

NO ORAL ARGUMENT DATE HAS BEEN SET

No. 05-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FG HEMISPHERE ASSOCIATES, LLC,

Plaintiff-Appellee,

v.

DEMOCRATIC REPUBLIC OF CONGO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORRECTED BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLANT DEMOCRATIC REPUBLIC OF CONGO

OF COUNSEL:

JONATHAN B. SCHWARTZ
Deputy Legal Adviser

WYNNE M. TEEL
Acting Assistant Legal Adviser
for Diplomatic Law and
Litigation

SUSAN R. BENDA
Attorney Adviser
Department of State
Washington, D.C.

KENNETH WAINSTEIN
United States Attorney

STUART E. SCHIFFER
Acting Assistant Attorney
General

DOUGLAS N. LETTER
(202) 514-3602

IRENE M. SOLET
(202) 514-3542
Attorneys, Appellate Staff
Civil Division, Room 7324
Department of Justice
950 Pennsylvania Ave., N.W.

Washington, D.C. _ 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

All parties, intervenors, and amici appearing before the district court and this Court are listed in the Brief for the Appellant.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for the Appellant.

C. Related Cases.

Except for the consideration of this case by the United States District Court for the District of Columbia, No. 03-1314(RJL), this case was not previously before this Court or any other court. Counsel are aware of no related case currently pending in this or any other court.



IRENE M. SOLET
Attorney For Amicus Curiae
The United States of America

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	
GLOSSARY	
INTEREST OF THE UNITED STATES	1
STATEMENT OF FACTS	3
A. Treaty And Statutory Background	3
1. The Vienna Convention on Diplomatic Relations	3
2. The Foreign Sovereign Immunities Act	4
B. Relevant Facts	5
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE PROPERTIES ARE IMMUNE FROM EXECUTION UNDER BOTH THE FSIA AND THE VIENNA CONVENTION	9
A. FSIA Immunity	10
B. Vienna Convention Immunity	14
II. THE DISTRICT COURT'S REFUSAL TO QUASH THE WRITS OF EXECUTION CONSTITUTED REVERSIBLE ERROR	20
CONCLUSION	31
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases:

Air Canada v. Department of Transp., 843 F.2d 1483 (D.C. Cir. 1988)	18
* Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240 (5 th Cir. 2002) .	21, 23, 26
Consumers United Ins. Co. v. Smith, 644 A.2d 1328 (D.C. App. 1994)	28
Creighton Ltd. v. Qatar, 181 F.3d 118 (D.C. Cir. 1999)	24
Hegna v. Islamic Republic of Iran, 287 F. Supp. 2d 608 (D. Md. 2003), aff'd on other grounds, 376 F.3d 226 (4th Cir. 2004) .	17
Janini v. Kuwait Univ., 43 F.3d 1534 (D.C. Cir. 1995)	11
Kolovrat v. Oregon, 366 U.S. 187 (1961)	18
Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Syst., Inc., 385 F.3d 1206 (9th Cir. 2004)	21
Mwani v. Bin Laden, 417 F.3d 1 (D.C. Cir. 2005)	11
In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998)	13
* Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987)	22, 24, 29, 30
Practical Concepts, Inc. v. Republic of Bolivia, 613 F. Supp. 863 (D.C.C. 1985)	29
Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82 (D.C. Cir. 2002) .	2 3

* Authorities chiefly relied upon are marked with an asterisk.

<u>Republic of Argentina v. Weltover</u> , 607 U.S. 614 (1992)	. . . . .	10
<u>Republic of Austria v. Altmann</u> , 541 U.S. 677 (2004)	. . . . .	13
<u>Saudi Arabia v. Nelson</u> , 507 U.S. 349 (1993)	. . . . .	10
<u>Sosa v. Alvarez-Machain</u> , 542 U.S. 692 (2004)	.	13
<u>South Dakota v. Yankton Sioux Tribe</u> , 522 U.S. 329 (1998)	. . . . .	12
<u>Sumitomo Shoji Am., Inc. v. Avagliano</u> , 457 U.S. 176 (1982)	. . . . .	18
<u>Transaero, Inc. v. La Fuerza Aerea Boliviana</u> , 30 F.3d 148 (D.C. Cir. 1994)	. . . . .	29
<u>United States v. Arlington County</u> , 669 F.2d 925 (4th Cir. 1982) <u>cert. denied</u> , 459 U.S. 801 (1982)	. . . . .	19
<u>United States v. Arlington County</u> , 702 F.2d 485 (4th Cir. 1983)	. . . . .	19
<u>United States v. City of Glen Cove</u> , 322 F. Supp. 149 (E.D.N.Y. 1971), <u>aff'd</u> , 450 F.2d 884 (2d Cir. 1971)	. . . . .	19

U.S. Constitution:

	. . . . .	19
Art. II, § 3, cl. 3	. . . . .

