IN THE DISTRICT COURT OF
APPEAL OF FLORIDA,
THIRD DISTRICT

THE REPUBLIC OF ECUADOR,

Appellant,

vs.

ROBERTO ISAIAS DASSUM and
WILLIAM ISAIAS DASSUM,

Appellees.
_____/

CASE NO: 3D15-2622

L. T. CASE NO: 09-34950-CA-01

ON APPEAL FROM A FINAL JUDGMENT OF THE
CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLEES' MOTION FOR REHEARING *EN BANC* OR, ALTERNATIVELY, FOR CERTIFICATION OF AN ISSUE OF GREAT PUBLIC IMPORTANCE

WHITE & CASE LLP
Raoul G. Cantero
Florida Bar No. 552356
Maria J. Beguiristain
Florida Bar No. 69851
Jesse L. Green
Florida Bar No. 95591
200 South Biscayne Boulevard, #4900
Miami, Florida 33131
Telephone: (305) 371-2700
E-mail: rcantero@whitecase.com
E-mail: mbeguiristain@whitecase.com
E-mail: jgreen@whitecase.com

LEWIS TEIN PL
Michael R. Tein
Florida Bar No. 993522
3059 Grand Avenue, #340
Coconut Grove, Florida 33133
Telephone: (305) 442-1101
E-mail: mtein@lewistein.com

Counsel for Appellees Robert Isaias Dassum and William Isaias Dassum

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Appellees, Roberto Isaias Dassum and William Isaias Dassum (the "Isaiases"), pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331, seek rehearing *en banc* of the panel decision, *Republic of Ecuador v. Isaias Dassum*, 43 Fla. L. Weekly D60 (Fla. 3d DCA Dec. 27, 2017) (the "Opinion"), attached as **Exhibit A**. Alternatively, they seek certification to the Florida Supreme Court of an issue of great public importance.

INTRODUCTION

The panel's Opinion interpreted the act of state doctrine, which precludes courts from inquiring into the validity of the acts of a sovereign nation committed within its own territory but not those exported to the United States for asset recovery. The doctrine is generally used as a defense when a plaintiff seeks to invalidate a sovereign's acts occurring in its territory. The Opinion, however, marks the first time that *any* U.S. court—state or federal—has allowed an act of state to be used as a stand-alone cause of action, and one that abolishes all defenses to liability. The Opinion therefore raises the question of whether the act of state doctrine requires Florida courts to recognize and enforce executive decrees of a foreign sovereign, regardless of whether the foreign state afforded due process, and without affording any due process here.

In this case, Appellant, the Republic of Ecuador, invoked the act of state doctrine to enforce, in a Florida court, a foreign agency pronouncement declaring

the Appellees liable for $661.5 million, without any trial in Ecuador and with all judicial challenges to the decree barred by an extraordinary constitutional amendment. Although the Florida trial court found that substantial evidence at trial showed that the defendants had committed no wrongdoing and were not provided due process in Ecuador, it granted judgment on the alternative ground that Ecuador "lack[ed] standing and/or failed to establish at trial any authority to bring suit" and because the statute of limitations had expired (A. 94).[1]

The Opinion not only reversed the trial court's decisions on those threshold issues; it also held that the defendants' liability "has been established in the Republic's act of state . . . and pursuant to the act of state doctrine, no court in this country may find otherwise." Slip Op. at 13-14. Thus, the Court held that "the proceedings on remand shall be limited solely to the issue of damages." *Id*. at 13.

The Opinion's expansion of the act of state doctrine—deferring completely to a foreign country's executive decree imposing $661 million in liability and precluding all defenses—is unprecedented. Thus, it raises questions of exceptional importance about how much deference a Florida court must give to foreign executive decrees. This Court should grant rehearing *en banc* to decide (1) whether Florida allows a foreign decree to establish liability in Florida courts

[1] "A" refers to the appendix filed with the answer brief. "R#" refers to the volume number of the record. The three volumes of trial transcripts are located at R28. 5044-5610; and exhibits at R30.

without any proof that the defendant was afforded due process in the foreign state or that the decree is consistent with Florida's public policy, and (2) whether applying the doctrine without requiring proof of liability or allowing defenses here violates due process. Alternatively, and for the same reasons, the Court should certify that the Opinion presents an issue of great public importance.

The Court should also grant rehearing *en banc* to resolve the intra-district conflict the Opinion creates with this Court's prior decision in this case, *Republic of Ecuador v. Isaias Dassum*, 146 So. 3d 58 (Fla. 3d DCA 2014) ("*Isaias I*") (attached as **Exhibit B**). In *Isaias I*, a different panel of this Court—Judges Salter, Rothenberg, and Wells—interpreted the extraterritoriality exception to the act of state doctrine. That exception requires courts "to determine whether the foreign sovereign's claim against the assets here amounts to a 'taking' contrary to United States policy and the fifth and fourteenth amendments to our Constitution." 146 So. 3d at 61. In *Isaias I*, the Court held that the exception did not apply in this case precisely because Ecuador merely "claim[ed] to be a creditor with a claim for money damages against the Isaiases based on their allegedly wrongful acts and omissions in Ecuador." *Id*. at 62. The Court held that the trial court was "not obligated to give preclusive effect to the findings of . . . the [Ecuadorian agency], and it will not interfere with the Republic's sovereignty or the foreign relations of

the United States if the Florida court rules for or against the Republic's claims here in Florida after considering the proof put forward by the Republic." *Id*. at 62-63.

The Opinion holds just the opposite: it found that "the Isaiases' liability for the losses to Filanbanco has been established in the Republic's act of state—AGD-12—and pursuant to the act of state doctrine, no court in this country may find otherwise." Slip Op. at 13-14. It thus eliminates the due-process protections established in *Isaias I* and erases the doctrine's extraterritoriality exception.

STATEMENT OF THE CASE AND FACTS

For the benefit of members of the Court who were not on the panel, we first relate the relevant facts, and then the history of this case leading up to both *Isaias I* and the Opinion.

A. Facts Relevant to the Appeal

The Isaiases are former administrators of Filanbanco, an Ecuadorian bank. *Isaias I*, 146 So. 3d at 59.[2] In 1998, in response to a financial crisis, the Ecuadorian Congress created the *Agencia de Garantia de Depositos* ("AGD")—akin to the U.S. Federal Deposit Insurance Corporation—which guaranteed bank deposits and performed regulatory functions. *Id.* at 59-60. That same December, Filanbanco was placed into restructuring under the jurisdiction of the AGD (R30.

[2] The Opinion states that the Isaiases were "indirect shareholders of Filanbanco." Slip Op. at 2. But the unrebutted evidence at trial showed that they were *not* shareholders (R28. 5243; R30. 6238-40). By its terms, Article 29 only imposes liability on "shareholders," as the trial court held (R12. 2000-01).

5787). The Isaiases' involvement with the bank ended at the same time (R28. 5397-98; R35. 7069).

Three years later, the so-called "Deloitte Report" was issued. *See generally, Isaias I*, 146 So. 3d at 60. The Deloitte Report was not an audit (R.30. 5746). Deloitte "had not even . . . reviewed" the bank's assets before discounting them and failed to identify the bank's 25 largest loans as "actual loans" that had been "repaid [to] the bank" (R28. 5195-97, 5233). Filanbanco's government-appointed liquidator offered unrebutted testimony that the Deloitte Report was not a "valid source for the losses of Filanbanco" (R24. 4363, R28. 5210-11). Ecuador did not even introduce the report at trial. Meanwhile, Filanbanco's General Manager testified that there had not been "a single instance of fraud, embezzlement or other misconduct by Roberto or William Isaias or anyone acting on behalf of them relating to Filanbanco" (R28. 5418). Ecuador presented no contrary evidence. Its sole witness testified that he "had nothing to do with the Deloitte Report;" "knows nothing about it;" and knew of no misconduct by the Defendants (R28. 5044, 5155-57, 5162). Yet, based on that flawed report, Ecuador now seeks damages of $661.5 million, minus the value of the Isaises' assets it already confiscated in Ecuador.

In 2002—over three years after the AGD took control of Filanbanco—Ecuador's Congress enacted Article 29, a law permitting the seizure of property in

Ecuador belonging to shareholders of banks that had failed due to their administrators' alleged fraud (R28. 5147-48; R30. 5722; R35. 7070). *See Isaias I*, 146 So. 3d at 60. Nearly six years later, in February 2008, Ecuador's Banking Board issued Resolution JB-2008-1084 ("JB-1084"), adopting the Deloitte Report without analysis and authorizing the Superintendent of Banks to recognize Filanbanco's losses at $661.5 million. *Id.* In July 2008, the AGD issued Resolution AGD-UIO-GG-2008-12 ("AGD-12"), invoking Article 29 and authorizing the seizure of "all assets of properties belonging to administrators shareholders [*sic*] of Filanbanco, S.A. until December 2, 1998 including the assets belonging to their property . . ." (A. 73). The Isaiases were not granted a trial or a hearing before Ecuador issued any of these decrees (R28. 5160).

The day after AGD-12 was issued, Ecuador enacted "Mandate 13," an extraordinary amendment to its constitution forbidding all judges—on pain of criminal prosecution—from hearing challenges to AGD-12 (A. 46-52). The preface to Mandate 13 expressly stated that it was enacted to prevent the Isaiases from challenging AGD-12 (R28. 5272-74). Mandate 13 also prohibited challenges to the mandate itself (A. 47). Based on Mandate 13, Ecuadorian courts refused even to hear the Isaiases' numerous challenges to AGD-12 (R28. 5285-5338; R30. 5793, 5838, 5843, 5917, 5953, 5970, 5991, 6006, 6028, 6034, 6063, 6086, 6098, 6105, 6112, 6121, 6130, 6155).

B. Course of Proceedings

In 2009, the AGD filed a complaint against the Isaiases in Miami-Dade Circuit Court (A. 1-12). The complaint did not allege any cause of action or list the elements of any claim under any U.S. state or federal law (*id.*). Instead, it alleged that "[a]s former shareholders, officers, executives and administrators of Filanbanco, S.A., the Isaias brothers are liable to the AGD under Article 29 for the $661.5 Million Filanbanco Loss, less any sums recovered from the AGD's seizure and sale of their assets in Ecuador" (A. 11).

The Isaiases asserted several affirmative defenses and also counterclaimed for a declaratory judgment that the AGD orders were illegal and improper under the law of Ecuador. *Isaias I*, 146 So. 3d at 60. The trial court found that the orders represented governmental actions taken within Ecuador and, based on the act of state doctrine, granted Ecuador's motion for summary judgment on the counterclaims. *Id*. The Isaiases did not appeal this ruling, which properly applied the act of state doctrine as a *defense* to counterclaims. That ruling is not at issue here.

The first judgment against Ecuador

In support of its "cause of action," Ecuador asserted that, under the act of state doctrine, AGD-12 established *both* liability and damages (R19. 3197; R20. 3474, 3480, 3490-92; R23. 3897, 4048). The Isaiases moved for summary

judgment, invoking the extraterritoriality exception on the grounds that, because Ecuador sought a judgment in the United States based on a determination of liability issued without due process, the trial court should refuse to apply the doctrine (Appendix to Initial Brief, Tab 6 at 10). Ecuador argued that the Isaiases' liability "has been determined and established in Ecuador by a number of Acts of State that are dispositive of all issues of liability in this lawsuit" and that the court's sole job was to calculate the amount still owing (R19. 3184, 3197).

The trial court applied the extraterritoriality exception, finding that Ecuador's "attempt to enforce a non-judgment finding of liability signif[ies] a substantial deviation from U.S. law and policy. The Defendants may have committed the wrongs which Ecuador has alleged. However, the manner in which Ecuador has attempted to right Defendants' alleged wrongs is inconsistent with U.S. law and policy" (R20. 3411). The trial court granted summary judgment in the Isaiases' favor (R20. 3402-12). Ecuador appealed. *Isaias I*, 146 So. 3d at 59.

Ecuador argues that it can prove its claim without the acts of state, and this Court grants it an opportunity to do so

On appeal, Ecuador argued that the trial court "gratuitously deprived [it] of any alternate means of proving its case by submitting evidence at trial" (A. 146; *see also* A. 121 ("Plaintiff should have been allowed to proceed on its alternate method for proving Defendants' liability with evidence at trial.")). Ecuador's briefs repeated that, even if its decrees did not by themselves determine the

Isaiases' liability, it was prepared to present "conventional means of proof" (A. 146, 164-65). This Court agreed, concluding that "the record demonstrates genuine issues of fact regarding the allegedly-remaining indebtedness of the Isaiases to the Republic." *Isaias I*, 146 So. 3d at 59. It also found that the extraterritoriality exception to the act of state doctrine did not apply because the complaint was not based on a "confiscatory decree of a foreign sovereign . . . acting beyond its territorial dominion." *Id.* But this Court did *not* hold—or even suggest—that either Article 29 or the subsequent resolutions determined the Isaiases' liability or that the Isaiases could not present a defense on the merits.

This Court interpreted JB-1084 as authorizing the AGD to "initiate all legal actions" against any person obligated to reimburse it for Filanbanco's losses. *Id*. at 61. The Court viewed the complaint as one such action, premised on recovery of the balance due "through litigation against the Isaiases in Miami-Dade County" and seeking a "judgment for money damages for the unrecovered net amount allegedly remaining." *Id*. at 61-62. This complaint, the Court added, stood in "stark contrast to a hypothetical complaint demanding the enforcement in Florida of a foreign sovereign's confiscation of property in Florida, as a judicial *fait accompli*, all in purported reliance on the act of state doctrine." *Id*. at 62.

This Court emphasized that "[t]he Isaiases are not precluded from opposing the entry of such a judgment in Miami-Dade County by asserting their defenses

and affirmative defenses at trial," underscoring that liability was not predetermined in Ecuador. *Id.* The Court noted that the "governmental resolutions establishing the Isaiases' *alleged* liability . . . [are not] foreign decrees subject to the more expansive principle of international comity" (*id.*). (emphasis added).

To the contrary, the Court noted that Ecuador "claims to be a creditor with a claim for money damages" and "[t]he validity and extent of any such claim are subject to proof, as in any claim by a foreign sovereign against one of its citizens residing in the United States. *Id*. (emphasis added). The Court emphasized that the "*trial court is not obligated to give preclusive effect to the findings of Deloitte and the AGD*." *Id.* (emphasis added). Nor would it "interfere with the Republic's sovereignty or the foreign relations of the United States if the Florida court rules for or against the Republic's claims here after considering the proof put forward by the Republic." *Id*. at 62-63.

On remand Ecuador reverted to its original position that "relief must be granted solely on the basis of the relevant Acts of State" (R24. 4318). At trial, Ecuador presented one witness: an Ecuadorian lawyer who authenticated Article 29 and the related resolutions and described the functions of Ecuadorian government entities (R28. 5124-68). Ecuador never presented the "conventional proof" of the Isaiases' liability it had promised. Instead, it asserted that its decree

established liability, arguing that "even the acts of state of the Nazi government could not be questioned under the Act of State Doctrine" (R29. 5617).

The Isaiases, on the other hand, presented unrebutted evidence showing, among other things, that they were not shareholders of Filanbanco; that they did not cause any of Filanbanco's losses; and that they had not committed any fraud, embezzlement, or other misconduct (R28. 5199-5201, 5243, 5418). The Isaiases also presented exhaustive evidence that, because of Mandate 13, Ecuador's courts refused to consider any their challenges to AGD-12. (R28. 5251; 5272-73; 5286-87). The Isaiases also introduced the June 2013 U.S. Department of State diplomatic note *denying* Ecuador's extradition request (R30. 6219). In that note, the State Department concluded that "Ecuador has not provided evidence . . . that the Isaias Brothers knowingly participated in the embezzlement scheme, nor that they diverted Central Bank funds, in a specific monetary amount" (R30. 6219).

The trial court's judgment

The trial court entered judgment in the Isaiases' favor (A. 94-101). It noted that Article 29 and the resolutions were acts of state and found that "[w]hile there was substantial evidence presented at trial by the Isaiases that they committed no wrongdoing, did not cause any losses to Filanbanco, and were not provided Due Process in Ecuador," it need not reach those issues because Ecuador "lack[ed]

standing and/or failed to establish at trial any authority to bring suit" and because the statute of limitations had expired (A. 94). Ecuador appealed.

The Opinion

The December 27, 2017 Opinion held that the Isaiases waived the issue of standing because it was not pled as an affirmative defense or tried by consent.[3] Slip Op. at 9. The Court also found that the statute of limitations began to run on July 8, 2008—"the date the Isaiases' liability for losses to Filanbanco was established in AGD-12," and therefore Ecuador's claim was timely.[4] *Id*. at 12.

Had the Opinion stopped there, this motion would be unnecessary. But it went much further, issuing the following remand instructions:

> To avoid any further confusion, the proceedings on remand shall be limited solely to the issue of damages. Because an act of state

[3] Contrary to the Opinion's suggestion that the issue was "[r]aised at oral argument for the first time," the Isaiases raised standing throughout the proceedings. The Answer twice denied Ecuador's standing allegations (R1. 65, 71). Three separate pre-trial memoranda specifically argued Ecuador's lack of standing (R23. 3873-75; R26. 4625; R27. 4772). And at trial, the defense cross-examined Ecuador's sole witness about this issue without objection and argued it in opening and closing (R28. 5113-16; 5148-52, 5573).

[4] The Opinion found that the Isaiases' liability "has been established in the Republic's act of state—AGD-12—and pursuant to the act of state doctrine, no court in this country may find otherwise," but also found that the four-year statute of limitations set forth in section 95.11(3)(p), Florida Statutes, applies. Slip Op. at 12-13. The Opinion did not explain how Florida's statute of limitations applied if courts are not permitted to question the validity of an act of state in the first place or why the new act-of-state cause of action it permitted accrues for statute-of-limitations purposes when the act is decreed rather than when the underlying conduct takes place.

> determined that the Isaiases are liable, the Republic is not required to prove the Isaiases' liability regarding the losses to Filanbanco. In other words, the Isaiases' liability for the losses to Filanbanco has been established in the Republic's act of state—AGD-12—and pursuant to the act of state doctrine, no court in this country may find otherwise.

Slip Op. at 12-13 (footnote omitted). The Opinion concluded that "the only issue that remains to be tried is the amount of indebtedness, if any, owed by the Isaiases to the Republic." *Id*. at 14.

While the Isaiases disagree with the Opinion's determinations on the issues of standing and statute of limitations, it is the Opinion's remand instructions that blatantly conflict with *Isaias I* and that have devastating due process and public-policy implications. It is to these instructions that this motion is directed.

MOTION FOR REHEARING *EN BANC*

Motions for rehearing *en banc* may be granted "on the grounds that the case or issue is of exceptional importance" or when "necessary to maintain uniformity in the court's decisions." Fla. R. App. P. 9.331(d)(1). Here, the Opinion presents an issue of exceptional importance because it recognizes a foreign act of state as an independent cause of action that precludes all defenses—the first case to so hold. The Opinion also conflicts with *Isaias I*, which held that the Isaiases *could* present defenses to liability. This Court should rehear this case *en banc*.

I. THE OPINION'S UNPRECEDENTED EXPANSION OF THE ACT OF STATE DOCTRINE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE

Until now, no court in the United States—state or federal—has allowed a foreign sovereign to enforce a government decree determining an individual's liability without either having provided due process in the country of origin or proving its case with evidence here. Such a holding would be anathema to the constitutional protections of both Florida and the United States prohibiting deprivations of property without due process. *See, e.g., Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1253 (Fla. 2008) (finding that the defendant is "entitled to defend itself on the merits" as "[p]rocedural due process under the Florida Constitution guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights.").

Yet the Opinion holds that Appellees' "liability for the losses to Filanbanco has been established in the Republic's act of state . . . and pursuant to the act of state doctrine, no court in this country may find otherwise." Slip Op. at 13-14. With this sweeping statement, the Opinion became the first in the United States to (1) recognize the act of state doctrine as an independent cause of action, untethered to any common law or statutory right of action; and (2) prohibit a defendant from defending itself in the United States against the alleged liability.

Below we explain how the Opinion (A) creates a new cause of action that precludes all defenses to liability; and (B) requires the enforcement of foreign decrees in Florida courts without any assurance of due process.

A. The Opinion Creates a New, Independent Cause of Action to Which No Defenses to Liability Are Allowed

A cause of action is "the right which a party has to institute a judicial proceeding" and a "particular legal right of plaintiff against defendant, together with some definite violation thereof which occasions loss or damage." *Del Campo Bacardi v. De Lindzon*, 845 So. 2d 33, 36 (Fla. 2002) (internal citations omitted). The act of state doctrine has never been a stand-alone cause of action.

The doctrine is traditionally used as a defense. When parties file claims against a foreign state, the doctrine prohibits the plaintiff from attacking the validity of the sovereign's conduct within its own territory. It does not allow sovereigns to enforce, without more, its decrees here. "Where applicable, the act of state doctrine renders a cause of action non-justiciable." *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Ir. Bank Corp.*, 2011 U.S. Dist. LEXIS 136018, at *44 n.10 (S.D.N.Y. Nov. 28, 2011). *See Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("[T]he act of state doctrine provides foreign states with a substantive defense on the merits. Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have

jurisdiction over a controversy in which one of the litigants has standing to challenge those acts."); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1964) (where a U.S. sugar broker contracted with a Cuban corporation to export Cuban sugar, but Cuba expropriated the sugar before it left Cuba, holding that the doctrine barred the broker's counterclaim challenging the validity of the decree transferring title to Cuba and that the broker was required to pay Cuba, not the former corporate owner, for the sugar); *United States v. Sum of $70,990,605,* 234 F. Supp. 3d 212, 242 (D.D.C. 2017) (noting that "the act of state doctrine is an affirmative defense," which requires the party to "identify an *act* of the [sovereign] the validity—or legality—of which this Court must decide").

Until now, however, no court in the United States had recognized the doctrine as permitting the foreign decree to be used offensively as a cause of action. Courts have refused to allow plaintiffs to use the act of state as a "sword," and then, by the same token, use it to bar any defenses. *See Grupo Protexa v. All Am. Marine Slip,* 856 F. Supp. 868, 883-84 (D.N.J. 1993) ("Of considerable impact to the Court's decision to forego application of the act-of-state doctrine is Protexa's use of it as a sword rather than a shield. The case law reviewed by the Court teaches that a court is less likely to invoke the act-of-state doctrine when it is interposed by the party seeking relief. The apparent reason for this is fair play and fundamental justice."), *aff'd,* 20 F.3d 1224 (3d Cir. 1994). In *Protexa,* the court

explained that the plaintiff seeking to invoke the doctrine "chose to bring this action in the district of New Jersey . . . It would be unjust to permit Protexa the benefit of an American forum and the protection of a doctrine that would unfairly impede the defendants in their ability to assert a defense." *Id.*

In other cases cited in *Isaias I* and the Opinion, foreign plaintiffs invoking the doctrine pursued common-law or statutory claims arising under state or federal law. *See Sabbatino*, 376 U.S. 398 (conversion of bills of lading); *FOGADE v. ENB Revocable Trust*, 263 F.3d 1274 (11th Cir. 2001) (RICO, breach of contract, fraudulent inducement, conversion, replevin, fraudulent transfers, civil conspiracy, reclamation of shares, and unjust enrichment); *Bank Tejarat v. Varshio-Saz*, 723 F. Supp. 516, 517 (C.D. Cal. 1989) (conversion); *Republic of Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir. 1986) (conversion).

As shown in the list of cases attached as **Exhibit C**, Appellees' extensive survey of case law has uncovered no case recognizing an act of state as an independent cause of action. Certainly, Ecuador has cited none.

