

08-3999-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-3999-cv

—♦♦♦—
MARIA DO ROSARIO VEIGA,

Plaintiff-Appellant,

—v.—

WORLD METEOROLOGICAL ORGANIZATION,
MICHEL JERRAUD, JORGE CORTES, JOACHIM MULLER,
IWONA RUMMEL-BULSKA,

Defendants-Appellees,

UNITED STATES DEPARTMENT OF JUSTICE,

Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR UNITED STATES AS INTERVENOR

LEV L. DASSIN,
*Acting United States Attorney for
the Southern District of New York,
Attorney for the United States.*
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-1579

EMILY E. DAUGHTRY,
DAVID S. JONES,
*Assistant United States Attorneys,
Of Counsel.*

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BRIEF FOR UNITED STATES AS INTERVENOR

Preliminary Statement

Pursuant to 28 U.S.C. § 2403(a), the United States respectfully submits this brief to defend the constitutionality of the International Organizations Immunities Act of 1945 ("IOIA"), 22 U.S.C. § 288 *et seq.*

Plaintiff-Appellant, a Portuguese and Italian national currently residing in Portugal, filed suit

against the World Meteorological Organization ("WMO"), a specialized agency of the United Nations based in Switzerland, and four present and former WMO officials, all of whom are also foreign nationals and/or foreign residents, for acts occurring within Switzerland. She appeals the July 15, 2008, judgment of the United States District Court for the Southern District of New York (Hon. Victor Marrero, J.), dismissing her case for lack of subject matter jurisdiction. The district court rejected the plaintiff's argument that the Constitution is violated by the dismissal of her claims under the IOIA, 22 U.S.C. § 288 *et seq.*, reasoning that, as a foreign national abroad who challenges the conduct of other foreign nationals and foreign residents, the plaintiff has no constitutional rights to invoke. The plaintiff has challenged the district court's ruling on appeal.

The United States takes no position on the merits of plaintiff's claim. However, the United States intervenes in this action in order to defend the constitutionality of the IOIA. The IOIA does not violate the Constitution as applied to dismiss the plaintiff's claims. As a foreign citizen who at all relevant times resided and worked in Switzerland, and who has sued her former employer, an international organization based in Switzerland, as well as its employees, for acts that occurred entirely abroad, the plaintiff has no constitutional rights to invoke.

Furthermore, the IOIA is clearly constitutional. First, the political branches' authority to grant immunity to foreign states has been recognized for nearly 200 years, and courts have uniformly rejected constitutional challenges to immunity doctrines. The

IOIA authorizes the President to confer on designated public international organizations the same immunity from suit and judicial process as is enjoyed by foreign governments, and similarly to grant immunity to designated organizations' officers and employees for acts performed in their official capacities. As such, the statute is a natural application of the immunity of the foreign states that comprise such international organizations. Like foreign sovereign immunity, the immunity granted under the IOIA facilitates the political branches' conduct of foreign affairs, which is increasingly carried out in modern times through international organizations of member sovereigns. Second, there is simply no constitutional right to bring suit free from the application of immunity doctrines.

Nature of the United States' Interest

Pursuant to 28 U.S.C. § 2403(a), the United States is authorized to intervene as of right in order to defend the constitutionality of an Act of Congress. Here, plaintiff asserts that the application of the IOIA to dismiss her claims against the WMO, a designated international organization under the statute, and individual WMO officials or employees, violates the Constitution. The United States has a general interest in defending the validity of federal statutes. In addition, the United States has a particular interest in defending the IOIA, because the IOIA furthers obligations undertaken by the United States under international treaties governing public international organizations, including the Convention of the World Meteorological Organization ("WMO Convention"). See Convention of the World Meteorological Organization, Mar. 23, 1950, 1 U.S.T. 281, T.I.A.S. No. 2052. Other

organizations designated under the IOIA include the United Nations, the Organization of American States, the World Health Organization, and the World Trade Organization, among many others.

Issues Presented for Review

1. Whether the district court erred in rejecting the plaintiff's constitutional challenge to the IOIA on the ground that, as a foreign national residing in a foreign state, in a dispute with an international organization arising out of a foreign employment relationship, the plaintiff has no constitutional rights to invoke.

2. Whether the IOIA, which confers certain privileges, exemptions, and immunities on designated public international organizations and their officers and employees, violates the Constitution.

