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CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs civil actions against foreign states in U.S. courts. The FSIA’s various statutory exceptions to a foreign state’s immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, 1605B, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of the U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2017 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Application of the FSIA in Enforcement of ICSID Arbitration Awards

As discussed in *Digest 2016* at 390-96, the United States submitted an *amicus* brief in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, No. 15-707 (2d. Cir.). The U.S. Court of Appeals for the Second Circuit issued its decision on July 11, 2017, holding that the FSIA provides the sole basis for subject matter jurisdiction over actions to enforce ICSID awards against a foreign sovereign and that, therefore, the procedures for service of process contained in the FSIA govern such actions. The decision refers extensively to the U.S. *amicus* brief. Excerpts follow from the decision.

* * * *

This appeal requires us to reconcile the ICSID Convention and Section 1650a with the FSIA, so that we may determine the appropriate procedures for converting an ICSID award into a federal judgment. The parties in this appeal each advocate for one of the two approaches adopted by the

district courts. Mobil supports the approach adopted by district courts in the Southern District and applied by the District Court here. Mobil argues that federal courts may enter judgment on ICSID awards summarily, according to the procedures used in the state courts of the forum state—here, on an *ex parte* petition by the award-creditor. Mobil contends, and the District Court ruled, that this approach best accords with the provisions of the ICSID Convention precluding award debtors from raising substantive challenges to the award in domestic courts.

Venezuela and the United States as *amicus curiae*, in contrast, endorse the approach adopted by district courts in the District of Columbia and in the Eastern District of Virginia. Venezuela and the United States would require that award creditors file a complaint seeking entry of judgment on the award; serve the complaint on the foreign sovereign award debtor; and comply with the venue requirements of the FSIA, with these three steps conferring jurisdiction over the foreign sovereign in the federal district court and permitting that court to enter a valid judgment. This procedure would not necessarily permit a substantive challenge to a duly authenticated award, but it would allow the defendant sovereign to appear and be heard before entry of judgment.

Resolution of this dispute requires us to answer whether Section 1650a provides an independent source of jurisdiction over a foreign sovereign award debtor or whether the later enacted FSIA offers the sole basis for federal courts' jurisdiction over foreign sovereigns. It also requires us to consider whether, even if the FSIA provides the sole source of jurisdiction over foreign sovereigns, Section 1650a empowers courts asked to enforce ICSID awards to modify the FSIA's procedural requirements and adopt state court summary procedures for enforcing judgments in each state in which enforcement is sought.

For the reasons set forth below, we agree with Venezuela and the United States as *amicus curiae* that the FSIA controls actions to enforce ICSID awards. We conclude that the FSIA provides the sole source of jurisdiction—subject matter and personal—for federal courts over actions brought to enforce ICSID awards against foreign sovereigns; that the FSIA's service and venue requirements must be satisfied before federal district courts may enter judgment on such awards; and that Section 1650a does not contemplate "recognition" of an ICSID award as a proceeding separate from "enforcement." Although the FSIA provides subject matter jurisdiction over this proceeding, the FSIA's service and venue requirements have not been satisfied here. Accordingly, the District Court lacked personal jurisdiction over Venezuela. The District Court's Rule 60(b) order must therefore be reversed and its judgment must be vacated.

I. Subject matter jurisdiction

Mobil argues that Section 1650a provides its own independent grant of subject matter jurisdiction when it states that an ICSID award "shall create a right arising under a treaty of the United States" and provides federal district courts with "exclusive jurisdiction" over such action. Appellees' Br. at 40 (quoting 22 U.S.C. § 1650a(a)(b)) (emphasis omitted). Mobil further argues that ICSID enforcement actions are exempted from the requirements of the later enacted FSIA by the reservation in FSIA Section 1604 that its provisions were adopted "[s]ubject to existing international agreements to which the United States is a party." *Id.* at 41–42 (quoting 28 U.S.C. § 1604) (emphasis omitted).

Venezuela does not contest that Section 1650a could serve as a grant of subject matter jurisdiction over some actions to enforce ICSID awards; rather, it argues that Section 1650a cannot confer subject matter jurisdiction on federal courts when the ICSID award debtor is a foreign sovereign. In such a case, it urges us to conclude, the FSIA takes precedence. The ICSID

Convention is not, it argues, one of the “existing international agreements” exempted from the FSIA’s operation. 28 U.S.C. § 1604.

The District Court found that, if the FSIA applied to this case, subject matter jurisdiction could arise from two exceptions to sovereign immunity found in the FSIA: the implied waiver exception and the arbitration exception.... See 28 U.S.C. §§ 1605(a)(1), (6). On this point, we are in accord with the District Court. Indeed, our Court recently held as much in *Blue Ridge Investments*, 735 F.3d 72. We disagree, however, with Mobil’s assertion that Section 1650a also provides a grant of subject matter jurisdiction to the federal courts over award enforcement actions against foreign sovereign award debtors, and that the FSIA did not abrogate that grant (if ever Section 1650a embodied such a grant). We reject this argument primarily for two reasons.

First, the Supreme Court’s decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), suggests that, even if Section 1650a once granted subject matter jurisdiction, after passage of the FSIA, Section 1650a cannot fairly be read to serve as an independent source of subject matter jurisdiction over a foreign sovereign. The Supreme Court’s emphatic and oft repeated declaration in *Amerada Hess* that the FSIA is the “sole basis for obtaining jurisdiction over a foreign state in our courts,” *id.* at 434; see also *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (quoting *Amerada Hess*, 488 U.S. at 434 35); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (same), is difficult to reconcile with an approach that preserves the potential of Section 1650a to serve as an alternative. Recently, the Supreme Court emphasized that the FSIA is “comprehensive”—a term the Court has used “often and advisedly to describe the Act’s sweep”—meaning that “after the enactment of the FSIA, the Act—and not the pre existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.” *NML Capital, Ltd.*, 134 S. Ct. at 2255 56 (alterations and citation omitted). We have similarly reiterated our understanding of the categorical nature of this declaration in *Kirschenbaum v. 650 Fifth Avenue and Related Properties*, 830 F.3d 107, 122 (2d Cir. 2016) (“The FSIA provides the exclusive basis for obtaining subject matter jurisdiction over a foreign state.”), and *Blue Ridge Investments*, 735 F.3d at 83 (“The only source of subject matter jurisdiction over a foreign sovereign or its instrumentalities in the courts of the United States is the FSIA . . .”). The comprehensiveness of the FSIA’s framework suggests that Section 1650a should not be read as providing an independent basis for courts to exercise subject matter jurisdiction over foreign sovereigns, or, at the very least, should no longer be read as providing such a basis, even if it once did.

Second, although the question is not free from doubt, we are not persuaded by Mobil’s argument that FSIA Section 1604’s carve out for “existing international agreements” includes the Convention. In *Amerada Hess*, the Supreme Court explained that international agreements that predate the FSIA are excluded from the Act’s reach only when they expressly conflict with the Act’s immunity provisions. See 488 U.S. at 442 (explaining that Section 1604’s carve out “applies when international agreements *expressly conflict* with the *immunity* provisions of the FSIA” (emphasis added)(alterations and citation omitted)); see also H.R. Rep. No. 94 1487, at 6616 (“In the event an international agreement *expressly conflicts* with [the FSIA], the international agreement would control. . . . [But] the international agreement would control *only where a conflict was manifest*.” (emphases added)). Because actions to enforce ICSID awards rendered against foreign sovereigns fall neatly into the FSIA’s specific exemptions from immunity under Sections 1605(a)(1) (waiver) and (6) (arbitration), see *Blue Ridge Invs.*, 735 F.3d at 83 86, we see no conflict between the FSIA’s immunity provisions and the ICSID

Convention or Section 1650a that would trigger Section 1604's carve out as construed by the Supreme Court.

Section 1650a's legislative history also undermines the argument that FSIA Section 1604 exempts the ICSID Convention and Section 1650a from the FSIA's jurisdictional provisions. The legislative record strongly suggests that, when Congress enacted Section 1650a in 1966, a decade before it passed the FSIA, it contemplated that actions against foreign sovereigns under Section 1650a would remain subject to sovereign immunity. Thus, during his appearance before the House Committee on Foreign Affairs, Deputy Legal Adviser at the Department of State Andreas Lowenfeld testified tellingly: "Basically what this convention says is that the district court shall have jurisdiction over the subject matter. As to whether it has jurisdiction over a party, there is nothing in the convention that will change the defense of sovereign immunity." H.R. 15785 Hearing, at 18 (statement of Andreas F. Lowenfeld, Deputy Legal Advisor, Dep't of State). He elaborated that if, for example, "someone wants to sue Jersey Standard in the United States, on an award, no problem. If somebody wants to sue Peru or the Peruvian Oil Institute, why it would depend on whether in the particular case that entity would or would not be entitled to sovereign immunity." *Id.* (paragraph break omitted).

His testimony is consonant with the venerable canon of construction that Congress is presumed to legislate with familiarity of the legal backdrop for its legislation. *See Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). We are aware of no contrary textual or record indication that Congress intended to exclude proceedings brought under Section 1650a from the ordinary operation of sovereign immunity, either as the principle of immunity stood before or after the enactment of the FSIA.

The Supreme Court's consideration of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, in *Amerada Hess* is also instructive. There, the Court rejected the argument that the ATS—which, like Section 1650a, predates the FSIA—continued to confer subject matter jurisdiction over a foreign sovereign after the FSIA's enactment. *Amerada Hess*, 488 U.S. at 436–38. To the extent the ATS ever provided a source of subject matter jurisdiction over foreign sovereigns, the *Amerada Hess* Court found it could no longer confer that authority after the passage of the FSIA, nor did Congress's failure to repeal the ATS when it enacted the FSIA counsel otherwise. *Id.* at 437. The Court viewed as particularly significant in this regard the fact that the ATS "does not distinguish among classes of defendants," and could therefore continue to have "the same effect after the passage of the FSIA as before with respect to defendants *other than foreign states*." *Id.* at 438 (emphasis added). In other words, any conferral of subject matter jurisdiction stemming from the ATS would be unaffected as to non-sovereign defendants, but the ATS could not confer subject matter jurisdiction over foreign sovereigns after passage of the FSIA.

The same is true here. Section 1650a does not "distinguish" among classes of private defendants: it states broadly that "[t]he district courts of the United States . . . shall have exclusive jurisdiction over actions and proceedings" to enforce ICSID awards. 22 U.S.C. § 1650a(b). Section 1650a's grant of subject matter jurisdiction over private defendants may remain intact; but, after passage of the FSIA, Section 1650a no longer confers subject matter jurisdiction over foreign sovereigns. The ATS and Section 1650a, of course, enacted two centuries apart and addressing very different concerns, have scant overlap in most respects. Nonetheless, the Supreme Court's reasoning about the interrelationship of the FSIA and the ATS as set forth in

Amerada Hess provides a useful template for interpreting the FSIA's comprehensive framework for sovereign immunity in the ICSID award context.

Combined with the legislative history that suggests that Congress expected actions under Section 1650a to be governed by sovereign immunity, *Amerada Hess* in its holding as well as in its language confirms our decision that Section 1650a does not constitute an independent grant of subject matter jurisdiction over a foreign sovereign. The FSIA provides the sole basis for subject matter jurisdiction over actions in federal court to enter judgment against foreign sovereigns on ICSID awards.

II. Personal jurisdiction

A. Scope of the FSIA

Having concluded that the FSIA provides the sole basis for subject matter jurisdiction in cases brought to enforce ICSID awards, we must now determine whether the FSIA also controls the procedures by which such actions must be brought against a foreign sovereign award debtor. We conclude that it does.

At Mobil's urging, the District Court concluded that the FSIA's service and venue requirements had no bearing on Mobil's application for enforcement. The court first observed that the FSIA "leaves congressional intent unclear" regarding whether its service of process and venue requirements apply in the ICSID award context. *Mobil Cerro Negro*, 87 F. Supp. 3d at 593. Having identified this ambiguity, the court then turned to its own interpretation of the "objectives of the ICSID Convention and of Congress" in passing Section 1650a to determine whether the summary procedures invoked by Mobil would be appropriate. *Id.* at 599.

We find no such ambiguity in the FSIA's text. As the Supreme Court has advised, "[a]lthough a major function of the [FSIA] . . . is to regulate jurisdiction of federal courts over cases involving foreign states, the Act's purpose is to set forth comprehensive rules governing sovereign immunity," including "procedures for commencing lawsuits against foreign states." *Verlinden*, 461 U.S. at 495 n.22 (internal quotation marks and citation omitted); *see also* H.R. Rep. No. 94 1487, at 6606 ("[T]his bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining *in personam* jurisdiction over, a foreign state . . ."). The Act was intended to "provide when and how parties can maintain a lawsuit against a foreign state." H.R. Rep. No. 94 1487, at 6604. The FSIA prescribes comprehensive procedures for bringing suit against foreign sovereigns, including suit for "recognition and enforcement of arbitral awards," 28 U.S.C. § 1605(a)(6), as to which the foreign state may be found to have waived the immunity otherwise conferred. Thus it is not Section 1650a's silence on enforcement of ICSID awards that guides our reasoning. Rather, we accord conclusive weight to the affirmative and sweeping provisions in the FSIA's comprehensive statutory scheme and the observation that the FSIA makes no provision for summary procedures in any instance.

In fact, the FSIA explicitly contemplates the exercise of federal court jurisdiction over actions to enforce international arbitral awards against foreign sovereigns under the exemption from immunity provided by Section 1605(a)(6). And nowhere in the FSIA did Congress expressly exempt actions against foreign sovereigns under Section 1605(a)(6) from the statute's service or venue requirements. *See* 28 U.S.C. §§ 1391(f), 1608. Indeed, nowhere in the FSIA did Congress provide an expedited procedure to enter a federal judgment against a foreign sovereign in *any* circumstance. *Cf.* H.R. Rep. No. 94 1487, at 6612 (noting "sections 1330(b) [personal jurisdiction provision], 1608 [service of process provision], and 1605 1607 [foreign sovereign immunity provisions] are all carefully interconnected"). We simply see no reason to conclude

that an action to enforce an ICSID award, which is comfortably encompassed within Section 1605(a)(6), would be exempt from the FSIA's procedural requirements.

B. Conflict with the ICSID Convention or Section 1650a

The District Court rejected this straightforward application of the FSIA's service and venue provisions, in part, based on its concern that requiring compliance with these provisions of the FSIA "would bring the FSIA into grave tension with the objectives of the ICSID Convention and of Congress." *Mobil Cerro Negro*, 87 F. Supp. 3d at 599. It thus endorsed instead the adoption of New York state procedures, which it viewed as more consistent with "Congress's expectation" that ICSID award recognition "would be automatic and not subject to contest." *Id.* at 600.

At the outset, we note that, in interpreting the ICSID Convention and its enabling act, we owe particular deference to the interpretation favored by the United States. *Medellín v. Texas*, 552 U.S. 491, 513 (2008) ("It is . . . well settled that the United States' interpretation of a treaty is entitled to great weight." (internal quotation marks and citation omitted)). In its brief *amicus curiae*, the United States articulates its view that "the mechanics of enforcing ICSID awards are not and never were governed by treaty," U.S. Br. at 13, and that neither the Convention nor Section 1650a "requires or forbids any particular set of procedures," *id.* at 16. Instead, the ICSID Convention "reserves the means of enforcement to member states, which enforce awards in the same way that they enforce domestic judgments." *Id.* at 13.

We agree with the United States that the FSIA's requirements and the United States' obligations under the ICSID Convention do not stand in significant tension. As we have noted, the ICSID Convention contemplates treatment of an award "as if it were a final judgment of the courts of a constituent state." ICSID Convention art. 54. Article 54 affords ICSID arbitral awards the status of final state court judgments, and was included in the Convention at the insistence of the United States. *See* Schreuer, *Commentary*, at 1143. It does not, however, dictate the nature of the proceedings through which ICSID awards will be enforced in the United States.

The United States was faithful to this provision when it enacted Section 1650a, requiring the federal courts to accord ICSID awards "full faith and credit as if the award were a final judgment of . . . one of the several States." 22 U.S.C. § 1650a(a). The legislative history suggests that this provision was intended to immunize ICSID awards from substantive assault outside the ICSID tribunal. *See, e.g.*, Smith House Statement at 4 ("[A]n action would have to be brought on the award in a U.S. district court In such an enforcement action, the district court would be required to give full faith and credit to the arbitral award. Essentially, this means that district courts would be precluded from inquiring into the merits of the underlying controversy."). Requiring an enforcement action to comply with the FSIA does not contravene this mandate.

