

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 06-56325 and 06-56406

CLAUDE CASSIRER

Plaintiff/Appellee,

v.

KINGDOM OF SPAIN, a foreign state, and THYSSEN-BORNEMISZA
COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of
Spain,

Defendants/Appellants.

Appeal From the United States District Court for the Central District of California
Honorable Gary Allen Feess
District Court No. CV-05—03459-GAF

APPELLEE'S RESPONSE IN SUPPORT OF REHEARING EN BANC

Victor A. Kovner
Stuart R. Dunwoody
Catherine E. Maxson
John A. Reed
Davis Wright Tremaine LLP
Attorneys for Claude Cassirer

Suite 2200
1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. BACKGROUND.....2

III. ARGUMENT.....4

 A. This Matter Should be Reheard En Banc Because the Majority’s Decision to Require Prudential Exhaustion Conflicts with Decisions in Other Cases.....4

 1. Reading a Prudential Exhaustion Requirement Into the FSIA Conflicts With Numerous Decisions Holding that the FSIA is a Comprehensive Statute To Which Courts Should Not Add New Requirements.....5

 a. Courts Have Repeatedly Recognized That the FSIA Contains a Complete Set of Standards for Determining Whether a Foreign State is Entitled to Sovereign Immunity.....5

 b. Justice Breyer’s Concurrence in *Altmann* Does Not Support the Panel Majority’s Decision to Require Prudential Exhaustion.....6

 c. *Sarei* Did Not Compel the Majority to Read Prudential Exhaustion Into the FSIA.....8

 2. The Majority’s Decision Treats Prudential Exhaustion As a Jurisdictional Prerequisite, Which Conflicts with This Court’s Decision in *Sarei*..... 11

 3. The Majority’s Instruction to the District Court to Consider the Substantive Law Applicable to the Plaintiff’s Claims When Deciding Whether Jurisdiction Exists Conflicts with This Court’s Decision in *Gates v. Victor Fine Foods*..... 11

 B. This Matter Should be Reheard En Banc Because the Panel Majority’s Insertion of a Judge-Made Prudential Exhaustion Requirement Into the FSIA Involves a Question of Exceptional Importance..... 12

 1. Reading Prudential Exhaustion Into the FSIA Will Lead to Inconsistent Sovereign Immunity Determinations, Precisely the Problem Congress Sought to Remedy by Enacting the FSIA..... 12

2. This Proceeding is of Exceptional Importance Because It Conflicts With a Decision from Another Circuit.....	14
IV. CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Agudas Chasidei Chabad of United States v. Russian Federation</i> , 528 F.3d 934 (D.C. Cir. 2008).....	15
<i>Altmann v. Republic of Austria</i> , 317 F.3d 954 (9th Cir. 2002)	8
<i>Argentine Republic v. Amerada Hess Shipping Corp.</i> , 488 U.S. 428 (1989).....	1, 5, 6
<i>Cassirer v. Kingdom of Spain</i> , 580 F.3d 1048 (9th Cir. 2009)	passim
<i>Gates v. Victor Fine Foods</i> , 54 F.3d 1457 (9th Cir. 1995)	1, 6, 11, 12
<i>Permanent Mission of India v. New York</i> , 551 U.S. 193 (2007).....	1, 6
<i>Phaneuf v. Republic of Indonesia</i> , 106 F.3d 302 (9th Cir. 1997)	1, 6
<i>Republic of Austria v. Altmann</i> , 541 U.S. 677 (2004).....	1, 5, 7, 10
<i>Sarei v. Rio Tinto, PLC</i> , 550 F.3d 822 (9th Cir. 2008)	passim
<i>Siderman de Blake v. Republic of Argentina</i> , 965 F.2d 699 (9th Cir. 1992)	8
<i>Verlinden B.V. v. Central Bank of Nigeria</i> , 461 U.S. 480 (1983).....	passim

FEDERAL STATUTES

28 U.S.C. § 1330(a)13
28 U.S.C. § 13509
28 U.S.C. § 160214
28 U.S.C. § 1605(a)(3).....3, 4, 7, 11

RULES

Fed. R. App. P. 351
Fed. R. App. P. 35(a)(1).....1
Fed. R. App. P. 35(a)(2).....1

OTHER AUTHORITIES

H.R. Rep. No. 94-1487, p. 19-20 (1976), 1976 U.S.C.C.A.N. 6604.....8

I. INTRODUCTION

Plaintiff-Appellee Claude Cassirer requests that the panel majority's decision to read prudential exhaustion into the Foreign Sovereign Immunities Act ("FSIA") be reheard en banc under both of the bases identified in FRAP 35.