In support of its holding that the act of state doctrine may be used as a sword, the Opinion cites *FOGADE* and *Bank Tejarat*. But in those cases, the foreign sovereigns filed claims under U.S. state and federal law, which they sought to prove in court; and those courts barred only affirmative defenses challenging the sovereign's actions within its own territory. In *FOGADE*, a Venezuelan

government agency and the corporation it placed into "intervention" (receivership) alleged RICO violations, conversion and fraud. 263 F.3d at 1289-92. The defendants contended that FOGADE's confiscation of their financial interests in Venezuela was illegal. *Id.* at 1292. Plaintiffs argued that the act of state doctrine barred consideration of the lawfulness of the intervention. *Id.* at 1293. Because the intervention (but not attempted enforcement, as here) occurred in Venezuela, the Eleventh Circuit held that the act of state doctrine barred defendants' "affirmative defenses questioning the standing of plaintiffs to sue because of the alleged illegality of the intervention . . . ." *Id.* at 1295-96 (emphasis added). *FOGADE* did not preclude all defenses to liability.

Likewise, in *Bank Tejarat*, the court did not consider whether to affirmatively enforce an act of state in support of a plaintiff's direct claim. Instead, a bank owned by the government of Iran brought *domestic/U.S. claims* alleging RICO violations and wire fraud against defendants who fled Iran after the overthrow of the government, alleging that the defendants fraudulently converted funds from the bank by wrongfully transferring money to their personal accounts. 723 F. Supp. at 516-17; *see also Bank Tejarat v. Varsho-Saz*, 1992 U.S. App. LEXIS 32669, at *1 (9th Cir. Dec. 3, 1992) (identifying plaintiff's original claims). Defendants asserted affirmative defenses of setoff and unclean hands, alleging that Iran wrongfully seized their property *in Iran* after they fled the country. 723 F.

Supp. at 517. The court barred the affirmative defenses because adjudication of those defenses "would require this court to judge the legality of acts of a foreign state *completed* within that state's territory." *Id*. (emphasis added) (quotation marks omitted).

Here, the trial court applied the act of state doctrine to the Isaiases' counterclaims attacking the expropriation of their property in Ecuador. Such an application of the doctrine is valid. But the trial court allowed the Isaiases to defend against substantive allegations that they committed fraud and embezzlement before enforcement here. *See Pro-Art Dental Lab*, 986 So. 2d at 1253 (holding that due process "contemplates that the defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him."). In fact, the Isaiases proved their innocence: as the trial court found, they presented "substantial evidence" that they "committed no wrongdoing" and "did not cause any losses to Filanbanco" (A. 94). But the Opinion precludes consideration of that evidence because, it held, "the Isaiases' liability for the losses to Filanbanco has been established in the Republic's act of state—AGD-12—and pursuant to the act of state doctrine, no court in this country may find otherwise." Slip Op. at 13-14.

B. The Opinion Requires the Enforcement of Foreign Decrees in Florida Courts Without Any Assurance of Due Process

The Opinion's sweeping language about the U.S. courts' inability to question acts of state eradicates due-process protections. To state the obvious: both the U.S. and the Florida Constitutions guarantee that persons may not be deprived of property without due process of law. U.S. Const. amend. XIV, § 1 (providing that no state shall "deprive any person of life, liberty, or property, without due process of law"); Fla. Const. art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law"). The Opinion jeopardizes those constitutional guarantees by requiring Florida courts to enforce foreign liability decrees, regardless of the availability of due process in the foreign nation and without any due process here. *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994) (finding that where "a party has been deprived of liberty or property without the safeguards of common-law procedure[s]" that provide "protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process"); *Pro-Art Dental Lab*, 986 So. 2d at 1253 (finding that the defendant is "entitled to defend itself on the merits" under the Florida Constitution).

The trial court below found that "there was substantial evidence presented at trial that the Isaiases . . . were not provided Due Process in Ecuador" (A. 94). That finding is consistent with that of the United Nations Human Rights Committee,

which held that Mandate 13 (which barred all challenges to AGD-12) violated the International Covenant on Civil and Political Rights and that Ecuador "should make full reparation" to the Isaiases and "ensure that due process is followed in the relevant suits at law." *Isaias v. Ecuador* (view adopted March 30, 2016 at 116th Sess.) Communication No. 2244/2013, at ¶¶ 7.4, 8, 9, U.N. Doc. CCPR/C/116/D/2244/2013 (attached as **Exhibit D**). The Opinion cannot be squared with the United Nations' decision, underscoring the exceptional importance of the issues it presents.

The Opinion also violates public policy by allowing foreign governments to do what the United States and its constituent governments cannot. While both the U.S. and the Florida Constitutions prohibit bills of attainder and *ex post facto* laws, the Opinion *requires* enforcement of a foreign decree directed at specific individuals—the Isaiases—designed to punish them for actions allegedly committed years earlier. U.S. Const. art. I, § 9; Fla. Const. art. I, § 10; *see Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 52 (2d Cir. 1965) (noting that although that the bill of attainder provision directly limits the powers of Congress, foreign parties "are entitled to expect this historic policy to be followed save when the weightiest reasons call for a departure.").

The Opinion leaves open the possibility that even defenses regarding damages are foreclosed. The Opinion notes that "the Isaiases have stated

affirmative defenses as to damages, including accord and satisfaction, release, and payment, all of which, *if not barred by the act of state doctrine*, may be asserted on remand and considered by the trial court." Slip Op. at 14 (emphasis added). Therefore, under the Opinion, even those defenses may be barred.

C. The Opinion Violates Florida's Foreign Money-Judgment Recognition Act and Undermines the Act of State Doctrine

The Opinion's declaration that U.S. courts cannot question acts of state determining liability creates profound public-policy implications—inviting foreign governments to sue in the United States to collect under summarily issued government decrees. Such a policy would grant more deference to foreign extra-judicial decrees than Florida law grants to foreign judgments.

Enacted in 1994, Florida's Uniform Out-of-Country Foreign Money-Judgment Recognition Act (FMJRA), § 55.601 et seq., Fla. Stat., establishes the procedure for recognizing foreign money judgments. The FMJRA refuses to recognize money judgments "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" and judgments "repugnant to the public policy of this state." § 55.605, Fla. Stat. (2017).

The Opinion recognizes that this case is Ecuador's "effort to obtain a money judgment against the Isaiases." Slip Op. at 2. Under the Opinion, a foreign government's executive decree—no matter how repugnant to Florida's public

policy—must be enforced and "no court in this country may find otherwise." Slip Op. at 14. Ironically, the Opinion makes it easier (in fact, automatic) for foreign governments to collect money under executive decrees than under judicial decrees.

Such a policy encourages rogue governments to act extra-judicially to impose monetary liability on dissidents, refugees, and people associated with opposition parties. For example, the government of Venezuela, or one of its agencies, could "declare" that a Florida resident embezzled $200 million in funds. The government could then sue that person in a Florida court, presenting only the declaration. The presiding judge would then have to enter judgment on the declaration, leaving for trial only the amount owed after setoff for any collections in Venezuela.

Even beyond political dissidents, the Opinion has troubling ramifications. American companies operating overseas would be subject to foreign liability decrees, allowing foreign governments to collect against Florida-based assets. A cruise line, for example, could face collection proceedings for any incident at a foreign port that an executive branch unilaterally deems caused harm to its country, without the ability to challenge liability. Or an undemocratic foreign government could seek to punish an American news outlet operating abroad by seeking to enforce a defamation decree in Florida courts, regardless of whether it provided due process. The list goes on.

The Opinion also carries implications for separation of powers and foreign relations. The act of state doctrine was developed to minimize judicial interference with the executive's ability to conduct foreign affairs. The doctrine is "a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l,* 493 U.S. 400, 404 (1990); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972) ("The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government."). But the Opinion's categorical language, placing acts of state beyond all judicial scrutiny, could require a U.S. court to accept conduct that the Executive may find intolerable. Rogue states such as Cuba, Venezuela, Iran, and North Korea could enforce decrees allowing collection of U.S. assets of U.S. corporations, citizens, and residents. Florida state courts would become enablers of foreign governments seeking to punish enemies within the United States or simply collect assets held here.

The Opinion also nullifies the extraterritoriality exception, or territorial limitation, to the doctrine. That limitation ensures that U.S. courts adjudicate

questions regarding confiscation of property located within the United States. *Republic of Iraq*, 353 F.2d at 51 ("[W]hen property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'"). For due-process and public-policy purposes, no substantive difference exists between a foreign decree seizing property here and one determining liability but which is immune from challenge and allows a sovereign to satisfy the indebtedness through U.S. assets. If courts will enforce seizures orders "only if they are consistent with the policy and law of the United States," the same rule should apply to orders determining liability.

II. REHEARING *EN BANC* IS APPROPRIATE BECAUSE THE OPINION CONFLICTS WITH OTHER DECISIONS OF THIS COURT

Motions for rehearing *en banc* are also appropriate when "necessary to maintain uniformity in the court's decisions." Fla. R. App. P. 9.331(d)(1). *See, e.g.*, *Smith v. State*, 211 So. 3d 176 (Fla. 3d DCA 2016) (granting rehearing *en banc* "in order to maintain uniformity in this court's decisions."); *Corley v. State*, 44 So. 3d 109 (Fla. 3d DCA 2009) (granting rehearing *en banc* because the Opinion conflicted with decisions of the Court). The Opinion (A) conflicts with *Isaias I* by precluding the Isaiases from presenting defenses to liability; and (B) conflicts with *Nahar v. Nahar*, 656 So. 2d 225 (Fla. 3d DCA 1995) (attached as

Exhibit E) because it treats acts of state as if they were foreign judgments but without subjecting them to the scrutiny that such judgments receive.

A. The Opinion Conflicts with *Isaias I* by Precluding the Isaiases from Presenting Defenses to Liability

In *Isaias I*, this Court addressed the territorial limitation to the act of state doctrine. It declined to apply the limitation precisely because Ecuador still had to prove its case, and the Isaiases were entitled to assert defenses. The Court found, among other things:

- "Simply stated, the Republic claims to be a creditor with a claim for money damages based on . . . allegedly wrongful acts and omissions in Ecuador." 146 So. 3d at 62;
- "The validity and extent of any such claim are subject to proof, as in any other claim by a foreign sovereign against one of its citizens residing in the United States." *Id.*;
- "[T]he Republic's complaint in Florida [does not] allege that the computations of liability in Ecuador must be given preclusive effect by the circuit court here." *Id*;
- The "trial court is not obligated to give preclusive effect to the findings of Deloitte and the AGD." *Id.*; and
- "The Isaiases are not precluded from opposing the entry of such a judgment in Miami-Dade County by asserting their defenses and affirmative defenses at trial." *Id.*;

This Court further held that Ecuador's claim was subject to proof, stating that it would not "interfere with the Republic's sovereignty or the foreign relations of the United States if the Florida court rules for or against the Republic's claims here after considering the proof put forward by the Republic." *Id.* at 62-63.

The Opinion conflicts with *Isaias I* in several ways. Whereas *Isaias I* held that Florida courts are "not obligated to give preclusive effect to the findings of . . . the AGD," the Opinion holds that "the Isaiases' liability for the losses to Filanbanco has been established in the Republic's act of state—AGD-12—and pursuant to the act of state doctrine, no court in this country may find otherwise." Slip Op. at 13-14. While *Isaias I* found that "[t]he validity and extent of "Ecuador's] claim are subject to proof as in any claim by a foreign sovereign against one of its citizens residing in the United States," 146 So. 3d at 62, the Opinion holds that "[b]ecause an act of state determined that the Isaiases are liable, the Republic is not required to prove the Isaiases' liability regarding the losses to Filanbanco." Slip Op. at 13.

This Court in *Isaias I* also held that "it will not interfere with the Republic's sovereignty . . . if the Florida court rules for *or against the Republic's claims here in Florida after considering the proof put forward by the Republic*," 146 So. 3d at 62-63 (emphasis added), but the Opinion holds that "no court in this country" may rule against Ecuador's finding of liability. Slip Op. at 13. And while *Isaias I* noted that "[s]imply stated, the Republic claims to be a creditor with a claim for money damages based on . . . allegedly wrongful acts and omissions in Ecuador," the Opinion precludes consideration of liability, ruling that "the proceedings on remand shall be limited solely to the issue of damages." Slip Op. at 13. On

remand from *Isaias I*, the Isaiases relied on the due-process protections this Court guaranteed, including the requirement that Ecuador prove its claims. The Opinion reverses course and eviscerates those protections. *See Middleton v. State*, 41 So. 3d 357, 360-61 (Fla. 3d DCA 2010) (reversing and remanding where the trial court's holding "virtually nullified the remand" and denied defendant his right to make his ineffective assistance claim). The conflict with *Isaias I* is clear.

B. The Opinion Conflicts with Court's Decision in *Nahar v. Nahar*

The panel's decision also is contrary to this Court's decision in *Nahar v. Nahar*, 656 So. 2d 225 (Fla. 3d DCA 1995). In *Nahar*, this Court found that a foreign judgment was entitled to comity where a foreign court has "satisfied Florida's jurisdictional and due process requirements." *Id*. at 230. In that case, the court granted comity to the order of a Dutch court where the party challenging recognition "had notice and opportunity to be heard, in fact she contested the issue to the highest court of the land." *Id*. at 229-30.

Here, the act of state was not issued by a court, and there is no evidence that it satisfied Florida's jurisdictional and due-process requirements. The Opinion, however, effectively elevates the decree to the status of a tested foreign judgment entitled to recognition by Florida courts—without, however, subjecting the decree to the considerations of comity that Florida courts give to foreign judgments, including whether that country provided due process. *See* § 55.605(1)(a), Fla. Stat.

(2017) (providing that an out-of-country foreign judgment is not conclusive if the judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law").

In *Isaias* I, this Court distinguished *Nahar*, noting that the acts of state here were *not* "'out-of-country foreign money-judgments' eligible for recognition and enforcement under sections 55.601–.607, Florida Statutes (2009), nor foreign decrees subject to the more expansive principle of international comity described in" *Nahar*. But that was when Ecuador was required to prove its case on remand. The Opinion's expansion of the act of state doctrine essentially converts Ecuador's executive decrees into foreign judgments—yet without the attendant scrutiny. There is no reason why executive decrees should be subject to *less* scrutiny than foreign judgments. Therefore, the Opinion conflicts with *Nahar* as well.

MOTION FOR CERTIFICATION

Under Rule 9.330(a), the Court may also certify questions of "great public importance" for Florida Supreme Court review. Fla. R. App. P. 9.030(a)(2)(A)(v). Certification is particularly appropriate where an opinion has "far-reaching possible consequences," *Smith v. State*, 497 So. 2d 910, 912 (Fla. 3d DCA 1986).

The Opinion passes upon a matter of great public importance because, as explained above, its extension of the act of state doctrine allows foreign states to enforce executive decrees in Florida courts without providing due process either in

the originating country or here. The Opinion could also compromise the executive branch's ability to conduct foreign relations and oversee international commerce.

Therefore, if this Court does not grant rehearing *en* banc, Appellees request that this Court certify its decision as passing upon the following (or similar) questions of great public importance:

> Does the act of state doctrine require Florida courts to enforce a foreign executive declaration of monetary liability against a Florida resident without considering whether the foreign state provided adequate due process, or analyzing whether enforcement of the decree is consistent with the public policy of Florida and the United States?
>
> Does the act of state doctrine require Florida courts to enforce a foreign executive declaration of monetary liability against a Florida resident without a trial on the merits or application of Florida's Uniform Out-of-Country Foreign Money-Judgment Recognition Act, Fla. Stat. § 55.601 et seq.?

CONCLUSION

For the reasons stated, Appellees request that this Court grant rehearing *en banc*. In the alternative, it should certify that the Opinion presents a question of great public importance.

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance and that the panel decision is

contrary to the following decisions of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court: *Republic of Ecuador v. Dassum*, 146 So. 3d 58 (Fla. 3d DCA 2014)); and *Nahar v. Nahar*, 656 So. 2d 225 (Fla. 3d DCA 1995).

By: */s/ Raoul G. Cantero*
Raoul G. Cantero

Respectfully submitted,

By: */s/ Raoul G. Cantero*
Raoul G. Cantero

Dated: February 5, 2018

WHITE & CASE LLP
By: /s/ *Raoul G. Cantero*
Raoul G. Cantero
Florida Bar No. 552356
Maria J. Beguiristain
Florida Bar No. 69851
Jesse L. Green
Florida Bar No. 95591
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
E-mail: rcantero@whitecase.com
E-mail: mbeguiristain@whitecase.com
E-mail: jgreen@whitecase.com

LEWIS TEIN PL
Michael R. Tein
Florida Bar No. 993522
3059 Grand Avenue, #340
Coconut Grove, Florida 33133
Telephone: (305) 442-1101
E-mail: mtein@lewistein.com

Counsel for Appellees, Roberto Isaias Dassum and William Isaias Dassum

CERTIFICATE OF SERVICE

I CERTIFY that on February 5, 2018 a copy of this motion was served by e-mail upon the following:

Alvin B. Davis
Digna B. French
Rafael Langer-Osuna
SQUIRE PATTON BOGGS (US) LLP
200 South Biscayne Boulevard, Suite 4700
Miami, Florida 33131
Telephone: (305) 577-2835
Facsimile: (305) 379-7146
E-mail: alvin.davis@squirepb.com
E-mail: digna.french@squirepb.com
E-mail: rafael.langerosuna@squirepb.com

By: /s/ *Raoul G. Cantero*
Raoul G. Cantero

EXHIBIT A

Third District Court of Appeal

State of Florida

Opinion filed December 27, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-2622
Lower Tribunal No. 09-34950

The Republic of Ecuador,
Appellant,

vs.

Roberto Isaias Dassum and William Isaias Dassum,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, John W. Thornton, Jr., Judge.

Squire Patton Boggs (US) LLP, and Alvin B. Davis, Digna B. French, and Rafael Langer-Osuna, for appellant.

White & Case LLP, and Raoul G. Cantero, Maria J. Beguiristain, and Jesse L. Green; Lewis Tein PL, and Michael R. Tein, for appellees.

Before SUAREZ, LAGOA, and LUCK, JJ.

LAGOA, J.

The Republic of Ecuador ("Republic") appeals from a final judgment entered in favor of brothers Roberto Isaias Dassum and William Isaias Dassum (the "Isaiases"). For the reasons set forth below, we reverse and remand for the trial court to hold a trial solely on damages. Because the liability of the Isaiases has been determined through an act of state, the only issue that remains is the amount of indebtedness, if any, owed by the Isaiases to the Republic.

I. FACTUAL AND PROCEDURAL HISTORY

This is the second time the parties have appeared before this Court in the Republic's effort to obtain a money judgment against the Isaiases for debts allegedly due from the failure of the Ecuadorian bank, Filanbanco S.A. ("Filanbanco"). See Republic of Ecuador v. Isaias Dassum (Isaias I), 146 So. 3d 58 (Fla. 3d DCA 2015). A brief factual and procedural history is necessary in order to discuss the current posture of this case before this Court.

The Isaiases were senior administrators and indirect shareholders of Filanbanco. On December 2, 1998, as a result of a liquidity crisis, Filanbanco was placed into restructuring under the jurisdiction and control of the Agencia de Garantía de Depósitos ("AGD"), an agency similar to the Federal Deposit Insurance Corporation in the United States. See Isaias I, 146 So. 3d at 60. On May 8, 2001, the accounting firm of Deloitte & Touche submitted a report (the "Deloitte Report")

to the Ecuadorian Superintendent of Banks, assessing Filanbanco's losses as of December 2, 1998, at $661.5 million.

Article 29 of Ecuador's Act for Economic Reorganization in the Area of Taxes and Finance ("Article 29"),[1] enacted in 2002, provides that administrators who have declared false technical equity and altered balance sheets shall guarantee deposits in the financial institution with their personal equity.[2] On February 26, 2008, the Banking Board of Ecuador passed Resolution No. JB-2008-1084 ("JB-1084"), which authorized Ecuador's Superintendent of Banks and Insurance to approve the Deloitte Report. In March 2008, the Superintendent of Banks and Insurance passed Resolution No. SBS-2008-185 ("SBS-185"), approving the Deloitte Report.

[1] All quotations of relevant Articles, Resolutions and acts of state are from translations of the documents from Spanish to English contained in the Record.

[2] Article 29 states as follows:

> In cases where administrators have declared an unreal technical equity, altered balance sheet figures, or charged interest rates on interest, they shall guarantee deposits in the financial institution with their personal equity, and the Deposit Guarantee Agency may seize property publicly known to belong to those shareholders and transfer it to a security trust pending establishment of its true ownership, in which case it shall become part of the resources of the Deposit Guarantee Agency and may not be disposed of during this period.

On July 8, 2008, the AGD issued Resolution Number AGD-UIO-GG-2008-12 ("AGD-12"), finding the Isaiases, as administrators of Filanbanco, liable for the bank's losses and ordering the seizure of their property. Specifically, AGD-12 states that "the declaration of the unrealistic technical equity and the alteration of the balances in Filanbanco on the behalf of its administrators, hid the real situation of this financial institution and the losses cut on December 2, 1998." AGD-12 also recognizes the losses set forth in JB-1084. Invoking Article 29, Article 1 of AGD-12 orders "the seizure of all assets of properties belonging to administrators shareholders of Filanbanco S.A. until December 2, 1998 including the assets belonging to their property." The Isaiases are specifically listed as administrators.[3] Portions of the Isaiases' property in Ecuador were seized by the AGD.

[3] Article 5 of AGD-12 states:

> Those who were Administrators of Filanbanco S.A. on or before December 2nd. 1998, and as for ordinance of Article 29 of the Reorganization of Economic matters in the Financial Tax Area are subject to these resolutions, are as follows: **Roberto Isaias Dassum**, Executive President; **William Isaias Dassum** Vice-Executive President . . . .

(emphasis added).

On April 29, 2009, the AGD filed a complaint against the Isaiases in Miami-Dade Circuit Court.[4] The AGD alleged that the Isaiases still owed the AGD at least $200 million and that the Isaiases have at least $20 million in publicly-known property in Miami-Dade County. Specifically, the AGD alleged that "[a]s former shareholders, officers, executives and administrators of Filanbanco, S.A., the Isaias brothers are liable to the AGD under Article 29 for the $661.5 Million Filanbanco Loss, less any sums recovered from the AGD's seizure and sale of their assets in Ecuador." The Isaiases filed an answer, affirmative defenses,[5] and counterclaims.

The Isaiases filed a motion for summary judgment asserting, among other things, that the Republic's[6] actions constituted an attempt to summarily confiscate the Isaiases' property located in Miami-Dade County. See Isaias I, 146 So. 3d at 60-61. The trial court entered summary judgment in favor of the Isaiases, and the

[4] By this point in time, the Isaiases were located in Miami. See Isaias I, 146 So. 3d at 60 ("In 2003, Ecuador issued arrest warrants for the Isaiases, who were by then in Miami.").

[5] The Isaiases asserted numerous affirmative defenses: 1) failure to state a cause of action; 2) statute of limitations; 3) laches; 4) fraud; 5) illegality; 6) comity; 7) no judgment; 8) payment; 9) failure to furnish proof of loss; 10) release; 11) estoppel; 12) accord and satisfaction; 13) contributory negligence; and 14) exhaustion of administrative remedies.

[6] In March 2010, the Isaiases and the Republic each filed a motion to substitute the Republic for the AGD because the AGD was dissolved pursuant to the laws of Ecuador on December 31, 2009. On March 19, 2010, the trial court entered an order substituting the Republic for the AGD.

Republic appealed to this Court. As this Court stated in Isaias I, the issue on appeal was "whether the extraterritoriality exception to the act of state doctrine bars the Republic's claims in Florida to recover some $200 million in alleged damages following the failure of Ecuador's (formerly) largest bank, Filanbanco."[7] Id. at 59. This Court reversed and remanded for further proceedings, concluding that "(1) the record demonstrates genuine issues of fact regarding the allegedly-remaining indebtedness of the Isaiases to the Republic; and (2) the Republic's complaint seeking remedies in Florida is not based, as argued by the Isaiases, on a 'confiscatory decree of a foreign sovereign . . . acting beyond its territorial dominion.'" Id.

