IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OCEANIC EXPLORATION COMPANY and PETROTIMOR COMPANHIA DE PETROLEOS S.A.R.L., Plaintiffs, v. CONOCOPHILLIPS, INC., *et al.*, Defendants.	No. 1:04-cv-00332-EGS

STATEMENT OF LAW AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANT TIMOR SEA DESIGNATED AUTHORITY TO DISMISS SECOND AMENDED COMPLAINT UNDER FED. R. CIV. P. 12(b)(1), 12(h)(3), 12(b)(2) AND 12(b)(6), AND ON ACT OF STATE, FOREIGN STATE COMPULSION AND COMITY GROUNDS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

United States Cases

Constitutions

Statutes and Rules

Treaties

Miscellaneous

Defendant the Timor Sea Designated Authority for the Joint Petroleum Development Area, an entity that is presumptively immune from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, submits this memorandum of law and authorities in support of its motion to dismiss the Complaint in this action under Fed. R. Civ. P. 12(b)(1), 12(h)(3), 12(b)(2), 12(b)(6), and on act of state, foreign state compulsion and comity grounds.

I. INTRODUCTION

Plaintiffs have expunged from their Second Amended Complaint ("SAC") the claims they previously presented, since these were inherently defective under the political question and act of state doctrines. Plaintiffs' new claims are, however, as unavailing as their previous claims. They summarize their claims as follows:

> Plaintiffs Oceanic Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L. (collectively "Oceanic") bring this action to recover damages for the loss of the opportunity in the post-independence period for East Timor to compete or bid for rights to explore for and produce oil and natural gas from the seabed between East Timor and Australia. If the ConocoPhillips defendants had not bribed East Timor's Prime Minister, Mari Alkatiri, and others, then Oceanic would have had the opportunity to bid terms more favorable to East Timor and would have been awarded the right to explore for and extract oil and natural gas from the Timor Gap.

SAC ¶ 1.

All of plaintiffs' claims presuppose that they had a legally cognizable right to "compete or bid" for the contracts that were offered to ConocoPhillips and others. The Timor Sea Treaty, May 20, 2002, Austl.-Timor-Leste, 2003 Austl. T.S. No. 13, negates, however, that presupposition.

The Court is already familiar with the history behind the political compromise between two sovereigns – embodied in the Timor Sea Treaty – that enabled them to move forward with development of the Joint Petroleum Development Area (JPDA) in the Timor Sea while preserving their differences for ultimate resolution at a later time. Under the Treaty, Timor-Leste

was given title to 90% of the petroleum in the JPDA, and Australia was given 10%; and ConocoPhillips, Woodside Petroleum and other companies were effectively "grandfathered" in with respect to the areas where they had already made investments and were active under the regime that Australia and Indonesia had previously put in place.[1] Ignoring the political realities, plaintiffs' new complaint is replete with incendiary allegations of bribery of officials -- including allegations against a head of state -- claiming that the "real motivations" for Timor-Leste's decision to enter into the Timor Sea Treaty are corrupt and illegitimate. Displaying a false sympathy for the people of Timor-Leste, plaintiffs are trying to take from them (and from Australia, the co-owner of the defendant, the Designated Authority) the revenues that are rightly theirs.

This case cannot go forward. This is not a case that "merely" requires intrusive U.S. judicial probing into the motivations behind the acts of state of other sovereigns (which would be highly inappropriate in and of itself). The adjudication of this case would also require, as a prerequisite to the plaintiffs obtaining the relief they seek, that this Court declare Annex F of the Timor Sea Treaty, an official act of state of two foreign sovereigns performed within their own spheres of jurisdiction, as well as other acts of state, to be invalid.

It is true that the new complaint recognizes (at long last) that "[t]he East Timor Constitution . . . vitiated all prior exploration, production or property interests in the Timor Gap." SAC ¶ 88. The new complaint is, however, completely silent about Annex F of the Timor Sea Treaty, which provides:

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[1] *See* Timor Sea Treaty Article 4, Annex F (attached as Exhibit 2 to Declaration of Einar Risa). Woodside Petroleum is Australia's largest publicly traded oil and gas exploration and production company. *See* http://www.woodside.com.au.

> Contracts shall be offered to those corporations holding, immediately before entry into force of the Treaty, contracts numbered 91-12, 91-13, 95-19, and 96-20 in the same terms as those contracts, modified to take into account the administrative structure under this Treaty, or as otherwise agreed by Australia and East Timor.

The Treaty's Annex F and other acts of state block this lawsuit. The applicability of the act of state doctrine is clear: The new complaint demands damages based upon plaintiffs' alleged "loss of the opportunity in the post-independence period for East Timor to compete or bid for rights to explore for and produce oil and natural gas from the seabed between East Timor and Australia." SAC ¶ 1. But in order to be granted relief, plaintiffs must have had a legally cognizable right to "compete or bid for rights" in the areas about which they are complaining. Annex F is an official act of state providing that there will be no bidding, and no opportunity for competition, in those same areas.[2] The act of state doctrine makes Annex F the "rule of decision for the courts of this country." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (*quoting Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)) (emphasis added). Plaintiffs had no cognizable right to "compete or bid for rights" in those areas unless Annex F is deemed invalid.[3] But, as this Court is well aware, it cannot declare Annex F invalid. That would be directly contrary to the Supreme Court's holding in *Kirkpatrick*:

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[2] Four of the six production sharing contracts in which ConocoPhillips has an interest (*see* SAC ¶ 109) are explicitly covered by Annex F. These include the production sharing contracts for Bayu Undan, Elang, Kakatua and Kakatua North, the fields from which plaintiffs allege oil has been imported into the United States. *See* SAC ¶¶ 128-130. With respect to the other two contracts, on the first day of the Designated Authority's existence, 2 April 2003, the Australia – Timor-Leste Joint Commission directed the Designated Authority to offer contracts to the same corporations that had held contracts for those areas immediately before entry into force of the Treaty, thereby effectively "grandfathering" those operations along the same lines as the operations covered by Annex F. *See Section* II.A below.

[3] Actually, even then the plaintiffs still would not have established a right to a bidding process. They would still need to point some applicable law that required bidding, and they cannot do that.

> The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.

493 U.S. at 409 (emphasis added).

Plaintiffs are effectively claiming that this Court has the power to declare that Australia and Timor-Leste cannot have had the law that is Annex F – that it must be deemed invalid because it was procured by alleged bribery -- and these states were required to have a different law, one whereby Australia and Timor-Leste could not "grandfather" in the pre-existing operations in the JPDA, and one whereby the plaintiffs would be accorded a legally cognizable right to "compete or bid" for these contracts. But in fact the law to be applied in the U.S. courts – the rule of decision -- is Annex F. *Kirkpatrick* clearly confirms this. Departure from *Kirkpatrick* would, as this Court has already observed, put the Court "squarely in the middle of efforts by sovereigns to determine how natural resources should be sold." Transcript of Feb. 8, 2005 Hearing ("Transcript") at 13.

The new complaint again alleges bribery of the head of state of Timor-Leste.[4] These allegations reinforce the need for application of the act of state or cognate doctrines in this case. The gross impropriety of adjudicating the kind of case that the plaintiffs are trying to force on this Court was recognized by Chief Justice John Marshall more than two hundred years ago, in a case where it was alleged that the legislators of one of the States of the United States, Georgia,

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[4] It also alleges bribery of unnamed "other officials." *See* SAC ¶¶ 1, 89. In the First Amended Complaint, plaintiffs alleged that "Australia was aware of and participated in the suborning of Alkatiri and his cronies. For example, in November 2002, members of the Fretlin party, which constituted a majority of the 88-member assembly in East Timor, individually went to the Australian embassy to receive US$50,000 payments from ConocoPhillips. The payments were actually made by Stephen Candotti, a Senior Administration Officer in the Australian Consulate, or an individual purporting to be Stephen Candotti." First Amended Complaint ¶ 195.

had passed legislation conferring title to certain land as the result of bribes. The Chief Justice wrote, for the Court:

> That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice.
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> This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130-131 (1810).[5]

If the Supreme Court of the United States found that it could not question the legislative act of one of its own States, how could a U.S. court now purport to adjudicate the diplomatic and legislative acts of two foreign sovereigns adopting and ratifying a treaty between them?