First, the panel majority's decision conflicts with decisions of the U.S. Supreme Court and decisions from this Court, namely *Permanent Mission of India v. New York*, 551 U.S. 193 (2007), *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008), *Phaneuf v. Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997), and *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995), and consideration by the full court is necessary to secure and maintain uniformity of courts' decisions. *See* FRAP 35(a)(1).

Second, this proceeding involves at least two questions of exceptional importance: the panel majority's decision to impose a judge-made exhaustion requirement on litigants asserting jurisdiction pursuant to the FSIA will lead to inconsistent sovereign immunity determinations, precisely the problem that Congress sought to remedy by enacting the FSIA; and the panel majority's opinion conflicts with a decision from the D.C. Circuit addressing this precise issue. *See* FRAP 35(a)(2).

Mr. Cassirer does not support an en banc rehearing for the other issues in this matter (on which the members of the panel reached unanimous agreement) and requests that the panel's decision on those issues be affirmed in all respects.¹

II. BACKGROUND

Mr. Cassirer filed this action to recover a masterpiece of French impressionist art, the painting *Rue Saint-Honoré, après-midi, effet de pluie* by Camille Pissarro (the "Painting"), which the Nazi regime looted from his grandmother in 1939 as part of its genocidal persecution of Jews. He filed suit against the Thyssen-Bornemisza Collection Foundation (the "Foundation") and the Kingdom of Spain ("Spain") in the United States District Court for the Central District of California, asserting the "takings exception" to sovereign immunity in the FSIA. Under the takings exception, the federal courts have subject matter jurisdiction to consider claims against foreign states (and their agencies and instrumentalities) if "rights in property taken in violation of international law are in issue and . . . that property . . . is owned or operated by an agency or

¹ Mr. Cassirer strongly considered filing a petition for rehearing en banc for the reasons given in this brief, but decided not to do so out of concern that such a petition would cause further delay. Mr. Cassirer is 89 years old and in poor health, and his case has moved very slowly. He filed his complaint in May 2005. Spain resisted service, and was not served until January 31, 2006. The defendants filed their notices of appeal in September 2006. Although the Ninth Circuit agreed to hear the appeals on an expedited basis, the matter was withdrawn from submission on October 5, 2007 pending the issuance of the decision in *Sarei v. Rio Tinto, PLC*, Nos. 02-56256 and 02-56390. Mr. Cassirer now supports rehearing en banc, and requests that it occur on an expedited schedule.

instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.” 28 U.S.C. § 1605(a)(3).

The Foundation and Spain moved to dismiss Mr. Cassirer’s complaint for lack of subject matter jurisdiction. They argued in the district court that it lacked subject matter jurisdiction because (1) Section 1605(a)(3) of the FSIA requires the defendant foreign state itself to have taken the property at issue in violation of international law, whereas Mr. Cassirer alleged that the Nazis took the Painting; (2) the Foundation was not engaged in a commercial activity in the United States and Section 1605(a)(3)’s nexus requirement thus was not satisfied; and (3) Mr. Cassirer did not allege that he had exhausted remedies in either Spain or Germany. The Foundation and Spain also argued lack of personal jurisdiction and absence of a case or controversy against Spain as grounds for dismissing the complaint. The district court denied the motions to dismiss on August 30, 2006, and the Foundation and Spain timely appealed. Only Spain raised the issue of exhaustion on appeal; the Foundation did not raise the issue in its briefs, nor did it join Spain’s argument on exhaustion.

On September 8, 2009, the panel issued its decision in this case, dismissing the appeal for lack of appellate jurisdiction as to all issues other than whether subject matter jurisdiction exists pursuant to the FSIA. On the issue of whether this case falls within the FSIA’s takings exception to sovereign immunity, the

panel unanimously held that Section 1605(a)(3) does not require the defendant foreign state itself to have taken the property at issue in violation of international law, and unanimously held that the Foundation “is engaged in a commercial activity in the United States.”