Statement of the Case

A. The Statutory Framework

The International Organizations Immunities Act of 1945, 22 U.S.C. § 288 *et seq.*, governs the privileges, exemptions and immunities of public international organizations in which the United States participates by treaty or federal statute, and which have been designated by the President as entitled to such privileges, exemptions and immunities. The IOIA was enacted by Congress, in order to "to confer upon international organizations, and officers and employees thereof, privileges and immunities of a governmental nature." S. Rep. No. 79-861, at 1 (1945).

The IOIA authorizes the President, in designating public international organizations, to provide that they

“shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments,” except to the extent that organizations expressly waive that immunity by contract or in a particular proceeding. 22 U.S.C. § 288a(b). In addition to providing immunity to the designated international organization itself, the IOIA also authorizes the President to grant officers and employees of such organizations immunity “from suit and legal process relating to acts performed by them in their official capacity and falling within their functions . . . except insofar as such immunity may be waived by the . . . international organization concerned.” 22 U.S.C. § 288d(b).

The United States participates in the WMO, a specialized agency of the United Nations, in accordance with the WMO Convention. See 1 U.S.T. 281. The President ratified the WMO Convention on May 4, 1949, after the Senate had given its advice and consent, and the treaty entered into force on March 23, 1950. The WMO Convention provides that the WMO “shall enjoy in the territory of each Member to which the present Convention applies such privileges and immunities as may be necessary for the fulfillment of its purposes and for the exercise of its functions.” WMO Convention, Article 27(b)(i), 1 U.S.T. at 292. It further provides that WMO officials “shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.” *Id.*, Article 27(b)(ii). The United States has implemented this obligation through designation of the WMO under the IOIA. The President issued an Executive Order designating the WMO as a public international organization “entitled to enjoy the

privileges, exemptions, and immunities conferred by the said International Organizations Immunities Act" on September 1, 1956. See Exec. Order 10,676, 21 Fed. Reg. 6625 (1956).

B. Factual Background and District Court Proceedings

Plaintiff is a citizen of Portugal and Italy who currently resides in Portugal. Her complaint seeks relief for actions allegedly taken against her by the WMO, a specialized agency of the United Nations that is located and headquartered in Geneva, Switzerland, in the course of plaintiff's employment in Switzerland as an internal auditor at the WMO. (Appendix ("A")- 2). Plaintiff alleges that in the course of her employment with the WMO, she discovered an illegal scheme to embezzle funds, which were used in part to influence improperly the election for Secretary General of the WMO. (A-3). Plaintiff further alleges that, when she sought to expose the illegal scheme, she was mistreated by WMO officials and ultimately forced from her position. (A-5-14).

Plaintiff filed a complaint in the district court against the WMO and four present or former WMO officials, all of whom are also foreign nationals and/or foreign residents, alleging a variety of employment-related common law claims, as well as intentional infliction of emotional distress, and defamation. (A-2-3, 15-19). The complaint also alleges claims under the civil Racketeering Influenced Corrupt Organization Act, and asserts without elaboration that Plaintiff's claims also arise under a variety of international treaties, customary international law, federal common law,

Swiss law, and New York State law. (A-1-2, 19-22). Plaintiff asserts that the district court has jurisdiction under both the general federal question statute, 28 U.S.C. § 1331, and the Alien Tort Statute, 28 U.S.C. § 1350. (A-1).

The district court initially dismissed the action on *forum non conveniens* grounds, but subsequently authorized the plaintiff to serve a copy of the summons, complaint, and a motion for reconsideration on a WMO representative located in New York, “insofar as such service would not be inconsistent with any provision of international treaty or national law.” *See Veiga v. World Meteorological Org.*, 568 F. Supp. 2d 367, 369 (S.D.N.Y. 2008). The WMO responded by sending a letter to the Representative of the United States of America to the United Nations and Other International Organizations in Geneva stating that it would not accept service because the WMO and its officials are immune from suit in a United States court. The WMO forwarded a copy of this letter to the district court. At the plaintiff’s request, the district court treated the WMO’s letter as a motion to dismiss for lack of subject matter jurisdiction. *See id.* at 370.

In its Decision and Order dated July 15, 2008, the district court dismissed plaintiff’s complaint for lack of subject matter jurisdiction. The district court found that the IOIA confers immunity on both the WMO and its officers and employees, and that there had been no express waiver of immunity by the WMO. *See id.* at 370-371. The district court further noted that, although plaintiff herself conceded that “the current state of U.S. law, as applied by American courts faced with an action against an international organization such as the WMO

purporting to enjoy immunity from suit or process, supports the assertion of [the WMO],” *id.* at 370 (*quoting* plaintiff’s response to WMO’s motion to dismiss), plaintiff “nonetheless seeks to avoid the inevitable conclusion of her concession by the novel approach of challenging the constitutionality of the IOIA.” *Id.* at 371.

