Cir.) and *Peterson v. Islamic Republic of Iran*, No. 08-17756 (9th Cir.). In the Ninth Circuit litigation, the family members of the 241 U.S. servicemen who died in the 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon, sought to satisfy a $2.6 billion default judgment against Iran and Iranian government agencies in connection with the bombing. In its brief, the United States supported affirmance of a district court's dismissal, on sovereign immunity grounds, of the plaintiffs' effort to compel Iran to assign its right to receive payments from foreign shipping companies for their use of Iran's harbor facilities. *See Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 48 (D.D.C. 2003); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007).

In the Seventh Circuit litigation, the plaintiffs sought to satisfy a default judgment against Iran awarding them $71.5 million in compensatory damages for injuries they sustained in a Hamas-orchestrated terrorist attack in Jerusalem in 1997. In its brief, the United States supported reversal of a district court's 2006 judgment holding that the immunity of a foreign

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[12] While TRIA does not require the violation of longstanding treaty obligations, it nonetheless facilitates recovery by various judgment creditors. For example, under TRIA § 201, certain judgment creditors may attach a foreign state's nondiplomatic property even if the state did not use that property for commercial activities; such property was not attachable before TRIA's enactment.

state's property is an "affirmative defense," subject to "forfeiture" unless the foreign state appears to assert its immunity. *Rubin v. Islamic Republic of Iran*, 436 F. Supp. 2d 938, 941 (N.D. Ill. 2006). *See also Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 261–68 (D.D.C. 2003).

Both U.S. briefs set forth the view that because foreign sovereign assets are presumptively immune, a court must consider a foreign state's immunity on its own initiative even if the foreign state does not appear in the litigation to assert its immunity and find applicable one of the FSIA's exceptions to immunity before issuing an order of attachment or execution against that state's property. Excerpts follow from the U.S. brief in *Peterson* (footnotes omitted). U.S. views on other legal issues raised in these cases are discussed below in A.1.c.(3)–(5) and A.2. The full texts of the government's briefs in both cases are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

A. . . . [T]he FSIA's text and structure make clear that a district court must consider *sua sponte* whether foreign state property is immune before permitting enforcement measures against that property.

First, and as noted, the statute creates a presumption of immunity from execution for foreign state property, and also requires judicial review, before permitting an order of attachment or execution. *See* 28 U.S.C. §§ 1609, 1610(a), (c). This approach evinces Congress' intent to protect foreign state property absent a judicial finding that an exception to immunity applies.

Furthermore, one of the exceptions to immunity for foreign state property applies where a foreign state waives immunity, § 1610(a)(1). There would seem to be no need for this provision if, as the plaintiffs argue, a foreign state waives immunity from execution unless it appears to raise the claim. Section § 1610(a)'s waiver provision "is governed by the same principles that apply to waivers of immunity from jurisdiction," H.R. Rep. 94-1487, at 28, and Congress "anticipated, at a minimum," that waiver from jurisdictional immunity "would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so." *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985).

Similarly, under the jurisdictional provisions of the FSIA, §§ 1604–1605, a court must consider *sua sponte* whether an exception to foreign state immunity from suit applies. *See Verlinden* [*B.V. v. Central Bank of Nigeria*], 461 U.S. [480,] 494 n.20 [(1983)]. The FSIA's execution provisions are modeled on the jurisdictional provisions, *see* H.R. Rep. 94-1487, at 8, 27, and the practice of *sua sponte* consideration of immunity from suit also supports *sua sponte* consideration of immunity from execution.

Taken together, these provisions strongly support the conclusion that, as the Fifth Circuit recognized in *Walker v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004), arguments about who has standing to raise a claim that foreign state property is immune from attachment are "irrelevant" under the FSIA.

* * * *

B. As the Supreme Court recently recognized in *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008), judicial seizure of the property of a foreign state "may be regarded as an affront to its dignity and may affect our relations with it." *Sua sponte* review of the statutory exceptions to immunity from execution protects against unjustified exercises of judicial power that could harm our foreign relations, potentially place the United States in violation of its international obligations, and lead to disadvantageous treatment of the United States in foreign courts.

The Department of State and the Department of Justice explained in a joint section-by-section analysis of the proposed legislation ultimately enacted as the FSIA that "[i]t would be inappropriate, and probably in violation of international law, to allow the successful litigant to levy on any assets of a foreign state because these may be used for strictly governmental and sovereign purposes." Hearing on H.R. 3493 before Subcomm. on Claims and Government Relations of House Judiciary Committee, 93d Cong., 1st Sess. 45 (Jun. 7, 1973). The concern about inappropriate enforcement measures is not merely hypothetical. In *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006), for example, the district court entered a default judgment on a motion seeking execution against the diplomatic property of a foreign state, which was entitled to immunity under the Vienna Convention on Diplomatic Relations. An assignment order by a U.S. court also could lead to friction in our foreign relations by purporting to impose obligations on foreign corporations with possession of foreign state assets, which might have inconsistent obligations with regard to those assets as a matter of domestic law or by contract.

An order by a U.S. Court authorizing execution against foreign state property also could have consequences for the treatment of the United States abroad under principles of reciprocity. As the D.C. Circuit recognized in *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), because "some foreign states base their sovereign immunity decisions on reciprocity," a U.S. court's decision to exercise jurisdiction over a foreign state can "subject the United States to suits abroad" in like circumstances. Similarly, a U.S. court's order permitting execution or attachment of foreign state property used for a public, governmental purposes could encourage foreign courts to issue like orders against United States property abroad. These considerations all militate heavily in favor of a court's *sua sponte* consideration of immunity prior to ordering execution or attachment.

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(3) Assignment of a foreign state's assets outside the United States

The U.S. brief in *Peterson*, discussed in A.1.c.(2) *supra*, also argued that if a foreign state's assets are not subject to execution under the FSIA, a court cannot order the state to assign them to a judgment creditor. Excerpts below from the brief elaborate upon the government's views (footnotes omitted).

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The district court correctly refused to order the foreign state defendant to assign to the plaintiffs in satisfaction of their judgment certain rights to payment from CMA CGM. [Editor's note: CMA CGM is a French shipping company.] The plaintiffs have conceded that the property held by CMA CGM is located outside the United States, and thus is immune from execution under the FSIA. The

district court's authority to execute against foreign state property is restricted to the circumstances set forth in 28 U.S.C. §§ 1609–1611. There is no indication in the statutory text or history that Congress intended for litigants to be able to sidestep these restrictions simply by seeking an order of assignment purporting to transfer ownership of immune assets, rather than by seeking an order of execution against those same assets.

The plaintiffs argue that the assignment order they seek is appropriate notwithstanding the limitations on execution under the FSIA because the order would not itself effectuate transfer of possession of foreign state property, but would require enforcement by a foreign court. Of course, a third party obligor may choose to comply with a U.S. court's assignment order and transfer possession of foreign state property that is immune from direct execution, rather than seek to challenge that order in court, making foreign enforcement unnecessary (and making the practical effect of the assignment order identical to execution). Furthermore, it is entirely likely that judgment creditors would seek enforcement of a U.S. Court's assignment order without regard to any limits that would otherwise apply in a foreign court to efforts to execute against foreign state property. In theory, an assignment order of this type might be used to circumvent the immunity requirements of both the U.S. and the foreign court.

In any event, the plaintiffs' distinction does not demonstrate tha[t] an assignment order directed at foreign state property abroad is appropriate. Such an order would purport to effectuate a change in ownership of foreign state property that is outside the Court's jurisdiction and immune from execution under the FSIA. Such an assignment order, transferring property interests in order to satisfy a judgment against a foreign state, is in every meaningful sense an order of execution. This Court should not permit this blatant end-run around the careful limits in §§ 1610 and 1611.

"The FSIA did not purport to authorize execution against a foreign state's property * * * wherever that property is located around the world." *Autotech Technologies LP v. Integral Research & Devel. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1451 (2008). Such a judicial act would constitute a "breathtaking assertion of extraterritorial jurisdiction," 499 F.3d at 750, and is contrary to normal principles of territorial jurisdiction, which recognize the primacy of a foreign court's authority over property located within its own territory.

* * * *

The United States is aware of no decision by a U.S. court ordering assignment of a foreign state's worldwide assets to satisfy a judgment, and courts in very similar circumstances have refused to order assignment of property that is immune from execution under the FSIA.

* * * *

(4) Notice requirements

The U.S. brief in *Peterson*, discussed in A.1.c.(2) *supra*, also argued that a judgment creditor seeking enforcement against a foreign state must provide "adequate notice" to that state, relying on methods comparable to the ones set out in 28 U.S.C. § 1608(a). Excerpts below provide U.S. views on that issue.

* * * *

In denying the plaintiffs' motion for an assignment, the district court also relied on the fact that the plaintiffs did not provide service in accordance with 28 U.S.C. § 1608(a) in registering their judgment and moving for an assignment of assets. The United States agrees that a judgment creditor must provide adequate notice to a foreign state of proceedings seeking enforcement of a default judgment. Although § 1608(a) is not directly applicable, it provides a helpful model for what constitutes adequate service. The plaintiffs' failure to provide adequate service provides an independent and sufficient basis for affirmance.

The FSIA "preserve[s] a distinction" between a foreign state's jurisdictional immunity from an action brought in a U.S. court and its "immunity from having its property attached or executed upon." *Ministry of Defense for Armed Forces of Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 385 F.3d 1206, 1218 (9th Cir. 2004), *vacated on other grounds,* 546 U.S. 450 (2006). Reflecting Congress's recognition of the significant interests at stake in execution, the FSIA requires that attachment or execution must be ordered by "the court," and only after a judicial determination "that a reasonable period of time has elapsed following the entry of judgment" or notice of default judgment. 28 U.S.C. § 1610(c). This is unlike the normal rule for private litigation, where execution can often be initiated by application to a court clerk or sheriff. By preventing execution except by court order, and by requiring the passage of a reasonable time following entry of default judgment, Congress clearly envisioned that there would be a meaningful opportunity for the foreign sovereign to be heard at the enforcement stage to assert immunity.

Because of the important interests at stake when a judgment creditor seeks to execute against a foreign state's property, and because the foreign state might not have participated in the underlying litigation addressing liability, it is critically important that a foreign state have notice that its property is subject to enforcement efforts and an opportunity to appear and to assert immunity from execution. *See, e.g., Connecticut Bank of Commerce*, 309 F.3d at 251. Courts have "stressed a foreign sovereign's interest—and our interest in protecting that interest—in being able to assert defenses based on its sovereign status." *FG Hemisphere*, 447 F.3d at 838.

Furthermore, the FSIA itself makes clear that Congress intended for foreign states to be notified not only of the initiation of a lawsuit, but also of the entry of a subsequent default judgment that might be the basis for enforcement proceedings. Section 1608(e) provides that a foreign state must receive notice of a default judgment using the same methods of service required for the summons and complaint, and § 1609(c) provides that no attachment or execution shall be permitted until the district court "determine[s] that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e)." Notably, notice of the default judgment in the underlying merits action in this case does not appear to have been made in compliance with these requirements. *See Peterson v. Islamic Republic of Iran*, Civ. 1:01-cv-2094 RCL, Affidavit of Service of Process of Judgment Pursuant to 28 U.S.C. § 1608(e), Dkt. 352 (filed June 23, 2008) (stating that copy of default judgment was mailed by plaintiff's counsel to Iranian Ministry of Foreign Affairs).