Federal Statutes:

Foreign Missions Act:	. . . . .	15
22 U.S.C. 4301 et <u>seq</u>	. . . . .	15
22 U.S.C. 4301(b)	. . . . .	16
22 U.S.C. 4301(c)	. . . . .	2
22 U.S.C. 4301-4316	. . . . .	2, 16
	. . . . .	16

22 U.S.C. 4303(1)
22 U.S.C. 4305

Foreign Sovereign Immunities Act, Pub. L.
No. 94-583, 90 Stat. 2891 (1976):

28 U.S.C. 1330	2
28 U.S.C. 1602	2
28 U.S.C. 1603(d)	10
28 U.S.C. 1604	4
28 U.S.C. 1605	4
28 U.S.C. 1605(a)(6)	4
28 U.S.C. 1607	4
28 U.S.C. 1608	24, 25
28 U.S.C. 1608(a)	24, 25
28 U.S.C. 1608(a) (1)	24, 25
28 U.S.C. 1608(a) (2)	25
28 U.S.C. 1608(a)(3)	25
28 U.S.C. 1608(a) (4)	25, 26
28 U.S.C. 1608(d)	25
28 U.S.C. 1609	4, 12, 14, 20
28 U.S.C. 1610	4
28 U.S.C. 1610(a)	3, 7, 8, 9, 12, 13, 14
28 U.S.C. 1610(a) (6)	5
28 U.S.C. 1610(a) (1) - (7)	5, 12
28 U.S.C. 1610(c)	21, 26
28 U.S.C. 1611	4

Treaties:

Vienna Convention on Diplomatic Relations;

23 U.S.T. 3227	2
Art. 1(b)	15
Art. 1(c)	15
Art. 1(e)	3
Art. 1(i)	3, 15, 16
Art. 14(a)	3
Art. 22(1)	3, 14
Art. 22(2)	2, 4, 16
Art. 22(3)	3, 14, 16, 20
Art. 23(1)	3
Art. 30(1)	3
Art. 39(1)	15
Art. 39(2)	15
Art. 39(3)	15

Federal Rules:

Fed. R. Civ. P. 4 25
Fed. R. Civ. P. 4 (j) (1) 25
Fed. R. Civ. P. 5(a)22, 23, 25
Fed. R. Civ. P. 6(e) 26
Fed. R. Civ. P. 60(b) 25
Fed. R. Civ. P. 69(a) 27

District Court of the District of Columbia,
Local Rule;

Rule 7(b) 26

District of Columbia Code:

D.C. Code 15-311 28
D. C. Code 15-311 28
D. C. Code 15-323 28
D. C. Code 16-544 28
D.C. Code 16-554 27, 28

District of Columbia Rules:

Civ. P. 69-I 27, 28

Legislative Materials:

H.R. Rep. No. 94-1487 (1976),
reprinted in 1976 U.S.C.C.A.N. 6604 11
S. Rep. No. 94-1310 (1976) 12

GLOSSARY

Art.	Article
Doc.	District Court Docket Number
DRC	defendant Democratic Republic of Congo
FG	plaintiff FG Hemisphere Associates, LLC
FMA	Foreign Missions Act
FSIA	Foreign Sovereign Immunities Act
Vienna Convention	Vienna Convention on Diplomatic Relations

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-7098

FG HEMISPHERE ASSOCIATES, LLC,

Plaintiff-Appellee, v.

DEMOCRATIC REPUBLIC OF CONGO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORRECTED BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLANT DEMOCRATIC REPUBLIC OF CONGO

INTEREST OF THE UNITED STATES

The district court granted writs of execution against two properties in the District of Columbia owned by the Democratic Republic of Congo ("DRC"), purchased and used for many years as the residences of the DRC's ambassador and a member of its diplomatic staff. When the writs were issued, those residences were occupied by former DRC diplomats who had refused to vacate the properties following dismissal from their posts by their own government.¹ In the order under review, the district court

¹The DRC has regained physical control of one property, and has obtained summary judgment in an eviction proceeding against the occupant of the other. The holdover occupants have vacated the ambassador's residence, and the DRC is working to persuade

(continued...)

denied the DRC's motion to quash the writs -- relief that the DRC sought because the properties remain immune from execution under both the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 ("Vienna Convention"), and the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602 et seq. ("FSIA").

The United States has a significant interest in the proper application of the Vienna Convention and the FSIA to properties owned by foreign states in the United States -- particularly properties claimed to be the premises of foreign missions. Under the Vienna Convention, the United States has a treaty obligation to protect the premises of foreign missions in this country.

Vienna Convention, Art. 22(2). Likewise, under the Foreign Missions Act, 22 U.S.C. 4301-4316, Congress has directed the Secretary of State to assist "agencies of Federal, State, and municipal government" in ensuring that foreign missions are accorded all proper privileges and immunities. 22 U.S.C. 4303(1).

The district court's order erroneously permits the forced sale of properties that are immune from execution under both the FSIA and the Vienna Convention. Such a sale would not only have a significant and damaging impact on this country's relations

¹(...continued)

the occupant of the other residence to depart voluntarily in order to avoid a forcible eviction. See DRC Reply To Response To Motion To Waive Bond Condition at 2-5; Errata Of Brief For Appellant at 2.

with the DRC, but would also disrupt our relations with other nations by undermining the inviolability of their diplomatic mission premises in the United States. Moreover, in light of the reciprocal nature of diplomatic relations, the inviolability of United States missions abroad could be put at risk.

STATEMENT OF FACTS

A. Treaty And Statutory Background.

1. The Vienna Convention on Diplomatic Relations.

The United States and the DRC are parties to the Vienna Convention. Under this treaty, the "`premises of the mission'" are "inviolable" and "immune from search, requisition, attachment or execution." Id. at Art. 22(1), (3). Additionally, mission premises "shall be exempt from all national, regional or municipal dues and taxes," except those that "represent payment for specific services rendered." Id. at Art. 23(1).

