



**U.S. Department of Justice**

*United States Attorney  
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May 23, 2007

Honorable Thomas Asreen  
Acting Clerk, United States Court of Appeals  
for the Second Circuit  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street  
New York, NY 10007

RE: Kensington Int'l Ltd. v. Bruno Jean-Richard Itoua and  
Société Nationale des Pétroles du Congo,  
Nos. 06-1763, 06-2216

Dear Mr. Asreen:

The government respectfully submits this letter brief in response to the Court's letter of May 1 requesting our views regarding the above-captioned appeals. We are enclosing an original and three copies of this letter brief for submission to the panel that will be hearing this appeal. We are also enclosing a motion for leave to participate in oral argument, which is scheduled for May 30, 2007.

Our amicus submission addresses three questions that are potentially at issue in these cases.<sup>1</sup> First, we discuss why defendant Itoua's ability to claim immunity is governed by common-

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<sup>1</sup> The government takes no position at this time on issues other than those discussed herein, nor does it take a position on the overall merits of plaintiff's suit.

law principles rather than the statutory terms of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 et seq. Second, we demonstrate that the district court erred by holding that plaintiff's complaint fell within the FSIA's commercial activities exception, 28 U.S.C. § 1605(a)(2), without sufficiently analyzing whether the suit is "based upon" acts or activities that the exception describes. Third, we explain why this Court should reject defendants' argument that they are immune from civil liability under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961 et seq.

1. **Common Law, Not the FSIA, Governs the Question Whether Defendant Itoua Has Immunity.**

The parties' contentions concerning defendant Itoua's immunity have centered on the FSIA. Itoua argues that he qualifies as an "instrumentality" of a foreign sovereign and thus is entitled to immunity according to the FSIA's terms. See Itoua Br. 21; Itoua Reply Br. 16-20. Plaintiff argues in turn that the FSIA's "agency or instrumentality" definition, 28 U.S.C. § 1603(b), does not encompass individual officials. See Pl. Br. 43-44. Neither party has considered, however, whether Itoua may claim immunity from a source other than the FSIA, in particular the common law. Yet that is the question that should control.

As explained in a Statement of Interest filed by the government in a recently decided case in the Southern District of

New York, Matar v. Dichter, 05 Civ. 10270 (WHP), 2007 WL 1276960 (S.D.N.Y. May 2, 2007), attached hereto and summarized below, the immunity of individual foreign officials is not governed by the FSIA. Rather, the immunity available to such officials stems from longstanding common law that the FSIA did not displace. While a number of courts, following the Ninth Circuit's decision in Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990), have construed the FSIA to extend to individuals, this construction is unsound and yields problematic results. Thus, the Court should reject Itoua's argument that he is immune as an instrumentality under the FSIA and, at the same time, remand for the district court to consider the question whether Itoua may claim immunity under pre-FSIA common law, as this question has not been raised or briefed by the parties on this appeal.

The Dichter Statement of Interest covers in detail how American jurisprudence has long recognized individual officials of foreign sovereigns to be immune from civil suit with respect to their official acts – as reflected, for example, in opinions of the Attorney General dating from the early years of the Republic. See Dichter Statement of Interest [hereinafter Dichter Statement] at 4-7. This immunity remained in place even as the law of sovereign immunity evolved over time. See id. at 7-10. Thus, in the years following the State Department's adoption of the "restrictive" theory of immunity in 1952, leading up to the codification of the

theory in the FSIA, the State Department continued to recognize the immunity of individual officials for their official acts – as did the courts, following the Executive’s lead. See, e.g., Heaney v. Government of Spain, 445 F.2d 501, 504 (2d Cir. 1971); Greenspan v. Crosbie, No. 74 Civ. 4734 (GLG), 1976 WL 841, at \*2 (S.D.N.Y. Nov. 23, 1976); Waltier v. Thomson, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960).