Even following a default judgment, any pleading "asserting new or additional claims" against a foreign state must be served in conformance with § 1608(a). *See* Fed. R. Civ. P. 5(a), 4(j)(1). In light of the distinct rights and interests implicated for the first time where a judgment against a foreign state is sought to be enforced, a motion seeking an order of enforcement against foreign state property can be viewed as analogous to a pleading asserting a new claim for relief.

More generally, all of these provisions and rules reflect an intent that a foreign state be provided with meaningful notice of critical developments in the litigation, typically in accordance with the methods for service identified in § 1608(a). Although § 1608(a) is not directly applicable to efforts to execute against foreign sovereign property, it nevertheless serves as a model for what constitutes effective notice to the foreign state. *Cf.* H.R. Rep. No. 94-1487, at 13–14 (explaining that Section 1608 "satisfies the due process requirement of adequate notice").

*   *   *   *

(5) Third-party assertions of immunity

The U.S. brief in *Rubin*, discussed in A.1.c.(2) *supra*, also addressed the significance of third-party assertions of an absent foreign state's immunity, which the United States often relies upon to protect U.S. interests abroad. Specifically, the United States argued that the court should have considered the views that the Chicago museums and the United States presented concerning the artifacts' immunity. The government stated:

> Just as the United States relies on foreign custodians of U.S. property to protect U.S. interests abroad, so may foreign states rely on U.S. custodians to protect their interests here. The University of Chicago's Oriental Institute has housed the Persepolis and Chogha Mish collections for decades pursuant to agreements with Iran. The University thus has a direct interest in plaintiffs' attempt to execute on these collections. Indeed, an order of execution may subject a private party in possession of foreign state assets to competing legal obligations with regard to those assets. *Cf. Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1348 (9th Cir. 1997). The University's standing to protect foreign state assets in its possession cannot seriously be questioned. The Museum of Natural History claims ownership of the Herzfeld collection, and its standing to contest execution is evident.
>
> . . . Even apart from the foreign policy concerns that underlie all foreign sovereign immunity determinations, the United States has a particular interest in one of the artifact collections that plaintiffs seek to attach. As our declaration explained, the Chogha Mish collection is the subject of a claim by Iran against the United States in proceedings before the Iran-U.S. Claims Tribunal. [citation omitted] The United States thus has a direct interest in the proper disposition of that property. . . .

(6) Post-judgment litigation and application of NDAA amendments

(i) Availability of new provisions concerning payment of special masters

As discussed in A.1.c.(2) *supra*, the *Peterson* plaintiffs' post-judgment litigation continued in 2009. On January 5, 2009, the U.S. District Court for the District of Columbia denied the plaintiffs' motions for payment of special masters who had assisted the court in the earlier litigation by recommending amounts for the court to award in damages. *Peterson v. Islamic Republic of Iran*, 01-2094 (RCL) (D.D.C. 2009); 01-2684 (RCL) (D.D.C. 2009). The plaintiffs sought the funding under § 1605A(e), which provides:

> (1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.
>
> (2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c) to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

On July 25, 2008, the United States had filed a response to the plaintiffs' motions at the court's request, expressing the view that payment was not justified under the circumstances. In its order, the court agreed with the United States, stating:

> As the United States correctly observes, these consolidated cases are maintained under 28 U.S.C. § 1605(a)(7), rather than the new terrorism exception, Section 1605A . . . . Accordingly, the new provisions in 28 U.S.C. § 1605A(e) are not applicable to these particular cases because § 1605A(e)(2) provides for the payment of special masters only in those cases brought or maintained pursuant to the new enactment, 1605A. This conclusion is also compelled by the case of *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. [Cir.] 2008). As the D.C. Circuit observed: "[A] plaintiff in a case pending under § 1605(a)(7) may not maintain that action based

> upon the jurisdiction conferred by § 1605A; in order to claim the benefits of § 1605A, the plaintiff must file a new action under that new provision." *Id.* at 1192. The plaintiffs in these actions have not filed under that new enactment, and therefore they cannot avail themselves [of] the special masters provisions.

The court's unpublished order and the U.S. response are available at *www.state.gov/s/l/c8183.htm*.

(ii) Exceptions to immunity from attachment or execution

On March 31, 2009, the U.S. District Court for the District of Columbia denied the *Peterson* plaintiffs' motions for appointment of receivers with broad powers to help them satisfy their judgment against Iran. *Peterson v. Islamic Republic of Iran*, 01-2094 (RCL) (D.D.C. 2009); 01-2684 (RCL) (D.D.C. 2009). As the court explained, the plaintiffs argued that new § 1610(g) of the FSIA "completely eliminates Iran's sovereign immunity with respect to its property, and thus that property should . . . be turned over to court-appointed receivers." Section 1610(g)(1) and (2) provide:

> (1) IN GENERAL.—Subject to paragraph (3) [concerning third-party joint property holders], the 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 the 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.
>
> (2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which

> paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Powers Act.

The court based its decision on the same grounds as its earlier decision to deny the same plaintiffs' petition for payment of special masters, discussed in A.1.c.(6)(i) *supra*, stating:

> . . . By its express terms, § 1610(g) applies only to "judgments entered under 1605A." Notably, plaintiffs could have converted their judgment under § 1605(a)(7) into a new action under § 1605A. *See* § 1083(c). Plaintiffs failed to do so. Accordingly, plaintiffs are not entitled to reap the benefits of any subsequent changes in the law relating to the degree of immunity accorded to Iran's property under the FSIA.

The court's unpublished order and the Statement of Interest the United States filed on March 13, 2009, are available at *www.state.gov/s/l/c8183.htm*.

(iii) In re Islamic Republic of Iran Terrorism Litigation

On September 30, 2009, Judge Royce C. Lamberth, Chief Judge of the U.S. District Court for the District of Columbia, issued an omnibus opinion, *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31 (D.D.C. 2009) ("Lamberth Opinion"), purporting to "consider whether and to what extent . . . recent changes in the law should apply retroactively to a number of civil actions against Iran that were filed, and in many instances, litigated to a final judgment prior to the enactment of the 2008 NDAA," which amended the FSIA. The court raised, *sua sponte*, the question of whether § 1083(c) of the NDAA "usurp[s] the prerogative of the judiciary to decide cases under Article III and thereby offend[s] the principle of separation of powers enshrined in our Constitution." Lamberth Opinion at 37. Specifically, the court examined the provisions of § 1083(c) that direct courts to disregard the judicial doctrines of res judicata and collateral estoppel with respect to any matters litigated in a prior FSIA terrorism case and, arguably, to reopen final judgments entered under the previous version of the terrorism exception, 28 U.S.C. § 1605(a)(7), for re-litigation. The court held that the statute "withstands constitutional scrutiny." *Id.*

However, the "Court also reache[d] an even more fundamental conclusion: Civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy." *Id.* After surveying the history of the litigation under the terrorism exception of the FSIA in the D.C. Circuit, Judge Lamberth offered a 30-page critique of the policy behind victims' litigation entitled "A Call for Meaningful Reform." Lamberth Opinion at 120–37. In this section, Judge Lamberth criticized the terrorism exception in the FSIA as an "empty promise," *id.* at 122, and opined that "[w]ith virtually no Iranian assets within the jurisdiction of our courts to satisfy judgments . . . the great travesty in all this is that our political branches have essentially told victims of terrorism to continue their long march to justice down a path that leads to nowhere." *Id.* at 125. The court also noted that "these actions frequently run into direct conflict with other sources of law" and that they sometimes negatively impact "the President's powers to manage national security" issues with Iran. *Id.* at 126.

By way of a solution, Judge Lamberth called upon Congress and the President to "pull together to find meaningful, workable solutions, rather than finding new and creative ways to push these tragic claims back onto the Courts." *Id.* at 133. The court suggested a claims commission, administered by the executive branch, which would adjudicate claims under the terrorism exception and make recommendations on how best to structure a large settlement with Iran in the event of normalization of relations between the United States and Iran. *Id.* at 134–35. Finally, the court invited the United States to file a brief in which it might express its views regarding any of the issues raised by the Lamberth Opinion. *Id.* at 137.

On November 30, 2009, the United States filed its response as the court had requested. *In re Islamic Republic of Iran Terrorism Litig.*, 01-cv-02094 (RCL) (D.D.C. 2009). In its response, the United States noted its appreciation to the court for its "efforts to resolve complex issues in this intricate field of law" and for the opportunity to comment on the opinion. Specifically, the United States noted that it "closely examines the need to participate in these cases and does so only when it deems participation necessary to address the interests of the United States." The United States continued:

> That judicious approach derives from an inherent dilemma identified by the Court in its opinion: The United States in no way seeks to stand as an "adversar[y]" to victims of terrorism in their pursuit of justice, but is compelled to participate when the plaintiffs' specific attempts to recover on their judgments "run into direct conflict with other sources of law" or the national interests of the United States. [citation omitted]

> Consistent with this approach, the United States does not have any specific comment at this time regarding the legal issues identified by this Court's opinion. The United States recognizes and appreciates this Court's attention in its opinion to previous filings by the United States on the viability of the drastic remedy of receivership, the limitations on the scope of 28 U.S.C. § 1610(g)(2), as well as the retroactivity problems that would accompany the appointment of Special Masters for work performed to effectuate a judgment pursuant to 28 U.S.C. § 1605(a)(7) [citations omitted]. The United States is also appreciative of this Court's offer to solicit the views of the United States on any future motions on the receivership issue. [citation omitted]
>
> The United States will continue to monitor these, and other, issues as they arise in the context of specific cases and motions filed by the plaintiffs, and will consider participation in litigation on those issues in the appropriate context where the need may arise. At this time, however, the United States hesitates to comment on issues raised by this Court's reasoned opinion out of concern that such views would not be narrowly tailored to particular facts in a given case.
>
> * * * *
>
> Apart from the specific legal issues identified, this Court stated in its opinion that the "more important[]" issue to be addressed is the consideration of whether there is "a more viable system of redress for these tragic and difficult cases" than the judicial system. [citation omitted] The Executive Branch will continue to evaluate its policy with respect to the system of recovery for victims of terrorism with this Court's opinion in mind, endeavoring to provide justice for victims while simultaneously preserving the important diplomatic and national interests of the United States.

The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

d. **In rem** ***action***

On December 22, 2009, the U.S. District Court for the Middle District of Florida dismissed claims to the remains of a shipwreck and related artifacts discovered at a site in international waters for lack of subject matter

jurisdiction under the FSIA. *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1129 (M.D. Fla. 2009). The court also vacated an arrest warrant the court had issued previously against the "vessel, its apparel, tackle, appurtenances and cargo." *Id.* at 1131. According to the report and recommendation of the magistrate judge, dated June 3, 2009, which the district court adopted and incorporated into its order, Odyssey Marine Exploration Inc. ("Odyssey") initiated the *in rem* action after discovering artifacts from a shipwreck site in international waters. Peru (based on its claim that the coins found at the shipwreck site had their origins in Peru) and 25 descendants of persons who are claimed to have had property on board the ship when it sank also filed claims to the items at the shipwreck site.