To make matters even worse, this is not a private lawsuit, as *Kirkpatrick* was. Plaintiffs have named a state actor, the Designated Authority, as a defendant. Moreover, the new complaint effectively attempts to put the head of state of the world's newest independent state on trial for alleged corruption here in the United States, even though heads of state are cloaked in

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[5] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, (1964) (not proper to explore the validity under Cuban law of acts of expropriation by the Castro government); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1301 (D. Del. 1970) ("Once governmental action is shown, further examination is neither necessary nor proper.").

absolute immunity.[6] These are additional, and special, reasons why the act of state doctrine must be applied in this case.

Given what plaintiffs have filed previously, it can be expected that they will argue for one or more of various non-existent "exceptions" to application of the act of state doctrine. These are addressed below, as are the numerous other defects in the Second Amended Complaint. These other defects are also dispositive of plaintiffs' claims; they include the threshold defects of plaintiffs' lack of standing and the lack of subject-matter jurisdiction under the FSIA, as well as the Designated Authority's complete defense of foreign state compulsion, and the failure of plaintiffs to state claims upon which relief can be granted.

II. ARGUMENT

A. Plaintiffs Lack Standing for Their Claims.

Plaintiffs' fundamental claim, underlying all their other claims, is that they had a legally cognizable right "to compete or bid for rights to explore for and produce oil and natural gas from the seabed between East Timor and Australia," and that the Designated Authority was required to have a "formal acreage release or public bidding process" for the production sharing contracts that were awarded to ConocoPhillips. SAC ¶¶ 1, 125. In fact, plaintiffs had no such right, and have not even attempted to allege that any law gave them such a right.

The non-existence of such a right is fatal to plaintiffs' standing to bring this lawsuit. In order to have standing, a "plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized . . . , and (b) 'actual or imminent, not "conjectural" or "hypothetical,"' . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to

[6] From the inception of this lawsuit, the Prime Minister has categorically denied these charges.

the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (emphasis added) (citations omitted).

Nothing in the Timor Sea Treaty gave the plaintiffs a right to compete or bid for the contracts in question. Furthermore, none of the directives that the Australia – Timor-Leste Joint Commission has given to the Designated Authority gave the plaintiffs such a right. To the contrary, Annex F of the Treaty and the decisions of the Joint Commission specifically precluded the Designated Authority from putting the contracts at issue out for bidding.[7]

As has been explained previously, Article 6 of the Timor Sea Treaty creates three layers of authority: a Designated Authority, a Joint Commission and a Ministerial Council. Under Article 6(b)(iii) of the Treaty, the Designated Authority "has juridical personality and such legal capacities under the law of both Australia and Timor-Leste as are necessary for the exercise of its powers and the performance of its functions. In particular, the Designated Authority shall have the capacity to contract, to acquire and dispose of movable and immovable property and to institute and be party to legal proceedings."

In Annex D of the Timor Sea Treaty, Australia and Timor-Leste gave the Australia – Timor-Leste Joint Commission for the Joint Petroleum Development Area the power to give directions to the Designated Authority on the discharge of the latter's powers and functions; and

[7] These contracts replaced contracts that had been in existence previously, and thereby assured continuity of operations. Many areas of the Joint Petroleum Development Area remain unexplored and unexploited, of course. In fact, the Designated Authority intends to release four areas that are not the subject of existing production sharing contracts in April of this year, subject to the completion of a Petroleum Mining Code as required in Article 7(a) of the Treaty. *See* Declaration of Einar Risa ¶ 10.

Annex C of that Treaty provides that the Designated Authority will carry out the directions given to it by the Joint Commission. *See also* Declaration of Einar Risa ("Declaration") ¶ 4.[8]

The Designated Authority came into being on the date of entry into force of the Timor Sea Treaty, 2 April 2003. In a directive issued that same day, entitled "Notification Regarding Decisions of the Joint Commission for the Joint Petroleum Development Area" ("Commission Decisions"), the Joint Commission directed the Executive Director of the Designated Authority, Einar Risa, to sign on behalf of the Designated Authority the production sharing contracts ("PSCs") for the areas covered by Annex F, *i.e.*, 03-12, 03-13, 03-19 and 03-20. The Commission Decisions are attached as Exhibit 3 to the Declaration. *See also* Declaration ¶¶ 5-6.

Furthermore, with respect to the PSCs for three other areas, 03-01, 03-16 and 03-21 (the "Non-Annex F PSCs"), the Joint Commission directed in paragraph 6 of the 2 April 2003 Commission Decisions that the Designated Authority also enter into PSCs with the corporations that had previously held the contracts for those areas, and that had already made significant expenditures there. *See also* Declaration ¶ 7. At the same time the Joint Commission also approved an Interim Petroleum Mining Code (Exhibit 4 to the Declaration), which specified the termination dates that these seven contracts would have. *See* Declaration ¶¶ 8-9. Consequently,

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[8] Einar Risa is the Executive Director of the Designated Authority. Plaintiffs allege, however, that Prime Minister Mari Alkatiri is "titular head of the Designated Authority." SAC ¶¶ 41, 92. This is yet another instance of plaintiffs' penchant for deliberately disregarding the separate juridical status of state entities (as in the First Amended Complaint, when they attempted to treat the Australia-Indonesia Joint Authority as if it were the same entity as the Designated Authority). Prime Minister Mari Alkatiri is the member for Timor-Leste of the Ministerial Council, and has no position in the Designated Authority. The other member of the Ministerial Council is the Australian Minister for Industry, Tourism and Resources, Ian McFarlane. Likewise, plaintiffs allege that Jose Teixeira is "one of the two East Timorese joint commissioners of the Designated Authority." SAC ¶¶ 41, 92. In fact, Jose Teixeira is one of the two East Timorese Commissioners of the Joint Commission. He has no position in the Designated Authority.

the Australia – Timor-Leste Joint Commission directed that the seven contracts about which plaintiffs are complaining (*see* SAC ¶ 126) not be made subject to a bidding process. Thus, no law operative in the JPDA gave plaintiffs – or anyone else – a right to bid for those contracts.

It was clearly within the sovereign prerogatives of Australia and Timor-Leste for them to decide that there would be no bidding for the contracts in question. There is, obviously, no peremptory rule of international law that imposes on a sovereign state a duty to put contracts for exploitation of its own natural resources out for bidding. Even more obviously, U.S. laws on when bidding is required or not required have no application in the Timor Sea.

The plaintiffs are, furthermore, no different from the dozens of other companies that might have wished to have competed in a bidding process for the contracts in question, if there had been a competitive bidding process. Plaintiffs have no more standing to complain of the lack of a bidding process than do these dozens of other companies. Formerly, the plaintiffs pretended that the colonial concession that Petrotimor had been granted more than a quarter-century before by Portugal somehow gave them standing that others did not have. Now, however, plaintiffs finally recognize that the Constitution of Timor-Leste "vitiated all prior interests . . . in East Timorese natural resources." SAC ¶ 88 (emphasis added). That includes, of course, any interest that Petrotimor or Oceanic might have had "in East Timorese natural resources." Hence Petrotimor and Oceanic have no more standing than any of dozens of companies that might have wished to bid, if there had been a competitive bidding process – which is to say, they have no standing at all. Nothing required the Designated Authority to put these areas out for bids, and nothing confers a special standing on Petrotimor or Oceanic

whereby they had a right to demand that there be a bidding process.[9] The Designated Authority was in fact directed not to put these contracts out for bids. Thus, because plaintiffs had no "legally protected interest" that could have been invaded, and therefore no legally recognized injury, they lack standing to bring this suit. *See Lujan*, 504 U.S. at 560; *Energy Transp. Group v. Maritime Admin.*, 956 F.2d 1206, 1212 (D.C. Cir. 1992) (finding that a party lacks standing to challenge the failure to establish a bidding process unless the party has a right to that process).

A second reason why plaintiffs lack standing is that "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'" *Id.* (*quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976) (emphasis added). The injury that plaintiffs have allegedly suffered is directly traceable to the Timor Sea Treaty, specifically Annexes F, C and D; and to the directives of the Australia – Timor-Leste Joint Commission for the JPDA. Neither Australia, Timor-Leste nor the Joint Commission have been made defendants in this case, yet the injury of which plaintiffs complain is the result of their directives.[10] This is an additional, and independent, reason why plaintiffs lack standing to bring this case.