Notably, in at least one of these pre-FSIA cases, Greenspan v. Crosbie, individual foreign officials were found to be immune notwithstanding that their conduct fell within the restrictive theory’s exception to immunity for commercial activity. There, plaintiffs sued the Province of Newfoundland and three of its individual officials for alleged violations of U.S. securities laws. 1976 WL 841, at \*1. Even though the Department of State determined that the province was not immune since the suit involved commercial activity, the Department filed a suggestion of immunity for the individual defendants, reasoning that they had participated in this activity only in their official capacities. The court dismissed the individual defendants from the suit on this basis, while retaining jurisdiction over the province itself. Id. at \*2. Thus, the State Department recognized, and the court accepted, that

the individuals were immune from suit even though the foreign state itself was not.<sup>2</sup>

Following the enactment of the FSIA in 1976, the Ninth Circuit in Chuidian was the first circuit court to consider whether the statute had any application to individual officials. The court found that it did; specifically, the court held that individual officials fall within the statute's definition of an "agency or instrumentality of a foreign state" and so possess the same immunity afforded to such entities under the statute. 912 F.2d at 1103. In reaching this holding, the court unnecessarily and erroneously rejected the government's position – which was the same position the government recently asserted in Dichter – that immunity for foreign officials is instead rooted in the common law. Id. at 1102-03. A number of other courts have followed Chuidian in this respect, though without significant analysis, and without the benefit of briefing by the government. See, e.g., Velasco v. Gov't of Indonesia, 370 F.3d 392, 399 (4th Cir. 2004); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal, 182 F.3d 380, 388 (5th Cir. 1999); El Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996); but see

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<sup>2</sup> This differential treatment is analogous to the protection given federal employees under the Federal Tort Claims Act (FTCA). As amended by the Westfall Act, the FTCA permits suits against the government for the acts of its employees within the scope of their employment, see 28 U.S.C. § 1346(b)(1), but immunizes the employees themselves from liability for the same conduct, see 28 U.S.C. § 2679(b)(1).

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005) (rejecting Chuidian's holding that the FSIA applies to individuals, yet failing to consider the possibility of common law immunity for individual officials). The district court in Dichter perfunctorily followed the Chuidian line of precedent as well, without any attempt to address the government's criticism of the decision. See Dichter, 2007 WL 1276960, at \*4 n.2.

The Court should reject that approach here. For while Chuidian's outcome was correct to the extent that it preserved some form of immunity for individual foreign officials, its statutory interpretation is misguided. The Chuidian court based its holding on the flawed rationale that "a bifurcated approach to sovereign immunity was not intended by the Act" - i.e., that Congress intended the FSIA to be a "comprehensive" statute governing all sovereign immunity determinations, regardless of the nature of the defendant. See Chuidian, 912 F.2d at 1102. But this reading of the statute is inconsistent with its text and legislative history. The statutory text speaks only to the immunity of "foreign states," their political subdivisions, and any "agency or instrumentality of a foreign state," 28 U.S.C. §§ 1603(a)-(b), terms that do not naturally describe individuals. Likewise, the legislative history's only reference to any type of individual official - diplomatic or consular representatives - clarifies that the FSIA does not govern their immunity since the statute "deals only with

the immunity of foreign states." H.R. Rep. No. 94-1487, at 21 (1976) ("FSIA House Report"), 1976 U.S.C.C.A.N. 6604, 6620.

Moreover, contrary to Chuidian's premise, courts have followed "a bifurcated approach to sovereign immunity" in other contexts where the FSIA is silent. As numerous courts have held, because the FSIA does not address the immunity of heads of state, their immunity continues to be governed by common law as it was pre-FSIA. See Dichter Statement at 16 & n.12 (collecting cases); see also Tachiona v. United States, 386 F. 3d 205, 220-21 (2d Cir. 2004) (expressing doubt that the FSIA "was meant to supplant" common-law immunity for heads of state, given that the statute and legislative history make no reference to individual officials). The same reasoning applies to the immunity of individual officials other than heads of state: the FSIA did not address their immunity, and so did not supplant it as it previously existed at common law.

Chuidian's mistaken analysis on this point is not of mere academic interest. By stretching the FSIA's terms to cover individual officials, the holding generates problematic implications. Most important, it implies that individual officials are subject to the same exceptions to immunity laid out in the FSIA for states and their agencies and instrumentalities – such that if an individual foreign official were sued, for example, over commercial transactions undertaken in an official capacity, the official would not be immune from suit and could be held personally

liable for the conduct at issue. See Chuidian, 912 F.2d at 1103-06 (considering, after finding individual official's immunity to be governed by the FSIA, whether any of the FSIA's exceptions were met). There is no indication that Congress intended any such result - which, significantly, diverges from the common law as it existed at the time of the FSIA's enactment. As reflected in Greenspan v. Crosbie, supra, the immunity then recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the restrictive theory, the official himself could not be. Thus, by subjecting the immunity of individual officials to the same limits applicable to the immunity of states and their agencies or instrumentalities, the Chuidian court's construction leaves foreign officials with less immunity than they enjoyed before the FSIA's enactment.