In granting Spain's motion to dismiss, the court noted its "emphatic agreement . . . with the Magistrate Judge's conclusion that no genuine, plausible claim persists that the site at issue is anything other than the site of the wreck of the Spanish naval vessel *Nuestra Señora de las Mercedes*." *Id.* at 1128. The court also noted its

> emphatic agreement with both the Magistrate and Spain, which states at page twenty-one of the response . . . that:
>
>> Odyssey's rehash of "commercial activity" arguments conspicuously fails to acknowledge that the exception expressly applies only to "property used for a commercial activity in the United States," if it "is or was used for the commercial activity upon which the claim is based." 28 U.S.C. §§ 1610(a), 1610(a)(2). Moreover, the FSIA defines "commercial activity in the United States" as "commercial activity carried on by such state and having substantial contact with the United States." 23 U.S.C. § 1603(e). It is undisputed that the *Mercedes* had nothing to do with the United States: "the *res* lacks any nexus to our nation's sovereign boundaries." [citation omitted]
>>
>> . . . .
>>
>> To defeat a showing of sovereign ownership and invocation of the FSIA, the claimant must show its claims are based on commercial activity by the vessel in the United States and/or a waiver of sovereign immunity. Odyssey has done neither.

Id. at 1128–29.

Odyssey, the Republic of Peru, and the individual claimants appealed the dismissal to the U.S. Court of Appeals for the Eleventh Circuit.

Excerpts follow from the magistrate judge's conclusions that the shipwreck, cargo, and related items, as Spanish property, are immune under § 1609 of the FSIA (footnotes and citations to submissions in the case omitted). Chapter 12.A.9.a. addresses other aspects of the magistrate judge's report and recommendation and the U.S. *amicus curiae* brief in support of Spain.

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* * * *

. . . Section 1609 of the FSIA states in pertinent part:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611.

Unquestionably, the *Mercedes* is the property of Spain—constructed in 1788 by Navy Engineers in the shipyard of the Spanish Navy in Havana, Cuba; commanded by officers and crewed by sailors of the Royal Spanish Navy throughout its service; and designated as a Spanish frigate of war. It remains on the Royal Navy's official registry of ships. As such, [§] 1609's plain reading limits Odyssey to arguing the Court has jurisdiction under "existing international agreements" or as permitted by [§§] 1610 and 1611. None of these exceptions apply here, as Spain urges and Odyssey's silence concedes. Instead, Odyssey sidesteps § 1609's exceptions by claiming: § 1609 does not shield property *outside* the United States; Spain must actually "possess" the *res*; the cargo should be partitioned to satisfy the descendants' claims to the private lots; and other provisions of the FSIA deny Spain sovereign immunity from *in personam* claims. These contentions are without merit as all evade the FSIA's goals, its statutory scheme, and the special status accorded warships per the various treaties and agreements § 1609 necessarily incorporates.

* * * *

2. Discovery Orders: *Rubin v. Islamic Republic of Iran*

The U.S. brief in *Rubin*, discussed in A.1.c.(2) *supra*, also supported reversal of the district court's 2008 ruling finding Iran subject to discovery. The court held that when a foreign state appears in a U.S. court to assert the immunity of specific property, as Iran did in this case, it "voluntarily" subjects itself to the obligations imposed on private litigants, including the obligation to identify all assets in which it has an interest, regardless of the location of those assets in the United States. *Rubin v. Islamic Republic of Iran*, 2008 WL 2502039 (N.D. Ill. June 23, 2008). Excerpts below from the U.S. brief elaborate on the government's argument that the court's order permitting broad discovery to identify Iran's assets in the United States was erroneous. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

* * * *

The order allowing general assets discovery rested on the flawed "affirmative defense" ruling and may be vacated on that basis. The district court directed a foreign state to choose between forfeiting the immunity of its property or appearing and subjecting itself to discovery. That approach found no support in the FSIA, which makes the property of a foreign state presumptively immune from execution and requires a judgment creditor to establish that specific property falls within an exception to immunity.

The district court compounded its error by treating Iran's limited appearance, which was made in response to the "affirmative defense" ruling for the limited purpose of asserting the immunity of the artifacts collections, as a basis for general discovery of "every conceivable asset of Iran's in the United States." . . . As other courts of appeals have recognized, discovery against a foreign sovereign "should be ordered 'circumspectly and only to verify allegations of specific facts crucial to the immunity determination.'" *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (quoting *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002)) (emphasis omitted). That approach is consistent with accepted international practice, which allows the United States to appear in foreign courts for specific, limited purposes—such as to assert the immunity of specific assets from attachment or the immunity of specific officials for specific conduct—without exposing itself to general discovery. By contrast, the district court's discovery order exceeds the bounds of accepted international practice, discourages foreign sovereigns from appearing in U.S. courts, and encourages foreign courts to allow similar discovery against the United States.

* * * *

3. Foreign Officials

In 2009 two federal appellate courts considered whether former foreign officials are immune from jurisdiction under the FSIA or under a longstanding non-statutory immunity that the FSIA did not replace. In *Yousuf v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009), the U.S. Court of Appeals for the Fourth Circuit held that the FSIA does not apply to individual foreign government officials and therefore the defendant, a former Somali Prime Minister and Defense Minister, was not immune from suit under the FSIA. The court remanded the case to the district court for an examination of whether Samantar might enjoy immunity on any other basis. In *Matar v. Dichter*, 563 F.3d 9, 13 (2d Cir. 2009), the U.S. Court of Appeals for the Second Circuit held that the defendant, the former head of the Israeli Security Agency, was immune from civil jurisdiction under common law, without deciding whether he might also be immune under the FSIA. The court held that "whether the FSIA applies to former officials or not, they continue to enjoy immunity under common law." For prior developments in the case, see *Digest 2006* at 465–76 and *Digest 2007* at 224–26 and 504–8.

On May 29, 2009, in an *amicus curiae* brief filed at the invitation of the Supreme Court in a third case, the United States expressed its view that foreign officials derive their immunity from "non-statutory principles articulated by the Executive, not the FSIA." *Federal Insurance Co. v. Kingdom of Saudi Arabia*, Case No. 08-640. The United States provided those views in opposing a petition for certiorari in a case seeking to hold several high-ranking Saudi officials and Saudi Arabia liable for the September 11, 2001 terrorist attacks. The United States argued that the lower courts correctly dismissed claims against the officials based on their immunity for governmental acts outside the United States but noted its disagreement with the conclusion of the court of appeals that the FSIA provided the basis for that immunity. Nonetheless, because the court of appeals correctly upheld the defendants' immunity, the U.S. brief stated that the government's disagreement with the court of appeals' analysis "on the proper legal basis for the individual defendants' official immunity . . . does not warrant this Court's review."

The Court denied certiorari on June 29, 2009, in *Federal Insurance Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009), but granted certiorari on September 30, 2009, in *Samantar v. Yousuf*, 130 S. Ct. 1499 (2009). The Court's review of whether the FSIA applies only to states or both to states and foreign government officials for actions taken in their official capacity remained pending at the end of 2009.[*]

The excerpts below from the government's brief in *Federal Insurance Co. v. Kingdom of Saudi Arabia* summarize the government's argument in opposing the petition for certiorari. (Citations to other submissions in the case are omitted.) The government's brief is available in full at *www.justice.gov/osg/briefs/2008/2pet/6invit/2008-0640.pet.ami.inv.html*.

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* * * *

a. The text, structure, and history of the FSIA demonstrate that it was not intended to address the immunity of foreign officials. Section 1603(a) provides that the phrase "foreign state" includes an "agency or instrumentality." 28 U.S.C. 1603(a). Congress's use of the terms "agency" and "instrumentality" rather than "agent" suggests they were not intended to encompass natural persons. That conclusion is reinforced by Subsection (b)'s definition of "agency or instrumentality" as an "entity" that "is a separate legal person, corporate or otherwise," which indicates an exclusive concern with non-natural "entit[ies]." 28 U.S.C. 1603(b).

Other features of the FSIA confirm that understanding. For example, the statute makes "the property of an agency or instrumentality of" a designated terrorist state subject to execution to satisfy a terrorism-related judgment against the state itself. See 28 U.S.C. 1610(g)(1). It is difficult

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[*] Editor's note: On June 1, 2010, the Supreme Court affirmed the lower court's judgment, holding that the FSIA did not govern Samantar's claim, and remanded the case to the district court to consider whether Samantar might be entitled to immunity under common law or whether he might assert other defenses. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). *Digest 2010* will discuss relevant aspects of the opinion.

to believe that Congress intended, as would follow from the court of appeals' ruling, that the personal property of every official or employee of a state sponsor of terrorism would be available for execution to satisfy a terrorism-related judgment against the state. Similarly, the FSIA's focus on the status of an entity as an agency or instrumentality at the time suit was filed, see *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003), would mean, if applied in the same fashion to the immunity of officials, that a plaintiff could circumvent that immunity by waiting until an official left office. Congress is unlikely to have conferred a time-limited immunity of this nature.

The FSIA's legislative history further demonstrates that Congress did not intend to supplant existing principles regarding the immunity of foreign officials. In clarifying that the FSIA would not affect diplomatic or consular immunity, notwithstanding the tort exception's reference to torts committed by foreign officials acting within the scope of their authority, the House report explained that the statute would "deal[] only with the immunity of foreign states." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 21 (1976) (*House Report*). Further, the report noted that with regard to discovery, "official immunity," of a kind existing separate from and outside of the FSIA, would apply if a litigant sought to depose a "high-ranking official of a foreign government." *Id.* at 23.

b. As petitioners note, the courts of appeals disagree over whether the FSIA governs the immunity of foreign officials. Compare *Belhas v. Ya'alon*, 515 F.3d 1279, 1284–1288 (D.C. Cir. 2008), *Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380 (5th Cir. 1999), and *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), with *Yousef v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009) (holding FSIA inapplicable, remanding for consideration of other sources of immunity), and *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005), cert. denied, 546 U.S. 1175 (2006). But that disagreement appears to be of little practical consequence, and is of no consequence where, as here, respondents would be immune from suit under both the FSIA and principles articulated by the Executive.

Notably, the Ninth Circuit, the first of the courts of appeals to adopt the FSIA as the framework for analyzing foreign official immunity, did so in order to *protect* foreign officials from suit and to prevent the FSIA from "be[ing] vitiated if litigants could avoid immunity simply by recasting the form of their pleadings" to name individual foreign officials as defendants. *Chuidian*, 912 F.2d at 1102. Where, as in *Chuidian* and this case, the lower courts apply the FSIA to provide immunity and the Executive also would recognize such immunity, the different approaches produce the same result, and the divergence in rationales becomes irrelevant. . . .

Questions have emerged in two contexts in which the FSIA might provide a less expansive immunity than the principles recognized by the Executive, but whether there is any genuine divergence is still unclear. First, as noted above, application of the FSIA framework raises the problematic prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office. See *Yousef*, 552 F.3d at 383 (holding that FSIA does not protect former officials, but remanding for consideration of non-FSIA immunity). But that potential anomaly so far has not led to untoward results. . . .

A second situation of possible divergence has arisen when foreign officials are sued individually for official acts falling within the FSIA's commercial activities exception. Two appellate decisions have upheld jurisdiction over foreign government officials in this circumstance, raising the possibility that the FSIA approach to official immunity would have a narrower scope than that based on principles recognized by the Executive Branch. See *Byrd*, 182 F.3d at 382, 384–385, 389–391 (alleged conspiracy by state-owned corporation to take control of sawmill); *Keller*, 277 F.3d at 816–817 (alleged conspiracy of officials at state bank to defraud plaintiff). But, in fact,

principles recognized by the Executive also might have allowed those two suits to go forward. In neither case did the Executive recommend immunity, nor did the courts consider non-statutory immunity. Recently, moreover, the Executive has indicated that "it is not clear whether (and if so, to what extent) [non-statutory] immunity applies to corporate officers of a state owned commercial enterprise." *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007) (No. 06-1763). That issue is not, in any event, presented here, where the challenged activity is not commercial in nature.