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[9] Plaintiffs also provide an excuse – different from the "futility" excuse they offered at oral argument – as to why they did not bid in 1991, when the Joint Authority put the areas out for bids. *Compare* Transcript at 80-84, 94-98 *with* SAC ¶ 80. This has, however, no bearing on their claim against the Designated Authority. Whether they bid back in 1991 or not, and whether they had a good reason not to bid or not (in fact, they did not bid), have no bearing on whether the Designated Authority had an obligation to put these contracts out for bidding. It had no such obligation, and was in fact directed not to do that.

[10] *See also* Section II.D. below. Plaintiff's claim of success in a bidding, *see* SAC ¶ 1, is also highly speculative.

B. Subject-Matter Jurisdiction Over the Designated Authority Does Not Exist Because None of the FSIA's Exceptions to Immunity Apply.

Once again, plaintiffs have failed to identify under which exception to immunity of the FSIA they have claimed jurisdiction, forcing the Designated Authority to play a guessing game. The only exception that plaintiffs claimed previously was the "direct effect in the United States" prong of the "commercial activity" exception to immunity, 28 U.S.C. § 1605(a)(2):

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

That is the only FSIA exception to immunity that can even arguably apply. Hence we analyze the plaintiffs' allegation that jurisdiction exists in terms of the criteria that must be met for jurisdiction to exist under that provision. Jurisdiction does not exist under that provision because the act (alleged omission, actually) upon which the claim is based was not "in connection with commercial activity" of the Designated Authority. Moreover, that act (or omission) did not have a "direct effect in the United States."

1. No Act Upon Which the Claim Is Based Was in Connection with Commercial Activity.

One must first determine what act the claim against the Designated Authority is based upon,[11] and then determine whether that act (i) is in connection with commercial activity of the defendant, and (ii) also has a "direct effect in the United States." The act sued upon is the Designated Authority's alleged failure to give the plaintiffs the "opportunity to compete or bid." Plaintiffs have not specified in their complaint what this act is in connection with. However, they allege that the Designated Authority "has been and is currently engaged in the commercial

[11] The phrase "based upon" in § 1605 of the FSIA "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993).

development of oil and natural gas in the Joint Petroleum Development Area between East Timor and Australia[, and that t]he Designated Authority entered into commercial production sharing contracts with, among others, certain ConocoPhillips defendants." SAC ¶ 40. Presumably, then, the Designated Authority's alleged failure was in connection with "commercial development of oil and natural gas" or "commercial production sharing contracts."[12]

These natural resources contracts are not considered commercial, however. The protecting and regulating of natural resources are sovereign, governmental activities. *See World Wide Minerals Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1187 (2003) (referring to "the principle of supreme state sovereignty over natural resources") (*quoting International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981)); *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989), *cert. denied*, 493 U.S. 937 (1989) (holding that "a contract whereby a foreign state grants a private party a license to exploit the state's natural resources is not a commercial activity [under the FSIA], since natural resources, to the extent they are 'affected with the public interest,' are goods in which only the sovereign may deal"); *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984) (holding that "licensing the exploitation of natural resources is a sovereign activity" under the FSIA).

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[12] Plaintiffs label the Designated Authority a "commercial unincorporated entity" and a "commercial actor." SAC ¶¶ 40, 109. Not only is this label inaccurate, *see* Declaration ¶¶ 14-16, but more fundamentally, § 1605 of the FSIA does not work in terms of whether an entity should be characterized as either "commercial" or "non-commercial." The FSIA's commercial activity

(continued)

Even in *Globe Nuclear Services and Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004), a case on which plaintiffs "rely heavily," *see* Transcript at 26 (submitted by plaintiffs as supplemental authority on August 9, 2004), the Fourth Circuit stated that it read the "natural resources" cases "to stand not for the overly broad proposition that all contracts involving 'natural resources' or their derivative products constitute sovereign activity, but for the narrower and much sounder principle that the grant of a license to operate within sovereign territory and to extract natural resources from within that territory is sovereign activity." 376 F.3d at 291. In the Second Amended Complaint, plaintiffs are apparently attempting to "plead around" *Globe Nuclear*, by claiming that what is involved here is not a "mere license" as described in *Globe Nuclear*, but a "commercial" production sharing contract. Thus, they allege: "The production sharing contracts, distinguished from natural resources licences which simply provide a fee to the government, involve the actual involvement of the awarding entities in the exploitation and marketing of resources." SAC ¶ 75. However, as the accompanying Declaration indicates, the Designated Authority has not been "involve[d] . . . in the exploitation and marketing of resources." Declaration ¶ 14. The Designated Authority's activities in relation to the contracts at issue have not been any more "commercial" than a "mere licensor"'s activities. Thus, the act sued upon was not in connection with any commercial activity carried on by the Designated Authority.

Moreover, the act sued upon, properly analyzed, is not even "in connection with" a natural resources contract, or "in connection with" any other contract. This can be seen by comparison with a clear example of an act that was "in connection with commercial activity of

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(continued)
exception confers jurisdiction only when the claim is based upon or in connection with particular commercial activity.

the foreign state" and that had a "direct effect in the United States." Such an example is given in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992):

> Respondents had designated their accounts in New York as the place of payment [for Argentina's bonds], and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming.

The act that had a direct effect in the United States was the breach (failure to pay) of a contract (the bond). This act of breach was, obviously, in connection with a commercial activity -- a loan in the form of a bond.

The situation with respect to the act sued upon here is different. The plaintiffs are not suing for the breach of a contract, commercial or otherwise. Plaintiffs are complaining because there was no bidding process, since the Designated Authority acted in accordance with the Timor Sea Treaty and the directives of the Australia – Timor-Leste Joint Commission for the JPDA and did not put the contracts out for bids. "To satisfy the 'in connection with' requirement, the acts complained of must have some 'substantive connection' or a 'causal link' to the commercial activity." *Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) (*quoting Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1291 (3d Cir. 1993) (claims "not substantively connected" to the commercial transaction that has been identified will not give rise to jurisdiction under this exception to immunity)). There is no such substantive connection or causal link here to commercial activity, such as one finds in *Weltover*, where the act – the breach – obviously is substantively connected to the contract that has been breached. No act connected to a commercial activity carried on by the Designated Authority has caused the harm that plaintiffs allege they have suffered. Consequently, jurisdiction is lacking under 28 U.S.C. § 1605(a)(2).

2. No Act Upon Which the Claim Is Based Had a Direct Effect in the United States.

An effect is "direct" for the purposes of this exception to immunity only if it "follows as an immediate consequence of the defendant's . . . activity." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (emphasis added). It must have "no intervening element, but rather, flow[ ] in a straight line without deviation or interruption.'" *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) (emphasis added).

In the Second Amended Complaint there are only two activities that could even arguably be considered "direct effects in the United States." One of these was the marketing of petroleum products to the United States. However, as the Declaration makes clear, the Designated Authority played no part in the decisions about where to sell the oil. *See* Declaration ¶¶ 11-13. Those decisions were ConocoPhillips' to make, and therefore the importations were not effects, direct or otherwise, caused by an act of the Designated Authority. Moreover, the decision of ConocoPhillips to sell to one location rather than to another obviously is in any event an "intervening element," involving another party's exercise of discretion, that is incompatible with a finding of "direct effect."[13]

The second activity is the deposit of money into accounts in the United States. This also cannot be the "direct effect" of the act sued upon. The act sued upon is the failure to give plaintiffs the opportunity to compete or bid. Arguably, the direct effect of no-bidding was that the contracts were awarded to ConocoPhillips (although it is not clear that even that should be characterized as "a direct effect" of the no-bidding). After ConocoPhillips received these contracts, it had to engage in activities to obtain the oil, and then had to make a decision as to

[13] Plaintiffs allege that the oil imported into the United States came from the Elang-Kakatua fields. *See* SAC ¶¶ 128-130. Those fields are covered by the Annex F contract, 03-12.

where to sell the oil. After selling it, it paid the Designated Authority. Thus, the payment came at the end of a chain of causes, and was not a direct effect of the alleged failure to give plaintiffs the opportunity to compete or bid. It is instructive to compare this situation to *Weltover*, where Argentina had a contractual obligation to make payment to New York, Argentina breached, and the obviously direct result was that "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *See Weltover*, 504 U.S. at 619. The lack of a direct effect in the United States is an additional, and independent, reason why subject-matter jurisdiction is lacking under 28 U.S.C. § 1605(a)(2).