Furthermore, Chuidian's interpretation of the FSIA's "agency or instrumentality" definition as encompassing individual officials would imply that an individual official's personal property qualifies as property of a state agency or instrumentality, making it subject to attachment according to the rules set forth in FSIA § 1610. Yet § 1610 was clearly intended to apply only to state-owned assets. See FSIA House Report at 27-30, 1976 U.S.C.C.A.N. at 6626-29. Notably, § 1610 affords litigants broader attachment rights with respect to property of state agencies or

instrumentalities compared to property of the state itself: so long as an agency or instrumentality is "engaged in commercial activity in the United States," any of its property in the United States can be attached to satisfy any claim as to which it lacks immunity from suit. See 28 U.S.C. § 1610(b); see also De Letelier v. Republic of Chile, 748 F.2d 790, 798-99 (2d Cir. 1984). Another important difference is that an agency or instrumentality of a foreign state is subject to punitive damages under the FSIA, whereas the foreign state itself is not. See 28 U.S.C. § 1606. Thus, were the FSIA's "agency or instrumentality" definition read to encompass individual officials, litigants in any FSIA action would have an obvious incentive to name as many individual foreign officials as possible as defendants, in order to maximize the potential for recovery and to circumvent the FSIA's limitations on attachment and punitive damages that apply to a suit against the state itself. It defies common sense to believe that Congress intended these consequences.

For all of these reasons, the Court should decline Itoua's invitation to hold that he is immune under the FSIA as an "agency or instrumentality" of a foreign state. To the extent Itoua can claim immunity from suit, such immunity would have to rest on common law rather than any provision of the FSIA. By so holding, the Court would effectively preserve immunity for individual foreign officials while avoiding the conceptual difficulties and problematic implications of the Chuidian approach.

As to whether Itoua is ultimately entitled to claim common law immunity here, the Court should remand the case for the district court to decide that issue in the first instance, as it turns on potentially complex questions that have not been raised or briefed by the parties and that are not addressed in the United States' Statement of Interest in Dichter. In particular, while common law immunity clearly extends to the official acts of traditional government ministers, such as the internal security minister sued in the Dichter case, it is not clear whether (and if so, to what extent) this immunity applies to corporate officers of a state owned commercial enterprise, such as Itoua. Moreover, even if common law immunity did extend to such individuals, there would still remain the question whether Itoua's allegedly corrupt conduct should be regarded as official or private in nature, see Dichter Statement at 24, a question that has received only cursory treatment here. Compare Pl. Br. 44 n.14, with Itoua Reply Br. 18 n.6. The government may wish to submit views on these and other relevant questions on remand.

**2. The District Court Improperly Neglected the "Based Upon" Requirement of the FSIA's Commercial Activity Exception.**

Regarding the parties' dispute over the application of the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), the district court's analysis of that issue was deficient. Even assuming the district court were correct in concluding that plaintiff had alleged conduct falling within one or more of the

three clauses of the exception, it should not have found the exception applicable without additionally finding that plaintiff's suit is "based upon" that conduct and, with respect to the third prong of § 1605(a)(2), that the conduct at issue had a "direct effect" in the United States as the Supreme Court construed that requirement in Weltover. A remand is accordingly appropriate for a complete analysis of these issues.

a. The FSIA expressly limits application of the commercial activity exception to circumstances in which a plaintiff's "action is based upon [1] a commercial activity carried on in the United States by the foreign state; [2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; [3] 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." 28 U.S.C. § 1605(a)(2) (emphasis added).

In applying this provision to plaintiff's complaint, the district court considered only whether "the activities [alleged] here \* \* \* satisfy \* \* \* the three prongs" of the exception. Kensington, 2006 WL 846351, at \*13. But as the Supreme Court explained in Saudi Arabia v. Nelson, 507 U.S. 349 (1993), Congress's inclusion of the term "based upon" institutes an additional, and significant, limitation on the jurisdiction of federal courts over foreign sovereigns.