The district court rejected plaintiff’s arguments that application of the IOIA to dismiss her claims violates the Constitution, finding that the circumstances of the underlying dispute—in which a foreign national residing abroad challenges the acts of an international organization and its officers occurring within Switzerland—did not supply a sufficient connection to the United States for any provision of the Constitution to apply. *See id.* at 372. The district court concluded that, because plaintiff had no constitutional protections, she did not fall within the zone of interests that are protected by the provisions she invoked, and, accordingly, she lacked prudential standing to challenge the constitutionality of the IOIA. *See id.* at 375. Because it found that plaintiff lacked prudential standing, the district court did not reach the merits of plaintiff’s argument that the statute, with its express provision of immunity from suit for designated international organizations and their officers, would be unconstitutional as applied to dismiss claims brought by an individual entitled to invoke the relevant provisions of the Constitution.*

* On appeal, plaintiff raises the constitutional arguments she raised below, as well as a host of other arguments, including that the individual defendants

Defendants have not participated in this appeal. However, they have submitted several letters and notes to the Court expressing the view that they are immune from suit and service of documents in this appeal under United States and international law. *See* Letter from Juan Llobera Serra to Hon. Catherine O'Hagan Wolfe, dated October 3, 2008, docketed on October 8, 2008; Diplomatic Note from WMO Secretariat to Permanent Mission of the United States of America to the United Nations Office and Other International Organizations in Geneva, dated November 11, 2008, copied to Hon. Catherine O'Hagan Wolfe, docketed on November 21, 2008; Diplomatic Note from WMO Secretariat to Permanent Mission of the United States of America to the United Nations Office and Other International Organizations in Geneva, dated November 24, 2008, docketed on December 3, 2008; Letter from Juan

are not entitled to immunity because their challenged conduct was not taken within the course of their official functions as WMO employees; that the WMO should be treated in the same manner as a domestic municipality, which would assertedly not be immune from suit; that the application of the IOIA to dismiss plaintiff's claims violates the International Covenant on Civil and Political Rights; and that the Alien Tort Statute's grant of jurisdiction must supersede the immunity provisions of the IOIA and provide a basis for standing. *See* Brief for Plaintiff-Appellant ("Pl. Br.") at 11-18, 31-44. The United States takes no position on the merits of these arguments and does not address them in its brief. Instead, the United States limits its participation to addressing the constitutional challenge to the IOIA, as contemplated by 28 U.S.C. § 2403 (a).

Llobera Serra to Hon. Catherine O'Hagan Wolfe, dated January 23, 2009, docketed on January 26, 2009. In addition, the Government of Switzerland has submitted a letter to the Court expressing its views that plaintiff's and the Court's attempts to serve documents upon co-defendants Michel Jarraud and Jorge Cortes by mail are inconsistent with Swiss law and the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents of November 15, 1965. Letter to Court from the Ambassador of Switzerland, dated January 26, 2009, docketed on February 4, 2009.

Summary of Argument

The Court should reject plaintiff's challenge to the constitutionality of the IOIA.

First, the district court correctly held that the application of the IOIA to dismiss the plaintiff's claims does not violate the Constitution, because the plaintiff has no constitutional rights to invoke. The Constitution's protections do not extend to a foreign national, residing in a foreign country, in her dealings outside the United States with the international organization that employs her, and its officers or employees, who are all foreign nationals or residents. *See Point I, infra.*

Moreover, the political branches do not violate the Constitution by granting immunity to designated public international organizations, and their officers and employees while acting in their official capacities. Courts have repeatedly recognized the authority of the political branches to limit the jurisdiction of United States courts in suits involving foreign sovereigns and foreign officials. The immunity extended to certain

international organizations under the IOIA is consistent with the immunities of the foreign sovereigns that comprise them, and which have been a recognized part of United States law since the earliest days of the Nation. International organizations are an increasingly prominent means of conducting international relations, and serve as the instrumentalities of numerous sovereign member nations. See Point II.A, *infra*. Finally, contrary to plaintiff's suggestion, there is no constitutional right to bring suit free from the application of jurisdictional immunity doctrines, the very function of which is to shield against the burdens of litigation. See Point II.B, *infra*.