Since no FSIA exception to immunity applies to any of plaintiffs' claims, the Court lacks subject-matter jurisdiction. *See* 28 U.S.C. § 1330(a). An additional consequence is that the Court lacks personal jurisdiction as well, because personal jurisdiction exists under the FSIA only if an exception to immunity applies. *See* 28 U.S.C. § 1330(b). Thus, the Second Amended Complaint should be dismissed under both Rules 12(b)(1) and (2).

3. The Designated Authority Is in Any Event Immune from the RICO Claims.

Claims I and II are defective for an additional reason: They allege violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(d), 1964(c), and conspiracy to violate RICO respectively. The Designated Authority is immune from such claims. In *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 821 (6th Cir. 2002), the U.S. Court of Appeals for the Sixth Circuit ruled that a RICO claim will not lie against an agency or instrumentality of a foreign state. A foreign state under the FSIA cannot be criminally indicted, since the FSIA does not provide an exception for criminal jurisdiction, and as a consequence, it is impossible to meet RICO's "predicate acts" requirement vis-à-vis an entity qualifying as a foreign state under the FSIA. The same ruling was made in *Dale v. Colagiovanni*, 337 F. Supp.

2d 825, 842-843 (S.D. Miss. 2004), which confirms that this reasoning also applies to RICO conspiracy claims.[14]

This immunity is of course based on the FSIA. "[T]he FSIA is the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA is very clear that foreign states remain immune except for the specifically enumerated exceptions in 28 U.S.C. §§ 1605-1607:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604.

This is a very clear provision of law. There is no exception in it for criminal jurisdiction. Moreover, 28 U.S.C. § 1330(a) provides for jurisdiction over a foreign state only for "civil actions."

In fact, absolute immunity had been the rule in the United States since Chief Justice Marshal's opinion in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812). In 1952, the State Department adopted the so-called "restrictive" theory of sovereign immunity. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983). "Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487. In 1976, Congress codified the restrictive theory of foreign sovereign immunity by enacting the

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[14] The United States is likewise not subject to RICO liability because of its sovereign immunity. *Saltany v. Reagan*, 702 F. Supp. 319, 321 (D.D.C. 1988), *aff'd in part and rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989) (*per curiam*); *Norris v. Department of Defense*, 1997 U.S. App. LEXIS 16360 (D.C. Cir. May 5, 1997); *Berger v. Pierce*, 933 F.2d 393, 397 (6th. Cir. 1991); *McNeily v. United States*, 6 F.3d 343, 350 (5th Cir. 1993) (entity is not subject to civil RICO action because it is not "'chargeable,' 'indictable,' or 'punishable' for violations of specific state and federal criminal provisions").

FSIA. The enumerated exceptions found in the FSIA do not include an exception for criminal jurisdiction. Hence foreign states remain immune from criminal jurisdiction, are therefore not indictable, and are therefore not subject to RICO claims. In short, *Keller* and *Colagiovanni* are correct, and Claims I and II must be dismissed as to the Designated Authority for this reason also.

C. The Act of State Doctrine Bars Adjudication.

For the reasons already set forth in the Introduction, it is clear that the act of state doctrine applies, because this Court would have to rule that Annex F of the Timor Sea Treaty and the directives of the Australia – Timor-Leste Joint Commission for the JPDA were wrongful and invalid acts of state, before plaintiffs could be accorded any relief. It is apparent from the papers previously filed in this case, however, that plaintiffs will claim that the situation presented here is the same as in *Kirkpatrick*, and that, as a result, the act of state doctrine does not apply; and will claim in the alternative that even if the case would require this Court to rule on the validity of Annex F of the Timor Sea Treaty and other acts of state undertaken by Australia and Timor-Leste, it is permissible to do so under U.S. law, because of an hypothesized "corruption exception" or a "commercial exception" or a "damages-only" exception to the act of state doctrine. There are no such exceptions.

1. The Case Is Different from *Kirkpatrick*. The Act of State Doctrine Does Apply.

The primary difference of this case from *Kirkpatrick* is, of course, that (1) the Court could not find that plaintiffs' alleged "right to compete or bid" existed unless it were to find that Annex F and the Commission Decisions, providing for no competition or bidding, should be deemed wrongful and invalid. That is the critical difference that makes the act of state doctrine

applicable in this case. But there are other important differences as well, all of which point in the direction of the applicability of the act of state doctrine.

Kirkpatrick was, of course, a case in which there had been a bidding process, and the allegation was that one U.S. bidder had engaged in bribery to the detriment of another U.S. bidder. The situation here is factually different. (2) The plaintiffs were not "disappointed bidders." They are complaining – on the basis of some law they never identify (because they cannot) – that the Designated Authority was required to have a bidding process for the awarding of their natural resources contracts.

Another highly important difference from *Kirkpatrick* is that (3) a sovereign entity, the Designated Authority, which is an agency of the sovereign states of Australia and Timor-Leste, has actually been made a defendant in this case. *Kirkpatrick* was a private lawsuit between two competing bidders. This lawsuit is not a private lawsuit. Plaintiffs have named the Designated Authority as a defendant, knowing full well that the funds received by the Designated Authority are distributed to the sovereigns Australia and Timor-Leste. *See* SAC ¶ 139. This lawsuit is an attack on the sovereigns Australia and Timor-Leste.[15] Most importantly, the inclusion in this lawsuit of the Designated Authority, which has been carrying out the directives of its sovereign owners, absolutely assures that this Court would be required to adjudicate the validity of acts of state of Australia and Timor-Leste – which is precisely why the case must be dismissed pursuant to the act of state doctrine.

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[15] The Designated Authority itself simply carried out the directives of the two sovereigns as set out in Annex F of the Timor Sea Treaty and in the Commission Decisions. Because these directives compelled the Designated Authority not to have a bidding process for the contracts in question, the Designated Authority cannot be held liable, regardless of whether the act of state doctrine applies. *See* Section II.D. below.

Another important difference is that (4) *Kirkpatrick* was based on the award of a procurement contract. This case concerns the granting of rights to exploit natural resources. The development of a nation's depletable resources clearly implicates its distinctly sovereign interests to a far greater extent than does the award of a procurement contract. As the D.C. Circuit has "previously held in the context of the FSIA, the 'right to regulate imports and exports is a sovereign prerogative.'" *World Wide Minerals Ltd. v. the Republic of Kazakhstan*, 296 F.3d 1154 (D.C. Cir. 2002) (*quoting Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988)).[16] *Compare World Wide Minerals* (natural resources; act of state doctrine applied) *with Virtual Defense and Development Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1 (D.D.C. 1999) (procurement contract; act of state doctrine not applied), *reconsideration denied, summary j. granted in part & denied in part*, 133 F. Supp. 2d 9 (D.D.C. 2001), *appeal dismissed*, 2001 U.S. App. LEXIS 7468 (D.C. Cir. 2001). Concerns about intrusions on sovereignty are heightened when a nation's natural resources are involved. *See Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) ("it is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy").

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[16] As previously noted, plaintiffs are apparently attempting to "plead around" cases such as *World Wide Minerals* and *Globe Nuclear*. However, as the Declaration indicates, the Designated Authority has not been "involve[d] . . . in the exploitation and marketing of resources." Declaration ¶¶ 14-16. Even more important for purposes of the point being made here, it is immaterial whether a sovereign chooses to have its natural resources exploited by license or by production sharing contract; the relevant point is that the development of a country's natural resources is intimately connected to its sovereignty. That is manifest in this case from the fact that specific provisions guaranteeing Timor-Leste's sovereign control over natural resources actually appear in the Constitution of Timor-Leste.

Another important difference is that (5) this case depends on proof that a law entered into by sovereigns (*i.e.*, a treaty, which provides the constitutive law for the Joint Petroleum Development Area) and ratified by their legislatures was the product of corruption. This differs a great deal from a claim that an act in execution of a law, or an act authorized by law – such as the award of a procurement contract – was affected by corruption. Looking behind a law to discern whether the legislature had "impure motives" is unthinkable even when a U.S. court is asked to examine the law of a U.S. state. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810). It is even more out of bounds to suggest that a U.S. court could look behind foreign legislation to see whether the foreign legislature had "impure motives," and on that basis declare its legislation to be invalid.