The term "based upon" requires that, for a complaint to qualify for the commercial activity exception, a plaintiff must allege conduct that falls within at least one of the exception's three clauses and has "something more than a mere connection with, or relation to" the plaintiff's cause of action. Nelson, 507 U.S. at 358.<sup>3</sup> The Supreme Court has endorsed the view that in assessing whether this is true in any given case, the "focus should be on 'the gravamen of the complaint.'" Id. at 357 (quoting Callejo v. Bancomer, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985)). Accordingly, this is precisely the approach that this Court has adopted. See Garb v. Republic of Poland, 440 F.3d 579, 586 (2d Cir. 2006).

Other circuits, however, have applied a more expansive test. They permit a plaintiff to invoke federal jurisdiction over a foreign sovereign merely by alleging conduct within one of the exception's three clauses that could establish a single element of – or even a single fact necessary to – the plaintiff's claim. See

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<sup>3</sup> While Nelson's discussion of the "based upon" requirement focused primarily on the first clause of § 1605(a)(2), the same principles naturally apply to the other clauses as well. Cf. Drexel Burnham Lambert Group Inc. v. Cmte. of Receivers for Galadari, 12 F.3d 317, 330 (2d Cir. 1993). The singular term "based upon" can have only one uniform meaning, although the requirement may be easier or harder to meet depending on the nature of the acts or activities contemplated by each of the three clauses. See Nelson, 507 U.S. at 358 (noting the "difference between a suit 'based upon' commercial activity [clause 1] and one 'based upon' acts performed 'in connection with' such activity [clause 2]").

Pl. Br. 35 (citing cases). This Court, however, has not endorsed that theory, and should not do so here.

As the government has previously explained, formulating the inquiry in that way "is not entirely consistent with the statutory language. To satisfy the literal meaning of the 'based upon' requirement," conduct within the exception's clauses "must provide the 'basis' – the 'foundation' or 'fundamental ingredient' – of the cause of action." Brief for the United States as Amicus Curiae Supporting Petitioners at 15 n.10, Nelson, 507 U.S. 349 (citing dictionaries) [hereinafter U.S. Nelson Brief]; see also Nelson, 507 U.S. at 357 ("the phrase 'based upon' \* \* \* denot[es] conduct that forms the 'basis,' or 'foundation' for a claim"). The text thus contemplates a holistic, rather than a formalistic, inquiry.

Nor is the single-element (or single-fact) test consistent with the Supreme Court's opinion in Nelson, which explained that "the phrase 'based upon' \* \* \* is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357 (emphasis added). At no point did the Court suggest that the "based upon" requirement would automatically be satisfied where commercial activity made up any element of (let alone any fact necessary to) a plaintiff's claim. The Court did clarify that it is not "necessarily" the case that "each and every element of a claim be commercial activity by a foreign state," and it "[did] not address

the case where a claim consists of both commercial and sovereign elements." Id. at 358 n.4. But the Court's reservation of that distinct question in no way endorses the extreme "single element" test. Rather than sanctioning the one-element (or one-fact) test, the Court's approach in Nelson is instead consistent with the government's longstanding view that the inquiry is a case-specific one in which the relevant acts or activities "must supply the 'gist' or 'gravamen' of the plaintiff's complaint." U.S. Nelson Brief at 15; see also Nelson, 507 U.S. at 357; Garb, 440 F.3d at 586.

Were it otherwise, the scope of the commercial activity exception would depend not on the nature of the sovereign's acts, but instead on the artfulness of a plaintiff's pleadings. Under the formalistic one-element test, the FSIA would permit one cause of action while barring another that is based on essentially the same underlying conduct, simply because the first allows commercial activity to be shoehorned into an "element" of the claim while the second does not. The inherent inconsistency of such an approach is easily illustrated in the context of the RICO Act, whose civil cause of action might be construed as including not only its own "elements," but also those of any predicate offenses that might be alleged. See, e.g., Pl. Br. 36-37. With so many elements from which to pick and choose, a plaintiff may easily craft a complaint where one element consists of commercial activity, even though that

activity lies at the periphery of the wrong it has allegedly suffered. There is no reason to believe that Congress intended the existence of the RICO Act to effect such an expansion in federal jurisdiction over foreign sovereigns, and a proper reading of the "based upon" limitation avoids such an unwarranted result.

b. Had the district court properly applied the foregoing principles to the facts of this case, it might well have concluded that the commercial activity exception does not apply. In any event, the conduct that the district court focused upon does not satisfy the exception's requirements.