To require that a civil action be prosecuted to conclusion before entering judgment on an ICSID award will not relieve federal courts of the responsibility under the Convention and Section 1650a to enforce ICSID awards as final. *See* ICSID Convention art. 53(1) (providing that ICSID awards "shall not be subject to any appeal or to any other remedy except those provided for in [the] Convention"); 22 U.S.C. § 1650a(a) (providing that "pecuniary obligations imposed by [] an award . . . shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States"); *see also* Schreuer, *Commentary*, at 1139 41.

Litigation on actions to enforce awards need not be protracted. That the action might be referred to as “plenary” as opposed to “summary” does not portend a proceeding in which the court must entertain all manner of substantive defenses, or even defenses cognizable under the Federal Arbitration Act. Used in this context, the word “plenary” signals merely the need for commencing an action under Federal Rule of Civil Procedure 3, service of the complaint in compliance with Rule 4 (as modified by the FSIA), and the opportunity for the defendant sovereign to appear and file responsive pleadings. To initiate such an action, an ICSID award creditor may file a complaint in district court, detailing the terms of the award, establishing proper venue, and furnishing a certified copy of the award. After the complaint is filed and service effected, the award creditor may file a motion for judgment on the pleadings, for instance, or a motion for summary judgment. The ICSID award- debtor would be a party to the action and would be able to challenge the United States court’s jurisdiction to enforce the award—for instance, on venue grounds—but would not be permitted to make substantive challenges to the award.

Moreover, requiring compliance with the FSIA facilitates an enforcement regime for ICSID awards that has a greater prospect of consistency across the nation. The District Court discounted any need for uniformity of enforcement in the ICSID context, observing that each member state to the Convention will enforce awards according to different procedures. But in so reasoning, the District Court overlooked the Congressional intent, manifest in the enabling legislation’s history and text, to provide for uniform enforcement *within* the United States. Congress vested exclusive jurisdiction over enforcement of ICSID awards in the federal courts. *See* 28 U.S.C. § 1650a(b). Testimony given by the General Counsel of the Treasury before the Senate Committee on Foreign Relations reflects that in enacting Section 1650a, Congress was guided by a desire to provide a uniform enforcement procedure throughout the United States:

[T]he proposed legislation states that district courts of the United States shall have exclusive jurisdiction over actions to enforce arbitral awards. This provision is also based on article 54(1) of the convention, which states that ...arbitral awards may be enforced in or through the Federal courts. The United States suggested this provision in order to be able to provide in the United States for a *uniform procedure* for enforcement of awards rendered pursuant to the convention.

S. Rep. No. 89 1374, at 17 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2617, 2619 (emphasis added). Calling upon different state procedures in each of the states in which district courts sit at the entry of judgment phase would actively undermine the goal of establishing a nationally uniform procedure for enforcement of ICSID awards. Indeed, such a regime could be expected to achieve the opposite result, in which each state could potentially require a distinct procedure. Applying the FSIA will facilitate national uniformity in procedure. Consistency as to enforcement seems to us importantly aligned with the values of predictability and federal control that foreign affairs demands and that the FSIA was designed to promote.

We are confident that our decision that actions to enforce ICSID awards against foreign sovereigns must comply with the FSIA’s service and venue provisions is consistent with the United States’ obligations under the ICSID Convention. We recognize, of course, that executions on the judgment will proceed according to state law. *See* Fed. R. Civ. P. 69(a)(1). But this does not compel us to abandon the goal of consistency when the award is first converted to a federal judgment.

C. “Recognition” under Section 1650a

The District Court’s contrary reasoning also derived from the notion that “recognition,” and not just “enforcement,” was part of the District Court’s task. The District Court viewed recognition, like confirmation in the context of other arbitral proceedings, as a mere ministerial act preliminary to enforcement. Other courts have rested their reasoning about their obligations with respect to ICSID awards in part on this distinction. *See, e.g., Micula II*, 2015 WL 4643180, at *3 4.

As noted above, Article 54 of the Convention requires member states to “recognize an award rendered pursuant to this Convention as binding and *enforce* the pecuniary obligations imposed by that award.” ICSID Convention art. 54 (1) (2) (emphasis added). In this, the Convention seems to refer to “recognition” and “enforcement” as if they were distinct actions. *See Schreuer, Commentary*, at 1128 (describing “recognition” as “the formal confirmation that the award is authentic and that it has the legal consequences provided by the law” and noting that it may be “a step preliminary to enforcement”).

But the Convention is not self executing. *See Medellín*, 552 U.S. at 505 06 & n.3 (treaties not specified as self executing can be enforced only pursuant to implementing legislation); *id.* at 533 34 & n.1 (Stevens, J., concurring) (citing Section 1650a as an example). We must therefore focus in the first instance on the terms of the ICSID enabling act, Section 1650a, to determine the scope of a federal court’s authority with respect to awards under the Convention, and refer to the Convention only for aid in construing Section 1650a where needed.

In contrast to the Convention, Section 1650a(a) refers to enforcement, but not to recognition: it directs only that “[t]he pecuniary obligations imposed by such an award shall be *enforced* and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.” 22 U.S.C. §1650a(a) (emphasis added). It makes no mention of recognition as a separate, additional judicial action, and we think that its framing was intentional. Other language from Section 1650a confirms this conclusion. Section 1650a(b) grants federal courts “exclusive jurisdiction over *actions* and *proceedings* under subsection (a).” *Id.* § 1650a(b) (emphasis added). The terms “actions” and “proceedings” typically connote something more than a summary *ex parte* conference leading to entry of a judgment on an award: after all, those terms are the foundation of the Federal Rules of Civil Procedure. Rule 1 provides, for example, “These rules govern the procedure in all civil actions and proceedings in the United States district courts,” subject to a few exceptions not relevant here. Fed. R. Civ. P. 1. In similar vein, Rule 2 provides, “There is one form of action—the civil action.” Fed. R. Civ. P. 2; *see also* Fed. R. Civ. P. 3 (“A civil action is commenced by filing a complaint with the court.”). Accordingly, we understand these terms to contemplate enforcement obtained through a civil action on the award. *See Micula I*, 104 F. Supp. 3d at 50 (“The use of the words ‘actions’ and ‘proceedings’ strongly connotes a congressional intent to domesticate ICSID awards through a plenary action, rather than *ex parte* confirmation or recognition.”).

Further, Section 1650a directs that “[t]he Federal Arbitration Act . . . shall not apply to enforcement of awards rendered pursuant to the [ICSID Convention].” 5 U.S.C. § 1650a(a). This exemption carries two resonances of import here. First, the FAA specifically provides for confirmation of domestic arbitral awards by *court order*, not through an “action” or “proceeding.” 9 U.S.C. § 9 (“[A]t any time within one year after the award is made any party to the arbitration may apply . . . for an *order confirming* the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed [elsewhere in] this title.”) (emphasis added)). That Congress so provided many years earlier suggests that,

although it knew how to provide for summary procedures in the arbitral context, it simply elected not to do so in Section 1650a. *See Micula I*, 104 F. Supp. 3d at 50 (“Congress was keenly aware that domestic arbitration awards could be confirmed, but elected not to use that procedure for ICSID awards.”).

Second, the FAA prescribes grounds for vacating an arbitral award where the award was tainted by, among other things, fraud, corruption, or misconduct by the arbitrator. *See* 9 U.S.C. § 10. By expressly precluding the FAA’s application to enforcement of ICSID Convention awards, Congress intended to make these grounds of attack unavailable to ICSID award debtors in federal court enforcement proceedings. *See* 112 Cong. Rec. 13148, 13149 (daily ed. June 15, 1966) (written statement of Sen. Fulbright) ... Congress’s exclusion of the FAA’s provisions from Section 1650a may suggest an expectation that actions to enforce ICSID awards would not be protracted, as emphasized by the District Court. But the exclusion of the substantive attacks available under the FAA from ICSID award actions does not, in our judgment, imply an intention that a foreign sovereign award debtor be denied notice of the action to enforce the award and the occasion to make non merits challenges to the award: for example, to question the authenticity of the award presented for enforcement, the finality of the award, or the possibility that an offset might apply to the award that would make execution in the full amount improper. If the debtor were not entitled to notice of an enforcement attempt, it would have no opportunity to level such attacks before the award became a federal judgment. Nor would remitting these challenges to the execution stage, which often would occur piecemeal and in various jurisdictions, be adequate, efficient, or in keeping with the general background of sovereign immunity law in the United States.

Our reading of Section 1650a thus suggests that Congress did not contemplate federal court “recognition” of ICSID awards; it contemplated only enforcement. And enforcement should proceed, the statute directs, “as if the award were a final judgment of a [state court]” for which enforcement were sought in federal court and which is owed full faith and credit. 22 U.S.C. § 1650a. Accordingly, we turn briefly to what it means to “enforce” a state court judgment in federal court and award it full faith and credit.

D. “Full faith and credit” under Section 1650a

Section 1650a requires federal courts to “enforce” ICSID awards and accord them “the same full faith and credit as if [they] were [] final judgment[s] of a court of general jurisdiction of one of the several States.” 22 U.S.C. § 1650a(a). To identify the type of action necessary to enforce ICSID awards in compliance with Section 1650a, we look to established procedures for enforcing state court judgments in federal court.

Since 1948, federal courts have been directed by 28 U.S.C. § 1738 to accord state court judgments full faith and credit. *See* Pub. L. No. 80 773, 62 Stat. 869, 947 (1948) (codified at 28 U.S.C. § 1738). Section 1738 does not, however, provide guidance as to how state court judgments may be enforced in federal court. Actions to enforce state court judgments in federal court are rare. *See Siag*, 2009 WL 1834562, at *1 (noting rarity). They are not unknown, however. *See, e.g., Weininger v. Castro*, 462 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (action brought in federal court on default judgment previously entered by state court against Republic of Cuba). As the United States’ brief *amicus curiae* points out, it was the case in 1966, and remains so today, that federal courts generally require that a civil action be filed, with notice to the judgment creditor, before enforcing a state court judgment. ... In light of this history, it is reasonable to conclude that Congress was aware of this practice when it enacted Section 1650a,

and thus would have contemplated that ICSID awards would be enforced in federal court by judgment entered on an action filed—and not on an *ex parte* petition—on an ICSID award.

* * * *

An examination of the available legislative history of Section 1650a also tends to confirm our view that Congress did not invite the incorporation of summary enforcement procedures against foreign sovereign award debtors.

* * * *

Our conclusion that Section 1650a does not support summary registration for converting ICSID awards into federal judgments, but rather requires commencement of an action on the award in federal court, brings Section 1650a into alignment with our interpretation of the FSIA. Following Supreme Court precedent, we have consistently described the FSIA as providing the sole source of subject matter jurisdiction over foreign sovereigns. We continue to do so today.

* * * *

2. Exceptions to Immunity from Jurisdiction: Commercial Activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case “in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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.”

The commercial activity exception was discussed in the *Bennett* and *Rubin* cases, though not as the primary issue. See *infra*, Section A.6.b. As discussed in *Digest 2016* at 402-06, *Helmerich & Payne Int’l Drilling Co., et al. v. Venezuela et al*, No. 15-698, in which the United States filed an *amicus* brief opposing certiorari in 2016, also involved the commercial activity exception. On May 15, 2017, the Supreme Court denied the cross-petition for certiorari in *Helmerich*, seeking review of the commercial activity ruling of the D.C. Circuit.

3. Expropriation Exception to Immunity: Standard for Establishing Jurisdiction

The expropriation exception to immunity in the FSIA provides that a foreign state is not immune from any suit “in which rights in property taken in violation of international law are in issue” and a specified commercial-activity nexus to the United States is present. 28 U.S.C. 1605(a)(3). As discussed in *Digest 2016* at 406-14, the United States filed briefs as *amicus curiae* both at the petition stage and on the merits in the Supreme Court of the United States in *Venezuela et al. v. Helmerich & Payne Int’l Drilling Co., et al.*, No. 15-423, a case involving the expropriation exception. On May 1, 2017, the Supreme Court

issued its decision, vacating the decision below and remanding. Excerpts follow from the Supreme Court's opinion.

* * * *

In our view, a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction. Rather, state and federal courts can maintain jurisdiction to hear the merits of a case only if they find that the property in which the party claims to hold rights was indeed "property taken in violation of international law." Put differently, the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (*property* rights) and that the relevant property was taken in a certain way (in violation of international law). A good argument to that effect is not sufficient. But a court normally need not resolve, as a jurisdictional matter, disputes about whether a party actually held rights in that property; those questions remain for the merits phase of the litigation.

Moreover, where jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes. But, consistent with foreign sovereign immunity's basic objective, namely, to free a foreign sovereign from *suit*, the court should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible. See *Verlinden B. V. v. Central Bank of Nigeria*, 461 U. S. 480, 493–494 (1983).

I

Since the mid-1970's a wholly owned Venezuela-incorporated subsidiary (Subsidiary) of an American company (Parent) supplied oil rigs to oil development entities that were part of the Venezuelan Government. In 2011 the American Parent company and its Venezuelan Subsidiary (the respondents here) brought this lawsuit in federal court against those foreign government entities. (The entities go by their initials, PDVSA, but we shall normally refer to them as "Venezuela" or the "Venezuelan Government.") The American Parent and the Venezuelan Subsidiary claimed that the Venezuelan Government had unlawfully expropriated the Subsidiary's oil rigs. And they sought compensation.

* * * *

For present purposes, it is important to keep in mind that the Court of Appeals did not decide (on the basis of the stipulated facts) that the plaintiffs' allegations *are* sufficient to show their property was taken in violation of international law. It decided instead that the plaintiffs *might* have such a claim. And it made clear the legal standard that it would apply. It said that, in deciding whether the expropriation exception applies, it would set an "exceptionally low bar." *Id.*, at 812. Any possible, *i.e.*, "non-frivolous," *ibid.*, claim of expropriation is sufficient, in the Court of Appeals' view, to bring a case within the scope of the FSIA's exception. In particular: If a plaintiff alleges facts and claims that permit the plaintiff to make an expropriation claim that is *not* "*wholly insubstantial or frivolous*," then the exception permits the suit and the sovereign loses its immunity. *Ibid.* (emphasis added). Given the factual stipulations, the Court of Appeals did not suggest further fact finding on this jurisdictional issue but, rather, decided that the

Subsidiary had “satisfied this Circuit’s forgiving standard for surviving a motion to dismiss in an FSIA case.” *Id.*, at 813.

Venezuela filed a petition for certiorari asking us to decide whether the Court of Appeals had applied the correct standard in deciding that the companies had met the expropriation exception’s requirements. We agreed to do so.

II

Foreign sovereign immunity is jurisdictional in this case because explicit statutory language makes it so. See §1604 (“[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided” by the FSIA’s exceptions); §1605(a) (“A foreign state shall not be immune from the jurisdiction” of federal and state courts if the exception at issue here is satisfied). Given the parties’ stipulations as to all relevant facts, our inquiry poses a “pure question of statutory construction,” *Republic of Austria v. Altmann*, 541 U. S. 677, 701 (2004). In our view, the expropriation exception grants jurisdiction only where there is a valid claim that “property” has been “taken in violation of international law.” §1605(a)(3). A nonfrivolous argument to that effect is insufficient.

For one thing, the provision’s language, while ambiguous, supports such a reading. It says that there is jurisdiction in a “case... in which rights in property taken in violation of international law are in issue.” *Ibid.* Such language would normally foresee a judicial decision about the jurisdictional matter. And that matter is whether a certain kind of “right” is “at issue,” namely, a *property right taken in violation of international law*. To take a purely hypothetical example, a party might assert a claim to a house in a foreign country. If the foreign country nationalized the house and, when sued, asserted sovereign immunity, then the claiming party would as a jurisdictional matter prove that he claimed “property” (which a house obviously is) and also that the property was “taken in violation of international law.” He need not show as a *jurisdictional* matter that he, rather than someone else, owned the house. That question is part of the merits of the case and remains “at issue.”

We recognize that merits and jurisdiction will sometimes come intertwined. Suppose that the party asserted a claim to architectural plans for the house. It might be necessary to decide whether the law recognizes the kind of right that he asserts, or whether it is a right in “property” that was “taken in violation of international law.” Perhaps that is the only serious issue in the case. If so, the court must still answer the jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it.

Our reading of the statute is consistent with its language. The case is one which the existence of “rights” remains “at issue” until the court decides the merits of the case. But whether the rights asserted are rights of a certain kind, namely, rights in “property taken in violation of international law,” is a jurisdictional matter that the court must typically decide at the outset of the case, or as close to the outset as is reasonably possible.