The "premises of the mission" include "the buildings * * * used for the purposes of the mission including the residence of the head of the mission." Id. at Art. 1(i). "Heads of mission" includes the ambassador. Id. at Art. 14(a). Under Article 30(1), "[t]he private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." A "'diplomatic agent'" is "the head of the mission or a member of the diplomatic staff of the mission[.]" Id. at Art. 1 (e) .

The treaty imposes on the "receiving State" a "special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." Id. at Art. 22(2).

2. The Foreign Sovereign Immunities Act.

The FSIA establishes a comprehensive scheme for obtaining and enforcing judgments against a foreign government.

Section 1604 of the statute establishes immunity for foreign states from the jurisdiction of federal and state courts, subject to the exceptions listed in 28 U.S.C. 1605 and 1607. Similarly, Section 1609 renders foreign state property in the United States immune from attachment or execution, subject to specific exceptions listed in 28 U.S.C. 1610 (and limited by 28 U.S.C. 1611). These immunities incorporate the rights of foreign states under international treaties to which the United States was a party when the FSIA was enacted. 28 U.S.C. 1604, 1609.

Significantly for this case, a foreign state's immunity from enforcement under the FSIA is considerably broader than its immunity from the jurisdiction of federal and state courts. For example, a foreign state is subject to the jurisdiction of those courts if the action seeks to confirm certain types of arbitral awards. 28 U.S.C. 1605(a)(6). But a judgment "based on an order confirming an arbitral award rendered against the foreign state"

does not provide the basis for executing against particular property owned by the foreign state unless the plaintiff can also demonstrate that the property is "used for a commercial activity in the United States." 28 U.S.C. 1610(a)(6). Use of property "for a commercial activity in the United States" is a threshold requirement for application of all exceptions to enforcement immunity in 28 U.S.C. 1610(a), each of which applies only if a different, additional condition is also met. 28 U.S.C. 1610 (a) (1) - (7) .

B. Relevant Facts.

This case concerns efforts to execute upon two properties located in the District of Columbia purchased by the DRC for use as diplomatic residences. One long served as the home of the ambassador; the other was also purchased for use as a diplomatic residence. District Court Docket Number ("Doc.") 42, Exhibit 6 at 2-4. At the request of the State Department, and in recognition of their diplomatic status, the District of Columbia has, since 1973 and 1987, respectively, exempted both properties from taxation. Both properties were being used as diplomatic residences -- one by the ambassador and the other by a military attache -- when those officials were terminated from their diplomatic positions by the DRC. The officials refused to leave the properties, and they remained there at the time of the proceedings in the district court. Doc. 42, Exhibit 6 at 2-4.

This litigation began with an arbitration award against the DRC in Switzerland. Doc. 16 at 2-3. The prevailing party in the arbitration proceeding obtained a default judgment against the DRC in the district court based on that award, and then sold the judgment to plaintiff FG Hemisphere Associates ("FG"). Id.; Doc. 23, Exhibit D and attached exhibits 1-2. Relying on the judgment, FG moved in the district court on March 14, 2005, for writs of execution against the two properties. Doc. 28. Ten days later, on March 24, 2005, in the absence of an appearance by the DRC, the court granted FG's motion and issued the requested writs. Doc. 29. The court's order states, without explanation, that the properties are being "used for commercial activity." Id.

The DRC appeared on May 31, 2005, and moved to quash the writs of execution, contending that the two properties were not being used for commercial purposes, but rather continued to be protected from execution under the Vienna Convention and the FSIA. Doc. 42. The DRC also pointed out that the district court had granted the writs only ten days after FG's motion, less than the time for a response on a motion under the court's rules. Doc. 56 at 12 n.20. An affidavit submitted in support of the DRC's motion states that FG's motion for execution was not received at the Foreign Ministry in Kinshasa until March 22, 2005, when it was sent for translation, and then to the other

named defendant, the DRC national electrical company, for review. Doc. 57, Exhibit 2. The affidavit further states that the Chief of Staff of the Ministry of Foreign Affairs learned of the writ of execution on or about May 4, 2005, and immediately directed the DRC's Ambassador to the United States to retain counsel to appear for the DRC. Id.

The district court nevertheless declined (without opinion) to quash the writs of execution. Minute Order of Aug. 11, 2005 denying Emergency Motion To Quash. The district court also denied the DRC's motion for a stay of the scheduled auction sale of the two properties. Minute Order of Aug. 11, 2005, denying as moot Motion to Stay Execution.

The DRC moved in this Court for an emergency stay of the auction sale pending appeal. The United States supported that motion as amicus curiae. This Court granted a stay pending appeal.

SUMMARY OF ARGUMENT

1.a. A foreign state's mere ownership of properties long used as diplomatic residences is not transformed through the conduct of holdovers into "use[] for a commercial activity" (28 U.S.C. 1610(a)) by the foreign state. This threshold requirement of the FSIA's exceptions to immunity from execution is not satisfied where, as here, the foreign state has never abandoned its intention to use its property to house diplomats

and, indeed, has taken steps to regain control of the property. Any other reading of Section 1610(a) would seriously damage this country's relations with foreign states and would put United States mission properties abroad at risk of losing their protected status during temporary gaps in diplomatic use.

b. These DRC properties also remain protected from execution under the Vienna Convention. The State Department administers that treaty in this country and likewise has a statutory role, under the Foreign Missions Act, in determining the treatment to be accorded foreign missions. It has concluded that these properties remain diplomatic. In light of the State Department's expertise in this area, its statutory role, and the deference owed to Executive agencies in the interpretation of treaties that they negotiate and subsequently administer, this Court should be especially reluctant to override the State Department's determination.