The district court determined that the first two clauses of the exception were satisfied by plaintiff's allegations of oil sales to U.S. purchasers and a multi-million dollar payment to the New York branch of a foreign bank. See Kensington, 2006 WL 846351, at \*13. Even if the district court was correct in concluding that these activities constitute "commercial activity carried on in the United States" or acts "performed in the United States in connection with a commercial activity of the foreign state elsewhere," neither of these acts constitutes the gravamen of plaintiff's claim. These acts did not themselves give rise to plaintiff's injury, nor do they independently come close to forming the gravamen of plaintiff's claim for damages. Instead, they attain significance, if at all, only in the context of plaintiff's allegations of a much broader international conspiracy to prevent

it from satisfying its judgments. If the hub of that conspiracy lacks the necessary commercial connection to the United States, plaintiff may not drag the conspiracy over the threshold of § 1605(a)(2) merely by seizing upon one of its allegedly commercial spokes. See Garb, 440 F.3d at 586-87 (finding "based upon" requirement not satisfied in suit concerning property expropriated abroad, "regardless of the subsequent commercial treatment of the expropriated property").

The district court's cursory treatment of the third clause is even more problematic. The court apparently concluded that the same two acts that it believed satisfied the first two clauses – the oil sales and the bank payment – satisfied the third clause as well. See Kensington, 2006 WL 846351, at \*13. But the same act cannot be both "in the United States" for purposes of clauses 1 and 2, yet "outside the territory of the United States" for purposes of clause 3. 28 U.S.C. § 1605(a)(2). Nor, of course, do these acts form the gravamen of plaintiff's claim any more under clause 3 than they do under clauses 1 and 2. Though a different sort of act is required to satisfy clause 3 – one that, inter alia, "causes a direct effect in the United States" – it is still the act itself that must form the gravamen of the plaintiff's complaint in order to satisfy the "based upon" requirement. See id. (action must be "based \* \* \* upon an act" that satisfies clause 3's requirements).

c. Perhaps recognizing the deficiency of the district court's analysis, plaintiff on appeal argues that defendants' entire course of conduct abroad falls within clause 3 because it had the "direct effect in the United States" of preventing plaintiff from satisfying a domesticated foreign judgment. Pl. Br. 18, 40-43. This approach risks stretching the definition of "direct effect" beyond its breaking point. The Supreme Court has made clear that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992) (emphasis added, internal quotation marks and alterations omitted). Yet as plaintiff's own recitation of the facts indicates, the foreign judgment was domesticated more than six months after the allegedly fraudulent transactions about which plaintiff complains. Compare Pl. Br. 6 (judgment domesticated on September 30, 2004), with id. at 10 (final fraudulent transaction took place on Jan. 30, 2004).

Moreover, nothing about defendants' alleged conduct required plaintiff to domesticate its foreign judgment in the United States; rather, this appears to have been a unilateral and tactical decision of the plaintiff's own choosing. The plaintiff's inability to collect on its domesticated judgment thus cannot be considered a "direct" consequence of the defendants' alleged conduct. Any contrary rule would allow litigants too easily to manufacture a "direct effect" post hoc with respect to foreign

commercial activity that otherwise would have no connection to the United States. Cf. Weltover, 504 U.S. at 619 (finding "direct effect" prong satisfied where debt agreements designated New York ex ante as a place of payment).

And in any event, the notion that such a judgment should by itself enable a plaintiff to obtain jurisdiction over a foreign sovereign for commercial activities abroad is highly problematic. This Court has already held that "the fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the [commercial activity] exception," noting that such a rule "would in large part eviscerate the FSIA's provision of immunity for foreign states." Antares Aircraft, L.P. v. Fed. Republic of Nigeria, 999 F.2d 33, 36 (1993). Adopting plaintiff's argument here could well open a similar loophole, if not an even larger one, given that Kensington is not even incorporated in any state of the United States.