Two judges on the panel, over a dissent by Judge Ikuta, held that a district court deciding whether a defendant foreign state is entitled to sovereign immunity under the FSIA must consider, as a prudential matter, requiring the plaintiff to exhaust local remedies in a foreign state.² The panel majority held that “where Congress has not clearly adopted or rejected exhaustion as a jurisdictional prerequisite, our formulation of prudential exhaustion applies equally to cases brought against foreign states (and their instrumentalities) under the FSIA.”

Cassirer, 580 F.3d at 1062.

III. ARGUMENT

A. **This Matter Should be Reheard En Banc Because the Majority’s Decision to Require Prudential Exhaustion Conflicts with Decisions in Other Cases.**

The panel majority’s decision obligating district courts to consider imposing an exhaustion requirement on plaintiffs suing under the FSIA conflicts with numerous decisions of the U.S. Supreme Court and decisions from this Court. The

² The majority did not specify whether any such exhaustion should occur in the defendant foreign state or in another foreign state, and left open the possibility that Mr. Cassirer could have to exhaust remedies in either Spain or Germany, or both. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1062-64 (9th Cir. 2009).

case, thus, should be reheard en banc.

1. **Reading a Prudential Exhaustion Requirement Into the FSIA Conflicts With Numerous Decisions Holding that the FSIA is a Comprehensive Statute To Which Courts Should Not Add New Requirements.**
 - a. **Courts Have Repeatedly Recognized That the FSIA Contains a Complete Set of Standards for Determining Whether a Foreign State is Entitled to Sovereign Immunity.**

The panel majority’s decision to read prudential exhaustion into the FSIA conflicts with the Supreme Court’s repeated statements that the FSIA is a comprehensive scheme that contains the sole source of standards for deciding when sovereign immunity deprives a court of jurisdiction. For example, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Supreme Court referred to the FSIA as “a comprehensive statute containing a ‘set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.’” *Id.* at 691 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)) (emphasis added); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 n.3, 437, 438 (1989) (repeatedly referring to Congress’s intention for the FSIA to provide a “comprehensive” statutory scheme).

Similarly, after citing the “settled proposition” that Congress determines the scope of federal courts’ subject matter jurisdiction, the Supreme Court held in

Amerada Hess that “the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.” 488 U.S. at 434; *see also Permanent Mission of India v. New York*, 551 U.S. 193, 197 (2007) (FSIA provides the only basis for obtaining federal court jurisdiction over a foreign state); *Verlinden*, 461 U.S. at 489 (the FSIA “expressly provides that its standards control”).

Consistent with these decisions from the Supreme Court, this Court has previously declined to read additional requirements into the FSIA. In *Phaneuf v. Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997), the Court reversed the district court’s decision requiring the defendant foreign state to prove that the plaintiff’s claim arose from a public act, given the absence of such an obligation in the plain language of the FSIA. *Id.* at 305-06. This Court “assume[d] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose,” and held that foreign states are entitled to sovereign immunity unless one of the exceptions explicitly outlined in the FSIA applies. *Id.* at 308 (interior quotation omitted); *see also Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995) (declining to “put words in Congress’ mouth” in interpreting the FSIA).

b. Justice Breyer’s Concurrence in *Altmann* Does Not Support the Panel Majority’s Decision to Require Prudential Exhaustion.

Although cited by the panel majority, Justice Breyer’s concurrence in

Republic of Austria v. Altmann does not support the decision to impose a judge-made exhaustion requirement on litigants asserting jurisdiction pursuant to the FSIA. *See* 580 F.3d at 1062 n.19 (citing Justice Breyer’s concurring opinion). In his concurrence, Justice Breyer simply noted that “a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking. . . . A plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the expropriating state may have trouble showing a tak[ing] in violation of international law.” *Altmann*, 541 U.S. at 714 (internal quotation marks omitted, emphases added).

As is evident from the quoted language (and Justice Breyer’s citation to constitutional taking cases in support thereof), Justice Breyer was not suggesting that exhaustion should be considered in every case brought under the FSIA, but rather was merely observing that it might apply in some cases asserting jurisdiction pursuant to the FSIA’s takings exception, 28 U.S.C. § 1605(a)(3).