2. Immunity from execution under the FSIA is distinct from immunity from jurisdiction, and a foreign state must have adequate notice that particular property has been targeted for execution. Here, the DRC did not have adequate notice before the district court issued the writs against its properties, or even the full time permitted under the district court's rules to respond to plaintiff's motion for execution. Further, the court's order does not demonstrate that it considered the merits

of the DRC's subsequent immunity claims, as applicable local law appears to require. The United States encourages foreign states to participate in litigation in U.S. courts affecting their interests. Nevertheless, the district court here erred in refusing to grant the DRC relief.

ARGUMENT

I. THE PROPERTIES ARE IMMUNE FROM EXECUTION UNDER BOTH THE FSIA AND THE VIENNA CONVENTION.

FG argued below that the two DRC properties here were not currently used for diplomatic purposes, and therefore were necessarily "used for a commercial activity" within the meaning of 28 U.S.C. 1610(a), because they were assertedly held for investment in an appreciating real estate market. Doc. 49 at 7-8. We show below that FG's premise that the properties no longer enjoy diplomatic status is mistaken. The Court need not reach that issue, however, because FG's contention that the DRC's continued ownership of property acquired to house diplomats constitutes its "use[] for a commercial activity" is without support in FSIA text, legislative history, or precedent. FG's reading would render this important threshold condition of the exceptions to immunity from execution in 28 U.S.C. 1610(a) virtually meaningless.

A. FSIA Immunity.

The FSIA defines "`commercial activity'" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. 1603(d). In addition, "[t]he 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." Id.

In giving meaning to this definition, the Supreme Court has explained that "a foreign state engages in commercial activity * * * only where it acts `in the manner of a private player within' the market." Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993) (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992)). Further, "whether a state acts `in the manner of' a private party is a question of behavior, not motivation." Id. "[T]he issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce." Weltover, 504 U.S. at 614 (internal quotation marks omitted).

Thus, Argentina's issuance of bonds in Weltover was a "commercial activity" (id. at 615-17), but Saudi Arabia's wrongful arrest, imprisonment, and torture of an American employed at a Saudi government-owned hospital was not (Nelson,

507 U.S. at 361-62). The decisions of this Court demonstrate a similar divide between actions that only a sovereign can take (which do not constitute "commercial activity"), and commercial behaviors in which private individuals can also engage. See, Mwani v. Bin Laden, 417 F.3d 1 (D.C. Cir. 2005) (terrorist bombing was not a commercial act); Janini v. Kuwait Univ., 43 F.3d 1534 (D.C. Cir. 1995) (unilateral termination of employment contract was a commercial act); Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987) (foreign state's breach of contract with private corporation was a commercial act).

As these cases show, a "commercial activity" must be something that a private individual can perform. But that factor alone is not sufficient. The conduct that triggers an exception to immunity "must itself take place in a commercial context." Mwani, 417 F.3d at 17 (emphasis added).

The examples of "commercial activity" provided in the House and Senate reports on the FSIA demonstrate that active participation in the marketplace is required to satisfy the statutory definition: "a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation." H.R. Rep. No. 94-1487, at

16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615; S. Rep. No. 94-1310, at 16 (1976). Given what Congress intended, a foreign state's mere ownership of properties used as diplomatic residences is not transformed through the conduct of holdover occupants into a commercial activity by the foreign state.

Moreover, FG's reading of the phrase "used for a commercial activity" would render this important threshold limitation on the FSIA's exceptions to enforcement immunity in 28 U.S.C. 1610(a) a virtual nullity. All property in the United States owned by foreign states -- or at least all appreciating property -- would be "used for a commercial activity." It would thus be subject to execution if it met one of the additional conditions specified in subsections (1) through (7) of 28 U.S.C. 1610(a), unless the foreign state could show that the property was independently immune from execution under an international agreement to which the United States was a party when the FSIA was enacted in 1976. See 28 U.S.C. 1609. The threshold requirement that property be "used for a commercial activity" would provide no meaningful limitation on these enumerated exceptions to immunity. This Court should "avoid[] interpreting [the] statute[] in a way that 'renders some words altogether redundant.'" South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 347 (1998).²

²FG has argued that the DRC received "imputed rent" from the two ~~properties because the holdover occupants, who are former~~
(continued...)

While courts do not defer to the views of the Executive on FSIA interpretation (see Republic of Austria v. Altmann, 541 U.S. 677, 701-02 (2004)), this Court has given careful consideration to the State Department's views on matters of "international comity," and has granted "substantial weight to the Department of State's factual estimation of the exigencies of protocol," explaining that this is a "factual question at the heart of the Department's expertise." In re Papandreou, 139 F.3d 247, 251-52 & n.2 (D.C. Cir. 1998); see also Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) ("there is a strong argument that federal courts should give serious weight to the Executive Branch's view" of foreign policy impact of private suits against foreign states).

The interpretation of 28 U.S.C. 1610(a) urged by FG would have a serious negative impact on relations between the DRC and the United States. Moreover, because relations among nations are by nature reciprocal, FG's approach would put United States mission properties abroad at risk of losing their protected status during temporary gaps in diplomatic use. This Court

^z(...continued)
diplomats, asserted that the DRC owes them money for salaries never paid. Doc. 49 at 8 n.3; Stay Opposition at 11 n.7. Even if this were true, however, it would not transform the DRC's ownership of the properties into a commercial act. The diplomatic staff is the very heart of the mission's diplomatic function. Paying diplomatic salaries cannot be what Congress had in mind when it spoke of "use[] for a commercial activity" (28 U.S.C. 1610(a)).

should therefore be especially reluctant to adopt FG's interpretation of Section 1610(a).