Precedent offers a degree of support for our interpretation. In *Permanent Mission of India to United Nations v. City of New York*, 551 U. S. 193 (2007), we interpreted a different FSIA exception for cases “in which . . . rights in immovable property situated in the United States are in issue.” §1605(a)(4). We held that there was jurisdiction over the case because the plaintiff’s lawsuit to enforce a tax lien “directly implicate[d]” the property rights described by the FSIA exception. See *id.*, at 200–201. We did not simply rely upon a finding that the plaintiff had made a nonfrivolous argument that the exception applied.

For another thing, one of the FSIA's basic objectives, as shown by its history, supports this reading. The Act for the most part embodies basic principles of international law long followed both in the United States and elsewhere. See *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136–137 (1812); see also *Verlinden*, 461 U. S., at 493 (explaining that the Act “comprehensively regulat[es] the amenability of foreign nations to suit in the United States”). Our courts have understood, as international law itself understands, foreign nation states to be “independent sovereign” entities. To grant those sovereign entities an immunity from suit in our courts both recognizes the “absolute independence of every sovereign authority” and helps to “induc[e]” each nation state, as a matter of “international comity,” to “respect the independence and dignity of every other,” including our own. *Berizzi Brothers Co. v. S. S. Pesaro*, 271 U. S. 562, 575 (1926) (quoting *The Parlement Belge*, [1880] 5 P. D. 197, 214–215 (appeal taken from Admiralty Div.)).

In the mid-20th century, we, like many other nations, began to treat nations acting in a commercial capacity like other commercial entities. See *Permanent Mission*, *supra*, at 199–200. And we consequently began to limit our recognition of sovereign immunity, denying that immunity in cases “arising out of a foreign state’s strictly commercial acts,” but continuing to apply that doctrine in “suits involving the foreign sovereign’s *public acts*,” *Verlinden*, 461 U.S., at 487 (emphasis added).

At first, our courts, aware of the expertise of the Executive Branch in matters of foreign affairs, relied heavily upon the advice of that branch when deciding just when and how this “restrictive” sovereign immunity doctrine applied. *Ibid.* See also H. R. Rep. No. 94–1487, pp. 8–9 (1976) (similar). But in 1976, Congress, at the urging of the Department of State and Department of Justice, began to codify the doctrine. The resulting statute, the FSIA, “starts from a premise of immunity and then creates exceptions to the general principle.” *Id.*, at 17; *Verlinden*, *supra*, at 493. Almost all the exceptions involve commerce or immovable property located in the United States. *E.g.*, §§1605(a)(2) and (4); see also §1602 (expressing the finding that “[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned”). The statute thereby creates a doctrine that by and large continues to reflect basic principles of international law, in particular those principles embodied in what jurists refer to as the “restrictive” theory of sovereign immunity. See, *e.g.*, Restatement (Third) of Foreign Relations Law of the United States §451, and Comment *a* (1986) (describing the restrictive theory of immunity); United Nations General Assembly, Convention on Jurisdictional Immunities of States and Their Property, Res. 59/38, Arts. 5, 10–12 (Dec. 2, 2004) (adopting a restrictive theory of immunity and withdrawing immunity for loss of property where, among other requirements, “the act or omission occurred in whole or in part in the territory of th[e] other State”); United Nations General Assembly, Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, Supp. A/59/22 No. 1, pp. 7–11 (Mar. 1–5, 2004) (same).

We have found nothing in the history of the statute that suggests Congress intended a radical departure from these basic principles. To the contrary, the State Department, which helped to draft the FSIA’s language (and to whose views on sovereign immunity this Court, like Congress, has paid special attention, *Altmann*, 541 U. S., at 696), told Congress that the Act was “drafted keeping in mind what we believe to be the general state of the law internationally, so that we conform fairly closely... to our accepted international standards,” Hearing on H. R. 3493 before the Subcommittee on Claims and Governmental Relations of the House of Representatives Committee on the Judiciary, 93d Cong., 1st Sess., 18 (1973). The Department

added that, by doing so, we would diminish the likelihood that other nations would each go their own way, thereby “subject[ing]” the United States “abroad” to more claims “than we permit in this country... .” *Ibid.* It is consequently not surprising to find that the expropriation exception on its face emphasizes conformity with international law by requiring not only a commercial connection with the United States but also a taking of property “*in violation of international law.*”

We emphasize this point, embedded in the statute’s language, history, and structure, because doing so reveals a basic objective of our sovereign immunity doctrine, which a “nonfrivolous-argument” reading of the expropriation exception would undermine. A sovereign’s taking or regulating of its own nationals’ property within its own territory is often just the kind of foreign sovereign’s public act (a “*jure imperii*”) that the restrictive theory of sovereign immunity ordinarily leaves immune from suit. See *Permanent Mission*, 551 U.S., at 199 (describing the FSIA’s distinction between public acts, or *jure imperii*, and purely commercial ones); Restatement (Third) of Foreign Relations Law of the United States §712, at 196 (noting that, under international law, a state is responsible for a “taking of the property of a *national of another state*” (emphasis added)). See also Restatement (Fourth) of Foreign Relations Law of the United States §455, Reporter’s Note 12, p. 9 (Tent. Draft No. 2, Mar. 22, 2016) (noting that “[n]o provision comparable” to the exception “has yet been adopted in the domestic immunity statutes of other countries” and that expropriations are considered acts *jure imperii*); *United States v. Belmont*, 301 U. S. 324, 332 (1937); B. Cheng & G. Schwarzberger, *General Principles of Law as Applied by International Courts and Tribunals* 37–38 (1953) (collecting cases describing “the power of the sovereign State to expropriate” (internal quotation marks omitted)); *Jurisdictional Immunities of the State (Germany v. Italy)*, 2012 I. C. J. 99, 123–125, ¶¶56–60 (Judgt. of Feb. 3) (noting consistent state practice in respect to the distinction between public and commercial acts and describing an international law of immunity recognizing such a difference); *Altmann, supra*, at 708 (BREYER, J., concurring) (describing the French Court of Appeals’ decision about whether a King who has abdicated the throne is ““entitled to claim ... immunity”” as ““Hea[d] of State”” when his sovereign status at the time of suit was in doubt (quoting *Ex-King Farouk of Egypt v. Christian Dior*, 84 Clunet 717, 24 I. L. R. 228, 229 (CA Paris 1957))).

To be sure, there are fair arguments to be made that a sovereign’s taking of its own nationals’ property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way. But such arguments are about whether such an expropriation does violate international law. To find jurisdiction only where a taking *does violate* international law is thus consistent with basic international law and the related statutory objectives and principles that we have mentioned. But to find jurisdiction where a taking does *not* violate international law (e.g., where there is a nonfrivolous but ultimately *incorrect* argument that the taking violates international law) is inconsistent with those objectives. And it is difficult to understand why Congress would have wanted that result.

Moreover, the “nonfrivolous-argument” interpretation would, in many cases, embroil the foreign sovereign in an American lawsuit for an increased period of time. It would substitute for a more workable standard (“violation of international law”) a standard limited only by the bounds of a lawyer’s (nonfrivolous) imagination. It would create increased complexity in respect to a jurisdictional matter where clarity is particularly important. *Hertz Corp. v. Friend*, 559 U. S.

77, 94–95 (2010). And clarity is doubly important here where foreign nations and foreign lawyers must understand our law.

Finally, the Solicitor General and the Department of State also warn us that the nonfrivolous-argument interpretation would “affron[t]” other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States in “expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.” Brief for United States as *Amicus Curiae* 21–22. (At any given time the Department of Justice’s Office of Foreign Litigation represents the United States in about 1,000 cases in 100 courts around the world. *Ibid.*) See also *National City Bank of N. Y. v. Republic of China*, 348 U. S. 356, 362 (1955) (noting that our grant of immunity to foreign sovereigns dovetails with our own interest in receiving similar treatment).

* * * *

4. Exceptions to Immunity from Jurisdiction: Torts and Terrorism

The tort exception to immunity in the FSIA provides that a foreign state is not immune in certain actions “for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission” of a foreign state. 28 U.S.C. § 1605(a)(5). The FSIA’s definitions section specifies that “[t]he ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.” *Id.* § 1603(c).

The terrorism exception applies, *inter alia*, in certain cases in which money damages are sought for “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act . . . engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.” 28 U.S.C. § 1605A(a)(1). The provision further specifies that “[t]he court shall hear a claim under this section if” certain additional requirements are met, *id.* § 1605A(a)(2), including that “the foreign state was designated as a state sponsor of terrorism at the time the act [at issue] occurred, or was so designated as a result of such act, and ...either remains so designated when the claim is filed ...or was so designated within the 6-month period before the claim is filed....” *Id.* § 1605A(a)(2)(A)(i).

As discussed in *Digest 2016* at 415-20, the United States filed a statement of interest in *Schermerhorn et al. v. Israel*, No. 16-0049, a case in which plaintiffs asserted jurisdiction under the FSIA tort and terrorism exceptions. The district court dismissed the case for lack of jurisdiction on January 25, 2017, and the plaintiffs filed a notice of appeal on February 15, 2017. The U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal in a decision issued on December 1, 2017, excerpted below.

* * * *

The FSIA provides “the sole basis for obtaining jurisdiction over a foreign state in our courts.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, foreign sovereigns enjoy absolute immunity from suit unless the case falls within one of several specified exceptions, two of which—the “non-commercial torts” exception, 28 U.S.C. § 1605(a)(5), and the “terrorism” exception, *id.* § 1605A—are at issue in this case. We consider each in turn, “[r]eview[ing] the District Court’s sovereign immunity determination de novo.” *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 35 (D.C. Cir. 2014).

Non-Commercial Torts Exception

The FSIA’s non-commercial torts exception confers jurisdiction in any case in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. 28 U.S.C. § 1605(a)(5). In this case, the dispositive question is whether Israel’s alleged torts—which took place aboard a U.S.-flagged vessel in international waters—“occur[ed] in the United States.” *Id.*

Under the FSIA, the “‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.” *Id.* § 1603(c). Although this definition speaks primarily in geographic terms, Plaintiffs argue that it also includes U.S.-flagged ships on the high seas.

Plaintiffs begin by noting that the definition of “United States” is introduced by the word “includes” rather than the word “means.” Appellants’ Br. 13-15. Invoking the rule of statutory interpretation that “[a] definition which declares what a term ‘means’ ... excludes any meaning that is not stated,” *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1979) (alterations in original) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)), Plaintiffs contend that the use of “includes” permits us to adopt a broader interpretation of the term “United States.” Appellants’ Br. 14; *see also National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 171-72 (D.C. Cir. 1982) (contrasting the “restrictive phrasing” using the word “means” with “the looser phrase ‘includes’”).

Relying on this interpretative leeway, Plaintiffs contend that a U.S.-flagged ship in international waters is part of the “United States.” The determinative test, Plaintiffs assert, is whether a U.S.-flagged ship and the territory and waters of the United States “share a comparable degree of U.S. sovereign control.” Appellants’ Br. 15. Arguing that they do, Plaintiffs invoke several non-FSIA cases that refer to a ship sailing under a particular country’s flag in international waters as constructively part of the flag state’s territory. Appellants’ Br. 19-20; *see Patterson v. Eudora*, 190 U.S. 169, 176 (1903) (“A ship which bears a nation’s flag is to be treated as a part of the territory of that nation.” (quoting *Queen v. Anderson*, (1868) L. R. 1 C. C. 161 (U.K.))); *Ross v. McIntyre*, 140 U.S. 453, 464 (1891) (“The deck of a private American vessel, it is true, is considered, for many purposes, constructively as territory of the United States...”). Plaintiffs also point out that a country’s law may extend to vessels flying its flag. *See Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953) (holding that Danish tort law extends to a Danish ship because it “is deemed to be a part of the territory of that sovereignty (whose flag it flies)” (quoting *United States v. Flores*, 289 U.S. 137, 155 (1933))).

Were we tasked with identifying the outer limits of the “United States” in general terms, Plaintiffs’ arguments might have some merit. But this case requires that we interpret a particular term in a particular law. And, fatal to Plaintiffs’ theory, the cases interpreting the FSIA—as opposed to the ones cited by Plaintiffs—not only “counsel[] that [section 1605(a)(5)] should be

narrowly construed,” *MacArthur Area Citizens Ass’n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987), but also require that we read the term “United States” in the FSIA to include only the geographic territory of the United States.

Our starting point is the Supreme Court’s discussion of the non-commercial torts exception in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). That case involved a Liberian-chartered oil tanker traveling from the Virgin Islands to Alaska around Cape Horn in South America during the Falklands War. *Id.* at 431. When the tanker was approximately 600 nautical miles from Argentina, it was attacked by the Argentine military. *Id.* at 431-32. The Liberian companies that owned and chartered the tanker brought suit against Argentina in the United States under the FSIA’s non-commercial torts exception, arguing that because the high seas were within the admiralty jurisdiction of the United States, the tort occurred “in the United States.” *Id.* at 440. Rejecting that view—and calling into question how Plaintiffs in our case read the term “United States”—the Supreme Court explained that it “construe[s] the modifying phrase ‘continental and insular’ to restrict the definition of United States to the continental United States and those islands that are part of the United States or its possessions; any other reading would render this phrase nugatory.” *Id.*

Of course, as Plaintiffs point out, *Amerada Hess* does not entirely foreclose their position because it primarily addresses whether the term “waters” includes the high seas, *see id.* at 441 (“Because respondents’ injury unquestionably occurred well outside the 3-mile limit then in effect for the territorial waters of the United States, the exception for noncommercial torts cannot apply.”), whereas they are concerned with whether the term “territory” is capacious enough to include U.S.-flagged vessels. Although the Supreme Court had no occasion to resolve the question before us—the ship involved was a foreign vessel—it did instruct courts interpreting the term “United States” to give full effect to the “modifying phrase ‘continental and insular’” and to “apply ‘[t]he canon of construction which teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *Id.* at 440 (alteration in original) (quoting *Foley Brothers v. Filardo*, 336 U.S. 281, 285 (1949)).

But even if Plaintiffs’ reading of “United States” survives *Amerada Hess*, it is defeated by our court’s decision in *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984). There, plaintiffs sought to invoke the non-commercial torts exception with respect to torts that allegedly occurred at the United States Embassy in Tehran, arguing that Congress has “power to exercise jurisdiction over certain activities at U.S. embassies.” *Id.* at 839. Although the court acknowledged that “the United States has some jurisdiction over its Embassy in Iran,” it rejected plaintiffs’ invocation of the non-commercial torts exception because the embassy was not within the territorial United States. *Id.* As the court explained, the use of “the words ‘continental or insular’ to modify the scope of the phrase ‘all territory and waters . . . subject to the jurisdiction of the United States’” is “clearly intended to restrict the definition of the United States to the continental United States and such islands as are part of the United States or are its possessions.” *Id.* (alteration in original) (quoting 28 U.S.C. § 1603(c)). This unambiguous language makes plain that the “United States,” at least for purposes of the FSIA, is limited to the geographic territories and waters of the United States.

Plaintiffs seek to distinguish *Persinger* on two grounds. First, they argue that unlike the plaintiffs in *Persinger*, they rely on “the unique status of ships” as part of the flag state’s territory “deriving from centuries of legal evolution,” rather than the mere fact that the United States exercises “some form of jurisdiction” over U.S. embassies on foreign soil. Appellants’ Br. 29. It is true, as Plaintiffs point out, that several cases recognize that “for the purposes of jurisdiction a

ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies.” *Scharrenberg v. Dollar S. S. Co.*, 245 U.S. 122, 127 (1917). But not only are these non-FSIA cases, they caution that “in the physical sense this expression is obviously figurative.” *Id.* (rejecting a claim that seamen employed on a ship are working “in the country of its registry” for purposes of a labor law); *see also* *Lauritzen*, 345 U.S. at 585 (“Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flagstate ...”). Thus, even outside the FSIA context, courts have sometimes rejected attempts to include U.S.-flagged vessels within the statutory definition of “United States,” *see, e.g.,* *Cunard S. S. Co. v. Mellon*, 262 U.S. 100, 122, 128 (1923) (holding that the Eighteenth Amendment and National Prohibition Act’s restriction on the sale and transport of liquors within “the United States and all territory subject to the jurisdiction thereof” does not include U.S.-registered ships outside territorial waters), and we have no indication that the drafters of the FSIA intended a different result, *see* *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984) (Scalia, J.) (explaining that the legislative history of section 1605(a)(5) indicates that the primary purpose of the exception “was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country” (discussing H.R. Rep. No. 94-1487, at 20-21 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6605, 6619-20)).