The matter proceeded to a bench trial at which the Republic presented the testimony of an expert in Ecuadorian law who authenticated the Republic's acts of

[7] The extraterritorial exception to the act of state doctrine applies when another state attempts to confiscate property located within the United States:

> There is, however, "a well-established corollary to the act of state doctrine, the so-called 'extraterritorial exception.'" Tchacosh Co., Ltd. v. Rockwell Int'l Corp., 766 F.2d 1333, 1336 (9th Cir. 1985). Under that exception, "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir.1965) (Friendly, J.).

Villoldo v. Castro Ruz, 821 F.3d 196, 202 (1st Cir. 2016).

state—Article 29 and the various Resolutions at issue.[8] The Isaiases presented witnesses and bank records in an attempt to prove they committed no wrongdoing and did not cause any loss to Filanbanco. After a three-day trial, the trial court entered final judgment in favor of the Isaiases, finding that the Republic lacked standing to bring suit and that the lawsuit was barred by the statute of limitations. This appeal ensued.

II. STANDARD OF REVIEW

Pure questions of law are reviewed de novo. The trial court's findings that the Republic lacked standing and that the Republic's suit was barred by the statute of limitations involve issues of law. Herbits v. City of Miami, 207 So. 3d 274, 281 (Fla. 3d DCA 2016) (stating that standing is a pure question of law that is reviewed de novo); Nationstar Mortg., LLC v. Sunderman, 201 So. 3d 139, 140 (Fla. 3d DCA 2015) (stating that a legal issue involving a statute of limitations question is reviewed de novo). As such, this Court's standard of review is de novo.

To the extent the final judgment addresses issues of foreign law, this Court's standard of review is also de novo. Transportes Aereos Nacionales, S.A. v. De Brenes, 625 So. 2d 4, 5 (Fla. 3d DCA 1993) ("A trial court's determination of foreign

[8] It is undisputed that Article 29 and Resolutions JB-1084, SBS-185, and AGD-12, constitute acts of state. In its final judgment, the trial court found that Article 29 and the Resolutions "are Acts of State of the Republic of Ecuador," and the Isaiases do not contend otherwise.

law is treated as a ruling on a question of law over which an appellate court exercises plenary review.").

III. ANALYSIS

The trial court's entry of final judgment in favor of the Isaiases was based upon two specific findings: (1) that the Republic lacked standing to bring suit; and (2) that the lawsuit was barred by the statute of limitations. We find that the trial court erred in both findings, and we address each issue separately.

A. Standing

With regard to the issue of standing, the trial court found that the Republic lacked standing and authority to sue because it failed to present evidence that the Republic had assumed the right to pursue this lawsuit from the AGD. We hold that the trial court erred in this finding because the Isaiases waived the issue of standing.

It is well-established that standing is an affirmative defense that must be raised by the defendant to avoid waiver. Krivanek v. Take Back Tampa Political Comm. 625 So. 2d 840, 842 (Fla. 1993); Cong. Park Office Condos II, LLC v. First–Citizens Bank & Tr. Co., 105 So. 3d 602, 607 (Fla. 4th DCA 2013) (noting that lack of standing is an affirmative defense which must be pled to avoid waiver); Schuster v. Blue Cross & Blue Shield of Fla., Inc., 843 So. 2d 909, 912 (Fla. 4th DCA 2003) ("There is no question that lack of standing is an affirmative defense that must be raised by the defendant and that the failure to raise it generally results in waiver.").

The Isaiases do not and cannot dispute that they did not plead the affirmative defense of standing below.

Raised at oral argument for the first time, the Isaiases argued that the issue of standing was tried by consent of the parties. We find this argument without merit. In order for a trial court to enter judgment upon an issue that was not pled, the parties must provide express or implied consent. See, e.g., Dysart v. Hunt, 383 So. 2d 259, 260 (Fla. 3d DCA 1980). It is undisputed—and the Isaiases conceded this point at oral argument—that the Republic did not expressly consent to trying the issue of standing. As previously noted, consent may also be implied. For example, "[a]n issue is tried by consent where the parties fail to object to the introduction of evidence on the issue." Dep't of Revenue v. Vanjaria Enters., 675 So. 2d 252, 254 (Fla. 5th DCA 1996). The Isaiases do not point to the admission of unobjected-to evidence on the issue of standing such that the matter could be construed as tried by implied consent. Because the issue of standing was not pled as an affirmative defense and was not tried by consent, we find the trial court erred in entering judgment in favor of the Isaiases on this ground. See Cortina v. Cortina, 98 So. 2d 334, 337 (Fla. 1957) ("It is fundamental that a judgment upon a matter entirely outside of the issues made by the pleadings cannot stand.").

B. Statute of Limitations

As noted above, the trial court also found that the Republic's action was barred by the four-year limitations period set forth in sections 95.11(3)(f) and (p), Florida Statutes (2016).[9] In making its finding, the trial court reasoned that there was no evidence that the Isaiases committed any wrongful act after December 2, 1998—the date Filanbanco was placed into restructuring and the last day the Isaiases were Filanbanco's administrators—and therefore, more than ten years elapsed between the last possible date on which a wrongful act could have occurred and the filing of the lawsuit on April 29, 2009. On appeal, the Republic argues that AGD-12 established that the Isaiases' liability commenced on July 8, 2008, and that the trial court violated the act of state doctrine when it found that the statute of

[9] Sections 95.11(3)(f) and (p), states:

> Actions other than for recovery of real property shall be commenced as follows: . . .
>
> **(3) Within four years.—**
>
> (f) An action founded on a statutory liability.
> . . . .
>
> (p) Any action not specifically provided for in these statutes.

limitations commenced, at the latest, on December 2, 1998, rather than on July 8, 2008. We agree with the Republic.

Under the act of state doctrine, "'the act within its own boundaries of one sovereign State . . . becomes . . . a rule of decision for the courts of this country.'" W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l., 493 U.S. 400, 406 (1990) (quoting Ricaud v. Am. Metal Co., 246 U.S. 304, 310 (1918)); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964). For that reason, "the act of state doctrine requires American courts to presume the validity of 'an official act of a foreign sovereign performed within its own territory.'" Republic of Austria v. Altmann, 541 U.S. 677, 713 (2004) (Breyer, J., concurring) (quoting W.S. Kirkpatrick, 493 U.S. at 405); see also Sabbatino, 376 U.S. at 401 ("The act of state doctrine . . . precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.").

"Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." W.S. Kirkpatrick, 493 U.S. at 406 (emphasis in original). As the Supreme Court has explained, the doctrine applies when "the relief sought or the defense interposed

would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." Id. at 405.

The Isaiases' liability for losses to Filanbanco was established by an act of state on July 8, 2008. Specifically, on that date, the AGD issued AGD-12, which found that "the declaration of the unrealistic technical equity and the alteration of the balances in Filanbanco on the behalf of its administrators, hid the real situation of this financial institution and the losses cut on December 2, 1998." AGD-12 goes on to list the Isaiases, among others, as administrators of Filanbanco. Invoking Article 29, Article 1 of AGD-12 proceeds to "order the seizure of all assets of properties belonging to administrators shareholders of Filanbanco S.A. until December 2, 1998 including the assets belonging to their property." Because the Isaiases' liability for losses to Filanbanco was established on July 8, 2008, when the AGD issued AGD-12, we find that the trial court violated the act of state doctrine when it found that December 2, 1998, was the date on which the Isaisases' liability accrued for statute of limitation purposes.

Pursuant to the act of state doctrine, neither the trial court nor this Court may inquire into the validity of the Republic's July 8, 2008, determination of liability as set forth in AGD-12 or find otherwise. The trial court's finding that liability accrued on December 2, 1998, rather than on July 8, 2008, is a clear violation of the act of state doctrine as the trial court rejected the validity of the Republic's public

act. See FOGADE v. ENB Revocable Tr., 263 F.3d 1274, 1296 (11th Cir. 2001) (finding that the act of state doctrine properly applied to bar the defendants' affirmative defense challenging the lawfulness of the Venezuelan government agency's intervention of the Venezuelan company-plantififf); Bank Tejarat v. Varsho-Saz, 723 F. Supp. 516, 521-22 (C.D. Cal. 1989) (striking the affirmative defenses of setoff and unclean hands because adjudication of those affirmative defenses would require the court to judge the legality of acts of a foreign state completed within that state's territory in violation of the act of state doctrine).

Because the act of state doctrine compels this Court to construe the statute of limitations to begin to run on July 8, 2008—the date the Isaiases' liability for losses to Filanbanco was established in AGD-12, the Republic's act of state—we find that the complaint filed less than a year later on April 29, 2009, was not barred by the four-year statute of limitations set forth in section 95.11(3)(p), Florida Statutes.

C. Proceedings on Remand

To avoid any further confusion, the proceedings on remand shall be limited solely to the issue of damages. Because an act of state determined that the Isaiases are liable, the Republic is not required to prove the Isaiases' liability regarding the losses to Filanbanco.[10] In other words, the Isaiases' liability for the losses to

[10] The Isaiases' argument that Isaias I directed that the Republic prove *both* liability and damages on remand is without merit. First, a finding of no liability would be in violation of the act of state doctrine, as AGD-12 has already established the Isaiases'

Filanbanco has been established in the Republic's act of state—AGD-12—and pursuant to the act of state doctrine, no court in this country may find otherwise.

As this Court noted in Isaias I, however, this does not mean that the Republic is entitled to automatically seize the Isaiases' property in Miami-Dade County. Isaias I, 146 So. 3d at 62-63. The Republic's claims that the Isaiases still owe money to the Republic are "subject to proof as in any claim by a foreign sovereign against one of its citizens residing in the United States." Id. at 62. Indeed, the Isaiases have stated numerous affirmative defenses as to damages, including accord and satisfaction, release, and payment, all of which, if not barred by the act of state doctrine, may be asserted on remand and considered by the trial court.

IV. CONCLUSION

For the reasons stated, we reverse the final judgment entered in favor of the Isaiases and remand the matter to the trial court for a trial on damages. Because the liability of the Isaiases has been determined through an act of state, the only issue

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liability. Second, the Isaiases' reliance on language in Isaias I that the "validity" of the Republic's claim was subject to proof is misplaced. The issue before this Court in Isaias I was whether the "extraterritoriality exception" to the act of state doctrine applied to the Republic's claim. Isaias I, 146 So. 3d at 61. This Court held that it did not, and reversed the summary judgment in favor of the Isaiases because issues of fact remained as to the Isaiases' "allegedly-remaining indebtedness to the Republic." Id. at 63. Given the issue on appeal in Isaias I and this Court's holding in Isaias I, the Court's reference to the "validity" of the Republic's claims is a reference to the amounts allegedly still due, not the underlying liability established in AGD-12.

that remains to be tried is the amount of indebtedness, if any, owed by the Isaiases to the Republic.

Reversed and remanded for further proceedings.

EXHIBIT B

Republic of Ecuador v. Dassum

Court of Appeal of Florida, Third District

July 2, 2014, Opinion Filed

No. 3D13-1753

Reporter
146 So. 3d 58 *; 2014 Fla. App. LEXIS 10162 **; 39 Fla. L. Weekly D 1392; 2014 WL 2963202

The Republic of Ecuador, Appellant, vs. Roberto Isaias Dassum and William Isaias Dassum, Appellees.

Subsequent History: Released for Publication September 16, 2014.

Rehearing denied by *Republic of Ecuador v. Dassum, 2014 Fla. App. LEXIS 15203 (Fla. Dist. Ct. App. 3d Dist., Sept. 16, 2014)*

Decision reached on appeal by, Remanded by *Republic of Ecuador v. Dassum, 2017 Fla. App. LEXIS 19760 (Fla. Dist. Ct. App. 3d Dist., Dec. 27, 2017)*

Prior History: **[**1]** An Appeal from the Circuit Court for Miami-Dade County, John W. Thornton, Judge. Lower Tribunal No. 09-34950.

Counsel: Squire Sanders and Alvin B. Davis and Digna B. French and Rafael Langer-Osuna, for appellant.

Lewis Tein; Kula & Samson, and Elliot Kula, for appellees.

Judges: Before WELLS, ROTHENBERG and SALTER, JJ.

Opinion by: SALTER

Opinion

[*59] SALTER, J.

The Republic of Ecuador (Republic) appeals a final summary judgment in favor of two former bankers from Ecuador now living in Miami, brothers Roberto Isaias and William Isaias. The legal issue is whether the extraterritoriality exception to the act of state doctrine bars the Republic's claims in Florida to recover some $200 million in alleged damages following the failure of Ecuador's (formerly) largest bank, Filanbanco.

We reverse and remand, concluding that: (1) the record demonstrates genuine issues of fact regarding the allegedly-remaining indebtedness of the Isaiases to the Republic; and (2) the Republic's complaint seeking remedies in Florida is not based, as argued by the Isaiases, on a "confiscatory decree of a foreign sovereign . . . acting beyond its territorial dominion."[1]

The Proceedings in Ecuador

The Isaiases owned and controlled **[**2]** two Panamanian entities which were the shareholders of Filanbanco. In 1998, Filanbanco experienced a liquidity crisis as part of a widespread national financial crisis. Ecuador's legislature established the Agencia **[*60]** de Garantia de Depositos ("AGD"), an agency similar to the Federal Deposit Insurance Corporation in the United States. By mid-2001, the AGD had injected over $1.16 billion[2] into Filanbanco in an effort to help the bank recover stability and to protect its depositors.

Filanbanco engaged the international accounting firm of Deloitte & Touche (Deloitte) to determine the extent and causes of the bank's massive losses. In May 2001, Deloitte issued a written report to the Republic's national superintendent of financial institutions concluding that depositors' losses (as of December 1998) were at least $661.5 million. Filanbanco was forced to close, and Article 29 of the AGD law imposed liability on the Isaiases (jointly and severally) for the losses. The Republic concluded that the Isaiases had drained the bank's funds through fraudulent misconduct. In 2003, Ecuador issued arrest warrants for the Isaiases, who were by then in Miami.[3]

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[1] Order Granting Defs.' Mot. Summ. J. at 8.

[2] All amounts in this opinion are expressed in United States dollars.

[3] **[**3]** Ecuador requested extradition of the Isaiases to Ecuador, but the request has not been granted so far as the record reflects.

In February 2008, the Republic's banking authority issued Resolution Number JB-2008-1084 (Resolution 1084), authorizing the approval and delivery of the Deloitte report to the AGD. The AGD then pursued the assets of the Isaiases in Ecuador to recover and sell them, thereby reducing the allegedly outstanding liability of the Isaiases to the Republic. As of April 2009, the AGD alleged that it had recovered and sold approximately $400 million of such assets in Ecuador to be applied in reduction of the claimed $661.5 million indebtedness of the Isaiases.

The Florida Lawsuit

In April 2009, the AGD[4] sued the Isaiases in circuit court in Miami, alleging that the Isaiases reside in Miami and have at least $20 million in property here. The complaint seeks to collect the Isaiases' allegedly-remaining liabilities of approximately $200 million. The prayer for relief in the complaint "demands judgment . . . for damages, interest, and such further relief that the Court may deem just and proper." The Republic's complaint does not demand that the circuit court summarily seize any **[**4]** of the Isaiases' property in Florida or transfer title to any such property to the Republic.

The Isaiases counterclaimed for a declaratory judgment that the AGD orders were illegal and improper under the law of Ecuador. The trial court determined that those orders represented governmental actions taken within Ecuador and granted the Republic's motion for summary judgment based on the act of state doctrine. Similarly, sixteen entities which had an interest in some of the assets seized and sold in Ecuador by the AGD for application to the alleged indebtedness of the Isaiases sought to intervene in the Florida lawsuit for a declaratory judgment that the seizure orders were illegal. The trial court dismissed the intervenors' complaint on grounds that the Florida claims of the intervenors related exclusively to sovereign actions of the Republic within its own borders, and were thus barred by the Foreign Sovereign Immunities Act[5] and the act of state doctrine.

In March 2013, the Isaiases moved for final summary judgment against the Republic on the claims asserted by the Republic in its Florida complaint. **[**5]** The primary **[*61]** basis for the Isaiases' motion was the extraterritoriality exception to the act of state doctrine. The trial court granted that motion, and this appeal followed.

Analysis

The act of state doctrine is a judicially-created principle of international comity; the courts of Florida and the United States will presumptively defer to governmental acts (whether we might characterize them as executive, legislative, or judicial) taken within the territory of another sovereign nation. *Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)*; *Nat'l Inst. of Agrarian Reform v. Kane, 153 So. 2d 40, 42 (Fla. 3d DCA 1963)*. The doctrine gives effect to the primacy of the executive branch of our own federal government in the conduct of international relations with other countries.

The governmental acts to which we ordinarily defer include actions of the executive branch of a foreign government—such as the AGD in the present case—which determine an indebtedness and direct the seizure of assets within that country in partial or full satisfaction of that indebtedness. But the courts of this country have also been receptive to claims asserted by foreign governments to recover for acts in a foreign country by alleged wrongdoers (officials from a prior administration or regime) who subsequently took up residence here with ill-gotten **[**6]** gain. *Republic of Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986)* ("The complaint seeks recovery of property illegally taken by a former head of state, not confiscation of property legally owned by him.").[6]

The act of state doctrine and our deference do not extend to sovereign acts of a foreign government purporting to seize, summarily, property within the United States. This "extraterritoriality exception" to the doctrine requires us to exercise our own jurisdiction and to determine whether the foreign sovereign's claim

[4] In 2010, the Republic of Ecuador itself was substituted for AGD as the party plaintiff.

[5] *28 U.S.C. §§ 1602-1611*.

[6] In cases such as *Marcos*, a successor foreign government alleges that a predecessor official's property or funds in the United States represent proceeds of an embezzlement or other wrongful acts in the foreign country. No specific "tracing" or "fruits of the crime" allegations are made in the complaint against the Isaiases, but the complaint alleges that the Isaiases are liable to the Republic for the Isaiases' acts and omissions regarding Filanbanco.

against the assets here amounts to a "taking" contrary to United States policy and the *fifth* and *fourteenth amendments* to our Constitution. *Bandes v. Harlow & Jones, Inc., 852 F.2d 661, 667 (2d Cir. 1988)*; *Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965)*.

In the present case, the Republic's complaint does not identify any act of the government of Ecuador summarily seizing or confiscating any property of the Isaiases **[**7]** in Miami-Dade County, the State of Florida, or the United States. Rather, the complaint alleges that Filanbanco is in liquidation and that Resolution 1084 has authorized the AGD to "initiate all legal actions" against any persons obligated by law to reimburse the AGD for the amounts advanced to depositors and other creditors of Filanbanco. The Republic's Florida complaint alleges that: the Isaiases were found by Deloitte (in a report then approved by Ecuador's banking authorities), to be liable to the AGD for $661.5 million; the AGD seized in Ecuador over $400 million in assets of the Isaiases in reduction of that liability; and the AGD has been authorized to pursue the balance of the liability through litigation against the Isaiases in Miami-Dade County. The prayer for relief in the complaint seeks a judgment for money damages for the unrecovered net **[*62]** amount allegedly remaining due from the Isaiases, jointly and severally, "and such other relief that the Court may deem just and proper."

This complaint is in stark contrast to a hypothetical complaint demanding the enforcement in Florida of a foreign sovereign's confiscation of property located in Florida, as a judicial *fait accompli* **[**8]** , all in purported reliance on the act of state doctrine. Such a demand plainly would be subject to the extraterritoriality exception to the doctrine, as in *Republic of Iraq*.

The order granting summary judgment in the present case was based on an erroneous predicate advanced by counsel for the Isaiases, who characterized the Florida complaint as an effort to "seize the [Isaiases'] property in the U.S" through an "executive fiat" within Ecuador. In fact, however, the complaint seeks a judgment for money damages which, if further proceedings warrant, could only then be used to execute upon property in the United States. The Isaiases are not precluded from opposing the entry of such a judgment in Miami-Dade County by asserting their defenses and affirmative defenses at trial.

Nor does the Republic's complaint in Florida allege that the computations of liability in Ecuador must be given preclusive effect by the circuit court here. The governmental resolutions establishing the Isaiases' alleged liability (and reductions in that alleged liability following recoveries in Ecuador) are neither "out-of-country foreign money-judgments" eligible for recognition and enforcement under *sections 55.601-.607, Florida Statutes* (2009),[7] nor **[**9]** foreign decrees subject to the more expansive principle of international comity described in *Nahar v. Nahar, 656 So. 2d 225 (Fla. 3d DCA 1995)*.

The Isaiases did not make a conclusive showing in the circuit court that the actions by the banking authorities and Deloitte in Ecuador were confiscatory acts strictly based on politics, revolution, or regime change. The Isaiases have not provided, on this record, summary judgment evidence under *Florida Rule of Civil Procedure 1.510(c)* that the Republic's claims of misapplication and misrepresentation, and the Deloitte report, for example, are pretextual or even factually incorrect. On the record presented, the Isaiases had the opportunity to present information to the banking authorities (and on at least some occasions, took advantage of that opportunity)[8] in Ecuador both before and after the issuance of the Deloitte report and before and after they moved to Miami.

Simply stated, the Republic claims to be a creditor with a claim for money damages against the Isaiases based on their allegedly wrongful acts and omissions in Ecuador. The validity and extent of any such claim are subject to proof as in any claim by a foreign sovereign against one of its citizens residing in the United States. The Florida trial court is not obligated to give preclusive effect to the findings of Deloitte and the AGD, and it will not interfere with the Republic's sovereignty or the foreign relations **[*63]** of the United States if the Florida court rules for or against the Republic's claims here in Florida after considering the proof put forward by the Republic.

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[7] The terms "judgment" and "foreign court," used repeatedly within Florida's Uniform Out-of-country Foreign Money-Judgment Recognition Act, make it clear that the Republic's banking authority's resolutions at issue in the present case would not be eligible for recognition under the Act.

[8] Although the order granting the motion for summary judgment characterizes the Republic's **[**10]** complaint as "an attempt to enforce a non-judgment finding of liability," the Isaiases have not shown that the "non-judgment" findings by Deloitte and the Republic's banking authorities are fabrications or even erroneous.

Conclusion

We reverse and remand the final summary judgment in favor of the Isaiases for further proceedings. The existing complaint is not barred as a matter of law as an attempt to obtain summary recognition of acts of state in Ecuador that "seize" or "confiscate" property of the Isaiases in Miami-Dade **[**11]** County. There are genuine issues of material fact that remain in dispute regarding (1) the Isaiases' allegedly-remaining indebtedness to the Republic, and (2) the entitlement of the Republic to the entry of a judgment here against the Isaiases for money damages. The Isaiases have not demonstrated on this record that the Republic has no facts or legal basis upon which it may prove its claims.

Reversed and remanded for further proceedings.