Moreover, (6) the plaintiffs' case depends on proof of alleged corruption of a head of state. Heads of state have been, from the time of *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), up to the present time, entitled to absolute immunity. This is another compelling reason for not adjudicating this case. The very idea of a U.S. court examining the alleged actions of the head of state of another country would, needless to say, "touch . . . sharply on national nerves." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

2. None of the "Exceptions" that Plaintiffs Have Claimed Exist.

Plaintiffs previously claimed that there is a "corruption exception" to the act of state doctrine, but there is not. Each of the three cases that plaintiffs cited previously for a "corruption exception" refers to the possibility of such an exception in *dicta*. *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 909-10 (D. Mich. 1981), cites *Dominicus Amercana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979) for the purported exception, but it was *dictum* in that case also. Moreover, *Dominicus* relied on *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), a case whose majority opinion actually states the opposite view on the

existence of such an exception: "we respectfully disagree with the proposition that 'scandalous payoffs' to foreign potentates or their janizaries provide any basis at all for reconsideration of the doctrine in this case." *Id.* at 79. *United States v. Labs of Virginia, Inc.*, 272 F. Supp. 2d 764, 792 (N.D. Ill. 2003), found that the act of state doctrine did not apply in that case at all, and then mentioned that a "treaty exception" would apply anyway, before mentioning in *dictum*, in a footnote, that a corruption exception "seems applicable." *Id.* at 772 n.5.

If a "corruption exception" were recognized, the doctrine would quickly be swallowed up, by plaintiffs routinely alleging corruption. Moreover, the United States has specific tools for addressing corrupt practices engaged in by persons subject to its jurisdiction, namely the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 *et seq.*

In fact, the idea of a "corruption exception" is simply contrary to the cogent reasoning of Chief Justice John Marshall in 1810, laid out by him in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-131 (quoted above at page 5). That reasoning was applied in a domestic context, but it has even more force in the international sphere, as regards the relations among co-equal sovereigns. The courts of one state have no business declaring whether the legislative acts of another state are invalid or not, based on allegations of corruption. [17]

There also is no "commercial exception." Plaintiffs claimed previously that this Court found and applied a "commercial exception" to the act of state doctrine in *Virtual Defense and*

[17] Curiously, plaintiffs now accept that the Constitution of Timor-Leste is legitimate and supplies the rule of decision for this Court to apply in deciding whether plaintiffs still had any cognizable rights in the Timor Gap, *see* SAC ¶ 88; but, inconsistently with that, they effectively take the position that the Timor Sea Treaty, ratified by the same legislature, cannot be accepted as supplying the rule of decision on the question whether there were competitive bidding obligations, due to alleged corruption.

Development Int'l, Inc. v. Republic of Moldova, 133 F. Supp. 2d 1 (D.D.C. 1999).[18] In making this claim, plaintiffs deliberately conflated and confused the distinct concepts of the commercial activity exception to sovereign immunity, and an alleged "commercial exception" to the act of state doctrine. In fact, in *Virtual Defense* this Court applied the commercial activity exception to immunity of the FSIA,[19] and at the same time specifically noted that the entirely separate act of state doctrine could still apply, quoting with approval the natural resources case, *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981):

> The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. . . . While the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not. . . . When the state *qua* state acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. Because the act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, we find that the act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved.

649 F.2d at 1360 (partially quoted at 133 F. Supp. 2d at 7) (emphasis added).

Rather than apply a "commercial exception" to the act of state doctrine, the Court in *Virtual Defense* decided to take the commerciality of the acts in question into consideration in weighing whether the act of state doctrine should be applied – in that case the Court was "merely asked to adjudicate a contract claim." *Virtual Defense*, 133 F. Supp. 2d at 8. If such weighing were done in a case – like this one -- concerning the states' manner of arranging the exploitation of their natural resources, and not one where the Court was "merely asked to adjudicate a contract claim," the scales would tilt very decisively in favor of finding that the act of state

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[18] *See* Plaintiffs' June 25, 2004 Memorandum of Points and Authorities in Opposition to Defendant Timor Sea Designated Authority's Motion to Dismiss at 9 ("This Court recently relied on the commercial activity exception to deny Moldova's motion to dismiss on act of state grounds").

[19] "The FSIA 'in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable.'" *Republic of Austria v. Altmann*, 541 U.S. 677, ___ (2004) (Breyer, J. concurring) (*quoting* legislative history of the FSIA, H.Rep. No. 1487, 94th Cong., 2d Sess. at 20 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6618).

doctrine should be applied. When the state is acting with respect to its precious natural resources, it is clearly acting in the public interest, and asserting its sovereignty. Thus, even if a "commercial exception" to the act of state doctrine existed, it would not apply here. Plaintiffs are attacking sovereign decisions on how natural resources would be exploited in a difficult period of transition for a newly independent state.[20]

Plaintiffs have also suggested previously that if a plaintiff seeks only damages, then necessarily the Court will always avoid having to challenge the validity of the acts of foreign sovereigns, and the act of state doctrine will not apply. This is basically like saying, "it is permissible to deem an act of state invalid and on that basis award damages, but just don't say that the act of state was invalid." There obviously is no such "exception." In fact, in the very case that established the act of state doctrine in U.S. jurisprudence, *Underhill v. Hernandez*, 168 U.S. 250 (1897), the plaintiff sought only damages.[21] Damages could not be awarded in *Underhill* because the act of state doctrine applied.[22]

D. Foreign State Compulsion Provides the Designated Authority with a Complete Defense to All Claims Asserted by Plaintiffs.

Plaintiffs are claiming that they are entitled to relief against the Designated Authority because they were deprived of "the opportunity in the post-independence period for East Timor

[20] It is entirely understandable that the states involved would choose to "grandfather" in existing operations in order to assure continuity and avoid disruptions. The compromises reached in the Timor Sea Treaty were in any event the result of political decisions that it is not the province of courts anywhere to second-guess.

[21] *See id.* at 251.

[22] Also, if plaintiffs' "damages-only" theory were correct, the Court in *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1187 (2003), would have dismissed on act of state grounds the claims that sought relief other than damages, and would have allowed the claims for damages (such as the conversion and tortious interference claims, *see* 296 F.3d at 1159, to go forward. Instead, the Court dismissed all claims under the act of state doctrine, without regard to the form of relief requested.

to compete or bid for rights to explore for and produce oil and natural gas from the seabed between East Timor and Australia." SAC ¶ 1. But plaintiffs lacked this opportunity to "compete or bid" entirely because of the directives to the Designated Authority in Annex F and the Commission Decisions, not because of any decisions committed to the Designated Authority's discretion. The Designated Authority was, in other words, compelled by the very Treaty that created it, as well as by the Joint Commission from which it is required to take directions pursuant to Annexes C and D of the Treaty, to "deprive" plaintiffs of the right they claim to an opportunity "to compete or bid." Such compulsion is a complete defense to all claims asserted by plaintiffs. *See Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970); *Bulk Oil (ZUG) A.G. v. Sun Co.*, 583 F. Supp. 1134, 1138 (S.D.N.Y. 1983) (defendant not liable for breach of contract because its acts "were compelled by the acts of a foreign sovereign"), *aff'd without opinion*, 742 F.2d 1431 (2d Cir. 1984).

The Restatement Third of the Foreign Relations Law of the United States sets out the applicable rule:

> § 441 Foreign State Compulsion
>
> (1) In general, a state may not require a person
>
> (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or
>
> (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.

Once again, the law to be applied in the Joint Petroleum Development Area was the law as set forth in Annexes C, D and F of the Timor Sea Treaty. Annex F and the Commission Decisions (which the Designated Authority was bound to follow, in accordance with Annexes C and D) prohibited the Designated Authority from putting out the areas in controversy out for bids. Thus, a U.S. court could not rule that the Designated Authority was required to put the

contracts in question out for bidding (and award damages for not doing so), because both § 441(1) criteria are met: The act (or alleged omission) was prohibited by the compelling states and was clearly within the compelling states' jurisdiction,[23] and the Designated Authority must for these purposes be considered a "national" of the two states that created it and that required that there be no bidding for the contracts in question.