B. Vienna Convention Immunity.

Immunity of the properties from execution under the Vienna Convention provides an independent ground for quashing the writs of execution issued by the district court. See 28 U.S.C. 1609 (FSIA execution provisions incorporate pre-existing treaty rights).

The Vienna Convention states that "the premises of the mission shall be inviolable" (Art. 22(1)), and expressly provides that those premises are immune from execution (Art. 22(3)). As we have noted, both properties at issue here supported the DRC's diplomatic mission to the United States. The properties retain the tax exemptions obtained for them by the State Department from the District of Columbia, and they continue to be listed in the State Department's records as diplomatic residences.

The State Department has been well aware of the situation involving occupation of these properties by holdovers. See, e.g., Doc. 42, Exhibit 7, Appendix I (diplomatic note from DRC to State Department requesting assistance in protecting former ambassadorial residence). Indeed, over the years, the State Department has assisted the DRC in understanding how to resolve the matter.

The Vienna Convention is an agreement between nations to regulate diplomatic relations. It does not explicitly address when the diplomatic status of mission properties commences or concludes,³ but rather leaves this judgment to the parties. In the United States, the State Department administers the Convention, accrediting foreign diplomatic personnel and determining the "members of the mission" and the "staff of the mission." Vienna Convention, Art. 1(b), (c). Similarly, the State Department determines which properties qualify for the protections of the "premises of the mission." *Id.* at Art. 1(i).

In the Foreign Missions Act ("FMA"), 22 U.S.C. 4301 et seq., Congress assigned to the State Department the central role in carrying out United States policy "to support the secure and efficient operation" of both American missions abroad and foreign missions in this country. See 22 U.S.C. 4301(b). That statute expressly charges the State Department with responsibility for

³In contrast, Article 39 of the Convention provides specific temporal boundaries for an individual's privileges and immunities. See Vienna Convention, Art. 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."); see also *id.* at Art. 39(1) & (3). Even in this area, however, where the treaty provides greater clarity, "[c]ourts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status." Abdulaziz v. Metropolitan Dade County, 741 F.2d 1328, 1331 (11th Cir. 1984) (citing Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949)).

managing the reciprocal relationship between the treatment of our own missions abroad and foreign missions here. 22 U.S.C. 4301(c). Thus, the State Department regulates foreign mission acquisition of real property, 22 U.S.C. 4305, and "[a]ssist[s] agencies of federal, State and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a foreign mission may be entitled," 22 U.S.C. 4303(1).⁴

In determining whether the property of a foreign state is "used for mission purposes" and thus constitutes part of the "premises of the mission" (Vienna Convention, Art. 1(i)), the State Department generally consults with a foreign state regarding its intended use of a property, and on that basis seeks tax exempt status from local authorities. In this instance, the DRC used the properties as diplomatic residences for many years, but that use was frustrated in recent years by the holdovers. The DRC has never abandoned its original objective, and has made efforts to regain possession and actual use of the properties. For this reason, the State Department continues to view the properties as diplomatic, and therefore inviolable and immune from execution (Vienna Convention, Art. 22(2) & (3)).

'Pursuant to its treaty and statutory obligations, the State Department has adopted procedures under which foreign nations submit requests for tax exemption to the State Department, which in turn submits such requests to the state or local taxing authority.

FG argued below that this Court can decide the status of the properties, without regard to the State Department's position, on the basis of their use at the time the writs of execution were issued. There are many reasons, however, why a property might not be used at a particular moment as a diplomatic residence. For example, Iran's embassy and ambassadorial and other diplomatic residences have not been used to house the mission offices or diplomats since the hostage crisis. Yet, courts have rejected efforts to execute against those properties, ruling that they remain in diplomatic use. See, e.g., Hegna v. Islamic Republic of Iran, 287 F. Supp. 2d 608, 609-10 (D. Md. 2003) aff'd on other grounds, 376 F.3d 226 (4th Cir. 2004) (Iranian diplomatic residences that had been blocked by the United States remained subject to the Vienna Convention). There are other circumstances as well, in the United States and abroad, that can and do result in a nation's failure to use its mission premises for a period of time. These may include renovations, an unfilled diplomatic post, disputes with holdovers, or disputes in which the receiving state does not allow the sale of properties that the sending state no longer uses for diplomatic purposes.

The State Department can best assess the foreign policy impact of withdrawing diplomatic status from property still claimed as such by a foreign state. Although done infrequently, the State Department has taken such action -- but only when it

has concluded, after multiple warnings, that the foreign state appears to have no intention to restore the property to active use for diplomatic purposes. This caution stems from acute awareness of the damaging impact that withdrawal of diplomatic status is likely to have on relations with the foreign state in question, on the foreign mission community generally, and on the treatment of United States missions abroad.

In light of the State Department's expertise regarding privileges and immunities of foreign states, and its particular statutory mandate with regard to diplomatic property, this Court should be especially reluctant to override the State Department's determination. Courts have consistently recognized the deference owed to Executive agencies in the interpretation of treaties that they negotiate and subsequently administer. See, e.g., Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982) (citing Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); Air Canada v. Department of Transp., 843 F.2d 1483, 1486 (D.C. Cir. 1988) (when operative terms of treaty "have some play," reviewing court "owes substantial deference to the interpretation given by the administering agency to matters within its competence"); see also

U.S. CONST. art. II, § 3, cl.3 (granting President power to "receive Ambassadors").