EXHIBIT C

EXHIBIT C

	Case Name	**Use of Act of State Doctrine**	**Stand-alone cause of action (Y/N)**
1.	*Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004)	Asserted by Congo defendants as affirmative defense	N
2.	*Af-Cap, Inc. v. Republic of Congo*, Nos. A-01-CA-100-SS, A-01-CA-321-SS, 2005 U.S. Dist. LEXIS 46414 (W.D. Tex. Feb. 4, 2005)	Asserted in opposition to motion for turnover relief	N
3.	*AG of Can. v. RJ Reynolds Tobacco Holdings*, 103 F. Supp. 2d 134 (N.D.N.Y. 2000)	Asserted by defendant tobacco company as affirmative defense	N
4.	*Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008)	Asserted by Russia as an affirmative defense.	N
5.	*Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008)	Asserted as a defense by the Russian Federation and several Russian state agencies	N
6.	*Airline Pilots Asso., Int'l v. TACA Int'l Airlines, S.A.*, 748 F.2d 965 (5th Cir. 1984)	Asserted as a defense by TACA	N
7.	*Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1974)	Asserted as a defense by Cuba	N
8.	*Allied Bank International v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440 (S.D.N.Y. 1983)	Asserted by Costa Rican-owned bank as affirmative defense	N
9.	*Ampac Group v. Republic of Honduras*, 797 F. Sup. 973 (S.D. Fla. 1992)	Asserted by Honduras as an affirmative defense	N
10.	*Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016)	Asserted as basis for dismissal, but dismissal affirmed on other grounds	N
11.	*Architectural Ingenieria Siglo XXI, Ltd. Liab. Co. v. Dominican Republic*, No. 1:13-cv-20544-KMM, 2017 U.S. Dist. LEXIS 5410 (S.D. Fla. Jan. 12, 2017)	Asserted as affirmative defense against breach of contract claim	N
12.	*Asociación de Reclamantes v. United Mexican States*, 561 F. Supp. 1190 (D.C.C. 1983)	Asserted by Mexico as an affirmative defense	N
13.	*Banco Nacional De Cuba v. First Nat'l City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967)	Asserted by Cuban bank as affirmative defense	N
14.	*Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394 (2d Cir. 1970)	Re-asserted as a defense by Cuba on appeal	N

15.	*Banco Nacional de Cuba v. First Nat'l City Bank*, 478 F.2d 191 (2d Cir. 1973)	Asserted as a defense by Banco Nacional de Cuba	N
16.	*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)	Factual support for conversion cause of action	N
17.	*Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60 (D.D.C. 2007)	Asserted as a defense by Iraq	N
18.	*Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979)	Asserted as affirmative defense in response to Order to Show Cause why an order authorizing the issuance of a writ of attachment should not be entered	N
19.	*Belgrade v. Sidex Int'l Furniture Corp.*, 2 F. Supp. 2d 407 (S.D.N.Y. 1998)	Raised as basis for dismissal in motion to dismiss	N
20.	*Belize Telecom Ltd. v. Gov't of Belize*, No. 05-20470-CIV-UNGARO-BENAGES/O'SULLIVAN 2005 U.S. Dist. LEXIS 18577 (S.D. Fla. May 10, 2005)	Cited by court as grounds to dismiss certain allegations in complaint.	N
21.	*Best Med. Belg., Inc. v. Kingdom of Belg.*, 913 F. Supp. 2d 230 (E.D. Va. 2012)	Used to support dismissal for lack of jurisdiction	N
22.	*BFI Grp. Divino Corp. v. JSC Russian Aluminum*, 481 F. Supp. 2d 274 (S.D.N.Y. 2007)	Asserted as basis for dismissal	N
23.	*Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000)	Asserted as a defense by Banque Paribas	N
24.	*Braka v. Nacional Fiannciera, S.A.*, No. 83 Civ. 4161(CES), 1984 U.S. Dist. LEXIS 15128 (S.D.N.Y. July 9, 1984)	Asserted as basis for dismissal	N
25.	*Chisholm v. Bank of Jamaica*, 643 F. Supp. 1393 (S.D. Fla. 1986)	Asserted by Bank of Jamaica as an affirmative defense	N
26.	*Chuidian v. Philippine Nat'l Bank*, 734 F. Supp. 415 (C.D. Cal. 1990)	Asserted by defendants as an affirmative defense	N
27.	*Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322 (5th Cir. 1982)	Asserted as a defense by Entex	N
28.	*Credit Suisse v. United States Dist. Court*, 130 F.3d 1342 (9th Cir. 1997)	Asserted by Swiss Bank in support of a writ of mandamus compelling district court to dismiss the action	N

29.	*Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000)	Asserted as a defense by Iraq	N
30.	*Daventree Ltd. v. Republic of Azer.*, 349 F. Supp. 2d 736 (S.D.N.Y. 2004)	Asserted by Azerbaijan as an affirmative defense	N
31.	*Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7 (D.D.C. 1986)	Asserted as a defense by Czechoslovakia	N
32.	*Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203 (D.C. Cir. 1987)	Recognized by Court as an affirmative defense for Czechoslovakia	N
33.	*De Csepel v. Republic of Hung.*, 714 F.3d 591 (D.C. Cir. 2013)	Asserted by Republic of Hungary as an affirmative defense	N
34.	*De Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011)	Asserted as a defense by Hungary	N
35.	*Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (CWx), 2006 U.S. Dist. LEXIS 96772 (C.D. Cal. Sept. 11, 2006)	Asserted as a defense by Deutsche Bank, A.G.	N
36.	*Doe v. State of Israel*, 400 F. Supp. 2d 86 (D.C.C. 2005)	Cited by Court as grounds for dismissing the Complaint	N
37.	*DRFP, LLC v. Republica Bolivariana De Venez.*, 945 F. Supp. 2d 890 (S.D. Ohio 2013)	Asserted by Venezuela as affirmative defense	N
38.	*Eckert Int'l v. Government of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167 (E.D. Va. 1993)	Asserted by Fiji as an affirmative defense	N
39.	*Eckert Int'l v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77 (4th Cir. 1994)	Asserted as basis for dismissal by the trial court, but not reviewed by appellate court	N
40.	*El-Hadad v. Embassy of the U.A.E.*, 69 F. Supp. 2d 69 (D.C.C.1999)	Asserted by U.A.E. as an affirmative defense	N
41.	*Fed. Treasury Enter. Sojuzplodoimport v. Spirts Int'l B.V.*, 809 F.3d 737 (2d Cir. 2016)	Cited by Court when reversing district court's ruling on plaintiff's standing	N
42.	*Federal Republic of Germany v. Elicofon*, 536 F. Supp. 813 (E.D.N.Y. 1978)	Asserted by intervener as an affirmative defense.	N
43.	*FG Hemisphere Assocs. LLC v. Republique Du Congo*, No. H-02-4261, 2006 U.S. Dist. LEXIS 23533 (S.D. Tex. Apr. 5, 2006)	Asserted by garnishees as defense against court requiring garnishees to post a bond as security in the event defendant "lifted" garnished oil	N

44.	*Films by Jove, Inc. v. Berov*, 341 F. Supp. 2d 199 (E.D.N.Y. 2004)	Asserted as a defense by Joseph Berov, Saint Petersburg Publishing House and the Federal State Unitarian Enterprise Soyuzmultfil Studio	N
45.	*First Merchs. Collection Corp. v. Republic of Arg.*, 190 F. Supp. 2d 1336 (S.D. Fla. 2002)	Asserted by Argentina as an affirmative defense.	N
46.	*First Nat'l Bank (Int'l) v. Banco Nacional de Cuba*, 658 F.2d 895 (2d Cir. 1981)	Asserted as a defense by Banco Nacional de Cuba	N
47.	*First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972)	Asserted as a defense against a counterclaim	N
48.	*Foremost McKesson, Inc. v. Islamic Republic of Iran*, No. 82-0220 1989 U.S. Dist. LEXIS 4055 (D.C.C. May 5, 1989)	Asserted by Iran as an affirmative defense	N
49.	*Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008)	Asserted by France as an affirmative defense	N
50.	*Friedar v. Government of Israel*, 614 F. Supp. 395 (S.D.N.Y. 1985)	Asserted by Israel as an affirmative defense	N
51.	*Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358 (N.D. Ill. 1983)	Asserted by the Court as grounds for dismissing the Complaint	N
52.	*Glen v. Club Mediterranee S.A.*, 450 F.3d 1251 (11th Cir. 2006)	Asserted as a defense by Club Mediterranee	N
53.	*Gross v. German Found. Indust. Initiative*, 456 F.3d 363 (3d Cir. 2006)	Asserted as a defense by the German Foundation Industrial Initiative	N
54.	*Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venez.*, 971 F. Supp. 2d 49 (D.D.C. 2013)	Asserted as a possible affirmative defense but was considered not ripe due to questions involving subject matter jurisdiction	N
55.	*Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venez.*, 784 F.3d 804 (D.C. Cir. 2015), *vacated on other grounds*.	Asserted as a defense by Venezuela	N
56.	*Hilsenrath v. Swiss Confederation*, 2007 U.S. Dist. LEXIS 81118 (N.D. Cal. Oct. 23, 2007)	Asserted as a defense by the Swiss Confederation	N
57.	*Honduras Aircraft Registry v. Gov't of Honduras*, 129 F.3d 543 (11th Cir. 1997)	Asserted as a defense by Honduras	N

58.	*Honduras Aircraft Registry v. Government of Honduras*, 833 F. Supp. 685 (S.D. Fla. 1995)	Asserted by Honduras as an affirmative defense	N
59.	*Hunt v. Coastal States Gas Producing Co.*, 583 S.W.2d 322 (Tex. 1979)	Cited by court as basis for affirming judgment on conversion claim	N
60.	*In re Philippine Nat'l Bank*, 397 F.3d 768 (9th Cir. 2005)	Asserted by the Philippine National Bank in a petition for writ of mandamus	N
61.	*In re Yukos Oil Co. Sec. Litig.*, No. 04 Civ. 5243 (WHP) 2006 U.S. Dist. LEXIS 78067 (S.D.N.Y. Oct. 25, 2006)	Asserted by Russian oil company as affirmative defense	N
62.	*Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984)	Asserted by PMGSE as an affirmative defense to a counterclaim	N
63.	*Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982)	Asserted as a defense by the Government of East Germany	N
64.	*Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.C.C. 1980)	Asserted by the Republic of Chile as an affirmative defense	N
65.	*Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.C.C. 1980)	Asserted by Libya as an affirmative defense	N
66.	*Lightwater Corp. v. Republic of Argentina*, 2003 U.S. Dist. LEXIS 6156 (S.D.N.Y. Apr. 14, 2003)	Asserted as a defense by the Republic of Argentina	N
67.	*Liu v. Republic of China*, 642 F. Supp 297 (N.D. Cal. 1986)	Asserted by Republic of China as affirmative defense	N
68.	*Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989)	Asserted as a defense by China	N
69.	*Lloyds Bank PLC v. Republic of Ecuador*, 1998 U.S. Dist. LEXIS 3065 (S.D.N.Y. March 12, 1998)	Asserted as a defense by Ecuador	N
70.	*Lucchino v. Foreign Countries of Brazil, South Korea, etc.*, 476 A.2d 1369 (1984)	Asserted by Mexico as an affirmative defense	N
71.	*Lyondell-CITGO Refining, LP v. Petroleos de Venezuela, S.A.*, No. 02 Civ. 0795 (CBM), 2003 U.S. Dist. LEXIS 13809 (S.D.N.Y. Aug. 8, 2003)	Asserted as a defense by Petroleos de Venezuela	N

72.	*Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007)	Asserted as a defense by the City of Amsterdam	N
73.	*Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021 (5th Cir. 1972)	Cited by court as grounds for determining plaintiff's standing	N
74.	*McKesson Corp. v. Islamic Republic of Iran*, 752 F. Supp. 2d 12 (D.D.C. 2010)	Asserted as defense against Iran-U.S. Treaty of Amity claim	N
75.	*McKesson Corp. v. Islamic Republic of Iran*, No. 82-0220 (RJL) 2009 U.S. Dist. LEXIS 109368 (D.C.C. Nov. 23, 2009)	Asserted by Iran as an affirmative defense	N
76.	*Mezerhane v. República Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015)	Cited by court as additional grounds for dismissal of plaintiff's complaint	N
77.	*Micula v. Gov't of Rom.*, 2015 U.S. Dist. LEXIS 102907 (S.D.N.Y. Aug. 5, 2015), *overruled on other grounds*.	Asserted as a defense by Romania and the Commission of the European Union	N
78.	*Ministry of Oil of the Republic of Iraq v. 1,032,212 Barrels of Crude Oil Aboard the United Kalavrvta*, No. G-14-249 U.S. Dist. LEXIS 1566 (S.D. Tex. Jan. 7, 2015)	Asserted by the Kurdistan Regional Government of Iraq as an affirmative defense	N
79.	*Ministry of Oil of the Republic of Iraq v. 1,032,212 Barrels of Crude Oil*, 2015 U.S. Dist. LEXIS 22980 (S.D. Tex. Feb. 26, 2015)	Asserted as a defense by the Kurdistan region of Iraq	N
80.	*Mirabella v. Banco Industrial de la Republica Argentina*, 421 N.Y.S. 2d 960 (Sup. Ct. 1979)	Asserted as a defense by Argentina	N
81.	*MMA Consultants 1, Inc. v. Republic of Peru*, 245 F. Supp. 3d 486 (S.D.N.Y. 2017)	Asserted by Peru as an affirmative defense	N
82.	*MOL, Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79 (D. Or. 1983)	Cited by court to dismiss action against Bangladesh	N
83.	*Nat'l Am. Corp. v. Fed. Republic of Nigeria & Cent. Bank of Nigeria*, No. 76 Civ. 2745 (GLG), 1977 U.S. Dist. LEXIS 12316 (S.D.N.Y. Dec. 19, 1977)	Asserted in defendants' summary judgment motion as part of non-justiciability defense	N
84.	*National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978)	Asserted as a defense by Nigeria	N

85.	*Nat'l Bank of Anguilla (Private Banking Tr.) Ltd. v. Nat'l Bank of Anguilla (In re Nat'l Bank of Anguilla (Private Banking Tr.) Ltd.)*, Nos. 16-11806 (MG), 16-01279 (MG), 16-13311 (SMB), 17-01058 (SMB), 2018 Bankr. LEXIS 226 (Bankr. S.D.N.Y. Jan. 29, 2018)	Asserted as basis for dismissal of adversary claims	N
86.	*Nnaka v. Fed. Republic of Nig.*, 238 F. Supp. 3d 17 (D.D.C. 2017)	Asserted as a defense by Nigeria	N
87.	*Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978)	Asserted as a defense by Pezetel (a Foreign Trade Organization of Poland)	N
88.	*Owens v. Republic of Sudan*, 374 F. Supp. 2d 1 (D.C.C. 2005)	Asserted by Sudan as an affirmative defense	N
89.	*Petersen Energia Inversora, S.A.U. v. Argentine Republic*, No. 15-cv-2739 (LAP) 2016 U.S. Dist. LEXIS 122244 (S.D.N.Y. Sep. 9, 2016)	Asserted by Argentina as an affirmative defense	N
90.	*Pons v. Republic of Cuba*, 294 F.2d 925 (1961)	Asserted as defense against counterclaim	N
91.	*Rapoport v. Republic of Mexico*, 619 F. Supp. 1476 (D.D.C. 1985)	Asserted as basis for dismissal	N
92.	*Republic of Ecuador v. Chevron Texaco Corp.*, 376 F. Supp. 2d 334 (S.D.N.Y. 2005)	Asserted by Ecuador and Petroecuador as grounds for the court to find Chevron Texaco Corp. was barred from seeking arbitration against Petroecuador	N
93.	*Republic of Haiti v. Duvalier*, 211 A.D. 379 (App. Div. 1995)	Asserted by defendant as an affirmative defense.	N
94.	*Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517 (S.D.N.Y. 2013)	Asserted by defendants as an affirmative defense	N
95.	*Republic of Phil. v. Westinghouse Elec. Corp.*, 774 F. Supp. 1438 (D.N.J. 1991)	Asserted by defendants as an affirmative defense	N
96.	*Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986)	Asserted by defendant as an affirmative defense	N
97.	*Republic of the Philippines v. Marcos*, No. 86 Civ. 2294(PNL), 1986 U.S. Dist. LEXIS 23629 (S.D.N.Y. June 26, 1986)	Asserted by defendants as basis for dismissal, but discussed by court as basis for federal question subject matter jurisdiction	N

98.	*Riedel v. Bancam S.A.*, 792 F.2d 587 (6th Cir. 1986)	Asserted by foreign bank as affirmative defense	N
99.	*Risk v. Kingdom of Norway*, 707 F. Supp. 1159 (N.D. Cal. 1989)	Asserted by Norway as an affirmative defense	N
100.	*Roxas v. Marcos*, 969 P.2d 1209 (Haw. 1998)	Asserted as a defense by Marcos as former head of state	N
101.	*Samco Global Arms, Inc. v. Arita*, 395 F.3d 1212 (11th Cir. 2005)	Asserted as defense by Honduras	N
102.	*Sampson v. Federal Republic of Germany*, 975 F. Supp. 1108 (N.D. Ill. 1997)	Asserted as a defense by Germany and the Conference on Jewish Material Claims Against Germany	N
103.	*Siderman De Blake v. Republic of Argentina*, No. CV 82-1772-RMT (MCx) 1984 U.S. Dist LEXIS 23166 (C.D. Cal. Sep. 28, 1984)	Cited by Court on defendant's behalf as affirmative defense	N
104.	*Sikhs for Justice v. Nath*, 893 F. Supp. 598 (S.D.N.Y. 2012)	Asserted by defendant as affirmative defense	N
105.	*Smith Rocke Ltd. v. Republic Bolivariana de Venez.*, No. 12 CV. 7316 2014 U.S. Dist. LEXIS 9692 (S.D.N.Y. Jan. 27, 2014)	Asserted by Venezuela as an affirmative defense	N
106.	*Sturdza v. Gov't of the United Arab Emirates*, No. 98-2051 (CKK) 1999 U.S. Dist. LEXIS 23173 (D.C.C. 1999)	Asserted by U.A.E. as an affirmative defense	N
107.	*Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981)	Asserted by Nigeria as an affirmative defense	N
108.	*TJGEM LLC v. Republic of Ghana*, 26 F. Supp. 3d 1 (D.D.C. 2013)	Asserted as basis for dismissal, but dismissed on other grounds	N
109.	*TransAmerica Leasing v. La República de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000)	Asserted as a defense by Venezuela	N
110.	*Trujillo-M v. Bank of Nova Scotia*, 51 Misc. 2d 689 (Sup. Ct. 1966)	Cited by Court as grounds to dismiss compliant	N
111.	UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210 (5th Cir. 2009)	Asserted as a defense by the Kingdom of Saudi Arabia	N
112.	*United Bank, Ltd., v. Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976)	Asserted as basis for ownership by one set of plaintiffs in interpleader action	N

113.	*United Mexican States v. Ashley*, 556 S.W.2d 784 (Tex. 1977)	Asserted by Mexico as an affirmative defense	N
114.	*United States Taekwondo Comm. v. United States Kukkiwon, Inc.*, 2013 COA 105 (Colo. App. 2013)	Cited by court as basis for lack of jurisdiction	N
115.	*United States v. Knowles*, 390 Fed. Appx. 915 (11th Cir. 2010)	Asserted as a defense by Bahamian national subject to extradition	N
116.	*United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990)	Asserted by Noriega as an affirmative defense	N
117.	*Victims of the Hungarian Holocaust v. Hungarian State Rys.*, 798 F. Supp. 2d 934 (N.D. Ill. 2011)	Asserted by defendant as an affirmative defense	N
118.	*Virtual Def. & Dev. Int'l, Inc. v. Republic of Mold.*, 133 F. Supp. 2d 9 (D.D.C. 2001)	Raised as basis for dismissal in motion to dismiss	N
119.	*Virtual Defs. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1 (D.D.C. 1999)	Asserted as a defense by Moldova	N
120.	*Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002)	Asserted by Royal Dutch Petroleum Co. as a basis for court to abstain from exercising jurisdiction	N
121.	*Wolf v. Federal Republic of Germany*, 95 F.3d 536 (7th Cir. 1996)	Asserted as a defense by the Federal Republic of Germany	N
122.	*Wolf v. Federal Republic of Germany*, No. 93 C 7499, 1995 U.S. Dist. LEXIS 5860 (N.D. Ill. May 1, 1995)	Asserted as a defense by Germany	N
123.	*World Wide Minerals Ltd. v. Republic of Kazakhstahn*, 116 F. Supp. 2d 98 (D.D.C. 2000)	Asserted as a defense by Kazakhstan	N
124.	*World Wide Minerals, LTD. v. Republic of Kaz.*, 296 F.3d 1154 (D.C. Cir. 2002)	Asserted by Republic of Kazakhstan as an affirmative defense	N

EXHIBIT D

United Nations CCPR/C/116/D/2244/2013

International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2244/2013*, **

Submitted by:	Roberto Isaías Dassum and William Isaías Dassum (represented by counsel, Xavier Castro Muñoz and Heidi Laniado Hollihan)
Alleged victims:	The authors
State party:	Ecuador
Date of communication:	12 March 2012 (initial submission)
Document references:	Decision adopted pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 5 June 2013 (not issued in document form)
Date of adoption of Views:	30 March 2016
Subject matter:	Criminal conviction and seizure of authors' assets
Procedural issues:	Lack of victim status; inadmissibility *ratione materiae*; *litis pendentia*; lack of jurisdiction; failure to exhaust domestic remedies; abuse of the right to submit communications

* Adopted by the Committee at its 116th session (7-31 March 2016).

** The following members of the Committee participated in the examination of the communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Sarah Cleveland, Mr. Ahmed Amin Fathalla, Mr. Olivier de Frouville, Mr. Yuji Iwasawa, Ms. Ivana Jelić, Mr. Duncan Muhumuza Laki, Ms. Photini Pazartzis, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez Rescia, Mr. Fabián Omar Salvioli, Mr. Dheerujlall Seetulsingh, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The text of an individual opinion (partly dissenting) by Mr. Yuval Shany, member of the Committee, appears as an annex to the present document.

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Substantive issues:	Right to liberty; right to due process; retroactive application of less favourable criminal law; equality before the law and non-discrimination
Articles of the Covenant:	2 (1) and 3 (a), 9, 14 (1), (2) and (3) (c), 15 and 26
Articles of the Optional Protocol:	Articles 1, 3 and 5 (2) (a) and (b)

1. The authors of the communication are Roberto Isaías Dassum and William Isaías Dassum, both Ecuadorian citizens. They claim to be the victims of violations of the rights set forth in the following articles of the Covenant: article 9; article 14 (1) and (2), read separately and in conjunction with article 2 (1) and (3) (a); article 14 (3) (c); article 15; and article 26. The Optional Protocol to the Covenant entered into force for Ecuador on 23 March 1976.

The facts as submitted by the authors

2.1 The authors are businessmen and were shareholders and directors of companies that were part of a corporate unit known as "Grupo Isaías", whose best known member was the Filanbanco bank. The authors were, respectively, president and vice-president of this bank. At the end of the 1990s, Ecuador experienced internal and external difficulties that seriously affected its economy. The slump in the production sector overall had a severe impact on the financial system, as a creditor of the sector. Ecuadorian banks suffered a serious crisis after 1998, when virtually all of them applied for liquidity loans from the Ecuadorian Central Bank (BCE). These loans were granted by BCE in 1998 and were based on the solvency of the technical assets of the financial group in question, which were submitted for review to the Office of the Superintendent of Banks. The Office of the Superintendent certified that Filanbanco was solvent and approved its access to stabilization loans.

2.2 After receiving several liquidity loans, private Filanbanco shareholders asked the Banking Board of Ecuador to subject the bank to a restructuring and consolidation programme, which the Board agreed to in its decision of 2 December 1998. This programme was exclusively for solvent banks with liquidity problems, which proves that Filanbanco was a solvent bank whose liquidity problems were cyclical. Otherwise, it would have been subjected to a pre-liquidation rationalization procedure.

2.3 Under the restructuring programme, the bank was handed over to a State agency, the Deposit Guarantee Agency (AGD). An audit carried out by the Arthur Andersen company in March 1999, just three months after the bank had been handed over to the Agency and while it was being administered by the State, showed that the bank was solvent and that the crisis when it was in private hands was due to liquidity problems. However, on 30 July 2002, while Filanbanco was still under State administration, the Banking Board decided on its compulsory liquidation, though not before the bank had been forced to absorb an insolvent bank (Banco La Previsora) and to make loans to other banks with problems. In view of the declaration of compulsory liquidation, Filanbanco closed its doors to the public on 30 July 2002. On 8 April 2010, the Office of the Superintendent of Banks declared that Filanbanco's assets were to be transferred to BCE and that it would cease to exist as a company.