Plaintiffs also seek to distinguish *Persinger* on the ground that the U.S. Embassy in Tehran was within the territory of Iran, and thus necessarily could not be “in the United States.” Appellants’ Br. 30. *Persinger*’s discussion of what was “in the United States,” Plaintiffs argue, is dicta. *Id.* But Plaintiffs misunderstand the court’s holding in *Persinger*. Like this panel, the court in *Persinger* was asked to determine whether a particular location was “within the definition of ‘United States’” under the FSIA. *Persinger*, 729 F.2d at 839. To resolve that issue, the court set forth a positive account of what the FSIA meant by “United States”—“the continental United States and such islands as are part of the United States or are its possessions”—and determined that U.S. embassies on foreign soil did not fall within that definition. *Id.* Hardly dictum, this discussion was necessary to the court’s holding. *See* *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1113 (D.C. Cir. 2017) (explaining that “it is not only the result but also those portions of the opinion necessary to that result by which we are bound” (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996))). It would not have been enough, as Plaintiffs suggest, for the court to rely only on the fact that the U.S. Embassy in Tehran was on foreign soil, given that the *Persinger* plaintiffs argued for an interpretation of “United States” that included all areas—including those outside the territorial United States—where the U.S. exercised some jurisdiction. Bound by *Persinger*’s strictly geographical interpretation of the “United States,” we hold that U.S.-flagged ships on the high seas do not fall within the FSIA’s non-commercial torts exception. Accordingly, this exception gives Plaintiffs no basis for invoking the district court’s jurisdiction in this case.

Terrorism Exception

Congress first enacted the FSIA’s terrorism exception as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code). As initially drafted, the exception—then codified at 28 U.S.C. § 1605(a)(7)—abrogated a foreign sovereign’s immunity in any case

(7) ... in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... [if] engaged in by an official,

employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under [certain statutes] at the time the act occurred, unless later so designated as a result of such act ...

Pub. L. No. 104-132, § 221, 110 Stat. at 1241-43 (codified at 28 U.S.C. § 1605(a)(7) (2006) (repealed 2008)).

Had this case been brought under section 1605(a)(7), Plaintiffs “readily concede that this action would be barred ...because... Israel has never been designated a state sponsor of terrorism by the Government of the United States.” Appellants’ Br. 32. But Congress amended the FSIA’s terrorism exception in 2008, and although the primary impetus for the amendment was to resolve a dispute over whether the exception provided a cause of action directly against a foreign state, *see Owens v. Republic of Sudan*, 864 F.3d 751, 763-65 (D.C. Cir. 2017) (discussing the history of FSIA amendments), Plaintiffs believe that it also eliminated the requirement that a state be designated a sponsor of terrorism for the exception to apply.

As amended by section 1083 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44 (2008) (codified at 28 U.S.C. § 1605A), the revised terrorism exception, now codified at 28 U.S.C. § 1605A, provides in relevant part:

(1) No Immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred

28 U.S.C. § 1605A(a) (2012).

Although section 1605A(a) and its predecessor section 1605(a)(7) are nearly identical, Plaintiffs emphasize the slight shift from the double negative construction of the old exception—“the court *shall decline* to hear a claim ...if the foreign state *was not* designated as a state sponsor of terrorism”—to the affirmative, two-sentence construction of the new exception—“The court *shall* hear a claim ...if ... the foreign state *was* designated as a state sponsor of terrorism.” According to Plaintiffs, by so revising the exception, Congress established a two-tiered approach to jurisdiction. The first sentence, section 1605A(a)(1), strips all foreign states of immunity in cases involving “personal injury or death” caused by certain specified terroristic acts. And the second sentence, section 1605A(a)(2), provides that when certain other conditions are met, such as when the defendant state is designated a state sponsor of terrorism, a court has no choice but to hear the case. Read together, these sentences, Plaintiffs argue, mean that when a case is brought only under section 1605A(a)(1), a court still has discretion to dismiss the case on grounds such as political question, act of state, or *forum non conveniens*; by contrast, a court

must hear cases that fit the criteria of section 1605A(a)(2). And although Plaintiffs agree that their case does not qualify as one the district court must hear, they contend that the court should have considered whether it might nonetheless have jurisdiction under section 1605A(a)(1).

Plaintiffs' reading of the statute is intriguing. Treating each sentence in isolation, as Plaintiffs urge, we could read section 1605A(a)(1) as establishing a seemingly unqualified abrogation of sovereign immunity and section 1605A(a)(2) as providing only when cases *must* be heard.

But this construction of the statute simply cannot be correct. The FSIA is premised on "a presumption of foreign sovereign immunity" qualified only by a small number of "discrete and limited exceptions." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87-88 (D.C. Cir. 2002) (collecting cases). As our court has explained, the terrorism exception, in particular, represents a "delicate legislative compromise" that rests in part on the fact that "only a defendant that has been specifically designated by the State Department as a 'state sponsor of terrorism' is subject to the loss of its sovereign immunity." *Id.* at 89 (quoting 28 U.S.C. § 1605(a)(7)(A)) (discussing the historical evolution of the FSIA).

Yet under Plaintiff's view, Congress, without any acknowledgement whatsoever, abandoned this longstanding compromise and authorized victims of alleged terrorism to bring suit against any state without regard to its designation as a state sponsor of terrorism. Asked at oral argument whether they knew of any support in the legislative history for their reading, Plaintiffs' counsel conceded they knew of none. *See* Oral Arg. 12:27-33 ("There is nothing that we have been able to find in the legislative history that discusses this either way."). In fact, the only relevant legislative history discusses the terrorism exception as though the state-sponsor requirement remains a mandatory prerequisite to invoking jurisdiction. *See Ensuring Legal Redress for American Victims of State-Sponsored Terrorism: Hearing on Victims of State-Sponsored Terrorism Before the H. Comm. on the Judiciary*, 110th Cong. 6 (2008), available at 2008 WL 2441390 (statement of Rep. Bruce Braley) (explaining that under the proposed amendment Iraq faced "no threat of future claims since Iraq is no longer designated as a state sponsor of terrorism").

Plaintiffs' reading of section 1605A is all the more implausible given that it would require discarding not just the state-sponsor prerequisite, but also other longstanding prerequisites to invoking the terrorism exception. Although this case concerns only the state-sponsor prerequisite, former section 1605(a)(7)—now section 1605A(a)(2)—listed several other requirements for invoking the exception. For instance, section 1605(a)(7)(B) provided that, even if a foreign state was designated a sponsor of terrorism, "the court shall decline to hear a claim ... if ... neither the claimant nor the victim was a national of the United States ... when the act upon which the claim is based occurred." 28 U.S.C. § 1605(a)(7)(B)(ii) (2006). After eliminating the double negative, the NDAA amendment carried this language into section 1605A(a)(2) in the clause just after the state-sponsor requirement. *See id.* § 1605A(a)(2)(A)(ii)(I) ("The court shall hear a claim under this section if ... the claimant or the victim was ... a national of the United States ..."). Under Plaintiffs' interpretation of section 1605A(a)—which reads the provisions of section 1605A(a)(2) as establishing only when a court must hear a case but not limiting when a court may hear such a case—this requirement would also no longer be a necessary prerequisite to invoking the court's jurisdiction.

The implications of Plaintiffs' reading of section 1605A(a)(1) are breathtaking. Without the state-sponsor and U.S.-national requirements, individuals with no connection at all to this country could bring suit here against any foreign sovereign, including a U.S. ally, for any injury

or death caused by an “act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.” *Id.* § 1605A(a)(1). As counsel for Israel pointed out at oral argument—and Plaintiffs’ counsel agreed—this would mean that “if a foreign national is concerned that someone has been killed in Iraq or Afghanistan by the British, that would be an extrajudicial killing and this court would have jurisdiction.” *Compare* Oral Arg. 23:46- 24:02 (raising hypothetical), *with id.* 30:54-31:21 (“Congress opened the door to that kind of suit.”).

Although Congress may one day decide that the state-sponsor and U.S.-national requirements are no longer necessary, we cannot conclude from an unexplained editorial change that it has already done so. Such “[f]undamental changes in the scope of a statute are not typically accomplished with so subtle a move.” *Kellogg Brown & Root Services Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1977 (2015). Rather, the FSIA’s terrorism exception continues to apply only to a foreign state “designated as a state sponsor of terrorism at the time the act . . . occurred, or was so designated as a result of such act.” 28 U.S.C. § 1605A(a)(2)(A)(i)(I).

Given the consequences of Plaintiffs’ interpretation, it is unsurprising that no court has countenanced such a reading of the terrorism exception after the NDAA amendment. Rather, cases in this circuit and elsewhere have continued to treat the state-sponsor requirement as a jurisdictional prerequisite to invoking the terrorism exception. *See, e.g., Owens*, 864 F.3d at 777 (“§ 1605A strives to hold designated state sponsors of terrorism accountable for their sponsorship of terror . . .”); *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 14 (D.C. Cir. 2015) (“The exception further requires that (i) the foreign country was designated a ‘state sponsor of terrorism at the time [of] the act’” (quoting 28 U.S.C. § 1605A(a)(2))); *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 115 n.7 (2d Cir. 2013) (explaining that section 1605A “is only available against a nation that has been designated by the United States government as a state sponsor of terrorism at the time of, or due to, a terrorist act”); *Doe v. Bin Laden*, 663 F.3d 64, 65 (2d Cir. 2011) (finding it undisputed that section 1605A “is not available against Afghanistan . . . because the State Department has not designated Afghanistan as a state sponsor of terrorism”). Although none of those cases squarely confronted the precise argument before us, they provide further support for the proposition that this slight revision to the terrorism exception did not bring about the dramatic departure from well-established FSIA practice that Plaintiffs seek.

* * * *

5. Service of Process

a. *Harrison v. Sudan*

As discussed in *Digest 2015* at 386-89, and *Digest 2016* at 420, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit on a petition for rehearing in *Harrison v. Sudan*, asserting the invalidity of service on a foreign sovereign via delivery of a summons and complaint to its embassy in the United States addressed to its foreign minister. The Second Circuit decided, contrary to the U.S. view, that this method of service was valid. On March 9, 2017, the Republic of Sudan filed a petition in

the U.S. Supreme Court for a writ of certiorari. On October 2, 2017, the Supreme Court invited the views of the United States.*

b. Kumar v. Sudan

In February 2017, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Fourth Circuit in support of reversal of a district court decision construing the FSIA as authorizing service on a foreign state by mail addressed to the foreign minister at the state's embassy in the United States. Plaintiffs sought damages for the death of their family members in al Qaeda's terrorist bombing of the U.S.S. Cole in the Port of Aden in Yemen on October 12, 2000. They obtained multiple default judgments, but Sudan asserted when it appeared in 2015 that service was improper. Excerpts follow from the U.S. *amicus* brief, which is available in full at <https://www.state.gov/s/l/c8183.htm>.**

* * * *

THE [FSIA] DOES NOT PERMIT A LITIGANT TO SERVE A FOREIGN STATE BY HAVING PROCESS ADDRESSED TO THE FOREIGN MINISTER MAILED TO THE STATE'S EMBASSY IN THE UNITED STATES

1. The FSIA provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States courts. The FSIA establishes the rule that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided” by the statute. 28 U.S.C. § 1604. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject matter jurisdiction in the district courts. 28 U.S.C. § 1330(a). The statute provides for personal jurisdiction over the foreign state in such suits “where service has been made under section 1608.” 28 U.S.C. § 1330(b).

Section 1608 provides the exclusive means for serving a foreign state in civil litigation. See Fed. R. Civ. P. 4(j)(1) (“A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.”). Section 1608(a) provides for service on “a foreign state or political subdivision of a foreign state.” Section 1608(b) provides for service on “an agency or instrumentality of a foreign state.” Both subsections specify hierarchical methods of service. First, service must be effected on a foreign state or its agency in accordance with any “special arrangement for service” between the plaintiff and the foreign state or agency. 28 U.S.C. § 1608(a)(1), (b)(1). If no such special arrangement exists, then service must be provided “in accordance with an applicable international convention on service of judicial documents” or, in the case of an agency or instrumentality, on any agent

* Editor's note: On May 22, 2018, the United States filed its brief in the U.S. Supreme Court. The brief will be discussed in *Digest 2018*.

** Editor's note: On January 19, 2018, the Fourth Circuit issued its decision adopting the Department's view that the FSIA's service provisions do not permit service of process on a foreign state by mail sent to the foreign state's embassy in the United States addressed to the foreign minister. The panel agreed that this method of service is not consistent with the statute's legislative history, the VDCR, or the Department's considered views. The decision rejects the reasoning of the Second Circuit in *Harrison v. Republic of Sudan*, which reached the opposite result.

authorized to receive service on behalf of the agency in the United States. *Id.* § 1608(a)(2), (b)(2).

If service cannot be made by one of those methods, then Section 1608 provides for service by delivery. The delivery provisions applicable to foreign states and to their agencies or instrumentalities differ in an important respect, however. While Section 1608(b)(3) authorizes service on a foreign state agency by delivery “if reasonably calculated to give actual notice,” section 1608(a)(3) says nothing about actual notice. Instead, it authorizes service “by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” 28 U.S.C. § 1608(a)(3). In light of the differences between the text of the two delivery provisions, courts have concluded that a private party may serve a foreign state by delivery only through “strict compliance” with the terms of Section 1608(a). *Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); see also *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994); but see *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service on foreign state because of substantial compliance with Section 1608(a)(3)).

Finally, Section 1608(a) provides for a fourth method of service on a foreign state, if service cannot be made under the delivery provision within thirty days. In that case, a plaintiff may deliver process to the State Department for service on the foreign state through diplomatic channels. 28 U.S.C. § 1608(a)(4).

2. Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to the embassy of the foreign state in the United States, addressed to the minister of foreign affairs. See U.S. Department of State, Bureau of Consular Affairs, Foreign Sovereign Immunities Act, <http://go.usa.gov/x9FGq> (“Service on a foreign embassy in the United States or mission to the United Nations is not one of the methods of service provided in the FSIA.”).

As noted, Section 1608(a)(3) authorizes service “by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” Although the provision does not expressly identify the place of service, the most natural understanding of the provision is that it requires that service be delivered to “the ministry of foreign affairs of the foreign state” and addressed to the specified government official, the head of the ministry. Thus, naturally read, the provision requires delivery to the official’s principal place of business, the ministry of foreign affairs in the foreign state’s seat of government. A state’s foreign minister does not work in the state’s embassies. Had Congress contemplated delivery to embassies, it would have enacted a statute requiring service to be addressed to the foreign state’s ambassador.

In construing Section 1608(a)(3), the D.C. Circuit has explained that the provision “mandates service on the Ministry of Foreign Affairs, the department most likely to understand American procedure.” *Transaero*, 30 F.3d at 154; see also *Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent “to the ‘head of the ministry of foreign affairs’ in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency”) (citing 28 U.S.C. § 1608(a)(3)). The D.C. Circuit’s interpretation is particularly instructive because most suits against foreign states (as opposed to suits against foreign state agencies or instrumentalities) are brought in that circuit. See *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (describing the District of Columbia as “the dedicated venue for actions against foreign states”) (quoting amicus brief); 28 U.S.C. § 1391(f)(4) (providing for venue in suits against a foreign state or political subdivision thereof in the United States District Court for the District of Columbia).

Construing Section 1608(a)(3) to require service on the foreign minister by delivery to the state's foreign ministry is consistent with the courts' recognition that Congress required strict compliance with the service-by-delivery provision applicable to foreign states. See *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154. While Congress permitted delivery on foreign state agencies or instrumentalities so long as the delivery is "reasonably calculated to give actual notice," 28 U.S.C. § 1608(b)(3), the provision governing service-by-delivery on a foreign state makes no mention of actual notice, *id.* § 1608(a)(3). A state's foreign minister's principal place of business is in the seat of government, not in the state's foreign embassies. Thus, a private party's service by mail or in person on a foreign minister at one of the state's embassies necessarily would require the further transmission of the summons and complaint to the foreign minister by the embassy staff. While the district court may have viewed that means of service as reasonably calculated to give actual notice to the foreign minister, that is insufficient for service by delivery under Section 1608(a)(3).