In litigation concerning taxation immunity, courts have recognized the State Department's unique and weighty role in determining the status of diplomatic and consular property. See United States v. Arlington County, 669 F.2d 925, 934 (4th Cir. 1982) (State Department's view that particular diplomatic residences are used for maintaining a diplomatic mission, though not conclusive, is entitled to great weight, and should be rejected only if "manifestly unreasonable"); United States v. Arlington County, 702 F.2d 485, 488 (4th Cir. 1983) (State Department's position regarding tax exempt status of residence is "the weight which tips the scales"); United States v. City of Glen Cove, 322 F. Supp. 149, 153-54 (E.D.N.Y.), aff'd, 450 F.2d 884 (2d Cir. 1971) (State Department's certificate regarding use of diplomatic properties is at least prima facie evidence, if not conclusive).

Such deference is particularly appropriate here. The Vienna Convention does not provide clear guidance regarding the circumstances in which the status of particular property as part of the premises of a foreign mission may be terminated. The State Department, which has responsibility for carrying out the United States' treaty obligation to protect the inviolability of such premises, has determined that the properties at issue here

remain part of the premises of the DRC's mission to the United States. As such, the premises are immune from execution under the Vienna Convention (Art. 22(3)), and, pursuant to the FSIA's incorporation of pre-existing treaty rights (28 U.S.C. 1609), likewise immune under that statute.

II. THE DISTRICT COURT'S REFUSAL TO QUASH THE WRITS OF EXECUTION CONSTITUTED REVERSIBLE ERROR.

FG's motion for authority to execute on the two DRC properties raised for the first time the question of the properties' immunity from execution under the 28 U.S.C. 1609 and 1610(a), an issue distinct from the DRC's jurisdictional immunity in the underlying action. Congress cannot have intended to recognize that distinct immunity without also intending that foreign states have a meaningful opportunity to assert it. In light of the FSIA, it is therefore essential that foreign states have adequate notice of any effort to execute against their property and opportunity to be heard. At the very least, the district court should not have acted on FG's motion for execution before the response time under the court's own rules had expired. Moreover, local law suggests that the lower court was obligated, when it considered the DRC's motion to quash the writs, to decide the merits of its claims that the properties are immune.

1. As already discussed, "the FSIA preserved a distinction between two different aspects of foreign sovereign immunity: jurisdictional immunity -- that is, a foreign sovereign's

immunity from actions brought in United States courts -- and immunity from attachment -- a foreign sovereign's immunity from having its property attached or executed upon." Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Syst., _____ Inc., 385 F.3d 1206, 1218 (9th Cir. 2004). The FSIA reflects Congress's recognition of the significant treaty and statutory immunities that can be implicated in executing a judgment against a foreign state's property. Departing from the model of private litigation, where execution can often be obtained by application to a court clerk or local sheriff, Congress in Section 1610(c) required that attachment or execution against a foreign state's property 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 a default judgment. 28 U.S.C. 1610(c).

Because a foreign state's immunity from jurisdiction and immunity from execution are distinct interests, it is irrelevant to application of the latter immunity here that the district court had jurisdiction over the DRC in FG's suit to confirm the arbitral award and that the DRC defaulted in that action. As the Fifth Circuit has noted, there is nothing improper about a foreign state choosing to default in litigation as to which it has no defense against liability. Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240, 251 (5th Cir. 2002).

Defaulting as to liability does not constitute waiver of the foreign state's immunity from execution. Id.

This Court has recognized that a foreign state "may refrain from appearing, thereby exposing [itself] to the risk of a default judgment," and later, "[w]hen enforcement of the default judgment is attempted * * * [it] may assert [its] jurisdictional objection." Practical Concepts, __Inc., 811 F.2d at 1547.

Although the immunity that Bolivia was permitted to assert at the enforcement stage in Practical Concepts was its immunity from the district court's jurisdiction over the underlying claim, the Court's holding presupposes both the propriety of defaulting in certain circumstances and that there will be a meaningful opportunity for the foreign sovereign to be heard nevertheless at the enforcement stage to assert its immunity. Here, the DRC's assertion of its immunity was even more obviously timely than was Bolivia's. Because DRC's arguments relate exclusively to the immunity of its property from execution, the point of execution is the only time at which those arguments could properly be raised.

2. In the district court, FG argued that there is no requirement to serve a foreign state that defaulted in the underlying litigation with notice of a motion for execution because FRCP 5(a) requires service on parties in default only of "pleadings asserting new or additional claims for relief." But

that reading of Rule 5(a) would mean that a foreign state that defaulted as to the underlying merits would have no notice that the entirely independent rights and immunities of the sovereign's property with respect to execution were being adjudicated. Notably, FG's argument would mean that a foreign state has no right to adequate notice of enforcement even when the plaintiff seeks to execute against the embassy itself or the current residence of the ambassador and her family. That result cannot be squared with the structure of the FSIA, which establishes immunity from execution as a distinct right.

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 may not have participated in the underlying litigation addressing liability, it is critically important that the foreign state have notice that its property is threatened with execution, and an opportunity to appear and to assert immunity from execution. Connecticut Bank of Commerce, 309 F.3d at 252. Although this Court has held that a foreign state is not a "person" entitled to due process under the Fifth Amendment of the U.S. Constitution, Price v. Socialist People's Libyan Arab Jamahiriva, 294 F.3d 82, 96-100 (D.C. Cir. 2002), the Court has, nonetheless, recognized that the FSIA itself represents Congress's extension of comity to foreign states and that, in many respects, its statutory requirements mirror the

protections that would be afforded by due process, see Practical Concepts, 811 F.2d at 1548 n.11; Creicrhton Ltd. v. Qatar, 181 F.3d 118, 125 (D.C. Cir. 1999).