2.4 Against this background, there began an intense campaign against the authors as former shareholders and directors of Filanbanco, including threats and defamatory statements from officials in the Office of the President and other government officials, and criminal proceedings were opened against them. The proceedings began with a request addressed by the Attorney General to the President of the Supreme Court on 16 June 2000,

asking him to conduct a preliminary investigation into the authors and other former officials of Filanbanco for bank embezzlement (article 257 of the Criminal Code in force at the time of the offence, i.e. 1998[1]) and fraud (article 363 of the same code), as well as various financial offences under the General Act on Financial Institutions. On 22 June 2000, the President of the Court ordered a preliminary investigation into the offences listed by the prosecutor and ordered the pretrial detention of the authors. On 26 June 2000, the President of the Court addressed an arrest warrant to National Police Headquarters; the authors contested the warrant on 27 June 2000.

2.5 On 20 November 2002, at the end of the investigation, the Attorney General submitted his report, amending his request of 16 June 2000 in the light of the investigation. His report contains the accusation against the authors for financial offences (false statements and authorization of illegal operations) but says there was no abuse of public funds belonging to BCE (embezzlement) or bank embezzlement, since it was only after the acts under investigation had taken place that the granting of associated, related or inter-company loans was classed as (bank) embezzlement.

2.6 On 19 March 2003, the President of the Court, distancing himself from the charges set out by the Attorney General, issued a decision to convene a trial for the offence of bank embezzlement.[2] The authors lodged an appeal against this decision with the Office of the President of the Court and filed an application for the procedure to be ruled null and void.

2.7 On 12 May 2009, the First Criminal Division of the National Court of Justice upheld the decision to convene a trial. The authors requested extensions, clarifications, amendments, declarations of nullity and recusal of the judges. On 28 October 2009, the judges on the panel decided to recuse themselves from the case, alleging that attempts had been made to bribe them. Three associate judges were appointed in their place; it was these judges who, on 15 January 2010, ruled on the authors' objections. They also amended the 12 May 2009 trial order, on the grounds that it violated the principles of legality and congruence between the indictment and the court decision. Therefore, the authors should not be tried for embezzlement but for the offences imputed to them in the indictment (balance sheet and document forgery).

[1] Article 257 states that: "Any person in the service of a public organization or entity or any person responsible for a public service who misuses public or private monies or securities, documents, deeds of title, bearer bonds or securities in their possession by virtue or reason of their office, whether the misuse takes the form of embezzlement, arbitrary disposal or any other similar form ... shall be punished with 4 to 8 years' imprisonment …

"This provision covers employees managing funds of the Ecuadorian Social Security Institute or of State-owned or private banks …"

Act No. 99-26, of 13 May 1999 introduced an amendment that added the following paragraph:

> "The provisions of this article also cover civil servants, administrators, executives or employees of private Ecuadorian financial institutions, as well as members of those bodies' boards of directors, who assist in the commission of these unlawful acts."

The same Act introduced the criminal offence of "special bank embezzlement":

> Article 257 A: "Any of the persons listed in the previous article who abuse their position to fraudulently obtain or grant associated, related or inter-company loans, in violation of the express legal provisions in respect of this kind of operation … shall be punished with 4 to 8 years' imprisonment …"

[2] The decision notes that some commentators were arguing that bank embezzlement could be considered an offence only if committed after article 257 A had been introduced in the Criminal Code. However, this assertion is unfounded, as the offence of bank embezzlement was already defined in paragraph 3 of article 257, which was in force at the time when the acts were committed. The decision cites a 1984 Supreme Court judgment that applied this provision of criminal law in convicting the directors of Banco La Previsora.

2.8 On 19 January 2010, the President of the National Council of the Judiciary suspended of his own motion the three associate judges for "alleged irregularities that have alarmed the general public and harmed the image of the judiciary", and started disciplinary proceedings against them for changing the criminal offence imputed to the authors. The President of Ecuador asked the Council to investigate the associate judges' bank accounts and publicly stated that the Council should dismiss them. On 26 January 2010, the National Assembly issued a resolution rejecting the decision of the associate judges and urged the Council to investigate their conduct and decide on appropriate sanctions. The associate judges ended up being reported to the Council by the Attorney General, dismissed and prosecuted for malfeasance. However, the proceedings against them were dismissed by the Second Criminal Division of the National Court of Justice on 8 December 2010, for lack of evidence.

2.9 The vacancy left by the dismissal of the associate judges was filled through the appointment of a "panel of temporary associate judges for criminal cases at the National Court of Justice", created specifically for these proceedings. The Constitution establishes a single category of associate judges at the National Court: they are selected under the same procedures and assigned the same duties as regular judges; they are appointed by the Council following a competitive recruitment process, not directly by the President of the National Court; and their job is not to try just one given case.[3]

2.10 On 17 May 2010, this panel declared the decision of 15 January 2010 to be null and void and reinstated the charge of embezzlement. This was the only decision taken by the panel. After issuing it, the panel members returned to private practice as lawyers.

2.11 The acts that were the subject of the proceedings took place before 1998, when the 1979 Constitution and the 1983 Code of Criminal Procedure were in force. According to articles 254 and 255 of the Code, proceedings are to be suspended until the accused surrender or are captured for trial. On 11 August 1998, a new constitution entered into force, article 121 of which allowed the trial in absentia of public officials and public servants in general who had been indicted on charges of embezzlement, bribery, extortion and illicit enrichment. The 2008 Constitution contains a similar rule. The authors were not public officials; nor were they being investigated for the aforementioned crimes. Moreover, the acts of which they were accused had occurred before the 1998 Constitution was adopted, and yet the proceedings against them went ahead.

2.12 On 3 August 2010, the Second Criminal Division of the National Court ordered the trial to begin. It also confirmed the detention order against the authors and the order notifying the police authorities and the International Criminal Police Organization (INTERPOL) that the authors were to be located and apprehended. On 11 August 2010, the

[3] According to the associate judges' decision of 17 May 2010, which is included in the file sent to the Committee, the State Counsel General appealed the decision of the panel of permanent associate judges, asking for it to be reversed and for the regular judges' decision to be upheld. The appeal was heard by the panel of temporary associate judges in accordance with the rules of procedure of the National Court, notably the Court's decision of 21 January 2009, which gives the President of the Court the authority to appoint temporary associate judges when neither the regular judges nor the permanent associate judges can act. Once their jurisdiction had been established, the temporary associate judges found that the permanent associate judges had amended, of their own motion, the decision of the regular judges to try the authors for embezzlement without having the authority to do so, since, regardless of the composition of the panel, it was still the same judicial body and therefore could not revoke its own decision. Its competence was limited to dealing with the requests for clarification and extensions submitted by the accused. Consequently, the panel of temporary associate judges declared the decision of the permanent associate judges to be null and void, and the decision of the regular judges to be applicable. As for the requests for clarification and extension requested by the accused, the panel rejected these as unrelated to flaws in the language or to clarification.

authors' objections were rejected and the order was given to begin proceedings in absentia. At the same time, the Government requested and obtained from INTERPOL international arrest warrants for the authors, who were living in the United States of America. In addition, the Government requested their extradition from the United States.

2.13 On 10 April 2012, a judge of the Special Criminal Division of the National Court sentenced the authors to 8 years' imprisonment for the crime of embezzlement. An appeal against the decision and appeals for annulment and in cassation were rejected on 12 March, 24 April and 29 October 2014, respectively, by the Special Criminal Division. The Constitutional Court rejected an application for a special protective remedy on 17 September 2015.

2.14 The National Court overturned of its own motion the appeal court ruling that the authors were guilty of embezzlement — by misappropriation of funds — as defined in article 257 of the Criminal Code, on the grounds that the ruling was a misinterpretation of this article and that the authors had actually been convicted of the offence of bank embezzlement, as defined in the same article. The penalty imposed was imprisonment for eight years, with no mitigating circumstances as the commission of the offence as part of a gang was an aggravating circumstance.

2.15 According to the authors, the cassation judgment aggravated the violations of the Covenant in that it violated: (a) the principle of legality, by retroactively assimilating the "misappropriation of funds" to the offence of embezzlement, even though the former had been decriminalized; it applied retroactively the less favourable criminal law, by considering them to be perpetrators of the offence of bank embezzlement, which at the time the charge was laid applied to much more limited cases; it applied the aggravating circumstance of "committed as part of a gang", which has been repealed in the current Comprehensive Organic Criminal Code; and it applied the criminal offence of embezzlement, which is indeterminate and an impediment to the defence of the accused; (b) the right to equality before the law, by applying more onerous sanctions than those imposed in identical cases; (c) the principle of *non reformatio in peius*, by imposing more onerous sanctions for offences other than those set out in the appeal court ruling, thereby also violating the right to a defence; (d) the right to be tried by independent judges, since the judges who ruled on the appeal had already participated in previous decisions in the same case or had publicly demonstrated bias in that connection.

2.16 In parallel with the criminal trial, a civil suit was brought by the Deposit Guarantee Agency against former shareholders and directors of Filanbanco to have their assets seized, allegedly in order to guarantee payment of the amounts owed to the bank's depositors at the time the Agency was called in. The proceedings were initiated by decision AGD-UIO-GG-2008-12 of 8 July 2008, which ordered the seizure of all assets belonging to individuals who had been directors and shareholders of Filanbanco up to 2 December 1998. On this basis, without any prior administrative or judicial proceedings and with the assistance of the police, the seizure of over 200 companies and other assets owned by the authors and other members of the Isaías group was set in motion.[4] In addition, on 9 July 2008, the Constituent Assembly, which had been elected under the political process led by the President of Ecuador, issued its Legislative Decree No. 13, according it constitutional rank. This decree confirmed the legal validity of the above-mentioned decision; declared that the decision was not subject to any constitutional remedy or other special protection; and ordered that applications for a remedy that had already been submitted should be shelved, without suspending or impeding implementation of the decision. Any judge who took over a case involving an application for any kind of constitutional remedy in connection with the decision or any future application to enforce the decision must reject them or face dismissal,

[4] The file contains a list of the companies and other assets seized.

without prejudice to any possible criminal liability incurred. The decree also established that the decision was not "subject to complaint, challenge, application for *amparo*, action-at-law, claim, judgment or any administrative or judicial decision".

2.17 Legislative Decree No. 13 of the Constituent Assembly has an antecedent in its Legislative Decree No. 1 of 9 November 2007, pursuant to which the decisions of the Constituent Assembly are not open to checks or challenges. This decree establishes that judges and courts processing any action that is contrary to these decisions shall be dismissed and prosecuted. On 10 June 2010, Roberto Isaías Dassum filed a motion with the Constitutional Court to have Legislative Decree No. 13 declared unconstitutional; the motion was dismissed on 21 June 2012 on the grounds that the decree was immune to such challenges.

2.18 The appeals submitted by the authors against this and subsequent decisions on the seizure of assets proved fruitless. The decision stipulates that all the authors' assets, including those that were not intended for the operations of Filanbanco or any other company in the same group, i.e. those allocated for the personal use of the authors, were liable to seizure. In addition, the seizure encompassed property believed by some to belong to the authors, regardless of the ownership shown on the respective property titles.

The complaint

3.1 The authors allege that irregularities in the criminal proceedings and asset seizure proceedings gave rise to violations of their right to the judicial guarantees of due process under article 14 (1), (2) and (3) (c) of the Covenant, read separately and in conjunction with article 2 (1) and (3) (a); the right to equality before the law and non-discrimination under article 26; the right not to be subjected to the retroactive application of less favourable criminal law under article 15; and the right to liberty of person under article 9.

3.2 The case is not pending before another international procedure, and domestic remedies with regard to the criminal proceedings have been exhausted. Regarding the asset seizure proceedings, there is no appropriate legal remedy, since Legislative Decree No. 13 of the Constituent Assembly excludes any judicial action or remedy.

Complaints relating to articles 14 and 26

3.3 In the criminal proceedings, Ecuador violated the rights of the authors (a) to be tried by a competent, independent and impartial tribunal established by law, (b) to be presumed innocent until proved guilty, and (c) to be tried without undue delay.

3.4 The decision of the three permanent associate judges of the First Criminal Division of the National Court not to prosecute the authors for bank embezzlement led to the dismissal and prosecution of the judges. Such arbitrariness violates the independence of the judiciary provided for in article 14 (1) of the Covenant.

3.5 The panel of temporary associate judges created specifically for this trial reinstated the charge of "bank embezzlement". This decision was taken just 10 days after the associate judges had been sworn in, despite the complexity of the case, the size of the file and the 10 years the case had lasted. This was the only ruling made by this panel. It was, therefore, a special court created in violation of the law for the sole purpose of handing down a judgment against the authors. Whatever the basis in domestic legislation for the establishment of this "temporary" court, it is illegitimate to use it solely to supplant three associate judges who were arbitrarily suspended and dismissed. Consequently, the appointment of this panel violated the principle of a "competent … tribunal established by law".

3.6 On 10 May 2010, Roberto Isaías Dassum appealed to have the appointment of the temporary associate judges revoked. On 11 May 2010 he requested that these associate judges recuse themselves from the case and on 20 May 2010 he challenged the decision to reinstate the charge of bank embezzlement, claiming a violation of the right to be tried by a competent, independent and impartial tribunal.

3.7 The right to be heard by the duly appointed (natural) judge had also been violated; as the authors were domiciled in Guayaquil, they should have been tried by an ordinary court in the district of Guayas. However, the case against the authors was added to those of other people being tried under special jurisdiction, so as to bring the case before the National Court.

3.8 To prohibit the authors from challenging the judges' appointment was also a violation of the right to be tried by an impartial court. This prohibition was the result of an amendment introduced in 2009 to the Code of Criminal Procedure, which established an absolute ban on the recusal of judges in cases initiated and processed under the 1983 Code, which was applicable in the case against the authors.

3.9 The authors' right under article 14 (2) of the Covenant to the presumption of innocence was violated by: (a) the repeated statements by the most senior officials in the executive branch affirming their guilt; and (b) the treatment of the authors as guilty during the proceedings, even before the full trial phase had begun. In the decision to start the trial, the President of the Supreme Court stated that "it had been determined in the preliminary investigation" that the authors "had committed" acts constituting "offences that were a means of committing the offence of bank embezzlement". This and similar statements implied that the responsibility of the authors was proven before the oral proceedings began and placed the burden of proof on them to prove during the rest of the trial that they were not guilty.

3.10 The authors' right to be tried without undue delay was violated by the unreasonable duration of the proceedings: (a) four years after the acts of which they had been accused had taken place, and two years after the start of proceedings, to issue the indictment (20 November 2002); and (b) more than six years to rule on the appeal against the order to start the trial, even though the law requires this to be decided in 15 days plus one day for every 100 pages in the case file. More than seven years passed between the formal opening of the full trial and its ratification by the panel of temporary associate judges.

3.11 The authors' absence from the country cannot be invoked as a cause of the delay in the criminal proceedings for two reasons: (a) the State chose to try them in absentia, even though its own Constitution forbade this; and (b) in leaving Ecuador, the authors were exercising their legitimate right to protect their freedom, integrity and security from the abuse of power of which they were victims.

3.12 The right to due process was also violated in the asset seizure proceedings. The Deposit Guarantee Agency is an administrative body that is not outside the scope of article 14 of the Covenant when it takes action to determine rights and obligations of a civil nature. In view of this, the absence of an administrative review procedure within the Agency, which would have allowed the authors to exercise their right to a defence before the Agency decided to seize their assets, violated due process guarantees (Covenant, art. 14 (1) and (2)). The State hid the legal weakness of decision AGD-UIOGG-2008-12 by giving it jurisdictional immunity under Legislative Decree No. 13. This immunity entails a violation of the right of access to justice, due process and equality before the law and the courts in respect of the authors' efforts to assert their rights under civil law, in particular their property rights as former Filanbanco owners and shareholders. Legislative Decree No. 13 also violates the right to due process in relation to article 2 (1) and (3) (a), of the Covenant, by not respecting the right to an effective remedy and the authors' right to equality before

the courts. For the same reasons, the decision and Legislative Decree No. 13, taken together, violate the right to equality before the law and non-discrimination provided for in article 26 of the Covenant, by denying access to justice to specific individuals seeking to assert their rights.[5]

Complaints relating to article 15

3.13 The authors are victims of a violation of this article in that: (a) they were subject to the application ex post facto of a newly defined criminal offence; and (b) they were accused of an offence that had been repealed by the time the full trial phase of the criminal proceedings began.

3.14 By Act No. 99-26 of 13 May 1999, i.e. after the incriminated acts had taken place, the Criminal Code was amended to include the criminal offence of "special bank embezzlement" (art. 257-A), which until then did not exist, and which involves loan operations with related companies. This amendment shows that, prior to its adoption, the conduct that constitutes this offence was not punishable. Until that date, both criminal law and banking legislation explicitly permitted such operations, within certain limits. Now, the National Court applied to the authors a criminal offence that had been repealed (art. 257), but reinterpreted it to cover related and inter-company operations. The prohibition of retroactive application of a law under article 15 (1) of the Covenant cannot be circumvented by a broader or improper interpretation of the old law designed to give retroactive effect to the new law.

3.15 Moreover, the authors are alleged to have authorized the use of the liquidity loans granted by the BCE to Filanbanco for unlawful purposes. Such conduct matches the legal definition of misappropriation of funds. However, Act No. 2001-47 "decriminalized" the misappropriation of public or private funds as a form of embezzlement, before the trial order was issued against the authors in 2003. This amounts to a violation of the last sentence of article 15 (1) of the Covenant, which protects the right to the retroactive application of the more favourable criminal law. This took place despite the fact that the Supreme Court avoided using the term "misappropriation", using instead the terms "arbitrary disposal of public funds" and "fraud" by means of the "authorization of illegal financial operations".

3.16 Retroactivity in contravention of article 15 (1) was also evident in the asset seizure proceedings started on 8 July 2008, since the legal basis cited by the Deposit Guarantee Agency was article 29 of the Act on Economic Restructuring in the Area of Tax and Finance, which was introduced in that Act in 2002.

Complaints relating to article 9

3.17 The judicial decision to place the authors in pretrial detention, though not executed, is an arbitrary measure taken by the State in violation of article 9 of the Covenant. To violate the right to liberty of person does not necessarily require the actual execution of a detention order or the incarceration of the person for whom an arbitrary arrest warrant has been issued. The very issuance of the detention order on 22 June 2000 and of an international arrest warrant, as well as the other measures taken to secure the authors' arrest and the extradition formalities, in the context of irregular and arbitrary criminal proceedings devoid of the minimum judicial guarantees, violates the right to liberty of person.

[5] The authors point out that a challenge against the decision, which was filed on 28 June 2010, was rejected by the Provincial Court of Justice of Guayaquil in application of Legislative Decree No. 13.

State party's observations on admissibility

4.1 In its observations of 4 December 2013 and 10 December 2015, the State party explains the differences between the criminal proceedings (started in 2000) and the asset seizure proceedings (started in 2008). In the first, the necessary judicial guarantees were assured, as the criminal case was brought against natural persons who had allegedly engaged in criminal activities regulated by the Criminal Code. By contrast, the acts linked to the seizure of assets stemmed from business activities and actions related to corporate assets. Given that in the proceedings before the Committee the only complainants are the authors, no internal action other than that taken against them can be brought up in those proceedings. Only natural persons are entitled to international protection of human rights. As a result, proceedings in which the plaintiffs are legal persons, and where the subject is their rights and obligations under national legislation, must be outside the scope of the communication. Moreover, it would be inappropriate to discuss lawsuits filed by persons other than the authors, be they natural or legal persons.

4.2 While the communication refers to an alleged violation of Covenant rights, this concerns the alleged use of the assets of different companies or groups of companies, which are legal persons. The authors are trying to use Covenant rights to defend the rights of legal persons. For this reason, the Committee should declare itself incompetent with regard to all administrative, legal or jurisdictional acts that involve companies or business groups. In addition, the allegations related to the property rights of shareholders, directors, businesses and corporations like the Isaías group are made in an effort to secure the protection of an alleged property right, and so the allegations related to the asset seizure proceedings should be declared inadmissible by the Committee *ratione materiae*.

4.3 The authors filed a petition with the Inter-American Commission on Human Rights. The outcome was a decision not to open the case on the grounds that the requirements for consideration had not been met and domestic remedies had not been exhausted. The Commission conducted a lengthy analysis of the petition and adopted a final decision that was duly notified to the complainants. Consequently, in accordance with article 5 (2) (a) of the Optional Protocol, the Committee should not consider the communication.

4.4 The communication is unsubstantiated as regards the obligations of the State party under the Covenant, as the authors are not in Ecuadorian territory and, therefore, such obligations are not enforceable by the State party. For the same reason, the authors are not subject to the power of the State party.

4.5 The Optional Protocol makes an exception to the requirement for the exhaustion of domestic remedies when the application of the remedies is unreasonably prolonged. In the present case, the complexity of the proceedings should be taken into account, as it was necessary first to request and then analyse extensive technical reports (external audits) from various public supervisory bodies, such as the Central Bank, the Anti-Corruption Commission and the Central and Regional Offices of the Superintendent of Banks. Moreover, the proceedings can be said to have been completed within a reasonable time, in view of the exhaustive procedures initiated by the authors, who in the course of the proceedings filed applications for every possible remedy available under domestic law.[6]

4.6 The authors have turned to the Committee without taking account of the purpose of the Covenant and the Optional Protocol, thereby hindering it in its task of considering the individual complaints submitted to it. This is a clear example of an abuse of the right to submit a communication.

[6] The State party provides a chronological list of the procedural motions filed in the years leading up to the trial.

State party's observations on the merits

4.7 In the State party's view, all the authors' arguments questioning the independence of the judges and courts are simply the result of their disagreement with court decisions and do not derive from the obligations that are the subject of article 14 of the Covenant. Article 182 of the Ecuadorian Constitution establishes the position of associate judge within the structure of the judiciary, giving such judges the same status, under the same regime of responsibilities and prohibited conduct in the exercise of their duties, as regular judges. On the basis of the standard-setting authority of the National Court in plenary session, as established by the Constitutional Court in its decision regarding the transition period — which, as a matter of constitutional jurisprudence, is binding on all public servants and individuals — article 11 of the Superseding Decision on the Organization of the National Court of 22 December 2008 sets out the legitimate, legal and constitutional activity of the associate judges of the National Court. This provision states that "in the absence of permanent associate judges … temporary associate judges [may be called on] to try a specific case … they shall be appointed by the regular judges of the Division hearing the case or, in their absence, by the President of the relevant Division." Accordingly, no one's right to be tried by a competent court has been violated. On the other hand, the recusal of judges as a procedural guarantee mechanism is practised in Ecuador.

4.8 There was no violation of the principle of presumption of innocence in the statements of the President of Ecuador, which were delivered in a setting designed to inform the public about his activities and the Government's policies. Such a setting reflects the freedom of expression of all citizens, including the President, whose personal opinions on a particular subject do not imply any influence on judges and courts.

4.9 As regards the complaints relating to article 15 of the Covenant, embezzlement was defined as an offence in the 1938 Criminal Code, as amended in 1971 (art. 257). This provision was amended again in 1977. Pursuant to the new provision, "officials of State-run or private banks," including shareholders, directors and employees, were listed among the perpetrators of the offence.[7] This made it possible to prosecute the authors and other bankers of the time. The judge considered that the authors were private banking officials, in their roles as president and vice president of Filanbanco, and that, according to the appellate ruling, "they misused public funds, that is, the liquidity loans granted by the Central Bank ... considering their conduct as the offence of embezzlement, as defined and sanctioned in the first and second paragraphs of article 257." Later, the Act of 13 May 1999 added a third paragraph to this article to include "civil servants, directors, executives or employees of private national financial institutions, as well as members of the boards of directors of such entities". The amendment clarified the earlier provision as regards the perpetrators of the offence. The legislature, in view of the widespread alarm created by the serious economic, social and political consequences of the banking crisis of 1998, was seeking in this amendment to expressly identify perpetrators of the offence, but this does not imply that the earlier provision had overlooked them.