In addition, Justice Breyer’s comment was directed only at those cases where a plaintiff asserts that her case fits within the FSIA’s takings exception because the expropriating state did not provide adequate compensation. *See Altmann*, 541 U.S. at 714 (“[A] plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking.”) (emphasis added). Failure to provide just compensation is, however, only one of three ways that a

taking may violate international law. As this Court has recognized on several occasions, a taking violates international law if it is discriminatory, or if it is not for a public purpose, or if the state fails to provide adequate compensation. *See, e.g., Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002), *amended*, 327 F.3d 1246 (9th Cir. 2003), *aff'd on other grounds*, 541 U.S. 677 (2004); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-12 (9th Cir. 1992); *see also* H.R. Rep. No. 94-1487, p. 19-20 (1976), 1976 U.S.C.C.A.N. 6604, 6618 (“The term ‘taken in violation of international law’ would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature.”).

In short, Justice Breyer’s concurrence does not support the panel majority’s imposition of prudential exhaustion in all FSIA cases, or even all cases asserting the FSIA’s taking exception.

c. *Sarei* Did Not Compel the Majority to Read Prudential Exhaustion Into the FSIA.

As Judge Ikuta explained in her dissent in this matter, the decision in *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008), does not require “writ[ing] an exhaustion requirement into the FSIA.” 580 F.3d at 1069. There are at least three reasons why *Sarei* is inapposite.

First, the substantive claims at issue in cases brought under the FSIA may

bear no resemblance to those at issue in cases brought under the Alien Tort Statute (“ATS”), the statute at issue in *Sarei*. As Judge Ikuta correctly noted, the FSIA “does not focus on international law claims.” 580 F.3d at 1066. In contrast, the ATS provides subject matter jurisdiction only for international law claims: those brought by “an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The panel majority appears to have missed this distinction and repeatedly stated, incorrectly, that suits under both statutes seek redress for violations of international law.

For example, the panel majority stated that “[a]s in *Sarei*, the substantive claims here are based on alleged violations of international law,” and that “the only meaningful difference between the international tort claims in *Sarei* and the claims made in the present case (and the only reason the FSIA is at issue) is that the defendant here is a sovereign foreign state.” 580 F.3d at 1062 n.20; *see also id.* at 1060-61 (several comments reflecting a belief that Mr. Cassirer was suing for a violation of international law). These statements about the substantive claims at issue in Mr. Cassirer’s case are simply untrue. Mr. Cassirer is not suing the Foundation and Spain because they violated international law; rather, his complaint asserts claims for conversion and possession of personal property, and he requests the imposition of a constructive trust and declaratory relief. The question of whether the Painting was taken in violation of international law arises only as a

threshold matter, to satisfy the criteria for the FSIA's taking exception.³

Second, the concern for comity that underlay the decision to require prudential exhaustion in *Sarei* has already been taken into consideration by the FSIA's comprehensive scheme. Indeed, comity is the reason that the principle of sovereign immunity (and therefore the FSIA) exists. As Chief Justice Marshall observed in *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), foreign sovereigns have no right to immunity, but courts in the United States may nevertheless grant immunity as "a matter of grace and comity." *Altmann*, 541 U.S. at 688-89 (emphasis added).

Third, because the ATS may provide jurisdiction for cases with little or no nexus with the United States, *Sarei* adopted prudential exhaustion to reduce the jurisdictional reach of the ATS. In contrast, Congress already took into account the question of whether the case has a nexus with the United States when creating the exceptions to sovereign immunity in the FSIA. As the Supreme Court noted in *Verlinden*, the FSIA addresses the concern with U.S. courts becoming international courts of claims "by enacting substantive provisions requiring some form of substantial contact with the United States." 461 U.S. at 490. For example, the takings exception requires that the property at issue must either be "present in the

³ The panel majority erroneously stated that there would be "little doubt that *Sarei* would apply" if Mr. Cassirer had sued a private party. 580 F.3d at 1062 n.20. Given the nature of Mr. Cassirer's claims, neither the ATS nor the FSIA would have any relevance to Mr. Cassirer's case if he were suing a private party.

United States in connection with a commercial activity carried on in the United States by the foreign state,” or be “owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality [must be] engaged in a commercial activity in the United States.” 28 U.S.C. § 1605(a)(3).