ARGUMENT

POINT I. THE APPLICATION OF THE IOIA TO DISMISS THE PLAINTIFF'S CLAIMS DOES NOT VIOLATE THE CONSTITUTION, BECAUSE THE PLAINTIFF HAS NO CONSTITUTIONAL RIGHTS TO INVOKE

The application of the IOIA to dismiss the plaintiff's claims does not violate the Constitution because, as the district court correctly recognized, the protections of the Constitution do not extend to plaintiff, a foreign national residing in a foreign state, in a suit against an international organization based in Switzerland, and against that organization's officials who are foreign nationals or foreign residents, arising out of a foreign employment relationship. The Supreme Court has repeatedly affirmed that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our

geographic borders.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); see also, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”); *Zadvydas*, 533 U.S. at 693 (citing *Verdugo-Urquidez* for the proposition that “the Fifth Amendment’s protections do not extend to aliens outside the territorial boundaries” of the United States); *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950) (finding “no authority whatever” supporting the contention that “the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located”).

The Supreme Court recently made clear that decisions limiting the extraterritorial reach of the Constitution do not stand for the proposition that “the political branches have the power to switch the Constitution on or off at will,” *Boumediene v. Bush*, 128 S.Ct. 2229, 2259 (2008), by holding individuals in territory over which the United States “maintains de facto sovereignty,” *id.* at 2253, 2259. Nothing in *Boumediene* suggests, however, that the protections of the Constitution apply to a foreign national, resident in a foreign country, in her dealings outside the United States with the international organization that employs her, and its officers or employees, who are all foreign nationals or residents. *Cf. id.* at 2259 (discussing citizenship and status of the individual and nature of United States authority over the location at issue as “relevant in determining the reach of the Suspension Clause”). No authority supports the plaintiff’s assertion of extraterritorial application of the Constitution.

POINT II. THE GRANT OF IMMUNITY TO PUBLIC INTERNATIONAL ORGANIZATIONS AND THEIR OFFICERS AND EMPLOYEES IS CONSTITUTIONAL

In any event, the IOIA complies fully with the Constitution. Like the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, and the Westfall Act, 28 U.S.C. § 2679 (b)(1), the IOIA is an exercise of the political branches' long-recognized authority to define sovereigns' immunities from federal courts' jurisdiction. Moreover, in extending jurisdictional immunity to organizations primarily composed of sovereign states, the IOIA is consistent with longstanding doctrines of immunity enjoyed by those states, which serve to promote the conduct of foreign affairs and to ensure the appropriate treatment of other sovereigns' representatives. Courts uniformly have rejected the propositions that the application of immunity doctrines to dismiss claims somehow deprives a litigant of otherwise-existing constitutional rights, or that international organizations consisting of multiple signatory sovereign states cannot properly be granted immunities like those conferred on individual foreign states.

A. The IOIA Is a Valid Exercise of the Political Branches' Authority to Confer Immunity, and Comports With Longstanding Doctrines of Foreign Sovereign Immunity

The immunities of government entities and officials of various kinds have been accepted as part of United States law and as subject to executive and legislative authority since the founding. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (noting immunity of the

United States); Act for the Punishment of Certain Crimes Against the United States, § 25, 1 Stat. 112, 117-118 (1790) (granting immunity to diplomats). The doctrine of foreign sovereign immunity has a similar longstanding history, and was recognized by the Supreme Court in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812). There, Chief Justice Marshall held that, “as a matter of comity, members of the international community”—including the United States—“had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases.” *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (describing Chief Justice Marshall’s holding in *The Schooner Exchange*). The immunity of a foreign sovereign was generally understood to encompass not only the state, but individual foreign officials insofar as they acted on the state’s behalf. See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (holding Venezuelan general protected from suit by “[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority”); *Matar v. Dichter*, __ F.3d __, 2009 WL 1011579 at * 3 (2d Cir. 2009) (recognizing the immunity of foreign officials under common law principles).

There can be no question that Congress has the power to enact laws that recognize the immunities of foreign sovereigns. The Supreme Court has recognized that Congress, “by reason of its authority over foreign commerce and foreign relations . . . has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 476, 493 (1983).