4.10 As regards the asset seizure proceedings, the Deposit Guarantee Agency and the Banking Board of Ecuador observed the principle of legality. In particular, the Agency's decision No. 153 of 31 July 2008 contains instructions for the seizure of assets and guarantees a procedure that respects the rules of due process. There was therefore no violation of article 14 (1) of the Covenant as regards equality before the courts. In addition, the seizure process includes procedures to establish the lawful origin and real ownership of the seized assets. In the event of an abuse of authority, the Deposit Guarantee Agency could have been subjected to one of the administrative remedies set out in the Administrative Disputes Act.

[7] Conclusion of the National Court in its judgment in cassation.

4.11 As regards Legislative Decree No. 13 of the Constituent Assembly, Ecuador rejects the authors' argument that it is unconstitutional and illegitimate. The Constituent Assembly was not a State but a supra-State body, whose mandate derived directly from the will of the people. As a matter of democratic principle, the people's will is distinct from and clearly superior to the State. According to article 2.2 of its rules of procedure, "the National Constituent Assembly shall adopt legislative decrees that are binding on its decisions and regulations in the exercise of its full powers. Legislative decrees shall have immediate effect without prejudice to their publication in the relevant organ." The Assembly considered the complex financial and administrative situation of Filanbanco and stressed the importance of the work of those institutions of State, such as the Deposit Guarantee Agency, which are considered an expression of the authorities' desire to eradicate all forms of impunity. It was in this context that the asset seizure proceedings were authorized. In line with Legislative Decree No. 13, the Assembly, in a decision of 8 July 2008, set out measures to protect the rights of the workers of the companies involved. The decision and Legislative Decree No. 13 are not acts of the State containing *ad hominem* legal rules, as they are not related to natural persons, as claimed by the authors.

4.12 As the authors are not under its jurisdiction or within its territory, Ecuador cannot be held accountable for acts relating to an alleged violation of article 9 of the Covenant. As regards the extradition proceedings, in June 2013 the United States Department of State informed Ecuador that the request to extradite the authors had been rejected, indicating that Ecuador must provide sufficient evidence to determine probable cause for the offence of which they were accused, and that the Departments of State and Justice would then reconsider the extradition request.

4.13 The State party recalls the Committee's jurisprudence in the case of *González del Río v. Peru* (communication No. 263/1987), according to which the issuance or existence of a detention order does not in itself constitute a form of deprivation of liberty. This jurisprudence confirms that the scope of protection of the right concerned is physical freedom, and that its violation requires not only that the person concerned is detained, but also that their detention is illegal or arbitrary. Insofar as the competent judge hands down a pretrial detention order in accordance with the law and verifies the existence of evidence that an offence was committed and that the defendants participated in committing it, as was done in the case against the authors according to the order to initiate criminal proceedings, the precautionary measure of pretrial detention is justified. The decision of 22 June 2000 justified the issuance of the detention order for breach of the law by Filanbanco, since, during the term of the loans granted by the Central Bank, these were not used to preserve the stability of the financial system but to invest in prohibited operations. Throughout the criminal process, the detention order was scrutinized periodically by the judges in the case in order to verify its content and ensure that the defendants appeared in court. Each renewal of the order complied with the legal requirements and was justified by the evidence that offences had been committed. Moreover, no figure can be placed on the period of validity of detention orders against a person who is still at large, because the order alone does not constitute a limitation on their physical freedom, and cannot be or become illegal or arbitrary.

Authors' comments on the State party's observations

5.1 The authors submitted comments on the State party's observations on 6 February 2014.

5.2 The smear campaign and the constant statements against them have continued. In February 2014, for example, on the programme "Enlace Ciudadano" (Citizen Liaison), broadcast by several radio and television stations, the President of the country called them

"scoundrels" and "criminals" and accused them once again of driving the country's largest bank into bankruptcy and attacking the national Government in the print media.

5.3 Ecuador asserts that in the criminal proceedings, the rights to due process and the protection of the court were respected. However, it offers no evidence of this assertion, it does not deny the facts that are the subject of the communication and it does not rebut their characterization as a violation of rights guaranteed by the Covenant.

5.4 As regards the asset seizure proceedings, the authors state that behind the rights of legal persons may be found the rights of their shareholders, natural persons, who, according to the State itself, were the authors or members of their families. The Act on Economic Restructuring in the Area of Tax and Finance provides explicitly for a measure to be taken against "the shareholders", who would be held personally liable, as individuals or natural persons, for the debts contracted by the banks, namely the legal entities that the shareholders, as individuals, are partners in. All the actions of the State denounced in this communication explicitly targeted the authors as natural rather than legal persons.

5.5 The authors submitted their complaint to the Inter-American Commission on Human Rights in 2005, but in 2008 the Commission decided not to proceed with it, on the grounds that domestic remedies had not been exhausted. The authors petitioned for a review but later desisted and formally withdrew their petition. This happened before they submitted their communication to the Committee.

5.6 The authors reject the State's argument about lack of jurisdiction *ratione loci*. All the acts reported in this communication were carried out by agents of the State in the exercise of Ecuadorian jurisdiction. The authors' absence from the territory does not absolve the State party of responsibility for the breach of its obligations under the Covenant or remove the victims from the protection that it affords them. Trying a person means exercising jurisdiction and using the power of the State over him or her.

5.7 Ecuador does not submit evidence of abuse of rights or explain how such abuse might have occurred. The delay in the criminal proceedings can be attributed to the lack of diligence of the judicial authorities and the arbitrariness of their conduct, which have forced the authors to seek remedies in defence of their right to a fair hearing.

5.8 Ecuador identifies deregulation and the removal of controls on financial activity, which lessened the State's control over the financial sector, as one of the causes of the 1999/2000 financial crisis. This assertion shows that the activities and behaviour for which the authors were tried were not prohibited by the legislation in force at the time. On the contrary, they were in compliance with the General Act on Financial Institutions.

5.9 Regarding the length of the proceedings, the authors state that the victims of procedural violations cannot be expected to abstain from seeking remedies or mounting a defence. The six years that it took for the criminal proceedings to begin following the decision to convene a trial cannot be blamed on the authors. That a trial to determine liability for banking offences should have been delayed for more than 13 years cannot be justified, either.

5.10 The Code of the Judiciary of 9 March 2009 does not grant the National Court of Justice the authority to appoint temporary associate judges and, moreover, it abrogates the decision of the Supreme Court of 19 May 2008 permitting the appointment of temporary associate judges.

5.11 Regarding Legislative Decree No. 13, the authors recall that the objective of a Constituent Assembly is to write a new constitution. In some cases, these bodies have taken on other functions, such as appointing civil servants or enacting transitional rules between one constitutional regime and the next. Nonetheless, the fact that such an assembly should

rule on and have an impact on private cases involving specific persons, depriving them of their fundamental rights, constitutes an unlawful and discriminatory situation.

5.12 As regards the characterization ex post facto of an action as a criminal offence or the application of an offence that has been repealed, Ecuador did not provide a specific reply to the authors' allegations or counter their arguments about the violation of the last sentence of article 15 (1) of the Covenant. As for the complaint relating to article 9, the authors reiterate their initial arguments. The order for their detention is still in force, and Ecuador is still trying to deprive them physically of their liberty.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee takes note of the objection raised by the State party that the obligations set out in the Covenant are not enforceable by it since the authors are not in Ecuadorian territory. The Committee considers that the authors' complaints are related to the judicial proceedings brought against them in the State party, regardless of their residence abroad, and that in this regard the State party has exercised its jurisdiction. Therefore, absence from the territory does not constitute an obstacle to the admissibility of the communication.

6.3 The Committee considers that the authors' allegations do not, of their nature, imply an abuse of the right to submit communications, and that there are no obstacles to the admissibility of the communication under article 3 of the Optional Protocol.

6.4 The Committee takes note of the State party's observation that the communication is inadmissible under article 5 (2) (a) of the Optional Protocol because the authors submitted a complaint to the Inter-American Commission on Human Rights. The authors responded to this argument by pointing out that the Commission decided in 2008 not to proceed with the complaint; and that the authors asked for a review but subsequently withdrew this request before submitting their communication to the Committee. The Committee refers to its jurisprudence on this matter[8] and considers that the same matter is not being examined under another procedure of international investigation or settlement. Therefore, the Committee is not precluded under article 5 (2) (a) of the Optional Protocol from considering the present communication.

6.5 The authors claim that the detention order violates their rights under article 9 of the Covenant. The Committee notes, however, that the order was issued within the framework of criminal proceedings, that it has not been executed, since the authors are not in the territory of the State party, and that the authors are not deprived of their liberty. Therefore, the Committee considers that this claim is unsubstantiated and therefore inadmissible under article 2 of the Optional Protocol.

6.6 As regards the complaints concerning article 14 (1) and (2) of the Covenant, read separately and in conjunction with article 2 (1) and (3) (a), and article 26, with regard to the asset seizure proceedings, and articles 14 (1), (2) and (3) (c) and 15, with regard to the criminal proceedings, the Committee considers that these claims have been sufficiently substantiated for purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

[8] Communication No. 2202/2012, *Rodríguez Castañeda v. Mexico*, Views adopted on 18 July 2013, para. 6.3.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

7.2 The authors claim that the asset seizure proceedings violated their right of access to justice, to equality before the courts and to due process under article 14 (1) and (2) of the Covenant, asserting their civil rights to challenge the seizure of their personal assets; that there was no administrative review procedure that would have allowed them to exercise their right to a defence before the Deposit Guarantee Agency ordered the seizure; that Legislative Decree No. 13 prohibited the institution of any legal challenge to the Agency's decision to order the seizures, and expressly established that any judge who took over a case involving an application for any kind of constitutional remedy in connection with the decision or any future application to enforce the decision must reject them or face dismissal, without prejudice to any possible criminal liability incurred; and that these actions would also violate their right to due process in relation to article 2 (1) and (3) (a), and the right to equality before the law and non-discrimination under article 26. The State party points out that the acts linked to the seizure of assets stemmed from business activities and actions related to corporate assets. Given that only natural persons are entitled to international protection of human rights, the authors' complaints about the asset seizure proceedings would be outside the scope of the communication; also *ratione materiae*, as the complaints are aimed at a purported right to property.

7.3 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, paragraph 9 of which states that "the fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights".

7.4 In the present case, the Committee considers that the issuance of Legislative Decree No. 13, which expressly prohibited the filing of any applications for constitutional remedy or other special protection in respect of the decisions of the Deposit Guarantee Agency and included the instruction to dismiss, without prejudice to any possible criminal liability incurred, any judges who took cognizance of such applications, violates the authors' right, under article 14 (1) of the Covenant, to a fair hearing in the determination of their rights and obligations in a suit at law.

7.5 Having reached that conclusion, the Committee will not consider the complaint relating to the violation of article 26 of the Covenant for the same acts.

7.6 The authors claim that in the criminal proceedings the following rights under article 14 were violated: the right to be tried by a competent, independent and impartial tribunal established by law; the right to be presumed innocent until proven guilty; and the right to be tried without undue delay. In this respect, the Committee notes that the National Court was designated as the competent court because of the privileges enjoyed by some of the co-defendants and on the basis of internal procedural rules whose interpretation is not for the Committee to question.

7.7 The Committee also notes that in the prosecutor's report of 20 November 2002, the authors are accused of financial crimes but not embezzlement, and it is pointed out, among other things, that bank embezzlement was categorized as an offence after the incriminated acts had taken place. However, the President of the Court ordered a trial for the offence of bank embezzlement, stating that such conduct was covered by article 257 of the Criminal Code in force at the time of the acts and that there was jurisprudence in this area. The trial

order for this offence was confirmed on 12 May 2009 by the Criminal Division of the Court, although the judges on the panel subsequently recused themselves from hearing the case. This led to their replacement by three associate judges from the same division, whose job was to rule on the authors' appeal against the trial order. The resultant panel handed down a decision amending the trial order of 12 May 2009 and determined that the authors should not be tried for embezzlement but for the offences set out in the indictment. The President of the Court, of his own motion, suspended the associate judges for misconduct and the State appealed their decision. To hear the appeal, three temporary associate judges were appointed to the Criminal Division, on the basis of the Court's decision of 21 January 2009 allowing the President of the Court to appoint temporary associate judges when neither the regular judges nor the permanent associate judges can act. This new panel revoked the decision of the permanent associate judges on the definition of the offence, on the grounds that they had amended of their own motion the decision of the regular judges without having the authority to do so, since, regardless of the composition of the panel, it was the same judicial body and therefore could not revoke its own decision.

7.8 The Committee notes that the competence of the Criminal Division to rule on issues relating to the trial order is not in dispute. The fact that its composition was altered twice on the basis of the procedural rules in force at the time does not affect the principle of the natural judge in the circumstances of the case, as the composition was determined in accordance with the law in force, including the rules governing the functioning of the Court, according to the State party. As the Committee is not a fourth level of jurisdiction (or a "court of fourth instance"), it is not its role to consider the merits of the decisions taken by the judges involved.

7.9 The Committee notes that the President of Ecuador made statements calling for the associate judges to be dismissed; that on 26 January 2010 the National Assembly issued a resolution rejecting the decision of the associate judges and calling for an investigation into their conduct; and that the associate judges were dismissed and prosecuted for malfeasance by the National Court of Justice, although the case was ultimately dismissed.

7.10 The Committee notes that the events that led to the authors' prosecution had a big impact on the economic and financial situation of the country, the consequences of which lasted for some time. The Committee also notes that in this context, the highest authorities in the land expressed their views publicly and made statements urging criminal sanctions for those responsible for the events, who had been, after all, people at the top of the country's most representative banking institutions. However, this does not mean that the manner in which the criminal proceedings against the authors were conducted or the final outcome of the investigation were determined by or were the result of the public utterances of representatives of the executive and the legislature, or that those utterances violated any article of the Covenant.

7.11 In the light of the above, the Committee considers that the information before it does not allow it to conclude that there has been a violation of article 14 (1) and (2) of the Covenant.

7.12 As regards the authors' complaint in connection with the delay in the criminal proceedings, the Committee notes, and agrees with the State party, that the acts that were the subject of the judicial investigation were very complex from a substantive standpoint, and also by virtue of the number of people involved. Moreover, the Court had to deal with a large number of procedural motions and appeals. In view of these factors, the Committee does not have sufficient evidence before it to enable it to conclude, under article 14 (3) (c) of the Covenant, that the National Court was responsible for any undue delays.

7.13 The authors claim to have been the victims of a violation of article 15 of the Covenant, as they were convicted of a criminal offence, bank embezzlement, provided for in article 257 of the Criminal Code, which did not cover the acts they were alleged to have committed, and that, in so doing, the courts made a wrongful interpretation of this article of the Criminal Code. In addition, the authors were accused of conduct that matched the legal definition of "misappropriation of funds", even though the misappropriation of public or private funds as a form of embezzlement was decriminalized in 2001. The Committee notes that the issues related to the criminal offence applicable to the authors and the interpretation of article 257 of the Criminal Code were the subject of many procedural motions and rulings by various bodies of the National Court from the beginning of the proceedings up to the ruling on the appeal in cassation, which analysed the changes in the criminal offences applied in the case, including the classification of bank embezzlement. Prior to the conviction in first instance, three different panels (regular judges, permanent associate judges and temporary associate judges) of the Criminal Division of the National Court ruled on the classification of the alleged acts as embezzlement. Moreover, the legal controversy surrounding the classification of the alleged acts as embezzlement was what led to the recusal of the regular judges of the Division, the dismissal of the permanent associate judges and the appointment of a panel of temporary associate judges. The same issue was also considered at appeal and in cassation. The authors' complaints to the Committee under article 14 (1) and (2) of the Covenant are also based on the controversy over whether the alleged acts were or were not covered by the definition of embezzlement contained in article 257 of the Criminal Code. Their complaints under article 14 (1) and (2) and those relating to article 15 of the Covenant are therefore closely linked. However, the Committee is not competent to elucidate the debate on *ius puniendi*, nor on different criminal classifications and their content, as it is not a fourth level of jurisdiction.

7.14 The Committee recalls its jurisprudence to the effect that it is for the courts of States parties to evaluate the facts and the evidence in each particular case, or the application of domestic legislation, unless it can be proven that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice. The Committee notes that, according to the ruling in cassation, the conduct imputed to the authors was already defined as a criminal offence in article 257 of the Criminal Code in force at the time of the events (bank embezzlement) and that the 1999 amendment, which post-dated them, simply clarified the established offence as regards the perpetrators of the criminal offence. The Committee considers that there is not sufficient evidence to affirm that the interpretation of article 257 of the Criminal Code by the domestic courts was manifestly wrong or arbitrary. Accordingly, the acts as described do not allow the Committee to conclude that there was a violation of article 15 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party violated the authors' right, under article 14 (1) of the Covenant, to a fair hearing in the determination of their rights and obligations in a suit at law.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. In implementation of this obligation, the State party should make full reparation to the persons whose rights under the Covenant have been violated. Consequently, the State party should ensure that due process is followed in the relevant suits at law, in accordance with article 14 (1) of the Covenant and the present Views.

10. By becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy where it has been determined that a violation has occurred. The Committee therefore requests the State party to provide, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and have them widely disseminated in the State party.

Annex

Individual opinion (partly dissenting) of Mr. Yuval Shany, member of the Committee

1. I agree with the Committee that the combination of decision AGD-UIO-GG-2008-12, adopted by the Deposit Guarantee Agency on 8 July 2008, and Legislative Decree No. 13, adopted by the Constituent Assembly on the following day, violated the authors' right under article 14 (1) of the Covenant to a fair and public hearing by a competent tribunal to determine their legal rights and obligations — in the present case, their rights and obligations as individuals subject to seizure of assets as directors and shareholders in the Filanbanco bank. The Committee was also correct in rejecting the State party's objection *ratione personae* alluding to the aim of the impugned measures to seize corporate assets, since the authors' private property was encompassed by the said measures, and the authors were deprived, as individuals, of the ability to challenge the legality of the measures.

2. I am less persuaded, however, by the Committee's treatment of the statement of the President of Ecuador, in which the President called on the associate judges to be dismissed and investigated, and of the treatment of the authors' claims pertaining to the retroactive application of Act No. 99-26 of 13 May 1999. With respect to the President's statement, I do not agree with the Committee's position that the key question is whether it has been demonstrated that the manner in which the criminal proceedings against the authors were conducted or the final outcome of the investigation were determined by or were the result of the public utterances of representatives of the executive branch and the legislature (para. 7.10). A call by a senior member of the executive branch to investigate judges and remove them from office because of an interim decision they rendered in the course of complex criminal proceedings constitutes a serious and direct act of interference in the independence of those proceedings. It should be recalled in this connection that the right to be tried before an independent tribunal is an absolute right,[a] not only in the sense that it is not subject to exceptions, but also in the sense that the right does not depend on the eventual outcome of the tainted proceedings. In other words, the right to be tried before an independent tribunal may be violated even if it is not shown that the outcome of the case was affected by the lack of independence. I am therefore of the view that the President's statement violated the authors' right to be tried before a tribunal that is actually independent and that reasonably appears to be independent.[b]

3. With regard to the issue of retroactivity, the Committee is correct in observing that it is generally for the domestic courts of the States parties to evaluate the manner of application of domestic law. However, in the circumstances of the present case, in which both the Attorney General and the associate judges were of the view that the indictment should not contain the new bank embezzlement offence because of the non-retroactive application of its new definitions, and given the aforementioned interference in the criminal proceedings by the executive branch, I remain doubtful as to whether the ultimate position of domestic courts on the matter could attract full deference from the Committee.

[a] See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 19.

[b] See European Court of Human Rights, Application No. 22107/93, *Findlay v. the United Kingdom*, judgment of 25 February 1997, para. 73.

EXHIBIT E

Nahar v. Nahar

Court of Appeal of Florida, Third District

June 7, 1995, Filed

CASE No. 91-1729

Reporter
656 So. 2d 225 *; 1995 Fla. App. LEXIS 6086 **; 20 Fla. L. Weekly D 1356

GLENDA NAHAR, individually and GLENDA NAHAR, as guardian for CATARINA SHARISA NAHAR, CARLOS SHARIEF NAHAR, and ALEXANDER LUCIEN NAHAR, Appellants, v. ORAL MILDRED JAP-A-JOE NAHAR, KENNETH IWAN NAHAR, FRANCELINE CORNELIA NAHAR, CORRINE ADELINE NAHAR, ROBERT ARMAND NAHAR, and HERMAN BERTUS NAHAR, Appellees.

Subsequent History: [1]** Released for Publication June 23, 1995. As Amended. Petition for Review Denied November 22, 1995, Reported at: *1995 Fla. LEXIS 2001*.

Prior History: An Appeal from the Circuit Court for Dade County, Robert H. Newman, Judge.

This Opinion Substituted on Grant of Rehearing En Banc for Withdrawn Opinion of June 15, 1993, Previously Reported at: *1993 Fla. App. LEXIS 6439*.

Disposition: Affirmed in part, reversed in part and remanded with instructions.

Counsel: Alfred Aronovitz; Daniels & Talisman; Glen E. Smith, for appellants.

Cypen & Cypen; Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin and Joel Eaton; Mark Dienstag, for appellees.

Sandler, Travis & Rosenberg and Edward M. Joffe and Russell E. Carlisle, as amicus curiae for The International Law Section of the Florida Bar.

Judges: Before SCHWARTZ, C.J., and BARKDULL, HUBBART, NESBITT, BASKIN, JORGENSON, COPE, LEVY, GERSTEN, GODERICH and GREEN, JJ. SCHWARTZ, C.J., and NESBITT, COPE, LEVY, GERSTEN, GODERICH and GREEN, JJ., concur. HUBBART, JUDGE (concurring in part; dissenting in part), BASKIN and JORGENSON, JJ., concur. JORGENSON, Judge, dissenting.

Opinion by: BARKDULL

Opinion

[*226] BARKDULL, Judge.

On motion for rehearing en banc granted, we hereby withdraw our previous opinion dated June 15, 1993, and substitute the following.

Appellant, Glenda Nahar, widow of decedent Roebi Nahar, and the couple's minor children, seek review of a final summary judgment **[**2]** entered in favor of appellees, Roebi Nahar's six adult children by a previous **[*227]** marriage, which ordered transfer of Roebi's six Florida bank accounts to Aruba, in the Netherlands Antilles, to be disposed of in accordance with Dutch law [1] and which ordered payment of administration fees and costs from one of those Florida accounts.

Roebi and Glenda Nahar were married in March of 1977. Prior to their wedding Roebi and Glenda appeared before a Civil Law Notary in Aruba [2] for the purpose of entering into an antenuptial agreement. That agreement provided that no community property would exist between the parties and that each party would keep whatever he or she contributed to or acquired during the marriage.

[3]** On May 15, 1984, Roebi, a Surinami national, [3] died intestate in Miami, Florida, U.S.A. Roebi was survived by his widow, Glenda, their three minor children, and six adult children by a prior marriage. At

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[1] Dutch law, synonymously know as the law of the Netherlands, is the controlling law on the island of Aruba in the Netherlands Antilles.

[2] An Aruban court official.

[3] Surinam is a dependency of the Netherlands.

the time of his death, Roebi, Glenda and the couple's three minor children resided in Miami, in a home owned by Roebi and Glenda. Roebi's six adult children resided in Aruba and other Dutch Territories. At the time of Roebi's death, he held six bank accounts in Miami, Florida, with deposits totalling $ 657,761.28 Dollars U.S. [4] **[**4]** On May 24, 1984, nine days after Roebi's death, Glenda effectively closed five [5] of the six Florida accounts by withdrawing the balances, which totaled $ 514,345.50.