Typically, a finding of foreign state compulsion is just the first step in an analysis of whether to apply U.S. law or not. That is because a foreign state compulsion issue typically arises when following a foreign law arguably puts an actor in violation of a U.S. law, often U.S. antitrust law, and the court has to decide whether or not U.S. law should be held to apply, despite the conflict between the two jurisdictions' laws. *See, e.g., Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993); *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997) (recognizing that the New Zealand Dairy Board, "a creation of the New Zealand legislature," *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 1996 U.S. Dist. LEXIS 1957 (1996), 942 F. Supp. 905 (S.D.N.Y. 1996) (earlier proceedings), could invoke foreign sovereign compulsion defense). This is not such a case, however. In this case there is no conflict with U.S. law and hence no such further step to be taken before the defense can be recognized. Obviously, no U.S. law purports to tell another country that it must put its natural resources out for bidding whenever those resources are going to be exploited. Australia and Timor-Leste were perfectly within their sovereign rights, and acting within their proper spheres of jurisdiction, when they directed the Designated Authority not to put the areas in question in the Timor Sea out for bidding. Thus, the short of the analysis is that the defendant – the

[23] Obviously, no state other than Australia and Timor-Leste has jurisdiction to prescribe laws for exploiting the petroleum in this area of the Timor Sea.

Designated Authority -- acted on the basis of foreign state compulsion, and therefore cannot be held liable for not having given plaintiffs an opportunity to bid or compete for the contracts in question.

The "loss of opportunity" of which plaintiffs complain came from the decisions made by the foreign states -- Australia and Timor-Leste, acting through a treaty and through their Joint Commission for the JPDA -- not to put the areas in controversy out for bidding.[24] Plaintiffs chose, however, not to sue the parties responsible for these decisions, *i.e.*, Australia and Timor-Leste. That is probably because if plaintiffs had sued the states of Australia and Timor-Leste, it would have been all the more crystal-clear that the act of state doctrine would certainly apply to prevent adjudication. Plaintiffs sued the Designated Authority instead. But the Designated Authority is not the legal person that was responsible for the relevant sovereign decisions, however: "While the FSIA applies both to instrumentalities and agencies of the foreign sovereign, and to the sovereign itself, there is a presumption that such entities and the sovereign are independent." *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351 (D.C. Cir. 1995) (emphasis added). The separate juridical identities of different agencies and instrumentalities from each other and from the foreign state must be respected. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 628 (1983); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990). Thus,

[24] To be clear, the following statement made by ConocoPhillips counsel at the hearing on February 8, 2005 is incorrect: "The actions to shut us out of bidding to be part of a joint services contract, a joint production contract, shutting us out of that contract was the act of state companies that were purely commercial entities, purely commercial entities." Transcript at 23. The decisions that "shut out" plaintiffs from competing for the contracts in question were not those of a "state company" (apparently the Designated Authority is meant by this, even though it is not a company); the decisions were those of the sovereigns Australia and Timor-Leste, and of their Joint Commission. The Designated Authority simply obeyed the sovereigns' directives. The statement also errs in labeling the Designated Authority a "purely commercial entit[y]." *See* Declaration ¶¶ 14-16.

even if assuming *arguendo* that Australia and Timor-Leste themselves could be liable for their decision not to have a bidding process (they could not be, due to the act of state doctrine), the Designated Authority still could not be liable for having no bidding process, because the sovereigns compelled her not to have such a process. The Designated Authority thus has a complete defense in foreign state compulsion.[25]

E. The Case Should in Any Event Be Dismissed on Grounds of Comity.

Even if plaintiffs' case did not suffer from all the above defects, the Court still should abstain from adjudication of this case, because it would disrupt international comity to adjudicate it. On grounds of the comity of nations, U.S. courts abstain from adjudicating cases "touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the Southern Dist.*, 482 U.S. 522, 543 n.27 (1987).

A conflict between U.S. and foreign law is a prerequisite to considering whether to refrain from the exercise of jurisdiction on grounds of international comity. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 798-799 (1993). Here it is clear that the law of the sovereigns Australia and Timor-Leste was that there would be no bidding for the contracts at issue. **If** U.S. law would impose a different rule of law (which, on account of the act of state doctrine, it should not do), that different rule of law would then be in conflict with the foreign law applicable in this case. In that situation it would be appropriate for the Court to consider refraining from jurisdiction on the grounds of comity. Indeed, even if it would be "reasonable" for a U.S. court to exercise jurisdiction, *see* Restatement (Third) of the Foreign Relations Law of the United States § 403(3) (1987), still it should not do so if the other state's interest is clearly greater. *See id.*

[25] This is of course in addition to the act of state doctrine being applicable to this case.

The area of natural resources regulation is a highly sensitive area of distinctly sovereign activity. In a recent case, *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Ca. 2002), involving mining operations on the island of Bougainville in Papua New Guinea ("PNG"), the court dismissed certain of plaintiffs' claim on the basis of comity. The court noted that "many of plaintiffs' claims allege injury that arises out of exploitation of PNG's natural resources. As noted earlier, this involves a right that is exclusively within the sovereign's control, indicating that regulation of such activity is important to PNG and that it has a high expectation it will be permitted to regulate the activity without outside interference." *Id.* at 1206.

The court in *Sarei* weighed the factors set forth in Restatement (Third) of the Foreign Relations Law of the United States § 403(2) (1987) in determining whether it would be reasonable to exercise jurisdiction in that case. Those factors are:[26]

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

These factors militate in favor of refraining from an adjudication of the Designated Authority. This is a state-owned authority regulating activity clearly within the jurisdiction of the sovereigns Australia and Timor-Leste. The regulation involved is obviously of great importance to those two states. The fact that the Designated Authority has made use of U.S.

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[26] These are the Restatement's factors for determining whether it is reasonable to exercise "jurisdiction to prescribe law."

banking facilities to hold deposits is certainly not a reason to find that the United States has a stronger interest than Australia and Timor-Leste have; nor is the fact that ConocoPhillips sometimes decides to sell oil to the United States a reason to exercise jurisdiction over the Designated Authority. The plaintiffs' attempt to attack the head of state of Timor-Leste in a U.S. court likewise strongly counsels against maintaining jurisdiction. Considerations of international comity would require that jurisdiction over this case be declined, even if (contrary to fact) jurisdiction were to exist and the act of state were to be inapplicable.

F. Plaintiffs Have Failed to State Claims Against the Designated Authority on the Basis of Which Relief Can Be Granted.

This section shows that plaintiffs have failed to state claims upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). Claims other than the First, Second, Fourth, Sixth and Seventh Claims are not addressed, because they are not alleged against the Designated Authority.

1. Plaintiffs Have Failed to State RICO Claims Against the Designated Authority.

Even if the Designated Authority were not immune from RICO claims, *see* Section II.B.3 above, the RICO claims would still have to be dismissed, because they fail to allege all the necessary elements of a RICO claim.

To state a RICO claim, a plaintiff must be injured in its "business or property." 18 U.S.C. § 1964(c). Plaintiffs have claimed that they suffered competitive injury. SAC ¶ 166. They cannot have suffered competitive injury, however. The decisions of Australia and Timor-Leste were that there would be no competition for the contracts in question; operations in the Joint Petroleum Development Area that had been in existence previously would be continued in existence. Plaintiffs cannot point to any law that gave them a right to compete, and therefore they also cannot point to any cognizable competitive injury. Just as they have no injury-in-fact

for standing purposes, they are unable to state any competitive injury for purposes of a RICO claim. That is fatal to their RICO claims.

That is not the only defect of the RICO claims. A RICO defendant must have played "some part in directing the [RICO] enterprise's affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (emphasis in original). Plaintiffs have failed to allege how the Designated Authority directs the enterprise. Plaintiffs allege that "only by getting money for the oil do ConocoPhillips and the Designated Authority realize the benefit from the oil and natural gas and the specified unlawful activity." SAC ¶ 142. The Designated Authority's actions of receiving money for the oil from ConocoPhillips and of distributing that money to Timor-Leste and Australia are acts that it is mandated to do by Timor-Leste and Australia. These are not acts that the Designated Authority has discretion not to do. It cannot be said to be "directing" the alleged enterprise by carrying out acts that it is required to do.

In fact, plaintiffs have not adequately alleged a common purpose to show the existence of an "enterprise." *See United States v. Turkette*, 452 U.S. 576, 583 (1981) ("a group of persons associated together for a common purpose of engaging in a course of conduct"). Plaintiffs allege bribery on the part of ConocoPhillips, not on the part of an "enterprise." Moreover, those allegations concern not a "pattern" but "only a single scheme, a single injury, and a single victim (or single set of victims)." *Western Assocs. Ltd. Partnership v. Market Square Assocs.*, 235 F.3d 629, 634 (D.C. Cir. 2001).