When Congress enacted the FSIA in 1976, it codified the restrictive theory of foreign sovereign immunity that the Executive Branch had been applying directly since 1952. *Id.* at 487-488; see Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 4, 90 Stat. 2891, 2891-2897. “In enacting the legislation, Congress relied specifically on its powers to prescribe the jurisdiction of Federal courts, Art. I, § 8, cl. 9; to define offenses against the ‘Law of Nations,’ Art. I, § 8, cl. 10; to regulate commerce with foreign nations, Art. I, § 8, cl. 3; and to make all laws necessary and proper to execute the Government’s powers, Art. I, § 8, cl. 18.” *Verlinden*, 461 U.S. at 493, n. 19. Accordingly, courts have rejected constitutional challenges to various aspects of the FSIA, citing the authority of Congress to address the scope of foreign states’ immunity from the jurisdiction of U.S. courts. See *Verlinden*, 461 U.S. at 497 (“Congress, pursuant to its unquestioned Art. 1 powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity.”); *Ruggiero v. Compania Peruana*, 639 F.2d 872, 880 (2d Cir. 1981) (“Congress could legitimately consider that a partial withdrawal of sovereign immunity from foreign states would interfere with United States’ international relations unless such states were accorded protection similar to what it had given itself.”); *Rex v. Cia. Pervana De Vapores, S.A.*, 660 F.2d 61 (3d Cir. 1981) (“[W]e do not doubt congressional authority to limit the jurisdiction of the federal courts to consider these claims.”).

The authority of the political branches to confer and define immunity serves vital public interests. It is particularly appropriate with respect to foreign sovereign immunity, given that “[a]ctions against

foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States,” *Verlinden*, 461 U.S. at 493, but is also visible in other legislative acts, such as the Westfall Act. See 28 U.S.C. § 2679 (b)(1) (“preclud[ing]” tort claims arising from government employees’ negligence other than pursuant to Federal Tort Claims Act); *Christensen v. Ward*, 916 F.2d 1462, 1472 (10th Cir. 1990) (“The distinction between governmental and nongovernmental defendants, and the doctrine of immunity itself, are rationally related to the substantial government interest in allowing judges, prosecutors, and government agents to serve effectively by concentrating on the business of government unfettered by the threat of burdensome personal litigation as a result of their decisions. . . . [T]he doctrine of sovereign immunity, as embodied in common law and the Reform Act, is constitutional.”).

The authority of the political branches to define and confer immunities includes the authority to grant immunities to designated public international organizations, such as the WMO. Although international organizations are not themselves foreign states, the statutory extension of immunities historically enjoyed by foreign states to international organizations reflects the international community’s “growing efforts to achieve coordinated international action through multinational organizations with specific missions.” *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). In passing the IOLA, Congress noted the “increased activities of the United States in relation to international organizations,” and specifically recognized the need to “extend privileges of a governmental character” in cases where “this

Government associates itself with one or more foreign governments in an international organization.” S. Rep. No. 79-861, at 2 (1945). Indeed, Congress limited the reach of the IOIA to public international organizations, described in the House Report as “those which are composed of governments as members,” H.R. Rep. No. 79-1203, at 1 (1945), in which “the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter.” 22 U.S.C. § 288; *see also* Exec. Order 10,676, 21 Fed. Reg. 6625 (1956) (designating WMO). The extension of such privileges is a logical one given the function of international organizations to serve as the instrumentalities of many nations, and given the modern reality that international organizations are critical fora for the conduct of foreign affairs.

The immunities of international organizations have been repeatedly recognized and respected by district courts within this Circuit over many years without their constitutionality ever having been called into question. *See, e.g., Van Aggelen v. United Nations*, 06 Civ. 8240 (LBS), 2007 WL 1121744, at * 1 (S.D.N.Y. Apr. 12, 2007), *aff'd*, 2009 WL 424175 (2d Cir. 2009); *D’Cruz v. Annan*, 05 Civ. 8918 (DC), 2005 WL 3527153, at *1-2 (S.D.N.Y. Dec. 22, 2005), *aff'd*, 223 Fed. Appx. 42 (2d Cir. 2007); *McGehee v. Albright*, 210 F. Supp. 2d 210, 218 (S.D.N.Y. 1999), *aff'd*, 208 F.3d 203 (2d Cir. 2000); *Askir v. Boutros-Ghali*, 933 F.Supp. 368, 373 (S.D.N.Y. 1996); *De Luca v. United Nations Org.*, 841 F.

Supp. 531, 533 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir. 1994); *Klyumel v. United Nations*, 92 Civ. 4231 (PKL), 1993 WL 42708, at *1 (S.D.N.Y. Feb. 17, 1993); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987).