Here, the district court issued the execution writs a mere ten days after FG's motion, and only two days after the DRC received an untranslated copy of the motion at its Foreign Ministry. The DRC thus did not have an adequate opportunity before the writs were issued to assert its claims that the two properties were immune from execution. The DRC's immunity arguments should therefore have been addressed on their merits, and its Rule 60(b) motion granted for the reasons stated above.

3. The FSIA does not specify the procedure governing notice of an attempt to execute against property of a foreign state following a default on the underlying claim. The statute does, however, provide a model for effective notice in 28 U.S.C. 1608(a), which specifies the acceptable methods for service of a "summons and complaint." 28 U.S.C. 1608(a)(1). The district court itself could have invoked the procedures in Section 1608(a) to assure that the DRC had adequate notice that its properties were threatened with execution.

i. Section 1608 requires that a "summons and complaint," translated into the foreign state's official language, be served on the head of its ministry of foreign affairs by specified

means. 28 U.S.C. 1608(a)(3) & (4).⁵ The foreign state has 60 days within which to respond. 28 U.S.C. 1608(d). Section 1608(a) expressly contemplates a role for the courts in assuring that a foreign state has effective notice of a suit against it. The provision directs the clerk of the court to dispatch the documents provided by the plaintiff, and to enlist the Secretary of State to send those documents through diplomatic channels if service is not accomplished within 30 days. 28 U.S.C. 1608(a) (3) & (4).

Section 1608(a) provides a method for service that Congress clearly considered adequate at the initiation of a suit against a foreign state. Even following a default, however, FRCP 5(a) requires that a "pleading[] asserting new or additional claims for relief against" the foreign state likewise be served in conformity with Section 1608's requirements.' In light of the distinct rights and interests under the FSIA presented for the first time at the execution stage in an action against a foreign state, there is ample basis for analogizing a motion for execution to a pleading asserting a new claim for relief. But

⁵These procedures may be avoided only if the foreign state has agreed to a different method of service (28 U.S.C. 1608(a)(1)) or one is provided by an applicable international convention on service of documents (28 U.S.C. 1608(a)(2)).

'Rule 5(a) requires such a pleading to be served in conformity with Rule 4, which, in turn, incorporates Section 1608's requirements. See FRCP 4(j)(1).

see Connecticut Bank of Commerce, 309 F.3d at 250 ("The post-judgment motion asking for a 1610(c) [order] was not a pleading."). At the very least, Section 1608(a) can be viewed by a district court as a "safe harbor" defining a form of notice of a motion to execute against a foreign state's property that is clearly adequate to allow the foreign state to assert its immunity claims.'

ii. Even under the district court's own rules, the court's denial of the DRC's motion for relief from the writs was premature. Those rules allowed the DRC 11 days to respond to a motion, plus three more days in the absence of same-day service. D.C. Local Rule 7(b); FRCP 6(e). This minimal period does not provide a meaningful opportunity for a foreign state to assert claims that its property is immune from execution. Here, for example, the DRC did not receive a copy of FG's motion to execute

'The court in Connecticut Bank of Commerce was addressing whether a motion in the judgment-granting court for a "1610(c) order" permitting execution against unidentified property should be deemed to have been a "pleading" that put the defendant on notice that the plaintiff sought a "declaratory judgment" regarding enforcement, and whether the resulting blanket "1610(c) order" should therefore be treated as a judgment entitled to res judicata effect in a foreign jurisdiction. Id. The Fifth Circuit's opinion does not address whether a "pleading" is required to obtain an order permitting execution against particular property under the FSIA.

'In several instances, the State Department has declined private parties' requests to serve under Section 1608(a)(4) papers concerning foreign state property, but has served such papers at a court's request.

until eight days had already passed, and the motion thereafter had to be translated before its import could be appreciated, and counsel then had to be retained. Nonetheless, it bears emphasis that, even if the ordinary rule regarding motions governed, the DRC would have had 14 days from the date of service of FG's motion for execution, i.e., until March 28, 2005, to respond. Yet the district court granted FG's motion on March 24, four days before even that minimal period had expired.

iii. Even if the DRC had received effective notice of FG's effort to execute against its property before the writs were issued, procedures in the District of Columbia for asserting exemptions from enforcement (applicable pursuant to FRCP 69(a)) suggest that the district court was obligated to consider the DRC's claim that the properties were immune when it moved to quash the writs.

The District of Columbia's Rules of Civil Procedure concerning "Attachment After Judgment In General" provide that "[b]efore the final disposition of the property attached or its proceeds (except where it is real property), any person may file a motion and affidavit setting forth a claim thereto or an interest in or lien upon the same." D.C. R. Civ. P. 69-I(c) (emphasis added); see also D.C. Code 16-554 (substantively the same). By its terms, this rule does not apply to real property. That is because the rule mirrors a provision of the District of

Columbia Code, D.C. Code 16-554, relating to "attachment" in aid of execution, that applies only to personal property, see D.C. Code 16-544. See also 15-521 ("When personal property taken on execution * * * is claimed by the defendant to be property exempt from execution, and * * * the defendant gives notice, in writing, that the property is exempt * * * a trial of * * * the exemption[] shall be had before the court.") (emphasis added).