No basis has been alleged, furthermore, for the Designated Authority to be considered "associated with" the plaintiffs' hypothesized RICO enterprise. A defendant "is considered to have 'associated with' a RICO enterprise if he engages in the predicate act violations with other members of the enterprise, even if he is not an actual 'insider' of the enterprise." *Blue Cross &*

Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 366 (D.N.Y. 2000). "[M]ere alliance with a legitimate entity, not involving any of the alleged wrongdoing or participation in any predicate acts, is insufficient." *Id.* To be subject to RICO, a defendant "must associate with an enterprise to carry on a pattern of racketeering activity. That association must include an aspect of purpose to violate the act." *Gussin v. Shockey*, 725 F. Supp. 271, 277 (D. Md. 1989) (emphasis added), *aff'd*, 933 F.2d 1001 (4th Cir. 1991).

Underlying all plaintiffs' claims, of course, are their allegations of bribery, all instances of which allegedly occurred before the Designated Authority even came into being; so the Designated Authority could not have had the purpose of engaging in such alleged activity. The purpose, of course, that the Designated Authority has been carrying out since it came into existence is that of fulfilling its regulatory and management functions with respect to the Joint Petroleum Development Area. The activities that plaintiffs darkly claim are made "with intent to promote specified unlawful activity" in ¶¶ 138 and 140 of the Second Amended Complaint (*e.g.*, distributing revenues to Australia and Timor-Leste in accordance with the terms of the Timor Sea Treaty) constitute, obviously, the normal functioning of the lawful natural resources exploitation that the Designated Authority was created to supervise. The Designated Authority obviously is carrying out the purpose that has been mandated for it by the states of Australia and Timor-Leste. The Designated Authority's carrying out the purpose the sovereigns have imposed on it cannot be a "purpose to violate the act." Regardless of whatever purposes various individuals or other entities allegedly have or have had, the entity the Designated Authority cannot have had any other purpose than to fulfill those lawful purposes mandated for it by the sovereigns. Consequently, there is also no basis to find that the Designated Authority is a "person" that is "associated with" the alleged enterprise.

The foregoing applies to the RICO conspiracy allegations as well. In addition, the plaintiffs provide no specific allegations to show that the Designated Authority conspired with anyone. Conclusory allegations of conspiracy are insufficient. *See, e.g., In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 557 (S.D.N.Y. 2004). This is particularly the case where the defendant qualifies as a "foreign state" under the FSIA. *Cf. Robinson v. Gov't of Malaysia*, 269 F.3d 133, 146 (2d Cir. 2001) (conclusory allegations cannot be allowed to thwart "the goal of the FSIA to enable a foreign government to obtain an early dismissal when the substance of the claim against it does not support jurisdiction").

2. Plaintiffs Have Failed to State Lanham Act Claims Against the Designated Authority.

Plaintiffs allege that the Designated Authority has engaged in acts of unfair competition that violated the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as amended* Sept. 28, 1979, art. 10*bis*, 21 U.S.T. 1583, 1648, 828 U.N.T.S. 305, 337 ("Paris Convention"). SAC ¶¶ 176-85. The Paris Convention is primarily concerned with trademark violations, and requires its signatories to offer national treatment to nationals of other signatories against related acts of unfair competition. Acts of unfair competition include "[a]ny act of competition contrary to honest practices in industrial or commercial matters." Paris Convention art. 10bis(2). The Paris Convention is incorporated into U.S. law via Section 44 of the Lanham Act, codified at 15 U.S.C. § 1126, and every court of appeals that has considered the issue has held that the Paris Convention does not create any substantive rights in U.S. law beyond those otherwise provided in the Act.[27] Plaintiffs allege that defendants, including the Designated

[27] *See, e.g., Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona*, 330 F.3d 617, 628 (4th Cir. 2003); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 907-08 (9th Cir. 2002); *International Café v. Hard Rock Café Int'l*, 252 F.3d 1274, 1278 (11th Cir. 2001) (*per curiam*); *Scotch Whisky Ass'n v. Majestic Distilling Co.*, 958 F.2d 594, 597 (4th Cir. 1992); *Kemart Corp. v. Printing Arts Research* *(continued)*

Authority, "engaged in acts of competition contrary to honest practices in industrial and commercial matters," SAC ¶ 180, and that as a result they are entitled to invoke the remedies of the Lanham Act, in particular 15 U.S.C. § 1126(h). *Id.* ¶¶ 181-82.[28]

As in the First Amended Complaint, plaintiffs assert that "Australia, Indonesia, Portugal and the United States are each signatories to the Paris Convention for the Protection of Industrial Property (the 'Paris Convention')." As pointed out previously, however, Timor-Leste is not a signatory to the Paris Convention. The Designated Authority is an entity created by Timor-Leste and Australia jointly (and indeed, after its initial three-year period, may become a Ministry of Timor-Leste, *see* Timor Sea Treaty Article 6(b)(ii)), and cannot be considered a national of Australia for purposes of the Paris Convention. Plaintiffs have never responded to this point, which is fatal to their Lanham Act claim against the Designated Authority.

Moreover, the Paris Convention and the Lanham Act exist to extend equal protection from unfair competition to foreign nationals, not to extend U.S. jurisdiction over activities by foreign nationals in foreign territory. The Paris Convention simply requires that foreign corporations be treated as favorably as domestic companies with respect to unfair competition claims. Paris Convention art. 3; *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 907 (9th Cir. 2002) (citing *Toho Co. v. Sears, Roebuck & Co.*, 645 F.2d 788, 792 (9th Cir. 1981)), *cert. denied*, 537 U.S. 1171 (2003). The Lanham Act goes no further, merely providing:

(continued)

Laboratories, Inc., 269 F.2d 375, 389 (9th Cir. 1959); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 643-44 (2d Cir. 1956); *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 652-54 (3d Cir. 1954).

[28] Section § 1126(h) provides that any foreign national of a country extending reciprocal benefits with the United States, through the Paris Convention or otherwise, "shall be entitled to effective protection against unfair competition, and the remedies provided in this chapter for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition."

> Any person whose country of origin is a party to any convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law, shall be entitled to the benefits of this section under the conditions expressed herein to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of a mark is otherwise entitled by this chapter.

15 U.S.C. § 1126(b); *see also International Café v. Hard Rock Café Int'l*, 252 F.3d 1274, 1278 (11th Cir. 2001) ("the Paris Convention, as incorporated by the Lanham Act, only requires 'national treatment,'" *i.e.*, that foreigners be treated on a par with domestic parties ("nationals")).[29] Signatories to the Paris Convention commit themselves to offering the same legal protection to all competitors within their territories, regardless of the competitors' nationality. Thus, if plaintiffs were foreign nationals complaining of trademark-related unfair competition from a U.S. competitor, the Lanham Act would apply. If plaintiffs filed suit in a foreign signatory state complaining of unfair competition from a national of that state, the Paris Convention would apply. Plaintiffs cannot, however, base a Lanham Act claim in a U.S. court on an allegation that plaintiffs' extraterritorial activities were affected by the acts of a foreign competitor. Signatories to the Paris Convention have not committed themselves to policing the level of national treatment provided in other signatory states, let alone in territories that are not subject to the Paris Convention at all.

In addition, even if the Designated Authority were subject to the Lanham Act, plaintiffs have not described a valid claim falling within the scope of that Act. First, Plaintiffs allege generalized "unfair competition" without tying the alleged acts in any way to the violations

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[29] Plaintiffs also cite 15 U.S.C. § 1126(i), which provides that "Citizens or residents of the United States shall have the same benefits as are granted by this section to persons described in subsection (b) of this section." This provision exists simply to ensure that the Lanham Act does not endow foreign nationals with greater rights than those accorded to U.S. citizens. "It does not create a federal cause of action where subsection 44(h) would not." *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 907 (9th Cir. 2002); *see also American Auto. Ass'n v. Spiegel*, 205 F.2d 771, 775 (2d Cir. 1953).

outlines in the Lanham Act. That Act "does not create a general federal law of unfair competition." *Mattel*, 296 F.3d at 907 (citing *Toho*, 645 F.2d at 792). It provides a limited remedy for acts of unfair competition that may be appropriately repressed through "the remedies provided in [the Act] for infringement of marks[.]" 15 U.S.C. § 1126(h). *See, e.g.*, *International Café*, 252 F.3d at 1278 ("[T]he Paris Convention, as incorporated by section 44 of the Lanham Act, creates no new cause of action for unfair competition. Any cause of action based on unfair competition must be grounded in the substantive provisions of the Lanham Act."). Unfair competition unrelated to harms listed in the Lanham Act – trademark infringement and false designation of the origin of goods – does not give rise to a Lanham Act claim.