* * * *

B. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. Same-sex Partners

On November 4, 2009, the Department of State circulated a diplomatic note to Chiefs of Mission of diplomatic missions in the United States, which advised that, "in addition to the categories of individuals previously accepted as family members, the Department has determined that the definition of 'family' forming part of the household of a diplomatic agent may include same-sex domestic partners ('domestic partners') for purposes of the application of the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations in the United States." This announced change in policy means that the Department accepts the accreditation of same-sex domestic partners of foreign diplomatic or consular personnel assigned to official duty in the United States, who became eligible for diplomatic visas as a result of a July 22, 2009 change in the Department's visa regulations. *See* 74 Fed. Reg. 36,112 (July 22, 2009) for the final rule. Accredited same-sex domestic partners enjoy the same privileges and immunities of other accredited family members who are recognized by the Department as forming part of a diplomat's household. The diplomatic note, which is provided below, is also available at *www.state.gov/s/l/c8183.htm*.

The Secretary of State presents her compliments to Their Excellencies and Messieurs and Mesdames the Chiefs of Mission and refers to the notes dated November 3, 1988, February 2, 1987, and May 22, 1986, concerning the definition of family members.

As indicated in the referenced May 22, 1986, note, it has long been an accepted principle of international law that the privileges and immunities to which members of the mission are entitled extend, to a certain degree, to the members of their families forming part of their households. The Vienna Convention on Diplomatic Relations (Article 37(1)) specifies the privileges and immunities which shall be accorded such "members of the family of a diplomatic agent forming part of [the] household" but does not provide a definition of the term "members of the family" for the purposes of the Convention. The drafters of the Convention recognized that the concept of "family" differs

among the societies of the world and left the matter to be resolved according to the standards of the respective receiving States.

The Chiefs of Mission are informed that, in addition to the categories of individuals previously accepted as family members, the Department has determined that the definition of "family" forming part of the household of a diplomatic agent may include same-sex domestic partners ("domestic partners") for purposes of the application of the Vienna Convention on Diplomatic Relations and Vienna Convention on Consular Relations in the United States. In accordance with guidance from the White House, the Department is not in a position to accept the accreditation of opposite-sex domestic partners as members of the family.

In order to be eligible for acceptance as a domestic partner of a member of a diplomatic or consular mission, a domestic partner must not be a member of some other household, must reside regularly in the household of the principal, and must be recognized by the sending State as a family member forming part of the household of the principal, as demonstrated by eligibility for rights and benefits from the sending State. Therefore, when notifying the Department of domestic partners of its mission members, the sending State is requested to submit appropriate documentation that it recognizes the domestic partner relationship, which could include evidence that the sending State provided the domestic partner with a diplomatic or an official passport or other documentation based on that status, or with travel or other allowances. Domestic partners of employees of a diplomatic or consular mission (and of miscellaneous foreign government offices) accepted by the Department will be eligible for "A" or "G" visas. The new visa regulation is enclosed.

In addition, the Department intends to pursue the legal measures necessary to enable the United States to offer dependent employment to domestic partners, on a reciprocal basis, in the context of bilateral dependent employment agreements or arrangements. The Chiefs of Mission will be advised of any such developments as soon as it is possible to do so.

The attention of the Chiefs of Mission is also drawn to applicable provisions of international law in respect of the termination of status. As stated in previous circular notes, whenever any person who has been accorded status as a member of the family in the United States (other than a student attending boarding school or college) ceases to reside with the principal, such person immediately ceases to be a member of the family within the meaning of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. Accordingly, all privileges and immunities, if any, to which such person previously had been entitled in the United States would terminate thirty days thereafter unless in a particular case a shorter time has been specified by the Department of State.

The Chiefs of Mission are advised that until the Department of State publications and circular notes are revised explicitly to incorporate "domestic partners" as members of the family of a diplomatic or consular agent forming part of the household, references to family members in the context of privileges and immunities and related matters other than dependent employment should be understood to include domestic partners as described herein.

It is emphasized that the standard set forth in this note is to define members of the family for the purposes of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and is without prejudice to other definitions of family for other purposes which have an independent basis in international agreements or U.S. domestic law.

2. Immunity of Diplomats from Civil Jurisdiction

In 2009 federal district courts in New York and Washington, D.C., issued decisions in cases that domestic workers brought against both serving and former foreign diplomats who employed them while on diplomatic assignments in the United States. The plaintiffs' claims alleged human trafficking, involuntary servitude, and slavery, and the defendants asserted they enjoyed immunity from jurisdiction under international law, including the Vienna Convention on Diplomatic Relations ("Vienna Convention" or "VCDR"). The first case, discussed below in B.2.a., addressed the question of whether a diplomat's employment of a domestic worker is a commercial activity for which, under Article 31(1)(c) of the Vienna Convention, the diplomat enjoys no immunity. Article 31(1)(c) provides an exception to diplomatic immunity for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official function." The United States understands the Vienna Convention to provide immunity to a diplomat for all matters incidental to daily life, including the employment of a servant, but not for the conduct of a business or for outside employment, for which there is no immunity. In the second two cases, discussed below in B.2.b., the courts considered whether Article 39(2) of the Vienna Convention provides residual immunity to a former diplomat for actions relating to employment of a domestic worker during the diplomatic assignment. Under Article 39(2), former diplomats enjoy ongoing immunity "with respect to acts performed . . . in the exercise of [their] functions as a member of the mission." For discussion of a diplomatic note the Department of State circulated to diplomatic missions in the United States in 2009 concerning domestic workers, see C.4. of this chapter.

a. Immunity of a serving diplomat for acts incidental to daily life

On March 20, 2009, the U.S. District Court for the District of Columbia held that a serving diplomat and his spouse were immune from claims filed by their former domestic servant and granted the defendants' motion to dismiss. The court also quashed service of process against the defendants. *Sabbithi v. Al Saleh,* 605 F. Supp. 2d 122 (D.D.C. 2009). In reaching its conclusion, the court relied on the Department of State's certification of the diplomatic status of the defendants, which provided them broad immunity from civil jurisdiction. Consistent with the Statement of Interest the United States filed on July 22, 2008, at the court's request, the court concluded that employment of a domestic servant did not fall within the commercial activity exception to immunity contained in Article 31(1)(c) of the Vienna Convention. Instead, the court concluded that "hiring domestic employees is an activity incidental to the daily life of a diplomat and his or her family, and

does not constitute commercial activity outside a diplomat's official function." *Id.* at 128–29.

In this case, the diplomat had left his post in Washington, D.C., and returned to Kuwait in 2007. The plaintiff thus argued that the defendants had no residual immunity for their alleged actions. The U.S. Statement of Interest noted that the question about immunity in the case related only to whether the defendants had immunity from suit when they were sued and served with notice of the suit. At that time, the defendants were serving diplomats in Washington. The United States explained that the fact that the defendants had left the United States in 2007

> has no bearing on the central issue now before the Court—namely, whether Defendants were immune from service of process when it was attempted in January 2007. If they were, the attempted service was a nullity, and the Court lacks personal jurisdiction over them. . . . Given that the record does not indicate that service has been effected at a time when Defendants were not immune from service of process, the United States does not at this time address the separate question whether Defendants enjoy "residual immunity" under Article 39(2) of the Vienna Convention. . . .

The U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

b. Residual immunity

(1) Swarna v. Al-Awadi

On March 20, 2009, the U.S. District Court for the Southern District of New York held that it had jurisdiction over a former Kuwaiti diplomat to the United Nations and his wife in a case their former domestic worker brought against them under the Alien Tort Claims Act and New York state law. The court entered a default judgment against the individual defendants. *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509 (S.D.N.Y. 2009). Plaintiff alleged that the individual defendants subjected her to slavery and slavery-like practices, including involuntary servitude, torture, and abuse (including physical assault and rape), and failed to pay her minimum wages required by New York state law. Plaintiff also sought to hold the State of Kuwait vicariously liable for the individual defendants' alleged actions, and the court dismissed those claims on sovereign immunity grounds.

The individual defendants, who were serving in Kuwait's mission in France when they were served at their Parisian residence, did not answer the complaint but filed a Notice of Appearance asserting immunity from civil jurisdiction under the Vienna Convention. Kuwait asserted immunity under

the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611. The United States declined the court's invitation, dated December 17, 2008, to address the issue of residual immunity and the exceptions to immunity that might apply to the case.

In assessing the plaintiff's claims against the individual defendants, the court considered the question of residual immunity and its scope. The court determined that the Kuwaiti diplomat did not commit the alleged acts in the exercise of his diplomatic functions. While employing an individual to work at a diplomatic mission may be an official act, the court held that the act of hiring and employing a domestic servant is a private act that is peripheral to an official's diplomatic duties. The court observed that the diplomat did not need to employ the servant to represent Kuwait or protect its interests, did not employ her in the course of implementing official policy, and did not supervise her at the Kuwaiti mission. The court also concluded that the diplomat's wife had no residual immunity, noting that it was not clear that she performed any functions that could be considered official and that she had no greater entitlement to immunity than her husband.

With regard to the claims against the State of Kuwait, the court analyzed the FSIA's commercial activities and tort exceptions to immunity. The court concluded that plaintiff had failed to show that Kuwait had engaged in any commercial activity, given that individuals and not the state had employed the plaintiff. The court also concluded that the tort exception did not apply because the diplomat did not act within the scope of his employment under New York law and the acts alleged to support the claim that Kuwait ratified, aided, or abetted the diplomat's abuse of plaintiff were discretionary acts.

The individual defendants' appeal of the district court's default judgment and the plaintiff's cross appeal of the district court's decision holding that Kuwait was immune from suit were pending before the U.S. Court of Appeals for the Second Circuit at the end of 2009.

(2) Baoanan v. Baja

On June 16, 2009, the U.S. District Court for the Southern District of New York determined that the former Philippine Ambassador to the United Nations and his wife were not immune from its jurisdiction with regard to their former domestic servant's claims of abuse. *Baoanan v. Baja*, 627 F. Supp. 2d 155 (S.D.N.Y. 2009). In this case, the plaintiff brought claims that included forced labor trafficking, involuntary servitude, and violations of the federal and state minimum wage laws and served the defendants with the complaint in the Philippines on July 8, 2008. Ambassador Baja served as the Permanent Representative of the Philippines to the United Nations from May 11, 2003, to February 21, 2007. Following *Swarna v. Al-Awadi*, 607 F. Supp.

2d 509 (S.D.N.Y. 2009) ("*Swarna*"), discussed in B.2.b.(1) *supra*, the court held that the former diplomat and his wife did not have residential diplomatic immunity under Article 39(2) of the Vienna Convention and denied the defendants' motion to dismiss and to quash the service of process against them.

The court's conclusion also relied in large part on the U.S. Statement of Interest filed on April 28, 2009. *Baonoan v. Baja*, 08 Civ. 5692 (VM) (S.D.N.Y. 2009). The United States endorsed the approach taken in *Swarna*, noting that the court had "correctly approached" the question of the scope of residual immunity by finding that it "pertains to acts taken in the regular course of implementing an official program or policy of the mission, . . . as well as the hiring and employment of an individual to work at a diplomatic mission." The government stated:

> The *Swarna* court also noted that "residual diplomatic immunity does not extend to lawsuits based on actions that were entirely peripheral to the diplomatic agent's official duties" . . . . Ultimately, the *Swarna* court determined that the acts alleged by a former domestic servant in her complaint against former Kuwaiti diplomats were not official but private acts and thus that the former diplomats were not shielded by the residual immunity set forth in Article 39(2). [citation omitted] While the Government takes no position in this case as to whether Ambassador Baja enjoys residual immunity, the Government agrees with the analytical approach of the *Swarna* court, which came to its determination by considering, "whether the acts allegedly committed by [defendant] against plaintiff were performed in the exercise of his diplomatic functions." . . .