As we next show, the United States' treaty obligations and the FSIA's legislative history, which explains the statute's consistency with those treaty obligations, further support the understanding that Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to one of its embassies. Such service of process on a foreign mission would be inconsistent with the United States' treaty obligations. But because Section 1608(a)(3) may be interpreted to prohibit such service, it must be so construed. See Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with * * * an international agreement of the United States.") (Third Restatement); see also, *e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

Article 22, Section 1 of the VCDR provides that "the premises of the mission shall be inviolable." VCDR, *done* April 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 104. There is an international consensus that a litigant's service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in VCDR Article 22. The United Nations International Law Commission prepared the preliminary draft of the Vienna Convention and presented the draft to the United Nations member states for their consideration. Int'l L. Comm'n, Report of the Commission to the General Assembly, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 131, U.N. Doc. A/CN.4/SER.A/1957/Add.1, <https://goo.gl/26RrG3> (Commission Report). In describing the almost identical provision that became Article 22, the International Law Commission explained that:

[a] special application of this principle [of the inviolability of the premises of the mission] is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

Commission Report, [1957] 2 Y.B. Int'l L. Comm'n at 137. The states that became parties to the VCDR have so understood Article 22, as is documented in numerous treatises describing state practice under the treaty. See, e.g., Eileen Denza, *Diplomatic Law* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] implicitly also protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). And, reflecting the international consensus, other nations' state immunity statutes do not authorize a litigant's service on a foreign state through mail or personal delivery to a foreign state's embassy, in the absence of express consent by the foreign state. See, e.g., Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act No. 24 of 2009, art. 20 (Japan); Foreign States Immunity Law, 5769-2008, § 13 (Israel); *Foreign State Immunities Act 1985*, §§ 24, 25 (Austl.); State Immunity Act, R.S.C. 1985, c S-18, § 9 (Can.); Foreign States Immunities Act 87 of 1981, § 13 (S. Afr.); State Immunity Act 1978, c. 33, § 12 (U.K.).

Moreover, the Executive Branch has long and consistently construed Article 22, and the customary international law it codifies, as precluding a litigant from serving process by mail or personal delivery to a foreign embassy as a means of serving a foreign state. See *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) ("The establishment by one country of a diplomatic mission in the territory of another does not implicitly or explicitly empower that mission to act as agent of the sending state for the purpose of accepting service of process." (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, to John W. Douglas, Assistant Attorney General, August 10, 1964)). The courts owe deference to that interpretation. See *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (quotation marks omitted)).

In light of that longstanding understanding of the Vienna Convention, the United States routinely refuses to recognize the propriety of a private party's service through mail or personal delivery to a United States embassy. When a foreign litigant (or foreign court official on behalf of a foreign litigant) purports to serve the United States through its embassy, the embassy sends a diplomatic note to the foreign government explaining that the United States does not consider itself to have been served consistently with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. For that reason, the United States has a strong interest in ensuring that its courts afford foreign states the same treatment the United States contends it is entitled to under the Vienna Convention. Cf. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that, in construing the FSIA, courts should consider the United States' interest in reciprocal treatment abroad).

Reflecting the Executive Branch's understanding and international practice, United States courts have recognized that a private party's delivery of process to a foreign mission or ambassador in the United States for service on another is inconsistent with the concept of inviolability enshrined in the VCDR. Thus, the Seventh Circuit held invalid a private party's service on a foreign-state agency by delivery to the foreign state's embassy in the United States because "service through an embassy is expressly banned" by the VCDR. *Autotech Tech. LP v.*

Integral Research & Dev. Corp., 499 F.3d 737, 748 (2007). Similarly, the D.C. Circuit has held that a litigant's service of process on an ambassador "as an agent of his sending country" is inconsistent with the inviolability of diplomatic agents established by VCDR Article 29. *Hellenic Lines*, 345 F.2d at 980; see *id.* at 980 n.4.

In addition, the FSIA's legislative history expressly addresses and repudiates the idea that a litigant's service on a foreign state may be effected by delivery of process to its mission in the United States. The House Report's section-by-section analysis explains that, prior to the FSIA's enactment, some litigants attempted to serve foreign states by "mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state." H.R. Rep. No. 94-1487, at 26 (1976); see *id.* (describing such service as being of "questionable validity"). The report states that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR], which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill." *Id.*

Because the VCDR prohibits a private party from serving a state by having process mailed to a foreign mission, because Section 1608(a)(3) may fairly be construed to prohibit such delivery, and because the FSIA's legislative history demonstrates Congress's intent to prevent private-party service on an embassy, the district court erred in concluding that plaintiffs had properly served the Republic of Sudan. *Charming Betsy*, 6 U.S. (2 Cranch) at 118; Third Restatement § 114.

3. Relying in part on the Second Circuit's decision in *Harrison v. Republic of Sudan*, the district court held that plaintiffs properly served Sudan because Section 1608(a)(3) "does not prescribe the place of service, only the person to whom process must be served." J.A. 468; see *id.* (citing 838 F.3d 86, 93 (2016)). But the Second Circuit's reasoning was that plaintiffs' service through "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C." is permissible under the statute because it "could reasonably be expected to result in delivery to the intended person." *Harrison*, 838 F.3d at 90. That approach is legally erroneous. As we explained above, while Section 1608(b)(3) authorizes service on a foreign state *agency or instrumentality* by delivery "if reasonably calculated to give actual notice," section 1608(a)(3) does not permit service on a foreign state itself by delivery reasonably calculated to give notice.

In addition, in light of the United States' international treaty obligations and the FSIA's legislative history discussed above, Section 1608(a)(3) cannot plausibly be construed to permit a private party to serve a foreign state by delivering process to the foreign state's embassy. The Second Circuit believed that the House Report discussion of Section 1608 "fails to make the distinction at issue in the instant case, between '[s]ervice on an embassy by mail,' [H.R. Rep. No. 94-1487, at 26] (emphasis added), and service on a minister of foreign affairs *via* or *care of* an embassy." *Harrison*, 838 F.3d at 92. But the distinction between service "on" an embassy and service on a foreign minister "via" an embassy is a false one. In both cases, the suit is against the foreign state itself. See 28 U.S.C. § 1603(a); *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against foreign state for purposes of the FSIA). There is no statutory basis for prohibiting a plaintiff's service at an embassy when the plaintiff names a foreign state's embassy as the defendant but not when the plaintiff instead names the foreign state.

Moreover, the Second Circuit plainly misconstrued the legislative history. The House Report unambiguously expressed disapproval for the method of “attempting to commence litigation against *a foreign state*” by “the mailing of a copy of the summons and complaint *to a diplomatic mission* of the foreign state.” H.R. Rep. No. 94-1487, at 26 (emphasis added). Private parties’ attempted service by mailing a summons and complaint to an embassy, however addressed, was the harm Congress sought to remedy in enacting Section 1608(a)(3).

That conclusion again is buttressed by the international obligation to respect mission inviolability. As discussed above, the House Report explains that Congress enacted Section 1608 to avoid inconsistency with VCDR Article 22(1), which provides categorically that “[t]he premises of the mission shall be inviolable,” and which precludes a private party from making a foreign state a defendant in a suit through any type of service through mail or personal delivery to its embassy. The district court below and the Second Circuit in *Harrison* believed that service on a foreign minister sent to an embassy is not precluded by the inviolability of the mission because it is the foreign minister who is served, not the embassy. J.A. 469; 838 F.3d at 92. But that purported distinction reflects a misunderstanding of Article 22 and the concept of inviolability it embodies, as explained above. See also Eileen Denza, *Interaction Between State and Diplomatic Immunity*, 102 American Soc. of Int’l L. Proc. 111, 111 (2008) (“At the very outset of legal proceedings against a state there is the problem of service of process—proceedings against the defendant cannot be begun through service on its embassy premises in the light of Article 22 of the Vienna Convention on Diplomatic Relations.”).

The district court and the Second Circuit also believed that because an embassy employee had accepted the delivery of the service of process, the embassy had consented to receive service, even if service of process would otherwise be a violation of its inviolability. J.A. 469; 838 F.3d at 95 (“Here, the Sudanese Embassy’s acceptance of the service package surely constituted ‘consent.’”). Article 22(1) provides, however, that “[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent *of the head of the mission*.” (emphasis added). There is no evidence in either this case or *Harrison* that the Ambassador consented to receive plaintiffs’ service of process by mail delivery on behalf of the foreign minister or Sudan. Other embassy employees do not have authority under Article 22 to consent to an action that otherwise would be a breach of a foreign mission’s inviolability.

In short, the text of the FSIA, its legislative history, and the United States’ international treaty obligations all support interpreting Section 1608(a)(3) as not permitting private parties to serve process on a foreign state through its embassy in the United States. Because plaintiffs in this case did not properly serve Sudan, the district court lacked personal jurisdiction. 28 U.S.C. § 1330(b). Accordingly, the district court erred in denying Sudan’s motion to vacate the judgments as void under Rule 60(b)(4). See *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005).

* * * *

c. Savang v. Lao People’s Democratic Republic

The United States filed a suggestion of immunity and statement of interest on behalf of the president and the prime minister of Laos in federal district court in California on July 13, 2017. The section of the U.S. statement of interest relating to the proper method of

service under the FSIA is excerpted below. The suggestion of immunity is excerpted in Section C, *infra*. On July 31, 2017, the court dismissed the case for lack of subject matter jurisdiction. *Savang v. Lao People's Democratic Republic*, No. 16-cv-02037 (E.D. Ca. 2017).

* * * *

The FSIA establishes “the sole basis for obtaining jurisdiction over a foreign state in our courts.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Personal jurisdiction exists under the statute where there is both subject matter jurisdiction and proper service. *See* 28 U.S.C. § 1330(a)–(b). Section 1608(a) of the act contains the four exclusive means of service of process on a foreign state, and specifies the order in which they must be attempted. *See id.* § 1608(a); *accord Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010). These methods are (1) service according to a “special arrangement between the plaintiff and the foreign state,” (2) service under “an applicable international convention on service,” (3) service by mail to the foreign minister of the foreign state, or (4) service by transmission of process to the State Department, which will forward necessary papers “through diplomatic channels to the foreign state.” 28 U.S.C. § 1608(a). Consistent with the United States’ position, most courts have required “strict compliance” with § 1608(a). *See, e.g., Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2010); *Transaero, Inc. v. La Fuerza Aérea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). The Ninth Circuit, by contrast, has held that “substantial compliance” will do. *Peterson*, 627 F.3d at 1129.

Even under a more liberal substantial compliance standard, however, Plaintiffs’ attempt to serve Laos was ineffective to satisfy any of § 1608(a)’s four methods of service. Subsection (a)(1) is inapposite, because there is no suggestion in the record of a “special arrangement” between Plaintiffs and Laos. Subsection (a)(2) is similarly inapplicable, because there are no international treaties on service of process in force between the United States and Laos. While Plaintiffs’ supplemental brief discusses service under the Hague Service Convention, *see* Pls.’ Supp. Br. at 6–8, Laos is not a party to that Convention, so service under (a)(2) is not an option available to Plaintiffs.

Plaintiffs’ purported service also failed to “substantially comply” with subsection (a)(3). To satisfy that provision, a plaintiff must:

send[] a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. § 1609(a)(3). Here, the summons and complaint were not sent via the clerk of the court. They did not include a “notice of suit” — a particular legal document whose components are specified in 22 C.F.R. § 93.2. Plaintiffs also concede that the summons and complaints were not translated into Lao. *See* Pls.’ Supp. Br. 6. And they were not addressed to the Lao minister of foreign affairs. *See* Affidavit of Process Server at 2, ECF No. 9.

Finally, Plaintiffs have made no attempt to effect service under subsection (a)(4) by requesting the clerk of the court to dispatch the requisite documents to the Secretary of State for transmission through diplomatic channels.

Accordingly, Plaintiffs' attempt to serve Laos by sending via Federal Express copies of the summons, Complaint, and civil cover sheet to the Presidential Palace, addressed to the former President of Laos, does not satisfy § 1608(a)'s requirements.

The Court therefore lacks personal jurisdiction over Laos.

* * * *

d. Valdevieso v. Tourist Office of Spain in New York

The United States submitted a statement of interest in another case in which service was attempted via mail to a foreign consulate in 2017. In *Valdevieso v. Tourist Office of Spain in New York*, No. 711.SCQ 2017 (Civ. Ct. NY, Queens), plaintiff attempted to effect service by mail to the Tourist Office of New York, which is part of the Spanish consulate. The U.S. statement of interest, dated May 23, 2017, is excerpted below.

* * * *

The FSIA is “the sole basis for obtaining jurisdiction over a foreign state” in United States courts. *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989)); see also *Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir. 2006). A lawsuit against a consulate is considered a suit against the foreign state itself for purposes of the FSIA. See, e.g., *Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 385 (S.D.N.Y. 2006); *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 345 (9th Cir. 1993). As explained further below, the United States considers the Tourist Office of Spain in New York part of the Spanish Consulate. Personal jurisdiction exists under the FSIA where there is both subject matter jurisdiction and proper service. See 28 U.S.C. § 1330(a)–(b); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 151 (2d Cir. 2001) (“[S]ubject matter jurisdiction plus service of process equals personal jurisdiction under the FSIA.”).

The FSIA sets out, in hierarchical order, four exclusive methods for service of process on foreign states in 28 U.S.C. § 1608. The first two procedures allow for service according to a special arrangement between the parties or “an applicable international convention on service of judicial documents.” 28 U.S.C. § 1608(a)(1)–(2). If service cannot be made using either of these methods, it may be accomplished

by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

Id. at § 1608(a)(3). If service cannot be accomplished in that fashion within thirty days, it must be done under section 1608(a)(4), which provides for service

by sending two copies of the summons and complaint and a notice of suit together with a translation of each into the official language of the foreign state by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

Id. at § 1608(a)(4). None of these options, however, permits mailing a summons to a foreign state's consulate in the United States. Plaintiff therefore has failed to comply with the FSIA's requirements in this case. Courts have made clear that section 1608(a) "mandate[s] strict adherence to its terms, not merely substantial compliance." *Finamar Investors, Inc. v. Republic of Tajikistan*, 889 F. Supp. 114, 117 (S.D.N.Y. 1995); *see also Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); *Transaero, Inc. v. La Fuerza Boliviano*, 30 F.3d 148, 154 (D.C. Cir. 1994); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983).

In addition, both Spain and the United States are parties to the VCCR, which provides that "[c]onsular premises shall be inviolable." 21 U.S.T. 77, art. 31. Article 1(j) of the VCCR defines "consular premises" to mean "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post." The VCCR further defines "consular functions" to include, among other things, "furthering the development of commercial, economic, cultural and scientific relations between the sending state and the receiving state." VCCR, Art. 5(b). Under these provisions, the Tourist Office of Spain in New York is considered part of the consulate. Courts have held that service of process on consular premises is contrary to the VCCR's guarantee of consular inviolability. *See Swezey v. Merrill Lynch*, 997 N.Y.S.2d 45, 47 (N.Y. App. Div. 2014); *Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012); Restatement (Third) of Foreign Relations Law § 466, note 2 (1987) ("Service of process at diplomatic or consular premises is prohibited."). Thus, under both the FSIA and the VCCR, the attempted service on the Tourist Office in this case is inappropriate and ineffective.

The United States has strong reciprocity interests in the enforcement of the applicable rules governing service of process on sovereign states, including application of and strict adherence to the requirements of the FSIA and the VCCR. The United States has long maintained that the United States must be served in a manner consistent with international law when it is sued abroad, and the United States regularly objects when such service does not take place. If the FSIA and VCCR were interpreted to permit parties in the United States to serve papers by mailing them to a consulate, it could make U.S. consulates abroad vulnerable to similar treatment by foreign courts, contrary to the United States' consistently asserted view of the law.

Absent service in strict compliance with the FSIA, 28 U.S.C. § 1608(a), this Court does not have personal jurisdiction over the Tourist Office of Spain in New York in this case.

* * * *

6. Execution of Judgments against Foreign States and Other Post-Judgment Actions**a. Hilt Construction v. Permanent Mission of Chad**

See discussion in Section E.2., *infra*, from the U.S. brief in *Hilt Construction v. Permanent Mission of Chad*, regarding an impermissible attempt to enforce a default judgment without seeking an order in accordance with the FSIA.

b. Bennett v. Bank Melli and Rubin v. Iran

As discussed in *Digest 2015* at 396-400, and *Digest 2016* at 435-36, in *Bennett v. Bank Melli*, Nos. 13-15442, 13-16100 (9th Cir. 2015), the United States filed a brief concerning the proper interpretation of section 1610(g) of the FSIA and certain provisions of the Terrorism Risk Insurance Act (“TRIA”). Section 1610(g) provides that, for individuals holding judgments under section 1605A of the FSIA, “the property of a foreign state,” as well as the “property of” its agency or instrumentality, “is subject to attachment in aid of execution, and execution, ...as provided in this section.” Section 201(a) of TRIA provides that “[n]otwithstanding any other provision of law,” certain terrorism-related judgment holders may attach “the blocked assets of” certain foreign states, including the blocked assets of any of their agencies or instrumentalities.