Although another provision of the Code makes clear that real property can be executed upon, D.C. Code 15-311, as long as there is inadequate personal property to satisfy the debt, D.C. Code 15-323, D.C. law does not appear to specify the means of raising an argument that the real property in question is exempt from execution. However, given the special nature of real property, a real property owner surely should not have narrower procedural rights than the owner of personal property. As noted above, under the D.C. rule applicable to execution against personal property, the DRC could make its immunity motion at any time "[b]efore the final disposition of the property attached," which it did. See D.C. Rule Civ. P. 69-I(c); D.C. Code 16-554; see also Consumers United Ins. Co. v. Smith, 644 A.2d 1328, 1353 (D.C. App. 1994) (court's issuance of writ of attachment and recording of judgment by Recorder of Deeds "are similar acts to accomplish identical purposes").

4. The district court's failure to grant the DRC's motion to quash the writs of execution was reversible error, whether the standard of review be de novo or abuse of discretion. As we have shown, the writs were issued prematurely, the DRC acted expeditiously to protect its interests once it was aware that the residences were threatened, and the DRC has strong arguments on the merits. Moreover, FG will suffer no prejudice by litigating these issues now, rather than at an earlier stage.

This Court is appropriately reluctant to refuse relief to a foreign state raising claims of immunity following a default. As the Court has recognized, "[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and `undermine the State Department's continuing efforts to encourage * * * foreign sovereigns generally[] to resolve disputes within the United States' legal framework.'" Practical Concepts, Inc., 811 F.2d at 1551 n.19; see also Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994) (voiding default judgment against foreign state for improper service under Section 1608(a)). In Practical Concepts, Bolivia had defaulted and counsel first appeared on its behalf at least 29 days after Bolivia learned that the district court had issued writs of attachment against its property. See 613 F. Supp. 863, 865 (D.D.C. 1985). Even less time passed here -- a total of 27 days -- between the time

when the DRC learned of the writs of execution, on May 4, 2005 (see Doc. 57, Exhibit 2 at 4), and when counsel for the DRC filed an appearance and motion to quash on May 31.

FG argued in opposing the stay pending appeal that Practical Concepts "affirmatively supports FG Hemisphere's position * * * that, when a defaulted defendant's lack of jurisdictional immunity is established [in a collateral attack on an order obtained by default], he has no further opportunity to litigate other issues." FG Opposition To Emergency Motion For Stay Pending Appeal at 9 n.5. The actual outcome in Practical Concepts forecloses this reading, however. The district court there had concluded that the FSIA deprived it of subject-matter jurisdiction over a claim that Bolivia had breached a contract. This Court reversed, but nevertheless remanded the matter to the district court for consideration of merits arguments by Bolivia that the lower court had not addressed.

The Court noted in Practical Concepts that a defendant's decision to default and to raise a jurisdictional objection only in a subsequent enforcement proceeding ordinarily restricts the defendant to its jurisdictional arguments and precludes defenses on the merits of the underlying claim. 811 F.2d at 1547. But the Court nevertheless found "compelling reasons to relieve Bolivia from the ordinary operation of a default judgment." Id. at 1548. Relying on the amicus brief filed in that case by the

United States, the Court pointed inter alia to this country's foreign policy interest in allowing disputes involving foreign states to "be resolved on the basis of all relevant legal arguments." Id. at 1552 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed and this Court should remand with instructions to the district court to grant the DRC's motion to quash the writs of execution.

Respectfully submitted,

OF COUNSEL:

JONATHAN B. SCHWARTZ
Deputy Legal Adviser

WYNNE M. TEEL
Acting Assistant Legal
Adviser for Diplomatic
Law and Litigation

SUSAN R. BENDA
Attorney Adviser
Department of State
Washington, D.C.

Washington, -----D.C.-- 20530-0001

KENNETH WAINSTEIN
United States Attorney

STUART E. SCHIFFER
Acting Assistant Attorney
General

DOUGLAS N. LETTER (202) 514-3602

IRENE M. SOLET
(202) 514-3542
Attorneys, Appellate Staff
Civil Division, Room 7324
Department of Justice
950 Pennsylvania Ave., N.W.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Fed. R. App. P., I hereby certify that the foregoing brief complies with the type-volume limitation in Rule 32(a)(7)(B). The brief, which uses a monospaced type face with not more than 10.5 characters per inch, contains 6940 words.



IRENE M SOLET
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2005, I caused a true copy of the foregoing Corrected Brief For The United States As Amicus Curiae Supporting Appellant Democratic Republic Of Congo, to be served on the following via both electronic mail and first-class mail:

Bradford A. Berenson
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington D.C., 20005
bberenson@sidley.com

Steven David Cundra
Jeffrey Marc Sherman
Hall, Estill, Hartwick, Gable, Golden & Nelson, P.C.
1120 20th Street, N.W.
Suite 700 North
Washington, D.C. 20036
scundra@hallestill.com

In addition, the following were served by first-class mail:

Tatanene Manata
c/o Bernard A. Gray, Sr.
2009 18th St., S.E.
Washington, D.C. 20020-4201

Elinga Simoke Atembina
c/o Sarah Watson
Hall Estill, Hartwick, Gable, Golden & Nelson, P.C.
1120 20th St., N.W.
Suite 700, North Building
Washington, D.C. 20036
(for pick-up by agreement between counsel for the Democratic Republic of Congo and Mr. Atembina)

Irene M. Solet
Attorney