Roebi's adult children petitioned the Aruban Court of the First Instance to have Roebi's Aruban properties and the Florida bank accounts, but not the Miami real estate, administered under the law of the Netherlands Antilles. The adult children alleged that Roebi and his family only resided in Miami temporarily and that their actual permanent place of residence was in Aruba. Glenda appeared and argued that Roebi was not a domiciliary of Aruba, that Dutch law did not apply and that the Florida accounts were outside any probate proceedings. The Court of the First Instance ordered Glenda to deposit the money from the Florida accounts with a Notary for safekeeping pending settlement of the estate. Glenda failed to comply with this order.

Roebi's adult children then petitioned for ancillary administration in Florida, seeking to have the money from the Florida accounts transferred to Aruba for distribution **[**5]** pursuant to Dutch law. [6] Glenda appeared and argued that the Florida bank accounts and Miami real estate had passed by operation of Florida law to her and her minor children and thus were outside of any probate proceeding. The Florida court stayed the ancillary proceedings pending decision by the Aruban court on the previously filed petition for administration. The adult children then sought to enjoin Glenda from depleting the money from the Florida bank accounts and from disposing of the Miami real estate. The trial court granted an injunction that required Glenda to deposit the money from the Florida bank accounts into the trial court, and prohibited her from disposing of the Miami real estate.

Meanwhile, in the Aruban action, Glenda was ordered to transfer the money from the Florida accounts to Aruba. From that order Glenda appealed, lost **[**6]** and appealed again to **[*228]** The Court of Cassation of the Netherlands. [7] The Hague ruled that Dutch law, not Florida law, controlled Roebi's estate and that the money from the Florida accounts was presumptively an asset of the estate. The Hague remanded the case to the Aruban court for further proceedings.

Glenda then filed a petition, in the Florida action, seeking to revoke probate and both sides moved for summary judgment. Roebi's adult children argued that Glenda was bound by The Hague's decision and that Dutch forced-heirship law was controlling. Glenda argued that Florida law was controlling and that by operation of Florida law the accounts had passed to her and her minor children outside of any probate proceedings. The trial court found The Hague's decision to be res judicata and entered final summary judgment in favor of Roebi's adult children. Thereafter, **[**7]** the trial court ordered that the money from the six Florida bank accounts, after payment of administrative fees and costs incurred in the Florida proceedings, be delivered to Roebi's estate in Aruba to be disposed of in accordance with Dutch law. The order of summary judgment made no express findings regarding the Miami real estate. From that summary judgment Glenda appeals.

We recognize that the final judgments of, and certain interlocutory orders by, the highest court of a foreign nation are entitled to comity. *See and compare* Metropolitan Investment Corp. v. Buchler, 575 So. 2d 262 (Fla. 3d DCA 1991); Cardenas v. Solis, 570 So. 2d 996 (Fla. 3d DCA 1990), *review denied*, *581 So. 2d 163 (Fla. 1991)*; Belle Island Inv. Co., Ltd. v. Feingold, 453 So. 2d 1143 (Fla. 3d DCA), *cause dismissed*, *459 So. 2d 1039 (Fla. 1984)*; Restatement (Second), Conflict of Laws, § 98 (1988). *See also* § 732.702, Fla. Stat.

[4] The six bank accounts at issue in this action break down into three categories; three Coconut Grove Bank accounts which were originally established by Roebi individually and which were later converted to the joint ownership of Roebi and Glenda with joint right of survivorship; two Peninsula Federal Savings and Loan accounts which were established in the name of Roebi or Glenda in trust for their three minor children; and, one Amerifirst Federal Savings and Loan account which was established as a "Totten Trust" in trust for Glenda and the couple's three minor children with Roebi as trustee.

[5] Five of the accounts were held by Roebi and Glenda either jointly or as trustees, the sixth bank account was a "Totten Trust" and as Glenda was not a trustee, she was unable to withdraw those funds.

[6] According to Dutch law, Glenda and all nine children are entitled to share in Roebi's property equally; each would thus receive a one-tenth part share of the estate.

[7] The Court of Cassation, the highest court of the Netherlands and its possessions, is located in the Hague and is commonly referred to as "The Hague."

(1991). *But see* Sanchez v. Sanchez de Davila, 547 So. 2d 943 (Fla. 3d DCA), *review denied*, *554 So. 2d 1168 (Fla. 1989)* (distinguishable due to the antenuptial agreement between deceased and his future wife); § 655.55 Fla. Stat. (1988). [8]

[8]** This court, in Cardenas v. Solis, 570 So. 2d 996 (Fla. 3d DCA 1990), stated that:

> It is well settled that, as a general rule, only the final judgments of courts of a foreign country are subject to recognition and enforcement in this country, provided certain jurisdictional and due process standards are observed by the foreign court; non-final or interlocutory orders of foreign courts, however, are generally not entitled to such recognition or enforcement. *See* Restatement (Second) Conflict of Laws § 98 comment c (1971).

Cardenas, at 998 (citations omitted)(restatement revised in 1988; comment c moved to comment d).

Nonetheless, the *Cardenas* court held that a Guatemalan temporary injunction issued in a domestic relations case would be enforced under principles of comity because it was one of the "limited exceptions to the general rule" and because enforcement could be based upon "compelling public policy reasons." Id., at 999. The *Cardenas* court then enunciated two areas where foreign interlocutory orders should be recognized: (1) creditors rights and (2) spousal and childrens' rights in a domestic relations case. Id., at 999. Accordingly, the **[**9]** *Cardenas* decision left substantial room under the principles of comity, for a foreign decree that is less than final to be acknowledged or ignored. Implicitly the *Cardenas* decision established a rule requiring the court to analyze each foreign order on a case by case basis prior to granting comity. It seems however that, rather than trying to analyze each foreign order on the basis of whether it is final and entitled to **[*229]** comity, non-final not subject to an exception and not entitled to comity, or non-final subject to an exception and entitled to comity, the better approach is to follow the Restatement (Second), Conflict of Laws, approach in it entirety. [9]

[10]** Sections 92 & 98 of the Restatement suggest that almost all foreign decrees should be granted comity:

> § 98 RECOGNITION OF FOREIGN NATION JUDGMENTS
> A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned.
> Comment:
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> a. Valid Judgment. The rule of this Section is limited to valid judgments, that is, to judgments which meet the requirements of § 92. . . .

To aid the reader in determining which "judgments" are to be considered "valid" and thus entitled to comity the Restatement states:

> § 92. REQUISITES OF A VALID JUDGMENT
> A judgment is valid if
> (a) the state in which it is rendered has jurisdiction to act judicially in the case; and
> (b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and
> (c) the judgment is rendered by a competent court;

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[8] We hold that § 655.55, Florida Statutes(1988), is not applicable to accounts established and closed before the effective date of the statute in 1988, particularly, where the deceased depositor died in 1984. Even if § 655.55, Florida Statutes, was applicable, the depositor, through his successor, was in litigation regarding the ownership of the accounts on the effective date of the statute, and subsection (6) of § 655.55 provides for rejection of the provisions of the statute by the depositor. Litigation between the depositor and/or their agents on the effective date of the statute was certainly written evidence of rejection of same.

[9] The courts of this state regularly seek guidance from the Restatement. *See* Continental Mortg. Inv. v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981)(citing the Restatement (Second), Conflict of Laws, § 203 Comment b); ***Mobil Oil Corp. v. Shevin, 354 So. 2d 372 (Fla. 1977)***(citing the Restatement (Second), Conflict of Laws, § 2 Comment a); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967)(citing the ***Restatement, Conflict of Laws, § 379***); ***Kellogg-Citizens Nat'l Bank of Green Bay, Wis., v. Felton, 145 Fla. 68, 199 So. 50 (Fla. 1940)***(citing the Restatement, Conflict, of Laws § 612).

> and
> (d) there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.
> Comment:
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> a. Meaning of "judgment." As **[**11]** used in the Restatement of this Subject, "judgment" is a general term which includes not only judgments at law but also the orders, injunctions or decrees of equity courts, and the judgments of probate courts, admiralty courts and other special courts. . . .

Consequently, it appears that any foreign decree should be recognized as a valid judgment, and thus be entitled to comity, where the parties have been given notice and the opportunity to be heard, where the foreign court had original jurisdiction and where the foreign decree does not offend the public policy of the State of Florida. *See and compare* Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139, 40 L. Ed. 95 (1895); Tahan v. Hodgson, 213 U.S. App. D.C. 306, 662 F.2d 862 (D.C. Dist. 1981). We find the Restatement (Second), Conflict of Laws, § 98 (1988) to be the better approach when determining whether a foreign decree is entitled to comity and recede from *Cardenas* to the extent that it conflicts with this holding.

The trial court properly granted comity to the Dutch court's order which held that Roebi was a domiciliary of Aruba and that his estate was governed by Dutch law. Administration of an estate is governed by the law of the decedent's **[**12]** domicile, *See* Biederman v. Cheatham, 161 So. 2d 538 (Fla. 2d DCA), *cert. denied*, *168 So. 2d 146 (Fla. 1964)*, and the forum will apply its own rules in determining the person's domicile prior to determining the applicable substantive law. *See* Restatement (Second), Conflict of Law, § 13; *see and compare* Mississippi Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L. Ed. 2d 29 (1989)(citing restatement for proposition that domicile is determined according to law of the forum); Texas v. Florida, 306 U.S. 398, 59 S.Ct. 563, 83 L. Ed. 817 (1939). The Dutch court had the power to determine Roebi's domicile and upon doing so, to determine the substantive law that would apply to Roebi's estate. We note that it is uncontroverted that the Dutch court had jurisdiction in this matter. Glenda had notice and opportunity to be heard, in **[*230]** fact she contested the issue to the highest court of the land. Where a party has had notice and opportunity to be heard and the foreign court has satisfied Florida's jurisdictional and due process requirements their orders will be entitled to comity. [10] *See Cardenas*; Restatement (Second), Conflict of Laws, § 98 (1988); *see* **[**13]** *also* Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 317 N.Y.S. 2d 315, 265 N.E.2d 739 (N.Y. 1970)(French court's judgment applying French law to New York joint bank account entitled to comity).

The trial court erred in failing to specifically address the Miami real estate in its order of summary judgment. While Roebi's personal and intangible property may be governed by the judgment of the Aruba court, the Miami real estate may be subject to a different result. We remand this matter to the trial court to resolve any issues regarding the disposition of the Miami real estate in the first instance.

We find no error in the trial court's order charging the marshaled assets with the cost **[**14]** incurred in marshaling same. *See* Nahar v. Nahar, 576 So. 2d 862 (Fla. 3d DCA 1991); In re Estate of Katz, 501 So. 2d 68 (Fla. 3d DCA 1987); *Perez v. Lopez, 454 So. 2d 777 (Fla. 3d DCA 1984)*. The trial court properly ordered the Administrator Ad Litem to pay these expenses from the assets of Roebi's estate.

We hold that the trial court erred in finding the Amerifirst "Totten Trust" to be under the jurisdiction of the Dutch court. This account was not the subject of dispute in the Dutch action, Glenda was not on notice that Roebi's adult children laid claim to this account, nor was it the subject of any order by the Dutch court which would be entitled to comity. [11] Further, we hold that this account was a true trust account which vested upon Roebi's death and, as the parties properly concede, the money from this account passed to the trust's beneficiaries according to the terms of that trust. *See* Seymour v. Seymour, 85 So. 2d 726 (Fla. 1956); First Nat'l Bank of Tampa v. First Fed. Sav. & Loan Ass'n of Tampa, 196

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[10] Although the validity and enforceability of the Nahar's antenuptial agreement is not at issue, we note with approval the recent decision of the Fourth District, In re Estate of Nicole Santos, 648 So. 2d 277 (Fla. 4th DCA 1995) in which it was determined that lex loci contractus governs the rights and liabilities of the parties to an antenuptial agreement.

[11] Although, the Dutch courts, in dicta, did discuss this account in their opinions, this court is only required to grant comity to orders of foreign courts, and we decline the invitation to extend comity to a foreign court's dicta.

So. 2d 211 (Fla. 2d DCA 1967).

[15]** Accordingly the final summary judgment under review is affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded with instructions.

SCHWARTZ, C.J., and NESBITT, COPE, LEVY, GERSTEN, GODERICH and GREEN, JJ., concur.

Concur by: HUBBART (In Part)

Dissent by: HUBBART (In Part); JORGENSON

Dissent

HUBBART, JUDGE (concurring in part; dissenting in part)

By today's decision, the court holds, *first*, that a widow and her three minor children have no personal property rights in (a) two Totten trust bank accounts set up by her deceased husband prior to his death at the Peninsula Savings and Loan Association in Miami, Florida, under which, in written documents filed with the bank, she and her husband were joint trustees and her three minor children were trust beneficiaries; and (b) three joint commercial bank accounts set up by her deceased husband prior to his death at the Coconut Grove Bank in Miami, Florida, under which, in written documents filed with the bank, she had a right of survivorship to the funds in said account upon her husband's death. The court reaches this result based on **[**16]** its determination that comity must be given to a Dutch court's interlocutory order in an ongoing probate proceeding of the deceased husband's estate in Aruba, which was opened by the husband's adult children from a prior marriage and over which the Dutch court has personal jurisdiction of the widow. In this interlocutory order, **[*231]** it was decided that (i) the husband was a domiciliary of Aruba (and only a temporary resident of Florida) at the time of his death in Florida, and (ii) the husband's estate is governed by Dutch law, not Florida law, with respect to the husband's Florida property. Under Dutch "forced heirship" law, the proceeds of the Florida bank accounts are *presumptively* probatable assets of the deceased husband' estate, notwithstanding the ownership of same by the widow and her minor children under Florida law. Accordingly, the court affirms a trial court order which directs that the proceeds of these accounts be turned over to the Dutch court in Aruba to dispose of as the Dutch court sees fit, as no final determination of ownership rights has been made with respect to these accounts. [12]

[17]** *Secondly*, the court holds that a widow and her three minor children do have personal property rights in a Totten trust bank account set up by her deceased husband prior to his death at the AmeriFirst Savings and Loan Association in Miami, Florida, under which, in written documents filed with the bank, the deceased husband was the sole trustee and the widow and her three minor children were the trust beneficiaries. The court reaches this result based on its determination that (a) this account is not the subject of dispute in the ongoing Dutch probate proceeding in Aruba as the adult children have not laid claim to that account and no order which is entitled to comity has been issued by the Dutch court with respect to this account, and (b) the proceeds of this trust account passed under Florida law to the widow and her three minor children upon the death of the husband. Accordingly, the court reverses a trial court order directing that the proceeds of this account be turned over to the Dutch court with directions that said proceeds be transferred to the widow and her three minor children.

Finally, the court holds that the trial court (a) erred in failing to specifically address **[**18]** the real estate held by the deceased husband and the widow in Miami, Florida, at the time of the husband's death upon a determination that the disposition of this property may not be governed by Dutch law as is true of the Peninsula and Coconut Grove bank accounts discussed above, and (b) did not err in its order charging the above bank accounts with the cost of marshaling the proceeds of same.

I agree entirely with the court as to its second and third

[12] Without dispute, there is no Dutch court decree, final or interlocutory, which distributes some or all of the proceeds of any of the bank accounts involved in this case as part of a probate accounting of the husband's estate; to the contrary, the entire estate proceeding is still in litigation in Aruba. Indeed, as to the Coconut Grove accounts, the Dutch courts have not even determined whether the proceeds of these accounts are probatable assets of the husband's estate, as these courts are still in the process of sorting out this issue under Dutch law. The Supreme Court of the Netherlands at the Hague has, in fact, remanded the cause to the courts in Aruba to decide this issue according to the standards established in the Supreme Court's opinion.

holdings, but regret that I cannot join the court's first holding. In my view, (1) Florida law, not Dutch law, governs the disposition of *all* the bank accounts in this case, not just the AmeriFirst Totten trust and Florida real estate, based on the controlling Florida conflict-of-laws rule governing joint bank accounts and Totten trusts; (2) comity principles, relied on by the court to reach a contrary conclusion, are totally inapplicable, and, indeed, are expressly forbidden, in determining the applicable conflict-of laws rule, and (3) Florida law dictates that the widow and her three minor children are the owners of these accounts, as the proceeds of same passed by operation of law to them upon the death of the husband.

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[19]** My fundamental disagreement with the court on the first holding, as stated above, is centered around which law governs the disposition of the Peninsula Totten trusts and the Coconut Grove joint accounts. The court concludes that Dutch law governs based on an application of comity principles, which means that *presumptively* the proceeds of these accounts are probatable assets and belong to the deceased's estate under Dutch "forced heirship" law [although there are exceptions thereto which the Dutch courts are still sorting out]. I think Florida law governs, which means, as will be demonstrated **[*232]** later, that the proceeds of these accounts pass by operation of law to the widow and her three minor children. Indeed, this is the pivotal issue of the instant case, the resolution of which can only be determined by reference to Florida's applicable conflict-of-laws rule because it is well-settled that, subject to exceptions not relevant here, the law of the forum governs in determining which conflict-of-laws rule is applicable in a given case. [13]

[20]** A

Turning, then, to the applicable Florida conflict-of-laws rule, it is established in Florida, as well as throughout the country, that the disposition of a joint bank account, including a Totten trust, is governed by the law of the situs of the account, regardless of the domicile of any party to the account; in particular, this rule has been applied where, as here, the proceeds of that account are subject to conflicting claims, as here, by (1) a surviving joint depositor or account beneficiary and (2)the executor of the estate of a deceased joint depositor or account trustee in a Florida or foreign probate proceeding. In *Seng v. Corns, 58 So. 2d 686 (Fla. 1952)*, the Florida Supreme Court held that in a Florida probate proceeding, the law of Illinois governed the disposition of a joint bank account located in an Illinois bank, and that, accordingly, the surviving joint depositor was entitled to the proceeds of that account, not the executor of the deceased joint depositor whose estate was being probated in Florida. The Court stated:

> "The Circuit Court [below] held that under the Statutes of Illinois, and construing the deposit contract before it under the Illinois decisions, **[**21]** the survivor of two joint depositors in an Illinois bank took legal title to the deposit and could not be required to deliver the funds to the Florida executor of the deceased joint depositor, no matter which joint depositor furnished the money so deposited. We agree."

Id. at 687. Not only did the Court apply the law of the situs of the joint bank account (Illinois) in determining

[13] "A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws. It derives this law from the same sources which are used for determining all its law: from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning." *Restatement (Second) of Conflict of Laws § 5* cmt b (1971). "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." *Restatement (Second) of Conflict of Laws § 6(1)* (1971). "Whenever state, and not federal, law is applicable to a given case, the choice-of-law rule determining which state's law is to be used, ordinarily is a rule of the law of the forum. . . . Exceptions are choice-of-law rules contained in international conventions to which the United States is a party and which bind the states under the U.S. Constitution's Supremacy Clause and occasional provisions of federal law." Eugene Scoles and Peter Hay, *Conflict of Laws* § 3.1, at 50, 50 n.2 (1982). "The basic theory of the common law of Conflict of Laws is that . . . the forum's own procedural rules are always applied. . . . For one thing, the law of Conflicts of Laws is itself procedural law. It is usually, but not always, the law of Conflicts of Laws of the forum that is applied . . . except in instances where the renvoi principle is applicable." Robert R. Leflar, *Conflict of Laws* § 60, at 109-10, 110 n.3 (1959). The "renvoi" principle, in turn, is applicable where the forum's conflict of laws rule requires that the law of a foreign jurisdiction be applied, but the conflict of law rule of the foreign jurisdiction requires that the law of the forum be applied. *Id*. *§ 6*, at 9-10.

that the proceeds of the subject account passed under Illinois law to the surviving joint depositor, it also implicitly concluded that this result was not changed by the fact that the estate of the deceased joint depositor was being probated in Florida -- a result that is flatly contrary to the court's determination in the instant case which applies the law of the jurisdiction where the estate of the deceased joint depositor is being probated (Aruba), instead of the law of the situs of the joint bank account (Florida) which *Seng* requires.

In *Lieberman v. Silverstein, 393 So. 2d 565 (Fla. 3d DCA 1981)*, this court held that the law of New York governed the disposition of two joint bank accounts located in New York in a Florida suit by the surviving joint depositor against the widow of the **[**22]** deceased joint depositor to recover the proceeds of a bank certificate of deposit [CD] which the deceased joint depositor had purchased with funds he withdrew from the joint accounts; under New York law, this court concluded that the surviving joint depositor impliedly **[*233]** consented to or ratified the subject withdrawal and that the deceased joint depositor's widow was entitled to the CD. Relying on *Seng*, the court stated:

> "It is clear that New York law governs the rights of the parties to a jointly held bank account located there and therefore controls the issues involved in this case."

Id. at 566 n. 2. Clearly, then, under Florida law the disposition of a joint bank account is governed by the law of the situs of the account.

Moreover, this court has held in *Sanchez v. Sanchez De Davila, 547 So. 2d 943* (Fla. 3d DCA), *rev.denied*, *554 So. 2d 1168 (Fla. 1989)* [a case virtually identical to the instant case], that in an ancillary probate proceeding, as here, the law of Florida governed the disposition of a Totten trust bank account located in Florida so that upon the death of the trustee under the account, the proceeds of the account passed **[**23]** by operation of law to those children of the deceased who were beneficiaries of the account -and that the "forced heirship" law of Venezuela, where the deceased trustee's estate was being probated just like the instant case, did not govern, so that those children of the deceased who were not beneficiaries of the account had no right to the proceeds of same. Relying on *Seng* and *Lieberman*, this court stated:

> "*It is well settled in Florida that the disposition of a joint bank account, including a Totten trust, is governed by the law of the situs of the account regardless of the domicile of any party to the account*.
>
> . . . .
>
> In the instant case, the subject Totten trust bank accounts are located in a bank in Miami, Florida, and accordingly Florida law must govern their disposition -- even though (a) Venezuela is the domicile of the decedent who created the trusts, and (b) Venezuelan law is contrary to Florida law on the disposition of the trusts when, as here, the creator of the trusts dies. Moreover, under Florida substantive law, it is undisputed that the beneficiaries of a Totten trust are entitled to the proceeds of the subject bank account upon **[**24]** the death of the creator of the trust. Plainly, then, the *appellant sons, as the beneficiaries of the subject Totten trust, are entitled to the funds of the said trusts -not all the children of the deceased as the trial court ruled [under Venezuelan "forced heirship" law]*."

Id. at 945 (citations omitted)(emphasis added). The court's decision in the instant case to apply Florida law to the disposition of the AmeriFirst Totten trust located in Miami, Florida, is fully consistent with this decision; the same result is equally dictated with respect to the Peninsula Totten trusts and the Coconut Grove joint accounts also located in Miami, Florida, and the court's decision to the contrary is in clear conflict with *Sanchez*.

Moreover, the Florida conflict-of-laws rule on the disposition of joint bank accounts and Totten trusts, in an estate context and otherwise, is in accord with the law of many other jurisdictions:

> *"The courts seem to agree that title of and rights in a bank deposit standing in the names of the depositor 'and' another is governed by the law of the place where the deposit has been made and the account is kept*.

Thus, the question **[**25]** *whether a deposit made by a deceased person in the names of the deceased or the plaintiff or the survivor of them created a joint tenancy*, with the right of the survivor to take upon the death of the other, w*as held to be governed by the law . . . where the deposit was made, and not by the law . . . where the will of the deceased was proved*…."

E.H. Schopler, Annotation, *Joint Bank Accounts-Governing Law*, *25 A.L.R.2d 1240, 1241-42 (1952)*[hereinafter *Schopler*](emphasis added)(citations omitted).