The Ninth Circuit’s 2016 holding in *Bennett* that §1610(g) contains “a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities,” 825 F.3d at 959, conflicted with the U.S. government view articulated in its *amicus* brief, as well as with the Seventh Circuit’s 2016 decision interpreting §1610(g), *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (2016). Petitions for writs of certiorari to the U.S. Supreme Court were filed in both *Bennett* and *Rubin*. On January 9, 2017, the Court invited the views of the U.S. government.

In its brief on the petition in *Bennett*, No. 16-334, the United States recommended that the Supreme Court resolve the issue of whether §1610(g) creates a freestanding exception to attachment immunity in its consideration of *Rubin* and that it deny certiorari on the second issue presented, regarding ownership of targeted assets. Excerpts follow from the U.S. brief filed on May 23, 2017 in *Bennett*.

* * * *

I. WHETHER SECTION 1610(g) CREATES A FREESTANDING EXCEPTION TO ATTACHMENT IMMUNITY WARRANTS THIS COURT’S REVIEW, BUT THE COURT SHOULD RESOLVE THAT QUESTION IN *RUBIN***A. The Decision Below Incorrectly Interprets Section 1610(g)**

1. Subsection (g) provides that “the property of a foreign state” against which a judgment has been entered under Section 1605A, “and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or

indirectly” in such an entity, “is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*, regardless of” the *Bancec* factors discussed above.^{**} 28 U.S.C. 1610(g)(1) (emphasis added). Subsection (g) thus sets aside the need for a *Bancec* inquiry in certain cases involving the terrorism exception. When a plaintiff obtains a Section 1605A judgment, the plaintiff can attempt to execute against the property of the foreign state itself or an agency or instrumentality, without regard to the *Bancec* factors. That significantly expands the universe of assets potentially available in such cases. But by its terms, the plaintiff still must proceed “as provided in this section.” *Ibid.* That is, the creditor must also satisfy one of the exceptions to attachment immunity “as provided in” Section 1610. Congress thus did not take the further step of creating a freestanding exception to attachment immunity that would override the carefully crafted exceptions to immunity elsewhere in Section 1610. See *Rubin*, 830 F.3d at 474.

2. The court of appeals’ alternative view would render much of the relevant provisions insignificant or superfluous.

a. First, subsection (g)’s statement that property may be attached “as provided in this section” would be essentially meaningless, because the statute would function the same way with or without it. The court of appeals appeared to recognize that the phrase must refer to some other part of Section 1610, and concluded that it “refer[s] to procedures contained in § 1610(f).” Pet. App. 14a. But as the Seventh Circuit explained in *Rubin*, “it would be very odd” for Congress to refer to subsection (f) in that way. 830 F.3d at 484. Congress would not be expected to say “this section” when it really meant “the preceding subsection.” Cf. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938-939 (2017).

Moreover, even on its own terms, the Ninth Circuit’s interpretation would not support attachment. Paragraph (f)(1) could theoretically allow the attachment of certain blocked assets—but the President exercised his statutory authority to waive paragraph (f)(1) before it went into effect. See *Rubin*, 830 F.3d at 486-487. Subsection (f) thus has been “inoperative from the start,” and “does not allow *any* form of execution.” *Id.* at 487. Accordingly, if subsection (g) referred solely to subsection (f), it “would mean no execution at all.” *Ibid.*

b. Second, the court of appeals’ interpretation of subsection (g) would render subsection (a)(7) largely irrelevant. See *Rubin*, 830 F.3d at 484. Subsection (a)(7) provides that a foreign state’s property used in commercial activity is not immune from attachment if the plaintiff is enforcing a judgment that “relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008).” 28 U.S.C. 1610(a)(7). Section 1605A is the current version of the terrorism exception. ... Subsections (a)(7) and (g) thus work together to enable holders of terrorism-related judgments to

^{**} Editor’s note: The *Bancec* discussion earlier in the brief is excerpted below:

In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), this Court recognized a general presumption that courts should respect the separate legal status of a state’s agencies and instrumentalities. *Id.* at 626-628. A foreign state’s judgment creditor therefore generally cannot satisfy that judgment by attaching the property of an agency or instrumentality. That presumption may be overcome as appropriate under the totality of the circumstances, however, if the instrumentality is “so extensively controlled by its owner that a relationship of principal and agent is created,” or if recognizing the entity’s separate juridical status would “work fraud or injustice.” *Id.* at 629 ... Some courts have identified “*Bancec* factors” to consider in making that determination. ... Subsection (g) thus establishes that courts need not engage in a *Bancec* analysis in enforcement proceedings in covered terrorism cases.

pursue property used in commercial activity (via subsection (a)(7)), and to do so whether that property is owned by the foreign state or by its agencies or instrumentalities, without need for a *Bancec* inquiry (via subsection (g)).

The court of appeals' interpretation of subsection (g), however, would make the two provisions work at cross-purposes by enabling Section 1605A creditors to evade subsection (a)(7)'s key limitation. Subsection (a)(7) allows a Section 1605A judgment creditor to pursue property only if it is used in commercial activity—but those same creditors could pursue property without that limitation simply by invoking subsection (g). For those creditors, subsection (a)(7) and its limitations would be superfluous.

Even worse, the court of appeals' interpretation would have made subsection (a)(7) entirely irrelevant when it was adopted. The very same statute—the 2008 NDAA—both amended subsection (a)(7) to refer to Section 1605A and enacted subsection (g). NDAA § 1083(b)(3)(A) and (D), 122 Stat. 341. And at the time, subsection (a)(7) referred *solely* to judgment creditors under Section 1605A. § 1083(b)(3)(A), 122 Stat. 341. Thus, under the court's interpretation, subsection (g)'s enactment rendered subsection (a)(7) completely pointless—even though Congress was making substantive changes to subsection (a)(7) at the very same time.

B. The Decision Below Conflicts With *Rubin*

1. The Ninth Circuit's decision here conflicts with *Rubin*. The Ninth Circuit held below that subsection (g) “contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities.” Pet. App. 13a. On that view, persons with a judgment against a foreign state under Section 1605A need not demonstrate any nexus between the property of the foreign state (or its agency or instrumentality) and commercial activity before proceeding to execution. The Seventh Circuit reached the opposite result in *Rubin*, while acknowledging the split in authority. 830 F.3d at 487 (“[W]e disagree with the Ninth Circuit's interpretation of subsection (g).”). And Iran, owner of the artifacts at issue in *Rubin*, acknowledges the split as well and agrees that the question warrants certiorari. See Iran Mem. in Response at 14-17, *Rubin*, *supra* (No. 16-534).

The Ninth Circuit's conclusion that the assets were attachable under subsection (g) is a holding, notwithstanding the court's conclusion that they are also attachable under TRIA. See Pet. App. 10a-12a. An alternative holding is still binding precedent. See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Operating Eng'rs Pension Trust v. Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301, 1304 (9th Cir. 1985). Moreover, the court's Section 1610(g) analysis—which prompted a dissent solely on that issue, see Pet. App. 27a-34a (Benson, J., concurring in part and dissenting in part)—gave the court's judgment a broader scope: It permitted the district court on remand to consider attachment under TRIA *and* Section 1610(g). TRIA permits creditors to recover only up to the amount of their compensatory damages, see § 201(a), 116 Stat. 2337, and only so long as the relevant assets remain “blocked,” see *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 369 (2009). Section 1610(g) contains neither limitation. Accordingly, there is a direct conflict on this question.

Respondents nonetheless contend (Joint Br. in Opp. 19-20) that there is no direct conflict because this case involves blocked assets, whereas *Rubin* does not. The Ninth Circuit's broad holding forecloses that view, however, because there is no suggestion that its interpretation of the reach of subsection (g) is applicable only to blocked assets. See Pet. App. 13a (“We hold that subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities.”). Respondents also point to paragraph (g)(2),

which renders the *United States*' own sovereign immunity inapplicable when assets are blocked. See 28 U.S.C. 1610(g)(2). But that does not suggest that subsection (g)'s provisions concerning *foreign state* immunity are inapplicable when assets are not blocked. And the Ninth Circuit never even mentioned paragraph (g)(2). Pet. App. 12a-20a.

Unless this Court intervenes, the circuit conflict will likely persist. The court of appeals denied en banc review here, even after soliciting (and receiving) from the United States an amicus brief arguing that the panel's interpretation of Section 1610(g) was wrong. Pet. App. 2a-3a. And although the court denied rehearing en banc before the Seventh Circuit decided *Rubin* and created the circuit conflict, the Seventh Circuit's analysis was similar to the analysis the parties and the United States had already presented to the Ninth Circuit in this case. It is thus unlikely that the Ninth Circuit would grant en banc review in a future case to adopt the Seventh Circuit's position. The Seventh Circuit also declined to grant en banc review in *Rubin*. 830 F.3d at 487 n.6.

C. The Question Presented Is Important

The meaning of Section 1610(g) is a pure question of statutory interpretation that has divided the circuits and that implicates foreign affairs. The court of appeals' interpretation of subsection (g) significantly broadens its scope by denying attachment immunity for property without any need for a nexus to commercial activity. Congress has carefully crafted exceptions in the FSIA relating to state sponsors of terrorism, and they should not be subject to unwarranted judicial expansion.

The interpretation of subsection (g) may have little practical impact in many cases involving enforcement of judgments obtained under the terrorism exception, because such creditors may be able to attach blocked property under TRIA (as the individual respondents seek to do here), without regard to the interpretation of subsection (g). The interpretation of subsection (g) is critical, however, when the assets at issue do not meet TRIA's specialized definition of "blocked property." § 201(d)(2), 116 Stat. 2338. For example, TRIA would not govern attachment involving judgments against Sudan, because Sudan's assets are no longer blocked for purposes of TRIA, see, e.g., *Harrison v. Republic of Sudan*, No. 13-cv-3127, 2017 WL 946422, at *3 (S.D.N.Y. Feb. 10, 2017), or judgments against Iran where the creditor seeks to attach assets that (like the assets at issue in *Rubin*) were unblocked by the Algiers Accords, Jan. 19, 1981, 20 I.L.M. 224. The court of appeals' rule would create an exception to immunity for all such unblocked property, even when it lacks any nexus to commercial activity.

D. The Court Should Grant The *Rubin* Petition And Hold This Case Pending The Outcome Of That Decision

Rubin is a better vehicle than this case for this Court's plenary review. *Rubin* arises from a final judgment, and if the Court denies review on the second question presented in that case, the *Rubin* petitioners' ability to attach the assets at issue will stand or fall on the interpretation of subsection (g). It is undisputed that the assets are Iran's property, and there would be final determinations that they are not attachable under subsection (a)'s commercial-activity exception or under TRIA. That case also demonstrates the impact of attaching assets that the foreign sovereign has not used in commercial activity and that are not blocked, and thus are not attachable under subsection (a) or TRIA. The plaintiffs seek to attach what Iran describes as "irreplaceable artifacts of [its] cultural heritage," which it loaned to an American university for academic study. Iran Mem. in Response at 26, *Rubin*, *supra* (No. 16-534).

By contrast, this case presents several complicating factors. First, it is interlocutory. The district court denied a motion to dismiss but certified the decision for interlocutory review, and

the court of appeals affirmed. Pet. App. 3a, 103a. Ordinarily, an interlocutory posture “itself alone furnishe[s] sufficient ground for the denial” of a petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, e.g., *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari).

Second, in part because of the interlocutory posture, it is unclear whether the interpretation of subsection (g) will ultimately make a practical difference here. The court of appeals held that respondents could attach the assets under TRIA. Pet. App. 10a-12a. And although the panel’s interpretation of subsection (g) gives a broader scope to the judgment, see pp. 14-15, *supra*, as a practical matter TRIA will likely resolve the case on remand unless there is some change in circumstances. For subsection (g) to have practical importance, the disputed assets would need to become unblocked, or respondents would have to find enough Iranian assets to satisfy their sizable compensatory damage awards (which dwarf the estimated \$17.6 million in property at issue here) and then seek to satisfy their punitive damage awards, which may be enforced under the FSIA but not TRIA.

Third, respondents here may raise alternate grounds for affirming the Ninth Circuit’s judgment. See Joint Br. in Opp. 22 (arguing that the assets are independently attachable under subsections (a)(7) and (b)(3)); see also Pet. App. 27a (Benson, J., concurring in part and dissenting in part) (concluding that the assets would be attachable by virtue of subsection (b)(3)). Those issues could be a distraction in the briefing and argument, and could interfere with the Court’s ability to resolve the question on which the circuits are divided. The appropriate course is accordingly for the Court to grant the petition in *Rubin*, and to hold the petition here for its decision in that case.

II. THIS COURT SHOULD NOT GRANT REVIEW ON THE SECOND QUESTION PRESENTED REGARDING OWNERSHIP UNDER TRIA AND SECTION 1610(g)

TRIA applies to the “assets of” a terrorist party or its agency/instrumentality, TRIA § 201(a), and Section 1610(g) applies to the “property of” a foreign state or its agency/instrumentality. In seeking this Court’s review to consider how to interpret those provisions, petitioner is actually seeking review of two distinct questions: whether these statutes require “ownership” or some lesser interest in property, and whether the relevant interest is determined under state or federal law. Neither question warrants this Court’s review here.

A. 1. Insofar as the question is whether TRIA and Section 1610(g) have an “ownership” requirement, the United States agrees with petitioner that they do. See Gov’t C.A. Br. 14-17; see also Pet. 29 (collecting citations to United States briefs taking this position). But the court of appeals does not appear to have rejected such a requirement. Indeed, in part of its opinion, the court appears to have assumed that both statutes require ownership. See Pet. App. 22a (“Like most courts, we look to state law to determine the ownership of assets in this context.”).

Petitioner’s contrary understanding of the Ninth Circuit’s opinion appears to rest on petitioner’s position that it could not have an ownership interest in funds that are owed to it, but that have not yet been paid. That seems to be a fact-bound argument that the court of appeals misapplied California law (or failed to properly understand the federal common law of property) on the facts of this case. Such fact-based disputes are not a basis for certiorari.

2. There is no clear split among the courts of appeals on this issue. The D.C. Circuit has concluded that both TRIA and Section 1610(g) require ownership. *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-940 (2013). No court of appeals has squarely held to the contrary. In *Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993 (2014), cert. denied, 136 S. Ct. 893

(2016), the Second Circuit concluded that Congress “has not defined the type of property interests” subject to attachment under Section 1610(g), and the court ultimately looked to state law. *Id.* at 1000-1001. But as the court understood state law, only one entity could have *any* property interest in the asset at issue (midstream electronic funds transfers). *Id.* at 1001-1002. The court thus did not need to confront the question whether an interest less than ownership would have sufficed under Section 1610(g). See *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 211-212 (2d Cir. 2014) (per curiam) (following *Calderon-Cardona* in a TRIA case involving midstream electronic funds transfers), cert. denied, 136 S. Ct. 893 (2016).

B. The Court’s review also is not warranted to consider whether a court should apply state or federal law in determining any ownership interest.

1. The Second and D.C. Circuits appear to have split on that question. Compare *Calderon-Cardona*, 770 F.3d at 1000-1001, and *Hausler*, 770 F.3d at 211-212, with *Heiser*, 735 F.3d at 940-941. That conflict does not make any practical difference, however, unless state property law and federal common law lead to different results, and they often will not. For example, although the Second and D.C. Circuits were ostensibly applying different bodies of law, they came to the same conclusion that downstream entities have no attachable interest in midstream electronic fund transfers. See *Calderon-Cardona*, 770 F.3d at 1001-1002 (applying U.C.C. Article 4-A as a matter of state law); *Heiser*, 735 F.3d at 940-941 (looking to U.C.C. Article 4-A to supply a rule of decision for federal common law).

The same is true in this case. The court of appeals concluded that it would reach the same result regardless of whether state or federal law applied, because the two are “aligned” here. Pet. App. 23a. Accordingly, unless this Court were prepared to review not only the question of which body of law applied, but also the court of appeals’ predicate understanding of California property law and federal common law, *and* the Court found a meaningful difference between the two here—case and fact-specific inquiries not worthy of certiorari—there would be no basis to set aside the judgment of the court of appeals and no need to decide the issue on which the circuits are divided.