Excerpts below from the U.S. Statement of Interest set forth the government's views on the scope of residual immunity and on the relationship between the "commercial activity" exception to the immunity of serving diplomats set forth in Article 31(1)(c) and the residual immunity enjoyed by former diplomats, as set forth in Article 39(2). The full text of the U.S. Statement of Interest is available at *www.state.gov/s/l/c8183.htm*.

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I. SCOPE OF RESIDUAL IMMUNITY

A. The Residual Immunity Enjoyed by Former Diplomats Is Limited to Immunity for Acts Performed in the Exercise of Official Functions as a Mission Member

The privileges and immunities accorded diplomatic agents are set forth in the VCDR. Under the VCDR, during the period of their accreditation, diplomatic agents enjoy near absolute immunity from civil jurisdiction. *See* VCDR, Article 31. The purpose of such diplomatic immunity "is not to

benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." *Id.*, preamble, cl. 4; *see also Swarna v. Al-Awadi*, 06 Civ. 4880 (PKC), 2009 WL 773446, at *6 (March 20, 2009 S.D.N.Y.); *U.S. v. Cole*, 717 F. Supp. 309 (E.D.Pa. 1989) ("The theoretical basis for diplomatic immunity is generally agreed to be 'functional necessity.'"). The Department of State has further elaborated that, "foreign representatives may carry out their duties effectively only if they are accorded a certain degree of insulation from the application of the laws of the host country. Thus, these representatives need protection *while* they are serving in their positions so that they may fully carry out their functions, without fear of interference or harassment by the receiving state." Declaration of Abraham D. Sofaer, dated July 5, 1988 ("Sofaer Decl."), ¶ 6, submitted in *United States v. Guinand*, 688 F. Supp. 774 (D.D.C. 1988), declaration excerpted in *Cumulative Digest of United States Practice in International Law*, 1981–1988, Book I (1993) at 1010–1013. [fn. omitted]

Once an individual *ceases* to be a diplomatic agent in a receiving state, however, the scope of that individual's immunity is then limited to that set forth in Article 39 (2):

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, *with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.*

VCDR, Article 39(2) (emphasis added). In other words, a former diplomat has continuing or residual immunity only for "acts performed . . . in the exercise of his functions as a member of the mission," *i.e.,* for his official acts.[4] VCDR, Article 39(2)*; see also Swarna,* 2009 WL 773446, at *5, *Brzak v. United Nations*, 551 F. Supp.2d 313, 317 (S.D.N.Y. 2008); *De Luca v. United Nations Organization*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994). Residual immunity is limited to official acts performed by a diplomat as part of his job because, as explained by a leading diplomatic law expert, such acts "are in law the acts of the sending State. It has therefore always been the case that the diplomat cannot be sued in respect of such acts since this would be indirectly to implead the sending State." Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 439 (3d ed. 2008). [fn. omitted] The need for the more expansive immunity enjoyed by accredited diplomats "terminates when the individual ceases to be a diplomatic agent." *Swarna*, 2009 WL 773446, at *6; *see also* Sofaer Decl., ¶ 6 (explaining that former diplomats "are no longer exercising important functions which must be protected in order to maintain the orderly conduct of foreign relations between their state and the receiving state"). Thus:

> [t]he United States Government has consistently interpreted Article 39 of the VCDR to permit the exercise of U.S. jurisdiction over persons whose status as members of the diplomatic mission has been terminated for acts they committed during the period in which they enjoyed privileges and immunities, except for acts performed in the exercise of the functions as a member of the mission. (Article 3 of the VCDR

[4] In this brief, the Government uses the term "official acts" to refer only to the scope of residual immunity provided by Article 39(2) of the VCDR. The Government takes no position on the scope of the term "official acts" as used elsewhere in the VCDR.

> lists the permissible functions of a diplomatic mission.) The Department of State has publicly communicated this interpretation to U.S. law enforcement authorities, to Congress, and to members of foreign diplomatic missions in the United States.

Sofaer Decl., ¶ 5.

The Department of State issued such a communication to the chiefs of all diplomatic missions in the United States in a Circular Note, which stated, "[t]he Department wishes to remind the missions that in any case involving criminal activity no immunity exists against the arrest and prosecution of a person formerly entitled to privileges and immunities who returns to the United States following the termination of his or her official duties, unless it can be proved that the crime *related to the exercise of official functions*." Circular Note, November 15, 1989, published at 2 Foreign Affairs Manual Exhibit 233.4 (emphasis added), *available at http://www.state.gov/documents/organization/84395.pdf*. Although this communication was focused on criminal immunity, the limited immunity of former diplomats described in Article 39(2) applies equally to both criminal and civil liability. *Swarna*, 2009 WL 773446, at *9. Furthermore, "[t]he United States Government's interpretation of the termination of immunity under the VCDR is . . . consistent with the practice of the other sovereign states, including [those] which are party to the Vienna Convention." Sofaer Decl., ¶ 8.

B. The Court Should Consider Whether Ambassador Baja's and/or His Wife's Employment of Plaintiff Was an Official Act to Determine Whether He and/or She Enjoy Residual Immunity From This Suit.

In this case, because Ambassador Baja was served in this action more than a year after he left his position as Permanent Representative to the United Nations, Ambassador Baja enjoys residual immunity only for his official acts carried out as a member of the Philippine Mission to the United Nations under Article 39 (2) of the VCDR.[6] During the period when Mrs. Baja was accredited by the Government of the Philippines to the United Nations as the Ambassador's spouse, she enjoyed the same broad privileges and immunities as Ambassador Baja. *See* VCDR, Article 37(1). However, Mrs. Baja was also served in this action long after Ambassador Baja left his post at the United Nations. As she was never a member of the Philippine Mission to the United Nations, she could not have conducted any acts under Article 39(2) "as a member of the mission," and her immunity does not continue to subsist for any acts. Thus, Mrs. Baja enjoys no residual immunity and is subject to the civil jurisdiction of the United States. *See* VCDR, Article 37(1), 39(2). *Cf. Swarna*, 2009 WL 773446, at *10–11.

The question remaining before the Court is thus whether Ambassador Baja's employment of plaintiff was an act carried out in the exercise of his official functions as a member of the Philippine Mission. It is clear that such acts are limited to those, "performed on behalf of or imputable to the sending State." Denza at 441. The more difficult question is what constitutes such an act. A similar

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[6] The privileges and immunities set forth in the VCDR are enjoyed by Ambassador Baja and his wife by virtue of the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("UN Headquarters Agreement"), which provides that certain resident representatives to the United Nations are entitled to the same privileges and immunities in the United States as the United States accords to diplomatic envoys accredited to it. *See* UN Headquarters Agreement, Article V, § 15, 12 Bevans 956, T.I.A.S. 1676; *Ahmed v. Hoque*, No. 01 Civ. 7224 (DLC), 2002 WL 1964806, at *5 (S.D.N.Y Aug. 23, 2002).

question arises in the consular context, as consular officers and employees are not subject to criminal or civil jurisdiction "in respect of acts performed in the exercise of consular functions." Vienna Convention on Consular Relations, Article 43(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("VCCR"). *See Ford v. Clement*, 834 F. Supp. 72, 75 (S.D.N.Y. 1993) ("[A] consular officer . . . must . . . plead and prove immunity on the ground that the act or omission underlying the process was in the performance of his official functions," *quoting Koeppel & Koeppel v. Federal Republic of Nigeria*, 704 F. Supp. 521, 522 (S.D.N.Y. 1989)). In evaluating whether a specific act was "performed in the exercise of consular functions," rendering a consular officer or employee immune from jurisdiction, courts have looked to Article 5 of the VCCR, which describes activities that comprise consular functions. *See, e.g., Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002); *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340 (9th Cir. 1993); *Ford,* 834 F. Supp. at 75 (S.D.N.Y. 1993); *Cole*, 717 F. Supp. at 323.

It would be reasonable for courts to look to the analogous article of the VCDR, Article 3, which provides a list of the "functions of a diplomatic mission," to inform an analysis of whether an act was performed in the exercise of a former diplomat's "functions as a member of the mission." Article 3 defines these as, inter alia,

(a) Representing the sending State in the receiving State;
(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) Negotiating with the Government of the receiving State;
(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations;

In the recent opinion in the *Swarna* case, the court correctly approached this question by conducting a careful analysis of the VCDR, including Article 3, and the existing case law in an attempt to discern the contours of residual diplomatic immunity. The *Swarna* court concluded that residual immunity pertains to acts taken in the regular course of implementing an official program or policy of the mission, *see Swarna*, 2009 WL 773446, at *6 (*citing De Luca*, 841 F. Supp. at 534–35), as well as the hiring and employment of an individual to work at a diplomatic mission, *see id.* at *7 (*citing Brzak*, 551 F. Supp. 2d at 319; *Osman v. Annan*, 07-837-CV-W (NKL), 2008 WL 2477535, at *1–2 (W.D. Mo. June 16, 2008); *D'Cruz v. Annan*, 05 Civ. 8918 (DC), 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005)).

The *Swarna* court also noted that "residual diplomatic immunity does not extend to lawsuits based on actions that were entirely peripheral to the diplomatic agent's official duties," such as, for example, the criminal distribution of narcotics, *see Swarna,* 2009 WL 773446, at *7 *(citing U.S. v. Guinard*, 688 F. Supp. 774, 774 (D.D.C. 1988)), and observed that the one case that "arguably holds to the contrary" did not independently analyze whether residual diplomatic immunity applied to defendant's acts because plaintiff had already conceded that defendant had been acting in his official capacity. *See Swarna*, 2009 WL 773446, at *8 (discussing *Knab v. Republic of Georgia*, 97 Civ. 3118 (TFH), 1998 WL 34067108 (D.D.C. May 29, 1998).) Ultimately, the *Swarna* court determined that the acts alleged by a former domestic servant in her complaint against former Kuwaiti diplomats were not official but private acts and thus that the former diplomats were not

shielded by the residual immunity set forth in Article 39(2). *See Swarna*, 2009 WL 773446, at *9, 10. While the Government takes no position in this case as to whether Ambassador Baja enjoys residual immunity, the Government agrees with the analytical approach of the *Swarna* court, which came to its determination by considering, "whether the acts allegedly committed by [defendant] against plaintiff were performed in the exercise of his diplomatic functions." *Id.* at *5.

II. RELATIONSHIP BETWEEN THE "COMMERCIAL ACTIVITY" EXCEPTION AND OFFICIAL ACTS IN THE VCDR

A. Residual Official Acts Immunity Under Article 39(2) of the VCDR Requires a Separate Analysis from the Commercial Activity Exception Under Article 31(1)(c) of the VCDR

In the Government's view, the question currently before the Court is whether the former Ambassador and his wife enjoy residual diplomatic immunity under Article 39(2) for the acts alleged by plaintiff. Accordingly, there is no need for the Court to address whether the plaintiff's claims fall within the "commercial activity" exception of Article 31(1)(c) of the VCDR, which is applicable only to diplomatic agents during the period of their assignment and accreditation.