Furthermore, the few courts to have specifically considered constitutional challenges to the immunities of international organizations or their officials have rejected those challenges out of hand. *See Weinstock v. Asian Development Bank*, No. Civ.A 105CV00174RMC, 2005 WL 1902858, at *3-*4 (D.D.C. Jul. 13, 2005) (rejecting constitutional challenge to immunity afforded to international organizations under the IOIA); *Ahmed v. Hoque*, 01 Civ. 7224 (DLC), 2002 WL 1964806, at * 7 (S.D.N.Y. Aug. 23, 2002) (rejecting plaintiff's constitutional challenge to diplomatic immunity invoked by Bangladeshi representative to the United Nations); *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549-550 (D.C. Cir. 1981) (upholding defendant's immunity under IOIA without addressing plaintiff's First and Fourteenth Amendment claims).

As the district court recognized in *Weinstock*, in rejecting the plaintiff's assertion that the dismissal of claims under the Asian Development Bank deprived the plaintiff of his "fundamental right of access to the court,"

[i]t is axiomatic that Congress can limit the jurisdiction of the lower federal courts. *E.g., Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts. . . ."). One

method by which it can do so, and which it employs quite frequently, is to provide by statute that the United States, foreign sovereigns, or certain entities are immune from suit in the district courts. The codification of these immunities is not a constitutional violation.

Weinstock, 2005 WL 1902858, at *3 (some citations omitted). The same rationale applies here, and bars the plaintiff's constitutional challenge.

B. There is No Constitutional Right to Bring Suit Free From the Application of Immunity Doctrines

Contrary to plaintiff's contention, there simply is no constitutional right on the part of a litigant to bring claims free from the application of applicable immunity doctrines. *See Christensen*, 916 F.2d at 1466, 1472 (10th Cir. 1990) (reprinting district court decision adopted by circuit court, rejecting similar challenge to sovereign immunity and official immunity defenses raised by federal defendants: "The Constitution does not create a fundamental right to pursue specific tort actions."); *see generally Bowman v. Niagara Mach. and Tool Works, Inc.*, 832 F.2d 1052, 1054 (7th Cir. 1987) ("The concept of constitutionally protected access to courts revolves around whether an individual is able to make sure of the courts' processes to vindicate *such rights as he may have*, as opposed to the extent to which rights actually are extended to protect or compensate him.").

While Plaintiff is correct that dismissal of her case on immunity grounds would leave her without a

remedy in United States courts, this consequence is an unremarkable, indeed wholly intended, consequence of immunity, the very function of which is to shield against the burdens of litigation where it applies, regardless of the merits of the case. *See, e.g., United States v. Bein*, 214 F.3d 408, 413 (3d Cir. 2000) (“[A]pplication of sovereign immunity, by its very nature, will leave a person wronged by Government conduct without recourse.”). If this consequence gave rise to a constitutional violation, then no form of immunity would be constitutionally permissible—an absurd result given the ubiquitous application of immunity doctrines in our law.

Indeed, while few litigants have advanced the argument that plaintiff makes here, the D.C. Circuit rejected a closely analogous argument that United States citizens’ due process rights were violated when the United States invoked diplomatic immunity in a lawsuit brought by those U.S. citizens in a German court. *See Dostal v. Haig*, 652 F.2d 173 (D.C. Cir. 1981). There, the court emphasized that, under the plaintiff’s theory, “it would seem that the due process clause is violated by the immunity enjoyed by foreign diplomats within the United States,” a conclusion the court squarely rejected: “due process is not infringed by the proper enjoyment of immunities derived from lawful sources even if thereby a claimant is frustrated in prosecuting a lawful claim.” *Id.* at 176.

CONCLUSION

The Court should uphold the constitutionality of the IOIA.

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May 1, 2009

Respectfully submitted,

LEV L. DASSIN,
*Acting United States Attorney for
the Southern District of New York,
Attorney for the United States.*

EMILY E. DAUGHTRY,
DAVID S. JONES,
*Assistant United States Attorneys,
Of Counsel.*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 4780 words in this brief.

LEV L. DASSIN,
*Acting United States Attorney for
the Southern District of New York*

By: EMILY E. DAUGHTRY,
Assistant United States Attorney

ANTI-VIRUS CERTIFICATION

Case Name: Veiga v. WMO

Docket Number: 08-3999-cv

I, Louis Bracco, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **agencycases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 5/1/2009) and found to be VIRUS FREE.



Louis Bracco
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Dated: May 1, 2009