2. The Majority’s Decision Treats Prudential Exhaustion As a Jurisdictional Prerequisite, Which Conflicts with This Court’s Decision in *Sarei*.

The majority’s decision to remand to the district court for it to consider requiring Mr. Cassirer to exhaust local remedies makes exhaustion a potential prerequisite to the exercise of subject matter jurisdiction.⁴ This decision conflicts with *Sarei*, which held that prudential exhaustion is not a prerequisite to the exercise of subject matter jurisdiction, but simply affects the timing of federal court decision-making. *Sarei*, 550 F.3d at 828.

3. The Majority’s Instruction to the District Court to Consider the Substantive Law Applicable to the Plaintiff’s Claims When Deciding Whether Jurisdiction Exists Conflicts with This Court’s Decision in *Gates v. Victor Fine Foods*.

In order to decide whether to impose an exhaustion requirement on plaintiffs suing under the FSIA, the panel majority instructed the district court to “determine whether the applicable substantive law would require exhaustion” if Congress has

⁴ The only issue that the *Cassirer* panel decided on the merits was whether the district court had subject matter jurisdiction to consider Mr. Cassirer’s claims against the Foundation and Spain; it dismissed the Foundation’s and Spain’s appeals as to all other issues for lack of appellate jurisdiction. 580 F.3d at 1054-55.

not clearly required exhaustion for the specific claims asserted in the complaint. 580 F.3d at 1063. This instruction conflicts with the decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), which held that district courts should not consult the applicable substantive law when interpreting the FSIA to determine whether subject matter jurisdiction exists. The district court in *Gates* had turned to the employment statutes governing the plaintiffs' substantive claims to decide whether the claims fit within the FSIA's "commercial activities" exception to immunity. This Court rejected that approach, which "placed the substantive cart before the jurisdictional horse. A court can apply the substantive portions of a statute only after it has *independently* determined that it has jurisdiction." *Id.* at 1464 (emphasis in original).

B. This Matter Should be Reheard En Banc Because the Panel Majority's Insertion of a Judge-Made Prudential Exhaustion Requirement Into the FSIA Involves a Question of Exceptional Importance.

The Court should rehear this matter en banc because reading prudential exhaustion into the FSIA raises an issue of exceptional importance.

1. Reading Prudential Exhaustion Into the FSIA Will Lead to Inconsistent Sovereign Immunity Determinations, Precisely the Problem Congress Sought to Remedy by Enacting the FSIA.

Even the panel majority recognizes that "the FSIA is silent as to any exhaustion requirement" and "[t]he legislative history is also devoid of any

enlightening reference to exhaustion.” 580 F.3d at 1060. Indeed, the FSIA added Section 1330(a) to Title 28, which provides that federal district courts “shall have original jurisdiction” over claims against foreign states for which the foreign state is not entitled to immunity under section 1605-1607 of Title 28 or an international agreement. 28 U.S.C. § 1330(a) (emphasis added). In short, there is no indication that Congress intended courts to require exhaustion as a prudential matter, which should be the end of the matter. 580 F.3d at 1056 (refusing to read a requirement into the FSIA’s takings exception where neither the plain language of the statute nor the legislative history reflected any congressional intent to do so).

Furthermore, prudential exhaustion will lead to inconsistent recognitions of sovereign immunity, directly contrary to Congress’s goal in enacting the FSIA. Until 1952, the Executive Branch generally asked courts to grant friendly sovereigns complete immunity from suit in U.S. courts. *Verlinden*, 461 U.S. at 486. The Executive Branch changed course in 1952 and adopted the “restrictive theory” of sovereign immunity under which it would ask courts to grant foreign states immunity only in cases arising out of a state’s public acts. 580 F.3d at 1064-65 (Ikuta, J., dissenting). Application of the restrictive theory, however, “resulted in a lack of uniform, predictable standards regarding when federal courts would exercise jurisdiction in lawsuits against foreign sovereigns” because foreign states pressured the State Department to recommend immunity in cases that did not relate

to the states' public acts. *Id.* at 1065.