As noted above, the VCDR provides accredited diplomatic agents, as well as members of their families forming part of their households, near absolute immunity from civil jurisdiction. *See* VCDR, Articles 31, 37. Article 31 provides three limited exceptions to this immunity, including an exception for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official function." VCDR, Article 31(1)(c). The scope of this exception has been ruled on in three cases outside this district, all of which were brought against diplomats by their former domestic servants; in all of these cases the courts agreed with the United States' position that the "commercial activities exception" to Article 31(1)(c) does not apply to the employment of a domestic worker. *See Sabbithi v. Al Saleh*, No. 07-CV-00115-EGS, 2009 WL 737006, at *4–5 (D.D.C. Mar. 20, 2009); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 193 (D.D.C. 2007); *Tabion v. Mufti*, 877 F. Supp. 285, 291–292 (E.D.Va. 1995), *aff'd*, 73 F.3d 535 (4th Cir. 1996). An analysis of the application of Article 31(1)(c)'s commercial exception with respect to accredited diplomatic agents, however, is independent from the analysis applicable here, regarding the residual immunity of Ambassador Baja under Article 39(2). While Article 31(1)(c) provides an exception to diplomatic immunity for commercial activity conducted "outside [a diplomat's] official function," it does not follow that those acts of an accredited diplomat that do not fall within the commercial activity exception are "official acts" for the purposes of residual immunity under Article 39(2). In fact, there is a broad scope of conduct that is neither commercial nor official, for which former diplomats do not enjoy immunity.

* * * *

. . . [T]he immunity of current diplomatic agents is extensive, consistent with the purpose of such immunity "to ensure the efficient performance of the functions of diplomatic missions." VCDR, preamble, cl. 4. The exception to such immunity for commercial or professional activities set forth in Article 31(1), when examined in this context, should be interpreted narrowly. *See* VCDR, Article 31(1); *see also Sabbithi,* 2009 WL 737006, at *4, *Gonzalez Paredes,* 479 F. Supp. 2d at 193, *Tabion,* 877 F. Supp. at 291. Residual immunity, however, is limited to acts "performed on behalf of or imputable to the sending State," Denza at 441. It is not the case that all acts of a diplomatic agent, other than those for which there is an exception to immunity under Article 31, are "performed on behalf of or imputable to the sending State." The types of conduct that clearly fall outside the scope of the commercial activities exception are "[o]rdinary contracts incidental to life

in the receiving State, such as purchase of goods, medical, legal or educational services, or agreements to rent accommodation." Denza at 305. But it is precisely this type of unofficial conduct, which is incidental to the life of a diplomat and therefore protected by the broad immunity provided under Article 31, that would appear to fall outside the scope of the official acts "imputable to the sending State" for which Article 39(2) provides residual immunity.

Indeed, to conflate conduct that is not commercial, and thus outside the scope of Article 31(1)(c), with acts performed in the exercise of a diplomat's function as a member of the mission for which there is ongoing immunity under Article 39(2), would provide former diplomats with essentially the same broad immunity enjoyed by accredited diplomats. As noted by the *Swarna* court, such conflation,

> would eliminate any difference between the scope of immunity provided by Art. 31 and that provided by Art. 39, despite the use of more restrictive language in Art. 39. . . . Art. 39 first provides that a diplomatic agent's immunity "shall normally cease" when his duties "come to an end" and he departs the country or after a reasonable time to depart has expired. VCDR [A]rt. 39(2). The next sentence qualifies the prior one: "However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." *Id.* This qualifier makes clear that diplomatic agents were only intended to receive residual immunity with respect to official acts, and that not *all* acts of a diplomatic agent were understood to be official.

Swarna, 2009 WL 773446, at *10. . . .

* * * *

3. Protection of Diplomatic Property and Diplomats

On September 21, 2009, Honduran President Manuel Zelaya, who was removed from office in a coup d'etat on June 28 and forced to leave Honduras, returned to Honduras and took refuge at the Brazilian Embassy. On September 22, 2009, State Department Spokesman Ian Kelly issued a statement concerning President Zelaya's return, stressing "the importance of respecting the inviolability of the Embassy of Brazil in Tegucigalpa and the individuals on its premises." The statement also noted "with appreciation the de facto authority's statement last night promising to respect the Vienna Convention on Diplomatic Relations of 1961, to which Honduras is a party." The full text of the statement is available at *www.state.gov/r/pa/prs/ps/2009/sept/129479.htm.*

On September 25, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, speaking in the U.S. capacity as President of the Security Council, made a statement to the press after the Brazilian Ambassador briefed the Council. On behalf of the Council, Ambassador Rice stated:

> Council members stressed the importance of respecting International Law through preserving the inviolability of the Embassy of Brazil in Tegucigalpa, and other protections afforded it by the Vienna Convention on diplomatic relations, and ensuring the safety of individuals on its premises. They condemned acts of intimidation against the Brazilian Embassy and called upon the de facto government of Honduras to cease harassing the Brazilian Embassy and to provide all necessary utilities and services including water, electricity, food and continuity of communications. Respect and protection of the inviolability of diplomatic premises is a universally accepted principle of international relations.

See *http://usun.state.gov/briefing/statements/2009/september/129633.htm*; *see also* the remarks of Legal Adviser Harold Hongju Koh at a press briefing in Geneva, available at *http://geneva.usmission.gov/news/2009/09/28/koh-posner/*, and the October 28 remarks of Ambassador Alejandro D. Wolff, Deputy Permanent Representative to the United Nations, to the General Assembly, available at *http://usun.state.gov/briefing/statements/2009/131038.htm*. Chapters 6.I.2., 7.C.1.b., and 16.A.4.c. provide additional discussion of the U.S. response to the coup in Honduras.

C. OTHER ISSUES OF STATE REPRESENTATION

1. Designation of a Benefit Under the Foreign Missions Act

a. Exemption of foreign diplomatic and consular staff from tobacco excise taxes

On January 14, 2009, Ambassador Eric J. Boswell, Director of the State Department's Office of Foreign Missions and Assistant Secretary for Diplomatic Security, designated as a benefit under the Foreign Missions Act, 22 U.S.C. §§ 4301-4316, an exemption for foreign missions and their personnel from excise taxes on tobacco and tobacco products. The designation, which was published in the Federal Register, as set forth below, was intended to clarify that the exemption from taxation provided under the Vienna Conventions and other international agreements included an exemption from these excise taxes. 74 Fed. Reg. 5019 (Jan. 28, 2009).

The Department had similarly designated an exemption for diplomatic and consular missions and their personnel from federal manufacturers' and retailers' excise taxes under the Foreign Missions Act in 1998 for purchases from the manufacturer or retailer liable for the tax.

After due consideration of the benefits, privileges and immunities provided to missions of the United States under the Vienna Diplomatic and Consular Conventions and other governing treaties, and in order to facilitate relations between the United States and foreign governments, to improve or maintain the availability of tax exemption privileges for the United States, and by virtue of the authority vested in me under the Foreign Missions Act, 22 U.S.C. 4301 *et seq.*, and Delegation of Authority No. 214, § 14, dated September 20, 1994, I hereby designate as a benefit under the Act, to be granted to foreign diplomatic and consular missions and personnel in the United States on the basis of reciprocity and as otherwise determined by the Department, to include personnel of international organizations and missions to such organizations who are otherwise entitled to exemption from direct taxes, exemption from Federal and State or local excise taxes imposed with respect to tobacco products (as defined in 26 U.S.C. 5702) manufactured, packaged or sold in the United States. Procedures governing implementation of this benefit will be established by the Department of the Treasury.

b. Exemption from real property taxes on certain consular and diplomatic property

On June 23, 2009, Deputy Secretary of State for Management and Resources Jacob J. Lew designated an "exemption from real property taxes on property owned by foreign governments and used to house staff of permanent missions to the United Nations or the Organization of American States or of consular posts as a benefit for purposes of the Foreign Missions Act." Deputy Secretary Lew further determined that "any state or local laws to the contrary are hereby preempted." 74 Fed. Reg. 31,788 (July 2, 2009). As the Federal Register notice, set forth below, explained, in so doing, Deputy Secretary Lew extended to diplomatic missions to the United Nations and the Organization of American States and to consular posts nationwide the same tax treatment the United States had provided to bilateral diplomatic missions in Washington, D.C. since 1986. The Deputy Secretary acted, among other things, "to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties."

Pursuant to the authority vested in the Secretary of State by the laws of the United States, including the Foreign Missions Act, 22 U.S.C. 4301 *et seq.*, and delegated by the Secretary to me as one of the President's principal officers for foreign affairs by Delegation of Authority No. 245-1 of February 13, 2009, and at the direction of the Secretary of State, and after due consideration of the

benefits, privileges, and immunities provided to missions of the United States abroad, as well as matters related to the protection of the interests of the United States, and at the request of foreign missions, I hereby designate exemption from real property taxes on property owned by foreign governments and used to house staff of permanent missions to the United Nations or the Organization of American States or of consular posts as a benefit for purposes of the Foreign Missions Act. I further determine that such exemption shall be provided to such foreign missions on such terms and conditions as may be approved by the Office of Foreign Missions and that any state or local laws to the contrary are hereby preempted. Prior inconsistent guidance is hereby rescinded. This action is in accord with the tax treatment of foreign government-owned property in the United States used as residences for staff of bilateral diplomatic missions, see Department of State, Notice: Property Owned by Diplomatic Missions and Used to House the Staff of Those Missions is Exempt from General Property Taxes, 51 FR 27303 (July 30, 1986), and conforms to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing.

This action is necessary to facilitate relations between the United States and foreign states, to protect the interests of the United States, to allow for a more cost effective approach to obtaining benefits for U.S. missions abroad, and to assist in resolving a dispute affecting U.S. interests and involving foreign governments which assert that international law requires the exemption from taxation of such diplomatic and consular properties. The dispute has become a major irritant in the United States' bilateral relations and threatens to cost the United States hundreds of millions of dollars in reciprocal taxation. As the largest foreign-government property owner overseas, the United States benefits financially much more than other countries from an international practice exempting staff residences from real property taxes, and it stands to lose the most if the practice is undermined. Responsive measures taken against the United States because of the dispute also have impeded significantly the State Department's ability to implement urgent and congressionally mandated security improvements to our Nation's diplomatic and consular facilities abroad, imposing unacceptable risks to the personnel working in those facilities. This action will allow the United States to press forward with improvements that will protect those who represent the Nation's interests abroad.

The exemption from real property taxes provided by this designation and determination shall apply to taxes that have been or will be assessed against any foreign government with respect to property subject to this determination, and shall operate to nullify any existing tax liens with respect to such property, but shall not operate to require refund of any taxes previously paid by any foreign government regarding such property. These actions are not exclusive and are independent of alternative legal grounds that support the tax exemption afforded herein.

c. Litigation concerning tax liens and property taxes imposed on consular and diplomatic property

On June 29, 2009, the United States filed a brief as *amicus curiae*, urging the U.S. Court of Appeals for the Second Circuit to vacate a lower court's judgment that upheld New York City's imposition of tax liens and assessment of local property taxes on residences owned by the Governments of India and Mongolia and used to house staff of their missions to the United Nations, and in the case of India, of its consular post

as well. *City of New York v. Permanent Mission of India to the United Nations*, No. 08-1805-cv (2d Cir.). *See Digest 2006* at 592–603; *Digest 2007* at 455–62; and *Digest 2008* at 456–57 and 495–98 for prior developments in the litigation. The U.S. brief argued that the court should vacate the lower court's judgment that India and Mongolia owed approximately $42 million and $4 million, respectively, because the State Department's June 23, 2009 determination, discussed in C.1.b. *supra*, exempted "taxes that have been or will be assessed" and nullified "any existing tax liens." Excerpts below from the U.S. brief discuss the State Department's authority under the Foreign Missions Act to designate and determine a tax exemption as a benefit accorded to foreign missions. The initial U.S. brief and the supplemental brief the United States filed on October 19, 2009, are available at *www.state.gov/s/l/c8183.htm*. The litigation remained pending at the end of 2009.[*]

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* * * *

1. The State Department's Notice falls within the broad authority granted in the FMA. That statute specifies that the State Department shall determine "[t]he treatment to be accorded to a foreign mission in the United States." 22 U.S.C. § 4301(c). Among the functions specified in the FMA, the State Department shall "[p]rovide or assist in the provision of benefits for or on behalf of a foreign mission in accordance with section 4304 of this title." 22 U.S.C. § 4303(2).