**3. Defendants are Not "Immune" from RICO Claims as a Matter of Law.**

As an adjunct to their claims of immunity under the FSIA, defendants further contend that they are "immune" to liability from claims brought under the RICO Act. They argue that because (in their view) a federal court could never assert criminal jurisdiction over them, they are incapable as a matter of law of committing an "act which is indictable" that might serve as a RICO predicate offense. 18 U.S.C. § 1961(1)(B); see also id. § 1962.

Should the Court find this issue to be properly presented in this interlocutory appeal, it should affirm the district court's conclusion that defendants do not enjoy such blanket RICO "immunity."

Defendants' focus on their putative status under federal criminal law is entirely misplaced. The RICO Act specifies what triggers liability separately from who may be subject to liability. As to the former, it defines proscribed "racketeering activity" to include "any act which is indictable under" various enumerated federal criminal provisions, 18 U.S.C. § 1961(1)(B) (emphasis added), without regard to whether the actor himself would be subject to indictment. See Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1215 n.6 (10th Cir. 1999). As to the latter, it elsewhere defines a "person" potentially subject to liability, see id. § 1961(3), and describes how such a "person" might become liable based upon involvement in "racketeering activity," see id. § 1962.

The phrase "act which is indictable" thus means precisely what it says, focusing on the conduct itself rather than the entity undertaking it. Not only is defendants' contrary view unsupported by the text, but it would also require divergent interpretations of parallel provisions within the same statutory definition. The definition of "racketeering activity" may be met not only by an "act which is indictable" under federal law, 18 U.S.C. §

1961(1)(A), but also an "act \* \* \* which is chargeable under State law," id. § 1961(1)(A). As plaintiff demonstrates (and defendants do not meaningfully dispute), courts have consistently held that this latter formulation is satisfied even where a state might be barred as a formal matter from actually charging the defendant with the state-law crime that serves as the RICO predicate offense. See Pl. Br. 48-50 (citing cases).

There is no indication that Congress meant to treat state and federal crimes differently under the RICO Act. The use of the term "chargeable" rather than "indictable" merely reflects the fact that indictments are constitutionally required in the federal system but may not be necessary at all in charging a defendant with a state crime. See LanFranco v. Murray, 313 F.3d 112, 118 (2d Cir. 2002) (Fifth Amendment's indictment requirement does not apply to states). Congress surely did not intend, for example, that a time-barred state bribery charge might serve as a RICO predicate while a time-barred federal one could not. To the contrary, in enacting the RICO Act, Congress expressly instructed that its "provisions \* \* \* be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). Artificially narrowing the meaning of "acts which are indictable" would run directly against that guidance.

In advancing such a narrow construction, defendants at bottom rely on Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991), which

addressed the very different question whether the federal government is amenable to suit under the RICO Act. See Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 820-21 (6th Cir. 2002) (following Berger as binding circuit precedent but noting potentially contrary out-of-circuit authority); McNeilly v. United States, 6 F.3d 343, 350 (5th Cir. 1993) (following Berger without independent analysis). But as the Tenth Circuit has suggested, the result in Berger (that the government cannot be sued) is best explained by the federal government's sovereign immunity to civil suits under statutes (like the RICO Act) where it has not consented to be sued, rather than by an atextual interpretation of "acts which are indictable." See Southway, 198 F.3d at 1215 n.5 (agreeing with Berger's result on sovereign immunity grounds); id. at 1215 n.6 (recognizing that § 1961(1)(B) "speaks to indictable 'acts,' not actors").

In light of the RICO Act's focus on acts, not actors, there is no need for this Court to reach the question whether the instrumentalities of foreign sovereigns are in fact subject to the criminal jurisdiction of the federal courts in this or any other context. Should the Court nevertheless determine that it must

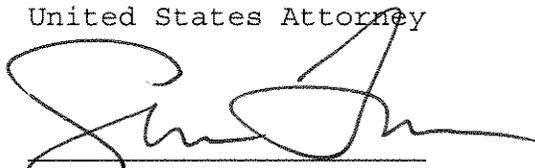
decide that issue, the government would appreciate the opportunity to present its views.

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