Second, extraterritorial application of the Lanham Act is limited, and generally extends only to trademark-related unfair competition committed by U.S. citizens without the consent of the foreign state involved. "Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested." *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 188 (1993). The courts have applied the Lanham Act to the extraterritorial activity of U.S. citizens, *see Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952), but have rejected arguments that the Act should be applied broadly to any and all extraterritorial behavior. From *Bulova*, the courts have discerned that

> [t]hree factors . . . are relevant to whether the Lanham Act is to be applied extraterritorially: (i) whether the defendant is a United States citizen; (ii) whether there exists a conflict between the defendant's trademark rights under foreign law and the plaintiff's trademark rights under domestic law; and (iii) whether the defendant's conduct has a substantial effect on United States commerce.

Atlantic Richfield Co. v. Arco Globus Int'l Co., 150 F.3d 189, 192 (2d Cir. 1998) (*citing Totalplan Corp. of Am. v. Colborne*, 14 F.3d 824, 830 (2d Cir. 1994); *Vanity Fair Mills v. T.*

Eaton Co., 234 F.2d 633, 642 (2d Cir. 1956)); *American Rice v. Arkansas Rice Growers Coop. Ass'n*, 701 F.2d 408, 414 (5th Cir. 1983).[30]

Applying these three factors to plaintiffs' Lanham Act claim, it is evident that the Lanham Act does not apply to the activities alleged. First, plaintiffs have not alleged any sort of Lanham Act-related conduct having "a substantial effect on United States commerce[,]" *Atlantic Richfield Co.*, 150 F.3d at 192. Even if they had, the absence of the remaining two factors would still be fatal to their claim. The rationale of the Court in *Bulova* "was so thoroughly based on the power of the United States to govern 'the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed', that the absence of one of the above factors might well be determinative and that the absence of both is certainly fatal." *Vanity Fair*, 234 F.2d at 642-43.

In this case, both are absent. First, the Designated Authority is not a U.S. citizen. Second, if the court were to find that the Designated Authority's actions in granting development contracts to plaintiffs' competitors were a violation of some Lanham Act-based right, that finding would be in direct conflict with the rights created under foreign law, the Timor Sea Treaty and the Commission Decisions. The Lanham Act is not applied where application of the Act would interfere with the laws of a foreign nation. *See Bulova*, 344 U.S. at 286-89

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[30] *See also Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 428-29 (9th Cir. 1977) (requiring balancing of even more considerations, including "the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations of principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.")

(emphasizing importance of not infringing on sovereignty of foreign state). If a foreign nation has granted a defendant a legal right to do something in that nation's territory, then the extraterritorial reach of the Lanham Act will not extend so far as to name that act unlawful, even if some minimal activity also occurred in the United States. As the court in *American Rice* stated:

> "Nor can we perceive upon what theory a plaintiff can recover damages for acts in the United States resulting in [activity in a foreign country] to which the defendant has established, over the plaintiff's opposition, a legal right [to do] in that country." Consequently, the Lanham Act should not cover "activities of the defendants, either here or abroad, concerned with [activities] in countries where the defendants have established rights superior to the plaintiff's[.]"

American Rice v. Arkansas Rice Growers Coop. Ass'n, 701 F.2d 408, 414 (5th Cir. 1983) (involving sale of merchandise in foreign country under mark to which defendant had legal right of use in that country) (*quoting George W. Luft Co. v. Zande Cosmetic Co.*, 142 F.2d 536, 541 (2nd Cir. 1944)). The Designated Authority not only had the legal right under applicable local law to award the contracts in the manner that it did, but in fact it was required to award them in that manner by the terms of the Timor Sea Treaty and the directives of the Joint Commission. The Lanham Act therefore does not apply to the Designated Authority's conduct.

3. Plaintiffs Have Failed to State Unjust Enrichment Claims Against the Designated Authority.

Plaintiffs allege as the basis for their "unjust enrichment" claim that "[t]he conduct of Defendants has secured to each Defendant profits and value, which unjustly enriches Defendants to the detriment and expense of Plaintiffs. Plaintiffs hereby request the disgorgement of all profits and value unjustly earned or retained by Defendants." SAC ¶ 192. This is a strange assertion to make in relation to the Designated Authority. Regardless of whether ConocoPhillips had the contracts in question or Petrotimor had them, the Designated Authority still would realize "profits and value," since that would occur no matter who the private party that acted as

contractor was. Moreover, as plaintiffs are well aware, the Designated Authority collects the revenues on behalf of the sovereign states, Australia and Timor-Leste. *See* SAC ¶¶ 139-140. The Second Amended Complaint wholly fails to allege how in any respect the Designated Authority is being "unjustly enriched" by contracting with ConocoPhillips as compared with contracting with Petrotimor or Oceanic.

There is a more fundamental problem with the unjust enrichment claim, however. The elements of unjust enrichment are:

> 1. A benefit conferred upon the defendant by the plaintiff;
>
> 2. An appreciation or knowledge by the defendant of the benefit; and
>
> 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of value.

Ellsworth Assocs. v. United States, 917 F. Supp. 841, 846 (D.D.C. 1996).

Plaintiffs have alleged no benefits that they have conferred upon the Designated Authority. Thus, they have stated no claim for unjust enrichment. The unjust enrichment claim is baseless.

4. Plaintiffs Have Failed to State Unfair Competition Claims Against the Designated Authority.

Plaintiffs allege that "Defendants' illegal and unfair conduct interfered and continues to interfere with Plaintiffs' ability to compete, and interfered with and continues to interfere with Plaintiffs' ability to extract oil and natural gas from the Timor Gap." SAC ¶ 194. Plaintiffs' "ability to compete" presupposes that they had a legally cognizable right to compete in the petroleum areas in question. They did not. For that reason the Designated Authority's conduct is not "illegal" or "unfair." To the contrary, the Designated Authority has carried out the

directive of the sovereign states that own it, in accordance with the Timor Sea Treaty and the Commission Decisions; its conduct has, therefore, been legal.[31]

This claim restates the false premise underlying all of plaintiffs' claims, that they had some legally cognizable right to submit a bid or otherwise compete for the production sharing contracts that were awarded to ConocoPhillips. They did not have such a right. Hence no one can have "interfered" with their non-existent "right."

Plaintiffs also wrongly assume that the applicable substantive law of unfair competition to be applied here is the unfair competition law of the District of Columbia. In fact, "the FSIA requires courts to utilize the choice-of-law analysis of the forum state with respect to all issues governed by state substantive law." *Virtual Defense and Development Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 17 (D.D.C. 2001), *appeal dismissed*, 2001 U.S. App. LEXIS 7468 (D.C. Cir. 2001). *See Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959-60 (2d Cir. 1991).

The District of Columbia follows the "substantial interest" position of the Restatement (Second) of Conflict of Laws (1971) § 145. The competing interests of the two jurisdictions will be balanced, the law of the jurisdiction with the more "substantial interest" in the resolution of the issue will be applied. Factors to be examined include (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship is centered. *Jaffe v. Pallotta TeamWorks*, 374 F.3d 1223 (D.C. Cir. 2004); *Herbert v. District of Columbia*, 808 A.2d 776, 779 (D.C. 2002).

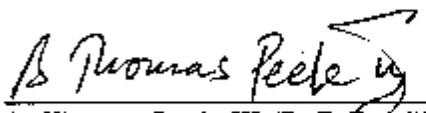
[31] And of course the Designated Authority is not a competitor of the plaintiffs.

It is apparent from application of those factors that the proper law to be applied is the law applicable in the Joint Petroleum Development Area, *i.e.*, the Timor Sea Treaty, the directives of the Joint Commission, and the Interim Petroleum Mining Code. The Designated Authority's actions under that legal regime were, as already noted, entirely legal, indeed they were mandated by law. Thus, as a matter of law, the applicable legal regime would not recognize the Designated Authority's acts as in any way constituting "unfair competition."

III. CONCLUSION

Plaintiffs' claims have previously been rejected by all sovereigns with any interest in the Timor Gap. Their claims have been rejected by the Federal Court of Australia. Their First Amended Complaint was rejected by this Court. The Timor Sea Designated Authority for the Joint Petroleum Development Area respectfully submits that the Second Amended Complaint should be dismissed as well, for the reasons set forth above, and the case should be closed once and for all.

Respectfully submitted,



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