In turn, section 4304 delineates the "[p]rovision of benefits" by the State Department to foreign missions. The State Department can provide benefits, subject to any "terms and conditions" the Department specifies, either "[u]pon the request of a foreign mission," or whenever the State Department "determines that such action is reasonably necessary on the basis of reciprocity or otherwise" in order to advance certain foreign relations goals. 22 U.S.C. § 4304(a)–(b). The statute lists those goals, which include:

- "to facilitate relations between the United States and a sending State,"
- "to protect the interests of the United States,"
- "to adjust for costs and procedures of obtaining benefits for missions of the United States abroad," and

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[*] Editor's note: On August 17, 2010, the U.S. Court of Appeals for the Second Circuit vacated and reversed the district court's opinion and remanded. *City of New York v. Permanent Mission of India to the United Nations*, 2010 U.S. App. LEXIS 17127 (2d Cir. 2010). The Second Circuit concluded that the State Department had acted within its statutory authority. The court held first "that the Foreign Missions Act ("FMA") permits the State Department to designate affirmative benefits such as tax exemptions and that the Act allows the State Department to make such tax exemptions preemptive of State and municipal tax laws." *Id.* at *4. Second, the court held "that, under the circumstances of this case, the State Department acted within its power in designating this benefit as effective retroactively." *Id.* The court also "conclude[d] that the Notice issued by the State Department was procedurally proper because it [fell] within the 'foreign affairs function' exception to notice and comment under the Administrative Procedure Act, 5 U.S.C § 553(a)(1)." *Id.* at *4–5.

- "to assist in resolving a dispute affecting United States interests and involving a foreign mission or sending State."

22 U.S.C. § 4304(b)(1)–(4).

"Benefit" is a broad, inclusive term in the FMA. The statute specifies one category of benefits—the acquisition of property, goods, or services—but the statute also delegates to the State Department the authority to specify "such other benefits as the Secretary may designate." 22 U.S.C. § 4302(a)(1). The definition of "benefit" thus gives the State Department authority to determine all aspects of the "treatment to be accorded to a foreign mission in the United States." 22 U.S.C. § 4301(c).[4] The expansive scope of the State Department's authority to confer benefits is confirmed by Congress' direction that "[d]eterminations with respect to the meaning and applicability of the term[] * * * shall be committed to the discretion of the Secretary." 22 U.S.C. § 4301(b). Thus, the State Department not only has the statutory power to "designate" any "other benefits," but may also "[d]etermin[e]" the "meaning" of the term "benefit."

The FMA repeatedly emphasizes the broad authority Congress granted to the State Department to specify the treatment of foreign missions by designating benefits. See, *e.g.*, 22 U.S.C. §§ 4301(c), 4302(b), 4303(1)–(2), (5), 4304(a)–(b). The statute also expressly commits to the State Department's discretion all determinations under the FMA, including the designation and determination of benefits. See 22 U.S.C. § 4308(g) ("Except as otherwise provided, any determination required under this chapter shall be committed to the discretion of the Secretary."). That language reflects Congress' judgment that the State Department shall bear primary responsibility for determining the treatment of foreign missions. . . .

[4] In determining the "treatment" to be accorded to foreign missions, the FMA directs the State Department to consider (among other factors) the reciprocal "benefits, privileges, and immunities" accorded to missions of the United States by other countries. 22 U.S.C. § 4301(c). The statute also directs the State Department to "[a]ssist" federal, state, and local governments in "according benefits, privileges and immunities" to foreign missions. 22 U.S.C. § 4303(1). Although the FMA refers to privileges and immunities along with benefits, the statute does not expressly grant the State Department any specific authority to establish privileges and immunities of missions. Instead, the statutory phrase refers to the international law obligations the United States owes to foreign missions. See 28 U.S.C. § 4310 (entitled "Privileges and immunities") ("Nothing in this chapter shall be construed to limit the authority of the United States to carry out its international law obligations."). The FMA gives the State Department authority to confer benefits that go beyond the privileges and immunities established by international law. Indeed, the legislative history reflects Congress' view that privileges and immunities under international law are a subset of the benefits that the State Department is authorized to provided to foreign missions. See, *e.g.*, 127 Cong. Rec. H26074 (Oct. 29, 1981) (section-by-section analysis of House bill substantially identical to FMA as enacted: FMA's broad authority "is intended * * * to enable the United States to exercise more effective control over the granting of privileges, immunities, and other benefits to foreign missions"). Although appellants argue that U.N. mission-staff housing is entitled to tax exemption under international law, the State Department acted under its domestic statutory authority pursuant to the FMA. The Notice thus does not require the Court to answer the question whether international law would provide an independent basis for affording appellants an exemption from real estate taxes.

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3. The State Department's Notice here is a proper exercise of the powers granted under the FMA. In 1986, the State Department issued a public notice recognizing an exemption from real property taxes for the residences of staff of bilateral foreign diplomatic missions. See 51 Fed. Reg. 27303 (July 30, 1986). The Fourth Circuit upheld that policy and (relying on the Supremacy Clause) prohibited efforts by a local government to impose real estate taxes on such diplomatic-residence properties. See *United States v. Arlington County*, 669 F.2d 925 (4th Cir. 1982) (*Arlington County I*) (upholding application of the State Department tax-exemption policy prospectively); *United States v. Arlington County*, 702 F.2d 485 (4th Cir. 1983) (*Arlington County II*) (retroactive application upheld).

At the time of that announcement, the State Department's policy concerning tax exemption for staff-residence property extended only to the housing for staff of bilateral diplomatic missions, not to other foreign mission staff residences, such as foreign government property used to house staff of consulates or permanent missions to international organizations. Under the State Department's policy at the time, those other mission properties remained subject to real property taxes by state and local governments. See United States Mission to the United Nations Circular Note HC-12-01 (April 5, 2001).

In the intervening years, the efforts of local governments in the United States to tax foreign mission property used to house staff of consulates and permanent missions to international organizations—including efforts by New York City to impose real estate taxes on the properties at issue in this case—have proved to be a persistent irritant in the foreign relations of the United States. The governments of India and Mongolia, among others, have repeatedly objected to those tax assessments, and have sought protection from the State Department.

Even more significantly, foreign governments have recently imposed or threatened to impose barriers, restrictions, and limitations on the operation of United States missions abroad. For example, the government of India has refused to issue permits for a new consular compound in Mumbai, resulting in substantial monetary costs to the United States and frustrating efforts to improve security for consular staff. . . .

Foreign governments have also threatened to impose taxes on staff-residence property owned by the United States abroad, justifying their policies by reference to the taxable status in the United States of property used for foreign mission staff housing. . . .

The Notice expressly refers to those concerns, and explains the disproportionate harm to the United States that flows from local taxation of foreign mission properties in this country. . . .

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2. London Congestion Tax

On August 12, 2009, the Department of State Office of the Spokesman responded to a question taken at the daily press briefing, asking "What is U.S. Government policy regarding the United Kingdom's Congestion Tax?" The City of London assesses a daily tax of eight pounds (£8.00) on all motorists entering an area of central London where the U.S. Embassy is located. "U.S. Government policy regarding the Congestion Tax has not

changed," the Department's response explained. "This is longstanding U.S. Government policy and is not affected by a change in Ambassadors." The Department also stated, "The Congestion Tax is prohibited by various treaties, including the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations; our 1951 bilateral Consular Agreement with the United Kingdom; and the NATO Status of Forces Agreement." The Department's response is also available at *www.state.gov/r/pa/prs/ps/2009/aug/127997.htm*. Additional discussion of the U.S. position concerning the congestion tax is available in *Digest 2005* at 570–74.

3. Agreement for Construction and Renovation of Embassies, Consulates, and the Permanent Mission of the People's Republic of China to the United Nations

On August 20, 2009, the United States and the People's Republic of China ("PRC") signed an international agreement governing the terms under which embassies, consulates, and the PRC's Permanent Mission to the United Nations may be constructed, expanded, renovated, or demolished. Agreement Between the Government of the United States of America and the Government of the People's Republic of China on the Conditions of Construction of Diplomatic and Consular Complexes in the People's Republic of China and the United States of America. Provisions excerpted below relate to the diplomatic and consular status of sites and archives; treatment of personnel, including privileges and immunities; and shipments of project-related materials and equipment, including a special bilateral arrangement for processing such shipments through upon arrival in both countries' ports. The agreement entered into force upon signature and will remain in effect for ten years from that date. The full text of the agreement is available at *www.state.gov/documents/organization/130493.pdf*.

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8. Diplomatic and Consular Status of Sites and Archives

8.1 Any site acquired by either Party for future diplomatic and consular construction projects, whether acquired prior or subsequent to this Agreement, shall be considered part of the premises of the Construction Party's diplomatic or consular mission under the VCDR or the China–U.S. Consular Treaty, respectively, from the date of delivery of right to use.

8.2 All of the Construction Party's temporary sites shall be considered part of the premises of the Construction Party's diplomatic or consular mission under the VCDR or the China–U.S. Consular Treaty, respectively, within the duration of use approved by the Host Country.

8.3 All sites referred to in Articles 8.1 and 8.2 of this Agreement shall be inviolable and under the total control of the Construction Party.

8.4 The records and papers of an organization from the same country as the Construction Party relating to design or construction work performed in connection with such construction (including but not limited to tender and contract documents, architectural and engineering plans and specifications) shall be considered a constituent part of the archives of the diplomatic or consular mission of the Construction Party and shall be inviolable under the VCDR and the China–U.S. Consular Treaty, respectively.

* * * *

9.6 Construction Party personnel who are of Construction Party nationality, and whose stay in the Host Country is more than 30 calendar days, shall be attached, as appropriate, to the Construction Party diplomatic mission as administrative and technical staff or to a consular mission as employees of the consulate for the duration of their work on a project. These personnel shall enjoy the privileges and immunities accorded administrative and technical staff of the diplomatic mission under the VCDR, or those accorded employees of a consulate under the China–U.S. Consular Treaty, respectively.

* * * *

[Shipments] 10.4 As a special bilateral arrangement, the Host Country customs shall, after the landing of construction materials and equipment shipped as special dedicated project materials for the Construction Party's embassy or consulate and within 48 hours of the submission of Construction Party's written declaration to the customs authorities, finish procedures for release and release the articles pursuant to Host Country customs procedures. The Construction Party shall submit advance written notice in accordance with Host Country requirements no later than 24 hours before the arrival of the shipments. The Construction Party shall comply with related Host Country laws and regulations and shall attach visible marks to the shipments and make customs declarations in writing to Host Country customs authorities.