Seeking to remedy this situation, Congress in 1976 enacted the FSIA to create “uniform and clear standards for litigants seeking to bring lawsuits against foreign sovereigns.” *Id.* at 1064 ; *see also Verlinden*, 461 U.S. at 489 (in enacting the FSIA, Congress cited “the importance of developing a uniform body of law” in the area of sovereign immunity determinations) (quoting H.R. Rep. No. 94-1487, p. 32 (1976)). Indeed, the FSIA explicitly states that “[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.” 28 U.S.C. § 1602.

If a prudential exhaustion requirement is added to the FSIA, sovereign immunity determinations will be subject to the discretion of the district court and will not have the uniformity and predictability that Congress intended to achieve through enactment of the FSIA. The panel majority's prudential exhaustion holding should be reheard en banc before the Court departs so dramatically from Congress's intent.

2. This Proceeding is of Exceptional Importance Because It Conflicts With a Decision from Another Circuit.

The D.C. Circuit has indicated that it is unlikely to obligate plaintiffs invoking the FSIA's takings exception to exhaust local remedies because no such requirement is called out in that section. In *Agudas Chasidei Chabad of United*

States v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008), the court affirmed the district court's decision not to obligate a plaintiff invoking the FSIA's takings exception to exhaust remedies in Russia. *Id.* at 948-49. The D.C. Circuit pointed to the absence of an exhaustion requirement in the plain language of the FSIA, and noted that the (former) inclusion of an exhaustion requirement in another section of the FSIA "strengthens the inference that its omission from a closely related section must have been intentional." *Id.* at 948.⁵

IV. CONCLUSION

For the foregoing reasons, Mr. Cassirer requests that the Court grant a rehearing en banc as to whether exhaustion should be required, as a prudential matter, in cases brought under the FSIA.

RESPECTFULLY SUBMITTED this 27th day of October, 2009.

Davis Wright Tremaine LLP
Attorneys for Appellee Claude Cassirer

By s/ Stuart R. Dunwoody
Stuart R. Dunwoody

⁵ As an alternative grounds for affirming the district court's decision not to require exhaustion, the D.C. Circuit noted that Russia had failed to identify an adequate, available remedy in Russia.

**Form 11. Certificate of Compliance Pursuant to
Circuit Rules 35-4 and 40-1**

**Form Must be Signed by Attorney or Unrepresented Litigant
and Attached to the Back of Each Copy of the Petition or Answer**

(signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

Proportionately spaced, has a typeface of 14 points or more and contains 3,606 words (petitions and answers must not exceed 4,200 words).

or

_____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

_____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Davis Wright Tremaine LLP
Attorneys for Appellee Claude Cassirer

By s/ Stuart R. Dunwoody
Stuart R. Dunwoody

(New Form 7/1/2000)

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF System.

I further certify that all of participants in the case are registered CM/ECF users.

Thaddeus J. Stauber
Nixon Peabody LLP
Gas Company Tower
555 West Fifth Street, 46th Floor
Los Angeles, CA 90013-1010
Tel: (213) 629-6000
Direct Tel: (213) 629-6053
Fax: (213) 629-6001
Email: tstauber@nixonpeabody.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile
 CM/ECF Notification

Walter T. Johnson
Nixon Peabody LLP
18th Floor
One Embarcadero Center
San Francisco, CA 94111
Tel: (415) 984-8346
Fax: (415) 984-8300
Email: wjohnson@nixonpeabody.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile
 CM/ECF Notification

William M. Barron
Smith, Gambrell & Russell, LLP
250 Park Avenue, Suite 1900
New York, NY 10177
Tel: (212) 907-9715
Fax: (212) 907-9815
Email: wbarron@sgrlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile
 CM/ECF Notification

Elizabeth A. Fierman
Alston & Bird LLP
333 S. Hope Street, 16th Floor
Los Angeles, CA 90071
Tel: (213) 576-1028
Fax: (213) 576-1100
Email: elizabeth.fierman@alston.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile
 CM/ECF Notification

Mark Mermelstein
Orrick Herrington & Sutcliffe LLP
777 South Figueroa Street, Suite 3200
Los Angeles, CA 90017-5855
Tel: (213) 612-2204
Fax: (213) 612-2499
Email: mmermelstein@orrick.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile
 CM/ECF Notification

DATED this 27th day of October, 2009.

s/ Stuart R. Dunwoody
STUART R. DUNWOODY