C. Finally, this case would be a poor vehicle for resolving the question because petitioner elides the important issue of exactly what the court of appeals understood the targeted property to be. Although the opinion is ambiguous, it can fairly be read to conceive of the targeted property as the right of Bank Melli to receive payment from Visa/Franklin (an asset Bank Melli almost surely owns under any relevant law), as distinguished from the Visa/Franklin account itself. See Pet. App. 22a-23a (“Bank Melli has a contractual right to obtain payments from Visa and Franklin. Under California law, those assets are property of Bank Melli and may be assigned to judgment creditors.”). That ambiguity counsels denial of certiorari in its own right, particularly given this case’s interlocutory posture, because the issue may be clarified (and mooted) on remand. Furthermore, if the asset at issue is understood to be the right to receive payment (as opposed to ownership of the funds themselves), it is particularly doubtful that state and federal law would differ as to whether Bank Melli owned that asset.

* * * *

On May 23, 2017, the United States filed its *amicus* brief on the petition in *Rubin*, No. 16-534, expressing the view that certiorari should be granted, limited to the first question presented—whether 1610(g) creates a freestanding exception to attachment immunity. For background on *Rubin*, in which plaintiffs seek to execute on a judgment by attaching Iranian artifacts on loan to the University of Chicago, see *Digest 2011* at

318-21; *Digest 2012* at 307-09; and *Digest 2014* at 383-86. The U.S. brief in the Supreme Court in *Rubin* at the petition stage reiterates the arguments in the *Bennett* brief (filed the same day) as to the importance of resolving the circuit split and the superiority of the *Rubin* case as a vehicle for deciding the correct interpretation of 1610(g). On June 27, 2017, the Supreme Court granted the petition, limited to the first question presented, on interpreting 1610(g). The U.S. *amicus* brief at the merits stage, filed on October 30, 2017, is excerpted below. ***

* * * *

SECTION 1610(g) DOES NOT CREATE A FREESTANDING EXCEPTION TO THE IMMUNITY OF FOREIGN SOVEREIGN PROPERTY FROM EXECUTION

A. Section 1610(g) Provides For Veil Piercing

1. The analysis under the FSIA “begin[s], as always, with the text of the statute.” *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 197 (2007). The text establishes that subsection (g) provides for veil piercing, but does not in addition allow execution regardless of the other provisions of Section 1610. Rather, it subjects additional entities’ property to execution only “as provided in th[at] section.” 28 U.S.C. 1610(g). Subsection (g) thus is not a stand-alone exception to immunity; it is expressly linked to the other exceptions in Section 1610.

a. Subsection (g) consists of a single sentence. ... Because this sentence is dense, it helps to break it into its components.

First, there must be “a foreign state against which a judgment is entered under Section 1605A.” 28 U.S.C. 1610(g). Section 1605A is the current version of the terrorism exception, so subsection (g) comes into play when a victim of terrorism has obtained a judgment under that provision against a designated state sponsor of terrorism.

Second, subsection (g) overrides the ordinary rule for piercing the veil in FSIA cases. Ordinarily, a creditor with a judgment against a foreign state can execute only against that state’s own property; if property is owned not by the state itself but by an agency or instrumentality (or a corporation or other separate entity owned by the state, agency, or instrumentality), it would be out of reach, unless unusual circumstances justified piercing the veil and treating that separate entity as if it were the foreign state itself. See *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983); see also *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473-478 (2003).

Subsection (g) plainly overrides that rule for creditors of judgments obtained under the current version of the terrorism exception: Those creditors can potentially reach not merely “the property of [the] foreign state” itself, but also “the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity.” 28 U.S.C. 1610(g)(1). And such veil piercing may occur

*** Editor’s note: On February 21, 2018, the Supreme Court issued its opinion holding that Section 1610(g) of the FSIA is not a freestanding exception to the immunity of foreign state property. The opinion is consistent with the arguments in the U.S. brief and will be discussed further in *Digest 2018*.

“regardless of” the *Bancec* factors that courts would otherwise have considered. *Ibid.*; see Pet. App. 23-26.

Third, and critical to the resolution of this case, sub-section (g) then specifies what can happen to the property in that broader pool: It is “subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section.*” 28 U.S.C. 1610(g)(1) (emphasis added). That is, the property of the state, agency, or instrumentality (including property that is or is held in another separate entity) is subject to execution “as provided in” other provisions of Section 1610.

Subsection (g) thus makes it easier for victims of terrorism to pierce the veil between a state and its agencies and instrumentalities. By the statute’s plain terms, however, a plaintiff can subject those entities’ property to execution only “as provided in this section.” 28 U.S.C. 1610(g)(1). Consequently, even if a creditor invokes subsection (g) to pierce the veil, the creditor still must satisfy one of the exceptions to immunity “provided in” Section 1610 to execute against that property.

In short, subsection (g) consists of one sentence with one subject: veil piercing. It does not also take the very different step of enabling a creditor to execute a judgment without regard to the exceptions to immunity provided in Section 1610. Instead, subsection (g) works together with Section 1610’s existing exceptions by magnifying their impact: It makes more entities’ property amenable to execution under those exceptions, and thereby places more property within the potential reach of victims of terrorism.

For example, before subsection (g) was enacted in 2008, a victim’s family with a judgment against Iran under the terrorism exception could not invoke subsection (a)(7) to execute against California real estate that was owned by a wholly-owned subsidiary of Bank Saderat Iran, an instrumentality of Iran. *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1067, 1075 (9th Cir. 2002), cert. denied, 538 U.S. 944 (2003). The judgment was against Iran, not the Bank; and applying the *Bancec* factors, the Ninth Circuit held that the family had not overcome *Bancec*’s presumption that the Bank was a separate juridical entity. *Id.* at 1071-1074. Accordingly, the family could not treat the property as Iran’s. Subsection (g) removes that barrier to execution: It would enable treatment of the Bank subsidiary’s real estate for purposes of subsection (a)(7) as if it were the state’s own property. See 154 Cong. Rec. 500 (2008) (statement of Sen. Lautenberg) (explaining that subsection (g) would abrogate *Flatow*).

Similarly, before subsection (g) was enacted, victims’ families that held judgments against Cuba under the terrorism exception could not use Section 1610 to garnish commercial debts owed by Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA), an instrumentality of Cuba. *Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1279-1280, 1283 (11th Cir. 1999). Without deciding whether Section 1610 would permit execution if they pierced the veil, the court held that the families could not do so: The judgment was against Cuba, not ETECSA; and applying the *Bancec* factors, the court held that the families had not overcome the presumption of separateness. *Id.* at 1282-1290. Subsection (g) removes that barrier.

Unlike in cases like *Flatow* and *Alejandro*, however, subsection (g)’s veil-piercing rule does not help petitioners in this case because the corporate veil is not a barrier to execution here. Petitioners’ judgment is against Iran, and Iran itself (not an agency or instrumentality) owns the Persepolis Collection. Petitioners instead are trying to use subsection (g) to circumvent the existing limitations on executing against a foreign state’s property that are set forth in Section

1610. They cannot do so, because subsection (g) subjects property to execution only “as provided in th[at] section.” 28 U.S.C. 1610(g)(1).

No other subsection of Section 1610 “provide[s]” for execution here. Subsection (a) can potentially provide for execution of a judgment obtained under the current version of the terrorism exception, and petitioners have obtained such a judgment against Iran. See 28 U.S.C. 1610(a)(7). But that exception reaches only property with the requisite commercial nexus, which the Collection lacks. Pet. App. 16-21. It is undisputed that subsections (b), (c), (d), and (e) do not provide for execution here. See Pets. Br. 39. Nor does subsection (f) provide for execution, because the President has exercised his authority to waive subsection (f)(1). See pp. 4-5, *supra*; Pet. App. 33-34. The court of appeals therefore correctly held that petitioners cannot execute against the Collection.

B. Section 1610(g) Subjects Property To Execution “As Provided In This Section,” Not “Regardless Of What Is Provided In This Section”

1. Petitioners’ interpretation of subsection (g) as a freestanding exception to execution immunity is fundamentally inconsistent with Congress’s express direction that property is subject to execution only “as provided in this section.” 28 U.S.C. 1610(g)(1). On petitioners’ interpretation, that phrase would be essentially meaningless because the statute would function exactly the same way even if it were deleted. Indeed, petitioners effectively read “as provided in this section” to mean “regardless of what is provided in this section.”

The notion that Congress said “as provided” when it meant “regardless of what is provided” is particularly implausible here. In subsection (g), Congress expressly stated that a terrorism creditor may pierce the veil “regardless of” the *Bancec* factors. 28 U.S.C. 1610(g)(1). If Congress had intended to allow such a creditor also to execute against property even when none of Section 1610’s exceptions were satisfied, one would expect Congress to have said so using parallel language, such as by stating that property is subject to execution “regardless of” the *Bancec* factors *and* “regardless of the provisions of this section.” Congress did not do so. Congress’s choice to expressly set aside some barriers to execution (the *Bancec* inquiry), but not others (the limitations “provided in this section”), is appropriately treated as deliberate. Cf. *Department of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”).

The textual differences between subsections (f) and (g) reinforce this reading. Subsection (f)(1) provides that, absent Presidential waiver, certain blocked property “shall be subject to execution” of a terrorism judgment “[n]otwithstanding any other provision of law.” 28 U.S.C. § 1610(f)(1) and (3). And unlike subsection (g), subsection (f)(1) does not further state that such property is subject to execution only “as provided in this section.” Subsection (f)(1) is thus naturally read to create a freestanding exception that can allow execution even when no other provision of Section 1610 permits it. By contrast, Congress did not say that subsection (g) applies “[n]otwithstanding any other provision of law.” To the contrary, Congress specified that subsection (g) makes property subject to execution only “as provided in this section,” 28 U.S.C. § 1610(g)(1), thus affirmatively establishing that subsection (g) is *not* freestanding. Rather, subsection (g) simply provides for veil piercing to make more entities’ property subject to execution as provided elsewhere in Section 1610.

2. Petitioners make multiple attempts to explain the meaning of the phrase “as provided in this section,” but none is persuasive.

a. Petitioners first contend (Br. 44) that subsection (g)’s reference to “this section” actually refers solely to subsection (f). See *Bennett v. Islamic Republic of Iran*, 825 F.3d 949,

959 (9th Cir. 2016), petition for cert. pending, No. 16-334 (filed Sept. 12, 2016). But as the court of appeals explained, “it would be very odd” for Congress to refer solely to subsection (f) in that way. Pet. App. 27. Congress would not be expected to say “this section” if it really meant “as provided in subsection (f).” *Id.* at 33. Indeed, Congress demonstrated in subsection (g) that it knew how to write precise cross-references. See 28 U.S.C. 1610(g)(1), (2), and (3) (“Subject to paragraph (3), the property of a foreign state”; “Any property * * * to which paragraph (1) applies”; “Nothing in this subsection shall be construed.”).

Petitioners admit (Br. 37, 44) that it is “strained” to interpret “this section” to mean “that other subsection.” They argue, however, that the court of appeals’ interpretation suffers from the same problem by interpreting “this section” to refer solely to subsections (a) and (b). But the court of appeals did not adopt that interpretation. Rather, the court correctly concluded that “[t]he word ‘section’ must mean what it says: Subsection (g) modifies *all* of § 1610.” Pet. App. 27; cf. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938-939 (2017). The court looked to subsection (a) in particular when analyzing potential exceptions because that was the only exception petitioners contended was applicable. See Pet. App. 14.

Petitioners’ construction is not merely implausible, but also would be self-defeating. Even if “as provided in this section” meant only “as provided in subsection (f),” petitioners still would be unable to execute on the property here because subsection (f) does not provide for execution in this case. Subsection (f)’s only provision that potentially authorizes execution (paragraph (1)) was waived by the President in 2000 before it ever went into effect, and well before Congress enacted subsection (g) in 2008. See pp. 4-6, *supra*. So subsection (f)(1), “being inoperative from the start, does not allow *any* form of execution.” Pet. App. 34.

b. For the first time in this litigation, petitioners now contend in the alternative that the phrase “as provided in this section” is a mistake, asserting that it refers not to the section of the U.S. Code where Congress codified it, 28 U.S.C. § 1610, but to the section of the Public Law that enacted it, Section 1083 of the NDAA. This argument lacks merit.

Title 28 of the U.S. Code has “been enacted into positive law”; it is not merely an editorial compilation that is *prima facie* evidence of the law. 1 U.S.C. § 204(a); see Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869. Petitioners do not point to any textual or contextual indication that “this section” in subsection (g) means anything other than Section 1610 of Title 28 as enacted into positive law. Petitioners thus are merely speculating that Congress made a drafting error. But “when [a] statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

In any event, Congress made no error. In Section 1083(a) of the NDAA, Congress added the current version of the terrorism exception (Section 1605A) to “title 28, United States Code.” § 1083(a)(1), 122 Stat. 338. Congress then made “Conforming Amendments” to the U.S. Code, *id.* § 1083(b), 122 Stat. 341, including by adding subsection (g) to 28 U.S.C. 1610. Specifically, Congress provided that “Section 1610 of title 28, United States Code is amended” by adding, in quotation marks, the full text of subsection (g). *Id.* § 1083(b)(3)(D), 122 Stat. 341-342. Congress thus inserted “as provided in this section” directly into “Section 1610 of title 28.” *Ibid.* “[T]his section” therefore plainly refers to “Section 1610 of title 28.” *Ibid.*

Other amendments to the U.S. Code reinforce that this choice was deliberate. When Congress was amending the U.S. Code, it consistently used “section,” “subsection,” or “paragraph” to refer to the U.S. Code. *E.g.*, NDAA § 1083(a)(1), 122 Stat. 338-340 (adding 28

U.S.C. 1605A(a)(2), (c), (d), (e)(1), (e)(2), (f), (g), and (h)); *id.* § 1083(b)(1)(C), (b)(3)(C) and (D), 122 Stat. 341-342. By contrast, Congress used “this section” to refer to the Public Law only when Congress was not changing the U.S. Code at all. See *Pets. Br.* 47 (recognizing this pattern); *e.g.*, NDAA § 1083(c)(1), 122 Stat. 342. And when Congress intended for the U.S. Code to refer to a section of the Public Law, it did so expressly: Congress inserted 28 U.S.C.

§ 1605A(a)(2)(A)(i)(II), which refers to “an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act.” NDAA § 1083(a)(1), 122 Stat. 339.

There is thus no sound basis for concluding that Congress mistakenly said “this section” in 28 U.S.C. 1610(g) when Congress was otherwise so precise. Petitioners note (*Br.* 46) that an earlier version of Section 1610(g) erroneously referred to a “judgment entered under this section,” when it really meant a judgment entered under Section 1605A. But as petitioners recognize (*ibid.*), Congress corrected that language before the bill was enacted into law. As enacted, subsection (g) refers to a judgment “entered under section 1605A.” 28 U.S.C.

§ 1610(g)(1). That drafting history thus undermines petitioners’ argument: It shows that Congress carefully edited the references in subsection (g) to correct any mistakes, but did *not* change “as provided in this section.” That further underscores that Congress meant what it said.

Petitioners’ speculation that “as provided in this section” refers to the NDAA also would make that phrase effectively meaningless. Petitioners assert (*Br.* 48) that it indicates that subsection (g) “override[s] the prohibition on punitive damages contained in [28 U.S.C.] 1606.” But no such prohibition applies here in the first place. The prohibition on punitive damages applies only to a claim where “a foreign state is not entitled to immunity under section 1605 or 1607.” 28 U.S.C. 1606. A person needs to have a judgment under a different section of the U.S. Code (Section 1605A) in order to invoke subsection (g). See 28 U.S.C. § 1610(g)(1). Section 1606’s prohibition on punitive damages is thus inapplicable in subsection (g) cases. Indeed, Section 1605A’s private right of action expressly allows “punitive damages.” 28 U.S.C. § 1605A(c). And it would be incongruous for Section 1610(g) to say anything about the kinds of damages that are available in the underlying suit, because Section 1610 comes into play only after the suit is over and the plaintiff is seeking to enforce the judgment.

c. Petitioners’ amici offer yet another explanation, contending that “as provided in this section” refers only to Section 1610’s procedures but not its substantive requirements. See *Former Officials Amici Br.* 23-25. But Section 1610 does not provide any procedures that would ever apply to execution under petitioners’ interpretation of subsection (g). The only provision in Section 1610 that establishes procedures for execution is subsection (c), which requires notice in certain cases—but it applies only to “execution referred to in subsections (a) and (b).” 28 U.S.C. § 1610(c). Under petitioners’ interpretation, however, nobody using subsection (g) would ever execute under subsections (a) or (b), because those same creditors could reach all the same property and more through subsection (g) itself. See pp. 22-25, *infra*. Subsection (c)’s procedures thus would never apply in a subsection (g) case. Amici also point (*Br.* 24) to subsection (f)(2), but that does not establish procedures for execution at all; it encourages federal agencies to assist plaintiffs in locating executable assets. 28 U.S.C. § 1610(f)(2); see p. 18 n.3, *supra*. Amici’s interpretation is thus functionally equivalent to deleting “as provided in this section” from subsection (g).