10.5 The Parties pledge that construction materials and equipment shipped as special dedicated project materials for the embassy or consulate, as well as equipment installed and used, shall all respect relevant provisions of the VCDR or the China–U.S. Consular Treaty related to articles for official use of the mission and at the same time shall be in keeping with Host Country laws and regulations, and shall be limited to official and communications use of the embassy or consulate. No equipment and instruments that endanger Host Country security shall be imported. As a necessary means to determine whether construction materials and equipment shipped by the Construction Party include equipment and instruments that endanger Host Country security and whether construction materials and equipment shipped conform to the declaration, the Host Country shall have the right to subject shipments to passive inspection, without opening the containers; or, on the premise that prior notice is served to the Construction Party, shall have the right to subject shipments to active inspection, without opening the containers. Such inspections shall be conducted in the presence of the Construction Party's diplomatic or consular agents or its authorized personnel. In the event the Construction Party objects to an active inspection, it shall have the right to return such shipments unopened and without inspection. In the event the Host Country determines that the Construction Party is importing equipment and instruments that endanger its national security, or that the materials and equipment shipped do not conform to the declaration, the Host Country, on the premise that prior notice is served to the Construction Party, shall have the right to inspect by opening the containers. Such inspections shall be conducted in the presence of the Construction Party's diplomatic or consular agents or its authorized personnel. In the event the

Construction Party objects to an inspection, it shall have the right to return such shipments unopened and without inspection.

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4. Labor Issues

On September 16, 2009, the Department of State circulated a diplomatic note to Chiefs of Mission of diplomatic missions in the United States, discussing the standards applicable to the employment of domestic workers of mission personnel who are in the United States on nonimmigrant A-3 or G-5 visas. The note superseded previous notes on the same subject and "emphasize[d] the importance the United States Government attaches to providing fair treatment to domestic workers who come to the United States to work for members of the diplomatic community." It also "remind[ed] the Chiefs of Mission to take any and all measures necessary to ensure that members of their missions employing such workers respect the laws relating to the treatment to be accorded to domestic workers."

The first section of the note addressed the Department of State's two new requirements concerning prospective domestic workers' eligibility for visas. As it explained, "Effective October 15, 2009, the Department of State will also require that foreign missions notify the Department of any prospective domestic worker before the worker applies for a visa." Second, the note advised that the Department would presume that foreign mission personnel below the rank of Minister would not be able to provide the legally required wages and working conditions; to overcome this presumption, the prospective mission member would have to demonstrate the financial ability to pay the salary and related travel expenses of a domestic worker. The note explained further that

> [t]o overcome this presumption, a prospective mission member not having the rank of Minister or above would have to demonstrate to the consular officer reviewing the A-3 or G-5 visa application that he or she has the financial ability to pay the salary of the domestic worker as specified in the contract, as well as the related travel expenses. The consular officer will also take into consideration the number of domestic workers that a particular mission member may reasonably have the ability to employ. If a mission member seeks to replace a domestic worker or add to his/her existing domestic staff, the A-3 or G-5 visa may be denied if the Department has credible evidence that the mission member failed to fulfill his/her obligations to a former or

current employee, such as to abide by the contract terms generally, and specifically, to pay a fair wage.

The Department's note also announced a new requirement that wage payments to domestic workers be made either by check or electronic fund transfer to a bank account in the domestic worker's name only, prohibiting cash payments to such workers. In addition, the note reminded the Chiefs of Mission that passports of domestic workers must be in the sole possession of the worker and advised them of a new statute requiring the Secretary of State to suspend A-3 or G-5 visas for missions in certain circumstances.

Finally, the note advised the Chiefs of Missions of new statutory authority that requires the Secretary of State to "suspend for such period as the Secretary determines necessary, the issuance of A-3 visas or G-5 visas to applicants seeking to work for officials of a diplomatic mission or international organization, if the Secretary determines that there is credible evidence that one or more employees of such mission or international organization have abused or exploited one or more nonimmigrants holding an A-3 or G-5 visa, and that the diplomatic mission or international organization tolerated such actions." William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (*see Digest 2008* at 119-20). The note also stated that the Department of State "forwards to the Department of Justice all credible allegations of abuse of domestic workers by mission members which may constitute criminal conduct. In that context, the Department of State may take other appropriate action, including a request for a waiver of any applicable immunity, based on a determination by an appropriate prosecuting authority."

The full text of the note is available at *www.state.gov/s/l/c8183.htm*.

D. INTERNATIONAL ORGANIZATIONS

1. INTERPOL

On December 16, 2009, President Barack H. Obama issued Executive Order 13524, expanding INTERPOL's privileges and immunities in the United States. 74 Fed. Reg. 67,803 (Dec. 21, 2009). The order amends Executive Order 12425 of June 15, 1983, which designated INTERPOL as a public international organization pursuant to the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288. The 1983 order provided INTERPOL with certain privileges and immunities, including certain immunities from suit and legal process in the United States but withheld some of the benefits normally given to international organizations under the IOIA because, at the

time, INTERPOL did not have an office in the United States. Because INTERPOL opened a liaison office to the United Nations in New York in 2004, the new order extends to INTERPOL the remaining privileges and immunities that IOIA-designated international organizations with offices in the United States normally enjoy. The privileges and immunities the new order accords to INTERPOL include: immunity from search and confiscation of its property and archives or files; freedom from customs duties and taxes related to the importation of baggage and effects; and immunity from federal income, Social Security, and property taxes. The new order does not enable or authorize INTERPOL or its officials to conduct searches or seizures, make arrests, or take any other law enforcement actions in the United States.

2. Constitutionality of the International Organizations Immunities Act

On May 1, 2009, the United States filed a brief as intervenor in the U.S. Court of Appeals for the Second Circuit in a case brought by a Portuguese and Italian national against her former employer, the World Meteorological Organization ("WMO"), a specialized agency of the United Nations, and four current or former WMO officials for acts that allegedly occurred in Switzerland. *Veiga v. World Meteorological Org.*, No. 08-3999-cv (2d Cir.). The plaintiff brought employment-related and other claims arising from her alleged discovery of an embezzlement scheme and efforts to expose it. In 2008 a district court dismissed the plaintiff's claims for lack of subject matter jurisdiction, rejecting the plaintiff's argument that the Constitution was violated by dismissal of her claims under the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288 et seq. On appeal, the plaintiff reiterated her argument that the application of the IOIA to dismiss her claims was unconstitutional. The United States took no position on the merits of the plaintiff's claim but defended the constitutionality of the IOIA. As an initial matter, the United States explained that, "[a]s a foreign citizen who at all relevant times resided and worked in Switzerland, and who has sued her former employer, an international organization based in Switzerland, as well as its employees, for acts that occurred entirely abroad, the plaintiff has no constitutional rights to invoke." The United States then argued that "there is simply no constitutional right to bring suit free from the application of immunity doctrines." Excerpts follow from the brief's discussion of the constitutionality of the IOIA. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*. The litigation remained pending as of the end of 2009.*

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* On March 3, 2010, the U.S. Court of Appeals for the Second Circuit affirmed the district court's judgment. *Veiga v. World Meteorological Org.*, 368 Fed. Appx. 189 (2d Cir. 2010); 2010 U.S. App. LEXIS 4440 (2d Cir. 2010).

*   *   *   *

The authority of the political branches to define and confer immunities includes the authority to grant immunities to designated public international organizations, such as the WMO. Although international organizations are not themselves foreign states, the statutory extension of immunities historically enjoyed by foreign states to international organizations reflects the international community's "growing efforts to achieve coordinated international action through multinational organizations with specific missions." *Mendaro v. World Bank,* 717 F.2d 610, 615 (D.C. Cir. 1983). In passing the IOIA, Congress noted the "increased activities of the United States in relation to international organizations," and specifically recognized the need to "extend privileges of a governmental character" in cases where "this Government associates itself with one or more foreign governments in an international organization." S. Rep. No. 79-861, at 2 (1945). Indeed, Congress limited the reach of the IOIA to public international organizations, described in the House Report as "those which are composed of governments as members," H.R. Rep. No. 79-1203, at 1 (1945), 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 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; *see also* Exec. Order 10,676, 21 Fed. Reg. 6625 (1956) (designating WMO). The extension of such privileges is a logical one given the function of international organizations to serve as the instrumentalities of many nations, and given the modern reality that international organizations are critical fora for the conduct of foreign affairs.

The immunities of international organizations have been repeatedly recognized and respected by district courts within this Circuit over many years without their constitutionality ever having been called into question. *See, e.g., Van Aggelen v. United Nations,* 06 Civ. 8240 (LBS), 2007 WL 1121744, at * 1 (S.D.N.Y. Apr. 12, 2007), *aff'd,* 2009 WL 424175 (2d Cir. 2009); *D'Cruz v. Annan*, 05 Civ. 8918 (DC), 2005 WL 3527153, at *1–2 (S.D.N.Y. Dec. 22, 2005), *aff'd,* 223 Fed. Appx. 42 (2d Cir. 2007); *McGehee v. Albright,* 210 F. Supp. 2d 210, 218 (S.D.N.Y. 1999), *aff'd,* 208 F.3d 203 (2d Cir. 2000); *Askir v. Boutros-Ghali,* 933 F. Supp. 368, 373 (S.D.N.Y. 1996); *De Luca v. United Nations Org.,* 841 F. Supp. 531, 533 (S.D.N.Y.), *aff 'd,* 41 F.3d 1502 (2d Cir. 1994); *Klyumel v. United Nations,* 92 Civ. 4231 (PKL), 1993 WL 42708, at *1 (S.D.N.Y. Feb. 17, 1993); *Boimah v. United Nations Gen. Assembly,* 664 F. Supp. 69, 71 (E.D.N.Y. 1987).

Furthermore, the few courts to have specifically considered constitutional challenges to the immunities of international organizations or their officials have rejected those challenges out of hand. *See Weinstock v. Asian Development Bank,* No. Civ.A 105 CV00174RMC, 2005 WL 1902858, at *3–*4 (D.D.C. Jul. 13, 2005) (rejecting constitutional challenge to immunity afforded to international organizations under the IOIA); *Ahmed v. Hogue,* 01 Civ. 7224 (DLC), 2002 WL 1964806, at *7 (S.D.N.Y. Aug. 23, 2002) (rejecting plaintiff's constitutional challenge to diplomatic immunity invoked by Bangladeshi representative to the United Nations); *Tuck v. Pan Am. Health Org.,* 668 F.2d 547, 549–550 (D.C. Cir. 1981) (upholding defendant's immunity under IOIA without addressing plaintiff's First and Fourteenth Amendment claims).

As the district court recognized in *Weinstock,* in rejecting the plaintiff's assertion that the dismissal of claims [against] the Asian Development Bank deprived the plaintiff of his "fundamental right of access to the court,"

> [i]t is axiomatic that Congress can limit the jurisdiction of the lower federal courts. *E.g., Keene Corp. v. United States,* 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts. . . ."). One method by which it can do so, and which it employs quite frequently, is to provide by statute that the United States, foreign sovereigns, or certain entities are immune from suit in the district courts. The codification of these immunities is not a constitutional violation.

Weinstock, 2005 WL 1902858, at *3 (some citations omitted). The same rationale applies here, and bars the plaintiff's constitutional challenge.

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Cross References

Immigration and visas and U.S. visa-related restrictions, **Chapters 1.C. and 16.A.4.c.(2), 4.d., and 4.e.**
Trafficking in persons, **Chapters 3.B.3. and 16.A.7.**
Security Council travel bans, **Chapter 16.A.1.a.(1), 2.a., 3.a., and 3.b.**
References to privileges and immunities and other benefits provided under earlier bilateral defense agreements in U.S.-Colombia Defense Cooperation Agreement, **Chapter 18.A.1.c.(1)**