Section 655.55(1), Florida Statutes (1991), codifies this conflict-of-laws rule as to bank accounts located in Florida:

> "The law of this state, *excluding its law regarding comity* and conflict of laws, shall govern all aspects, including without limitation the validity and effect, of any deposit account in a branch or office in this state of a financial institution . . . *regardless of the* citizenship, residence, location, or *domicile of any other party to the contract or agreement governing such deposit account,* **[*234]** *and regardless of any provision of any law of the jurisdiction of the residence, location, or domicile of such other party*, whether or **[**26]** not such deposit account bears any other relation to this state. . . ." (emphasis added).

"Deposit account," as employed in the above statute, is specifically defined to include, as here, "any deposit or account in one or more names including, without limitation, any . . . joint account . . . or Totten trust account." *§ 655.55(3)(b), Fla.Stat.* (1991). Because this statute codifies an existing Florida conflict-of-laws rule as stated in prior case law, it is not surprising - and, indeed, appears perfectly fair -- that the statute is expressly made both prospective and retroactive, to wit: "this section applies to deposit accounts . . . entered into *before*, *on*, or *after* July 1, 1988," the effective date of the statute. *§ 655.55(6), Fla.Stat.* (1991). Consequently, the statute is clearly applicable to the joint bank accounts and Totten trusts involved in this case as they were, without dispute, "entered into before . . . July 1, 1988." *§ 655.55(6), Fla.Stat.* (1991). [14]

[27]** Without question, then, the applicable Florida conflict-oflaws rule, as established by both prior case law and the above statute, is that the disposition of a joint bank account, including a Totten trust, is governed by the law of the situs of the account, regardless of the domicile of any party to the account; this rule, in turn, has been applied where, as here, the estate of a deceased joint depositor is being probated in a foreign

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[14] Without any cited authority or stated reasons, the court, however, holds that this statute "is not applicable to accounts [as here] established and closed before the effective date of the statute in 1988, particularly, where the deceased depositor died in 1984." ___ So. 2d at ____ (slip. op. at 6 n. 8). This is clearly an erroneous interpretation because there are no exemptions stated in the statute for accounts opened and *closed* before July 1, 1988 or for accounts where one of the depositors *died* before July 1, 1988; the statute, without reservation, applies to "deposit accounts entered into . . . before July 1, 1988," *§ 655.55, Fla.Stat.* (1991), regardless of whether the account is later closed or where one of the depositors later dies.

The only express exemption provided for in the statute states that "this section *shall not apply to any deposit accounts existing on July 1, 1988*, if either party to the contract or agreement governing the deposit account provides the other party with a written objection to the application of this section within 6 months of July 1, 1988." *§ 655.55(6), Fla.Stat.*(1991)(emphasis added). Obviously, this exemption is inapplicable to the accounts involved in the instant case because, without dispute, these accounts did not exist on July 1, 1988, having been closed prior thereto. Accordingly, the court's fall-back holding that -- "even if *[section] 655.55, Florida Statutes*, was applicable [to the accounts in the instant case]," the above exemption was nonetheless applicable on the theory that "the depositor, through his successor, was in litigation regarding the ownership of the accounts on [July 1, 1988] the effective date of the statute" and such litigation "was certainly written evidence of rejection of same" ___ So. 2d at ___ (slip. op. at 6 n.8) -- is clearly wrong; overlooked in this holding is that the entire exemption only applies to accounts, unlike the instant case, which existed on July 1, 1988.

jurisdiction. *Seng*; *Lieberman*; *Sanchez*; *Schopler*; *see* § 655.55, Fla.Stat. (1991).

B

The centerpiece, however, of the court's refusal to apply Florida law [in accord with the applicable Florida conflict-oflaws rule] to the Peninsula Totten trusts and Coconut Grove joint accounts is the court's decision to grant *comity* to an interlocutory order entered by the Dutch court in Aruba that the husband was domiciled in Aruba at the time of his death and therefore his estate must be governed by Dutch law, rather than Florida law. This order is one of a series of interlocutory orders which have been entered by the Dutch trial and appellate courts in Aruba and the Netherlands in a complicated, on-going probate of the deceased husband's **[**28]** estate in Aruba in which, admittedly, no final determination concerning the ownership of the subject bank accounts [particularly the Coconut Grove accounts] has been made by the Dutch courts. The court states:

> "*The trial court [in Florida] properly granted comity to the Dutch court's order which held that Roebi [the husband] was a domiciliary of Aruba and that his estate was governed by Dutch law*. Administration of an estate is governed by the law of the decedent's domicile, *See* Biederman v. Cheatham, 161 So. 2d 538 (Fla. 2d DCA), *cert. denied*, *168 So. 2d 146 (Fla. 1964)*, and the forum will apply its own rules in determining the person's domicile prior to determining the applicable substantive law. **[*235]** *See* Restatement (Second), Conflict of Law, § 13; *see and compare* Mississippi Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed 2d 29 (1989) (citing restatement for proposition that domicile is determined according to law of the forum); Texas v. Florida, 306 U.S. 398, 59 S.Ct. 563, 83 L.Ed. 817 (1939). The Dutch court had the power to determine Roebi's [husband's] domicile and upon doing so, to determine the substantive law that would **[**29]** apply to Roebi's estate. We note that it is uncontroverted that the Dutch court had jurisdiction in this matter. Glenda [the widow] had notice and opportunity to be heard, in fact she contested the issue to the highest court of the land. Where a party has had notice and opportunity to be heard and the foreign court has satisfied Florida's jurisdictional and due process requirements their orders will be entitled to comity. *See Cardenas*; Restatement (Second), Conflict of Laws, § 98 (1988); *see also* Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 317 N.Y.S. 2d 315, 265 N.E.2d 739 (N.Y. 1970) (French court's judgment applying French law to New York bank account entitled to comity)"

656 So. 2d at 229-230 (slip op. at 9-10)(emphasis added).

The fundamental flaw in this analysis, however, is that comity principles are totally inapplicable in determining what conflict-of-laws rule should be followed in a given case. As previously noted, the law of the forum, exclusive of comity law, governs in determining which conflict-of-laws rule is applicable to a given case because it is considered a rule of procedure, subject to limited exceptions not applicable here. *See supra* note 1 and accompanying text. **[**30]** Beyond that, Section 655.55(1), Florida Statutes (1991), *expressly prohibits* the application of comity principles when determining, as here, the disposition of a joint bank account and Totten trust located in Florida. The statute provides that "the law of this state, *excluding its law regarding comity* . . ., shall govern all aspects . . . of any deposit account in a branch or office in this state of a financial institution …," which "deposit account" is defined to include, as here, "any . . . joint account . . . or Totten trust account." § 655.55 (1)(3)(b), Fla.Stat.(1991). Yet the court has done precisely what the statute forbids when it gives comity to the Dutch court order holding that Dutch law governs the disposition of the Peninsula and Coconut Grove bank accounts.

Nor is it of any moment that the husband's estate is being probated in Aruba, that the husband was domiciled in Aruba at the time of his death, or that the Dutch courts have personal jurisdiction over the widow and have ruled against the widow as to what law governs these accounts. In the abstract, these factors may arguably be important in determining whether to give comity to the judgments of a foreign **[**31]** jurisdiction, but, as previously explained, comity principles are inapplicable to this case, as the law of the forum governs, exclusive of comity law, in determining what conflict-of-laws rule to apply in a given case, *see supra* note 1 and accompanying text. And our applicable conflict-of-laws rule requires us to apply the law of Florida, exclusive of comity principles, to the disposition of these accounts regardless of the domicile of any party to the account or whether the estate of one of the account depositors is being probated in a foreign

jurisdiction [15] . *§ 655.55, Fla.Stat.*(1991); *Seng*; *Sanchez*.

[32]** In any event, the court, in my judgment, does not really give comity to any decree of **[*236]** the Dutch court in Aruba because it does not order the widow or her minor children to transfer any of the proceeds of the Peninsula totten trusts or Coconut Grove accounts to a third party in accord with such a decree. Instead the court inappropriately gives "comity" to a Dutch court interlocutory order that Dutch law governs the disposition of the subject accounts and then turns the proceeds of the accounts over to the Dutch courts to do whatever they wish in accord with Dutch law, inasmuch as no decree has yet been entered disposing of the proceeds of these accounts. This is clearly not giving comity to the decree of a foreign jurisdiction as there is no decree to give comity to, but is instead an impermissible transfer of jurisdiction to the courts of a foreign country to enter an *in futuro* decree. [16]

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[15] As an aside, the court's statement that the "administration of an estate is governed by the law of the decedent's domicile," So. 2d at (slip op. at 9) is not supported by the cited authority [*Biederman v. Cheatham, 161 So. 2d 538* (Fla.2d DCA), *cert.denied*, ***168 So. 2d 146*** (Fla. 1964], and clearly is an overstatement which the court itself does not follow, as it (1) applies Florida law to the AmeriFirst Totten trust, and (2) strongly implies that Dutch law may not govern the disposition of the parties' jointly held real estate in Miami, to wit: "the Miami real estate may be subject to a different result" and "may not be governed by the judgment of the Aruba court." ___ So. 2d at ___ (slip op. at 11). Moreover, in ***Seng v. Corns, 58 So. 2d 686 (Fla. 1952)***, the Florida Supreme Court applied Illinois law to a joint bank account located in Illinois in a Florida probate proceeding involving presumably a Florida domiciliary; and in *Sanchez v. Sanchez De Davila, 547 So. 2d 943* (Fla.3d DCA), *rev.denied*, ***554 So. 2d 1168 (Fla. 1989)***, this court applied Florida law to Totten trusts located in Florida, rather than the law of Venezuela where the estate of one of the deceased joint depositors [a Venezuelan domiciliary] was being probated.

[16] A major part of the court's opinion is devoted to creating a new rule of comity which is contrary to the established law and is based on a misunderstanding of the Restatement (Second) of Conflict of Laws. The court holds that "any foreign decree [whether final or interlocutory] should be recognized as a valid judgment, and thus be entitled to comity, where the parties have been given notice and the opportunity to be heard, where the foreign court had original jurisdiction and where the foreign decree does not offend the public policy of the State of Florida." ___ So. 2d at ___ (slip op. at 9). This holding is used as a predicate to its later decision to give "comity" to the interlocutory Dutch court order announcing that Dutch law governs the disposition of the bank accounts involved in this case, an inappropriate application of comity principles.

This holding, however, is contrary to the Florida Supreme Court's decision in ***Ogden v. Ogden, 159 Fla. 604, 33 So. 2d 870 (1947)***, which refused to give comity in a divorce action to an English court order entered in a suit to restore conjugal rights because the order was non-final in nature. The Court stated:

> "*We do not understand the rule of international comity to require the courts of this country to recognize and give effect to the judgments of an English court that are not final*. If permitted to reason by analogy, it may be said that such is the effect of the *full faith and credit clause of the Constitution of the United States* as to the judgments of other states."

Id. at 874 (Terrell, J., concurring). It is also contrary to our decision in *Cardenas v. Solis, 570 So. 2d 996, 998-99 (Fla. 3d DCA 1990)*, *rev. denied*, ***581 So. 2d 163 (Fla. 1991)***, which, in an extensive analysis of the relevant international law authorities on the subject, followed the *Ogden* holding as a general rule, but recognized certain exceptions thereto, not relevant here.

The court expressly refuses to follow the *Cardenas* holding, and implicitly goes in conflict with *Ogden*, based on a misunderstanding of *Sections 92* and *98 of the Restatement (Second) of Conflict of Laws* (1971, as revised 1988). *Section 98* states that a "valid judgment" of a foreign nation will be recognized in the United States; *Section 92*, in turn, defines a "valid judgment" of a sister state in the United States as one which satisfies certain jurisdictional and due process prerequisites, a definition which is expressly adopted by *Section 98* at comment a, and therefore applies to foreign nations as well. *Comment c of section 92*, however, states that "such judgments . . . are entitled to recognition and enforcement . . . *except as stated in §§ 103, 107-121*;" *Section 107 of the Restatement (Second) of Conflict of Laws* (1971), in turn, states: "*A judgment will not be recognized or enforced in other states insofar as it is not a final determination under the local law of the state of rendition*"; *comment a to section 107* also states that "*The rule of this section applies to non-final judgments*, whether at law or in equity, as opposed to modifiable judgments. . . ." It is therefore abundantly clear that *Sections 92* and *98 of the Restatement (Second) of Conflict of Laws* apply solely to final determinations of rights in final judgments, and are inapplicable to interlocutory orders which do not finally determine the rights of the parties. If there was any doubt as to the position of the American Law Institute on this subject, it was laid to rest by *Section 481 of the*

[33]** Plainly, then, comity principles are inapplicable to this controversy as the case is controlled **[*237]** by the Florida conflict-oflaws rule that the disposition of a joint bank account, including a Totten trust, is governed by the law of the situs of the account -- Florida law [exclusive of comity law] for the subject Florida accounts -- regardless of the domicile of any party to the account or whether the estate of any party to the account is being probated in a foreign jurisdiction. Indeed, the court concedes this to be true with respect to the AmeriFirst Totten trust as well as, impliedly, the Florida real estate; the same result should obtain with respect to the Peninsula Totten trusts and the Coconut Grove joint accounts as well.

II

Turning now to the applicable Florida law governing the disposition of all the bank accounts involved in this case, it is clear beyond any hope of successful contradiction that the proceeds of these accounts passed to the widow and her three minor children upon the death of her husband. Moreover, there is no monetary claim which has been reduced to judgment by any court to which the proceeds of these accounts could be attached in satisfaction of judgment; **[**34]** to the contrary, no monetary claim has been filed in Aruba or here against the widow or her three minor children. Consequently, the proceeds of all the Florida bank accounts herein should be transferred to the widow and her three minor children.

A

It is well settled in Florida that the beneficiaries of a Totten trust bank account are, by operation of law, entitled to the proceeds of the subject bank account upon the death of the depositor/trustee. [17] Moreover, we have held that this result is not changed by the fact that the estate of the trustee, as here, is being probated in a foreign jurisdiction where the trustee was domiciled at the time of his death, and the foreign jurisdiction has a "forced heirship" law which presumptively makes the proceeds of such an account probatable assets. [18]

[35]** 1

It is therefore clear that under Florida law the proceeds of the Totten trust set up by the deceased husband at the AmeriFirst Savings and Loan Association passed by operation of law to the beneficiaries of the trust, i.e. the widow and her three minor children, upon the death of the trustee husband. In this connection, the parties' antenuptial agreement does not obviate this otherwise

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Restatement (Third) of Foreign Relations (1987), which states that, subject to certain jurisdictional and due process prerequisites, "a *final* judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in the United States."

The court, however, walks away from all this law and requires Florida courts to enforce any interlocutory foreign court order which satisfies certain basic jurisdictional and due process prerequisites. This new rule is bound to create enormous confusion and instability in future cases because now a Florida court must enforce an otherwise valid interlocutory order which is not a final determination of rights and which may be changed in a subsequent valid interlocutory order which will also have to be enforced in Florida. This result is totally contrary to the rationale against generally enforcing such interlocutory orders, as stated in *comment b of Section 107 of the Restatement (Second) of Conflict of Laws* (1971)[which generally precludes the enforcement of foreign interlocutory orders] -- namely, "[a] judgment will not be given greater effect abroad than it enjoys at home. A judgment will not have the force of res judicata in the state of rendition as to issues that remain subject to final determination. The judgment should neither be recognized nor enforced in other states as to such issues." Moreover, we have further stated that "the underlying reasons" behind this general rule is that "it would be an undue burden for American courts to become entangled in the otherwise unfamiliar intricacies of foreign court practice by recognizing or enforcing the temporary court orders of another country, orders which are subject to being vacated, withdrawn or superseded." *Cardenas v. Solis, 570 So. 2d 996, 998 (Fla. 3d DCA 1990)*, *rev. denied*, ***581 So. 2d 163 (Fla. 1991)***. Henceforth, however, Florida courts will have to become involved in the intricacies of frequently unfamiliar foreign court practice and enforce valid interlocutory orders which may be later vacated, withdrawn or superseded by the foreign court, which subsequent interlocutory orders will also have to be enforced -- thereby creating, in my view, enormous instability,confusion and unfairness. Consequently, I would adhere to the contrary rule established in *Ogden*, the Restatement (Second) of Conflict of Laws, the Restatement (Third) of Foreign Relations, and as extensively analyzed in *Cardenas*, which recognizes, as a general rule, only final judgments and decrees of a foreign jurisdiction, subject to limited exceptions.

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[17] *Seymour v. Seymour, 85 So. 2d 726, 727 (Fla. 1956)*; *Sanchez v. Sanchez De Davila, 547 So. 2d 943, 945* (Fla. 3d DCA), *rev. denied*, ***554 So. 2d 1168 (Fla. 1989)***; ***In re Solnik's Estate, 401 So. 2d 896, 897 (Fla. 4th DCA 1981)***.

[18] *Sanchez v. Sanchez De Davila, 547 So. 2d 943* (Fla. 3d DCA), *rev.denied*, ***554 So. 2d 1168 (Fla. 1989)***.

inevitable result, as there is utterly no provision in the agreement precluding the husband from setting up a trust for his wife or children. To the contrary, Article III of the agreement expressly obligates the husband to provide for the education of his children, which duty the husband carried out by setting up the Totten trust; nor does the agreement prohibit either party, as here, from making a gift causa mortis to one another. The conclusion is therefore inescapable that under Florida law the widow and her three minor children became the owners of this account upon the death of the husband; indeed the court expressly so holds, as any **[*238]** decision to the contrary would be inconsistent with the result reached by this court in *Sanchez v. Sanchez De Davila, 547 So. 2d 943* (Fla.3d DCA), *rev.denied* **[**36]** , *554 So. 2d 1168 (Fla. 1989)*, based on virtually identical facts.

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The result is slightly different, however, with respect to the two Totten trusts set up by the husband at the Peninsula Savings and Loan Association for the benefit of the three minor children. Unlike the AmeriFirst Totten trust, the Peninsula Totten trusts name the husband or the widow as joint trustees; consequently, upon the death of the husband, the proceeds of these accounts did not pass by operation of law to the beneficiaries of the trusts, to wit: the three minor children, because there is still one living trustee, the widow, on these accounts. The widow, however, upon becoming the sole trustee of these Totten trusts upon the husband's death, had the undoubted power under Florida law to revoke such trusts at any time during her lifetime. *Seymour v. Seymour, 85 So. 2d 726 (Fla. 1956)*. Consequently, when the widow closed these accounts subsequent to the husband's death, she was entirely authorized to do so under Florida law, and, accordingly, the proceeds of this account belong to her. [19]

[37]** B

It is equally well settled under Florida law that in a joint commercial bank account with right of survivorship, the person or persons creating such account "shall be presumed to have intended that upon the death of any such person all rights, title, interest, and claim in, to, and in respect of such deposits and account and additions thereto . . . less all proper setoffs and charges in favor of the bank, shall vest in the surviving account holder or holders," § 658.56(1), Fla.Stat.(1983), which presumption "may be overcome only by proof of fraud or undue influence or clear and convincing proof of contrary intent." § 658.56(2), Fla.Stat.(1983).

> "In the absence of such proof,[however,] all rights, title, interest, and claims in, to, and in respect of such deposits and account and the additions thereto . . ., less all proper setoffs and charges in favor of the bank against any one or more of any such persons, shall, upon the death of such person, vest in the surviving account holder or holders . . . *notwithstanding that the provisions hereof may constitute or cause a vesting or disposition of property or rights or interests therein, testamentary in nature*, which, **[**38]** except for the provisions of this section, would or might otherwise be void or voidable."

§ 658.56(2), Fla.Stat.(1983).

In the instant case, it is undisputed that the husband set up three commercial bank accounts at the Coconut Grove Bank in the name of himself and the widow, with joint right of survivorship. Upon the husband's death, the proceeds of these accounts passed by operation of law to the widow as, in effect, a valid testamentary disposition [or perhaps more accurately a valid gift causa mortis] under Section 658.56, Florida Statutes (1983), unless the statutory presumption that the husband/decedent intended such disposition is overcome by "proof of fraud or undue influence or clear and convincing proof of a contrary intent." There is utterly no evidence in this record that the husband was fraudulently induced or was subjected to undue influence or otherwise did not intend to set up the joint accounts and set up the subject testamentary disposition. Moreover, as previously noted, there is nothing in the antenuptial agreement entered into by the parties to prevent such a testamentary disposition by one party to another, as here, because the agreement does not **[**39]** even deal with the subject. It is therefore clear that the statutory presumption of the deceased husband's intent was not overcome in this case, and that, under Florida law, the proceeds of these joint accounts, with right of survivorship passed by operation of law as a virtual testamentary disposition to the widow.

III

In sum, then, I concur in the court's reversal of the trial

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[19] As previously noted, the antenuptial agreement did not prohibit the husband from setting up a trust fund, as here, for his children; nor did the agreement prevent the widow from serving as a co-trustee of the trust.

court order under review **[*239]** relating to the proceeds of the AmeriFirst Totten trust; I agree that the proceeds of this account should be transferred to the widow and her three minor children as the beneficiaries of this Totten trust account in accord with applicable Florida law. I also concur with (a) the court's reversal of the subject trial court order for failing to address the real estate held by the husband and the widow in Miami, Florida, at the time of the husband's death, as the disposition of this property should also be governed by Florida law; and (b) the court's affirmance of the trial court order charging the subject bank accounts with the costs of marshaling the proceeds of same.

I dissent, however, from the court's affirmance of the trial court order requiring that the proceeds of the **[**40]** Peninsula Totten trusts and the Coconut Grove joint accounts be turned over to the Dutch court in Aruba to dispose of as such court sees fit in accord under Dutch law. Like the AmeriFirst Totten trust, I would reverse this aspect of the subject order as well and remand with directions that the proceeds of these accounts be transferred to the widow in accord with Florida law.

BASKIN and JORGENSON, JJ., concur.

JORGENSON, Judge, dissenting.

I agree with Judge Hubbart that Florida law controls the disposition of the Coconut Grove joint accounts and the Peninsula Totten Trusts. I write separately, however, to express my view that this case presents an exception to the rule of comity, and that the Florida probate court had no ancillary jurisdiction over these bank accounts.

"Comity is the practice by which one court follows the decisions of another court on a like question, though not bound by the law of precedence to do so. . . . The rules of comity 'may not be departed from unless in certain cases for the purpose of the necessary protection of [Florida] citizens or of *enforcing some paramount rule of public policy*.'" *Berger v. Hollander, 391 So. 2d 716, 719 (Fla. 2d DCA **[**41]** 1980)* (emphasis added) (quoting *Herron v. Passailaigue, 92 Fla. 818, 110 So. 539 (1926)*). Florida courts have long recognized the confusion engendered by joint bank accounts, and the survivorship issues that arise upon the death of the depositor. *See*, *e.g.*, *In re: Estate of Combee, 601 So. 2d 1165 (Fla. 1992)*; *In re: Estate of Gainer, 466 So. 2d 1055 (Fla. 1985)*. Statutes regulating these accounts used to be described as "designed primarily to regulate banks, and . . . not generally conclusive of the ownership of deposited money." *Seymour v. Seymour, 85 So. 2d 726, 727 (Fla. 1956)*. However, "statutes of this kind have been expanded beyond their original bank protection purpose so that they now contain provisions touching upon ownership in joint accounts. . . . *Those statutes were said to be intended to eliminate uncertainties surrounding survivorship rights*." *Drozinski v. Straub, 383 So. 2d 301, 305 (Fla. 2d DCA 1980)* (emphasis added). Individuals who open joint accounts or Totten Trusts in Florida should enjoy the certainty that the disposition of their funds in those accounts will be governed by the laws of Florida, and not by the vagaries of a distant **[**42]** tribunal. Even under Florida's comity doctrine foreign decrees must bow to this state's legislative and judicial pronouncements of public policy relating to the establishment of survivorship rights. In my view, the public policy implicated in this case overrides the judicial discretion to grant comity. Under Florida law, therefore, the funds in these accounts pass directly to the widow and do not become part of the decedent's estate.

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