C. Petitioners' Interpretation Of Section 1610(g) Would Defeat Limitations Congress Imposed On The Same Creditors In Section 1610(a)(7)

Petitioners' interpretation of Section 1610(g) is further flawed because it would render other portions of the FSIA "inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted). In particular, it would render superfluous Congress's decision in Section 1610(a)(7) to allow creditors under the current version of the terrorism exception to execute only against property with a commercial nexus, because those same creditors could defeat that critical limitation simply by invoking subsection (g) instead of subsection (a).

1. Subsection (a)(7) provides that a foreign state's property is not immune from execution if the plaintiff is enforcing a judgment that "relates to a claim for which the foreign state is not immune under section 1605A"—that is, under the current version of the terrorism exception—and the property is used in commercial activity in the United States. 28 U.S.C. § 1610(a)(7). Under the court of appeals' interpretation, subsections (a)(7) and (g) work together to enable holders of judgments under the current terrorism exception to pursue property used in commercial activity (via subsection (a)(7)), and to do so whether that property is owned by the foreign state or an agency or instrumentality, without need for a *Bancec* inquiry (via subsection (g)).

Petitioners' interpretation of subsection (g), however, would make the two provisions work at cross-purposes by enabling creditors under the current version of the terrorism exception to use subsection (g) to defeat subsection (a)(7)'s crucial limitation. Subsection (a)(7) allows a creditor under the current version of the terrorism exception to pursue property *only if it is used in commercial activity*—but petitioners would allow those same creditors to pursue property without that limitation simply by invoking a different subsection of Section 1610 (subsection (g) instead of (a)). Under petitioners' interpretation, subsection (g) would thus render subsection (a)(7)'s commercial-nexus requirement wholly superfluous for those creditors.

Petitioners have no answer. They merely note (Br. 41-44) that subsection (g) does not render superfluous Congress's reference in subsection (a)(7) to the *former* version of the terrorism exception as well. See 28 U.S.C. § 1610(a)(7). But as set forth above, the problem is that petitioners' interpretation renders superfluous Congress's express imposition of a commercial-nexus requirement on individuals holding a judgment under the *current* version, Section 1605A. *Ibid.*

Indeed, petitioners' interpretation of subsection (g) would have made subsection (a)(7) entirely irrelevant at the time Congress adopted those provisions. The same statute—the NDAA—amended subsection (a)(7) to refer to Section 1605A *and* added subsection (g). § 1083(b)(3)(A) and (D), 122 Stat. 341. And at the time, subsection (a)(7) referred *solely* to the current version of the terrorism exception. *Id.* § 1083(b)(3)(A), 122 Stat. 341.4 Thus, under petitioners' interpretation, subsection (g)'s enactment rendered subsection (a)(7) completely superfluous—even though Congress made substantive changes to subsection (a)(7) at the very same time. But Congress does not usually "give with one hand what it takes away with the other." *Greenlaw v. United States*, 554 U.S. 237, 251 (2008).

2. Some of petitioners' amici contend that subsection (a)(7)'s reference to the current version of the terrorism exception (Section 1605A) is not superfluous because, they assert, creditors who relied on Section 1605A to obtain jurisdiction but then invoked a state-law cause of action can use subsection (a)(7) for execution, but cannot use subsection (g). See Victims of Terrorism Amici Br. 24-25. Specifically, they contend that such a judgment is not "entered under

Section 1605A,” as required to invoke subsection (g). *Ibid.* (quoting 28 U.S.C. 1610(g)(1)). But that is incorrect. Section 1605A provides that a “court *shall hear a claim under this section*” if the requirements for jurisdiction are met, 28 U.S.C. § 1605A(a)(2) (emphasis added), and jurisdiction does not depend on the source of the plaintiff’s cause of action, 28 U.S.C. § 1605A(a)(1). Accordingly, whenever a court has jurisdiction under Section 1605A and enters judgment, that judgment is “entered under section 1605A” and the plaintiff can invoke Section 1610(g). The source of the cause of action is irrelevant.

3. a. Petitioners contend (Br. 37-39) that the court of appeals’ interpretation renders superfluous subsection (g)’s references to “the property of a foreign state against which a judgment is entered under section 1605A” and to the “property of an agency or instrumentality of such a state.” 28 U.S.C. § 1610(g)(1). They argue that subsection (g) could instead consist solely of the “separate juridical entity” clause—*i.e.*, it could simply say that a creditor can execute against “property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity.” *Ibid.* But Congress’s clear purpose in enacting subsection (g) was to enable a creditor with a judgment against a foreign state under the current version of the terrorism exception to execute against property of (1) the state; (2) its agencies or instrumentalities; and (3) separate juridical entities owned by the state or its agencies or instrumentalities, if an exception elsewhere in Section 1610 provides for execution. The natural way to say that is to identify all three categories expressly.

Congress also had good reason to specify each category. First, subsection (g) specifies the state itself because that is how Congress identified the subset of cases in which subsection (g) permits veil piercing: When there is “property of a foreign state against which a judgment is entered under section 1605A.” 28 U.S.C. § 1610(g)(1). Without that limitation, subsection (g) would abrogate the *Bancec* inquiry in *all* cases, not merely terrorism cases. Second, Congress had obvious reason to specify that subsection (g) reaches agencies and instrumentalities: It was the decision in *Flatow* that prompted the proposal to override the *Bancec* inquiry in terrorism cases, and both *Flatow* and *Bancec* involved property of agencies or instrumentalities. See *Bancec*, 462 U.S. at 621; *Flatow*, 308 F.3d at 1071 & n.10. Third, Congress needed to include the “separate juridical entity” category in order to extend veil piercing to corporate subsidiaries of an agency or instrumentality (which are not ordinarily themselves agencies or instrumentalities, see *Dole Food*, 538 U.S. at 473-478), and corporate subsidiaries of the state itself that do not qualify as agencies or instrumentalities (which occurs if the subsidiary is a citizen of the United States or a third country, see 28 U.S.C. 1603(b)(3)). Subsection (g) is thus a comprehensive veil-piercing provision.

Petitioners contend (Br. 38) that the “agencies or instrumentalities” category is unnecessary because the “separate juridical entity” category would cover agencies and instrumentalities whenever they are separate juridical entities, and because veil piercing is unnecessary when the entity is *not* such a separate entity. But under the FSIA’s definition, an agency or instrumentality must be a “separate legal person, corporate or otherwise.” 28 U.S.C. § 1603(b)(1). The second category in subsection (g) clearly refers to an “agency or instrumentality” as so defined. And it is unlikely that Congress would enact subsection (g) without expressly saying that it reaches both the state and its agencies and instrumentalities specifically, when the primary purpose of subsection (g) is to reach both the state and its agencies and instrumentalities. The third category then expands veil piercing still further by covering certain entities that do not satisfy the definition of “agency or instrumentality.” That structure is sensible, not superfluous.

b. Petitioners also contend (Br. 32) that the *Bancec* factors listed in subsection (g) “cannot be reconciled with a requirement that the property being attached must be used by the foreign state judgment debtor for commercial activities.” But that argument fundamentally misperceives how subsection (g) works. When subsection (g) pierces the veil and causes the property of an agency or instrumentality to be treated as the state’s property for purposes of execution, the proper inquiry under subsection (a)(7) is not to ask whether the property is used for commercial activity by the *state*. Rather, the question is whether it is used for commercial activity by *that agency or instrumentality*.

Given Congress’s purpose of making it easier for victims of terrorism to pierce the veil, Congress sensibly directed courts that they may proceed “regardless of” factors they otherwise would have considered. *E.g.*, 28 U.S.C. 1610(g)(1)(C) (instructing courts not to consider “the degree to which officials of that government manage the property or otherwise control its daily affairs”). There is nothing incongruous about using one inquiry in subsection (g) and another in subsection (a), as they are asking different questions for different reasons.

D. Petitioners’ Reliance On The Statutory Purpose And Legislative History Is Misplaced

It is undisputed that Congress intended for subsection (g) to “expand successful plaintiffs’ options for collecting judgments against state sponsors of terrorism.” *Bennett*, 825 F.3d at 961. But that general purpose does not help resolve the question presented here, because both competing interpretations advance that purpose: The court of appeals’ interpretation “expand[s] successful plaintiffs’ options for collecting [such] judgments,” *ibid.*, by making it easier to pierce the veil.

The question presented here is *how far* Congress went in advancing that purpose, and in particular whether Congress intended (1) to provide for veil piercing *and* (2) to make property subject to execution regardless of the other requirements of Section 1610. As set forth above, Section 1610(g)’s text and context unambiguously establish that Congress took the first step but not the second: It made property of different entities subject to execution “regardless of” the *Bancec* factors, but only “as provided in th[at] section.” 28 U.S.C. 1610(g)(1). Because the text is clear, “reliance on legislative history is unnecessary.” *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) (citation omitted).

In any event, the legislative history does not support petitioners. Just as the text of subsection (g) is focused on a single topic—veil piercing—the legislative history of subsection (g) is focused on that one topic as well. *E.g.*, H.R. Conf. Rep. No. 447, 110th Cong., 1st Sess. 1001-1002 (2007) (Conf. Rep.) (discussing veil piercing and protections for third-party joint property holders); 154 Cong. Rec. at 500 (statement of Sen. Lautenberg) (explaining that the bill would remedy “misapplication of the ‘Bancec doctrine’ ”); *ibid.* (giving *Flatow* as an example of such misapplication); 151 Cong. Rec. 12,869 (2005) (statement of Sen. Specter) (it would “chang[e] the legal standard of the Bancec doctrine”). There is no similar indication in the legislative history that Congress even considered allowing execution without regard to a commercial nexus or the other limitations in Section 1610, notwithstanding that dispensing with all such limitations would be a very different—and more dramatic—step.

Petitioners primarily rely (Br. 57) on a statement in the Conference Report that subsection (g) would “permit[] any property in which the foreign state has a beneficial ownership to be subject to execution of [a] judgment.” Conf. Rep. at 1001. But the lone word “any” cannot bear the weight petitioners place upon it. That Report does not even mention the commercial-activity requirement or other limitations on execution under Section 1610, much less say that

subsection (g) would override them. Indeed, petitioners acknowledge that “any” is an overstatement that must be qualified: Petitioners agree (Br. 17; Pet. 13) that subsection (g) does not circumvent the FSIA’s prohibitions against executing upon central bank, diplomatic, or consular property. See 28 U.S.C. 1609, 1611(b); Vienna Convention on Diplomatic Relations, Art. 22(3), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Imprecise language in one passage of the legislative history provides no sound basis for concluding that subsection (g)’s reach is limited by Sections 1609 and 1611—yet not by anything in Section 1610—when subsection (g) is expressly tied to what is “provided in” Section 1610. 28 U.S.C. § 1610(g)(1); cf. *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011) (refusing to “allow[] ambiguous legislative history to muddy clear statutory language”).

At bottom, petitioners’ argument boils down to the position that their interpretation would be more favorable to victims of terrorism. But “no legislation pursues its purposes at all costs.” *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam). And this Court’s function is “to give [a] statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve.” *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010); e.g., *Mohamed*, 566 U.S. at 461 (“Congress has seen fit to proceed in more modest steps.”); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 383 (2009) (rejecting an interpretation of TRIA that would have been more favorable to a victim of Iranian terrorism; stating that “Congress had a more complicated set of purposes in mind”).

Here, Congress enacted Section 1610’s limitations on execution for good reason. The “judicial seizure” of a foreign state’s property “may be regarded as an affront to its dignity and may ... affect our relations with it.” *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945)). Indeed, “at the time the FSIA was passed, the international community viewed execution against a foreign state’s property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action.” *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-256 (5th Cir. 2002); see *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 14, 22 (1973) (statement of Acting Legal Adviser Brower), Ian Brownlie, *Principles of Public International Law* 346 (5th ed. 1998). The FSIA’s exceptions to execution immunity in turn are “narrower” than its exceptions to jurisdictional immunity. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014).

Even in the context of actions against state sponsors of terrorism, execution could provoke serious foreign policy consequences, including impacts on the treatment of the United States’ own property abroad. Execution could also lead to the diversion of assets that might otherwise be used to serve critical United States foreign policy objectives, such as when a formerly terrorist country has undergone a regime change. For example, President George W. Bush initially vetoed the NDAA because of concern that its execution provisions “would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation’s reconstruction efforts.” *Republic of Iraq v. Beatty*, 556 U.S. 848, 853-854 (2009) (citation omitted). Congress then added a provision allowing the President to waive the relevant provisions as to Iraq, which the President did immediately upon signing the bill into law. *Ibid.*

Section 1610’s limitations on execution exist to protect against these kinds of potentially adverse foreign-policy repercussions. For example, Section 1610(a) limits execution to property that is used for commercial activity in the United States. 28 U.S.C. 1610(a). That exception

reflects the idea that “subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty” and embroiling the United States in a foreign relations conflict “than would an attempt to pass on the legality of their governmental acts.” *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-704 (1976) (plurality opinion). And although subsection (f) is not limited to commercial property, Congress limited it to property that is blocked or otherwise regulated under certain sanctions programs—and Congress made execution subject to Presidential waiver. See 28 U.S.C. § 1610(f)(3). Congress thus ensured that the Executive can eliminate or fine-tune execution in light of foreign policy concerns. The President has done just that, waiving subsection (f) on the ground that it “would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions.” 65 Fed. Reg. at 66,483.

The property at issue here consists of ancient Persian artifacts, documenting a unique aspect of Iran’s cultural heritage, that were lent to a U.S. institution in the 1930s for academic study. Iran has never used the Collection for commercial activity in the United States; the Collection is not blocked; and it is not subject to execution under subsection (f). Execution against such unique cultural artifacts could cause affront and reciprocity problems that are different in kind from execution under any other provision of Section 1610.

If Congress were going to take the step of enabling execution even against property that is *not* commercial, *not* blocked, and *not* otherwise subject to execution under Section 1610, one would expect Congress to have said so expressly after squarely considering the ramifications of that decision. Congress did neither. Subsection (g) subjects additional property to execution only “as provided in th[at] section.” 28 U.S.C. 1610(g)(1).

* * * *

B. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*, including the *amicus* brief filed by the United States and the Supreme Court’s opinion. As discussed in *Digest 2015* at 420-25, the U.S. Supreme Court denied the third petition for a writ of certiorari in *Samantar*. The cases discussed below involve the consideration of foreign official immunity in light of the Court’s 2010 decision.

2. *Ali v. Warfaa*

Like *Samantar*, *Warfaa v. Ali* involves claims against a former Somali official. On February 1, 2016, the Fourth Circuit Court of Appeals issued a decision in *Warfaa v. Ali* that Ali was not immune from suit under the Torture Victim Protection Act (“TVPA”) for the alleged torture and attempted extrajudicial killing of Warfaa, while dismissing Warfaa’s claims under the Alien Tort Statute (“ATS”). Ali filed a petition for certiorari, No. 15-1345, on the immunity question, and Warfaa filed a conditional cross-petition,

No. 15-1464, on the ATS question. On October 3, 2016 the Supreme Court invited the Solicitor General to file briefs on both petitions expressing the views of the United States. The U.S. brief in *Warfaa v. Ali* (on the ATS issue) is discussed in Chapter 5.

The U.S. brief filed in the Supreme Court on May 23, 2017 identifies the errors in the Fourth Circuit’s opinion in the case, but argues nonetheless that the Supreme Court need not review it because both the Fourth Circuit and the Executive Branch had concluded that Ali was not entitled to immunity. Excerpts follow from the U.S. brief in *Ali v. Warfaa*, No. 15-1345, arguing that the petition should be denied. On June 26, 2017, the Supreme Court denied the petition.

* * * *

A. The Decision Of The Court Of Appeals Rests On Erroneous Circuit Precedent

1. Under this Court’s decisions, an Executive Branch determination whether a foreign official is immune from suit is binding on the courts. That principle applies both to status-based and conduct-based immunity, and the court of appeals erred in holding otherwise in *Samantar II*, which the court followed in this case.

a. In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA left in place the Executive Branch’s historical authority to determine the immunity of foreign officials in the same manner as it determined the immunity of foreign states. See *id.* at 321-325. The pre-FSIA immunity decisions that this Court cited in *Samantar* confirm that the State Department’s determination regarding immunity is, and long has been, binding in judicial proceedings. See *id.* at 311-312. In *Ex parte Peru*, 318 U.S. 578 (1943), for example, the Court held that in suits against foreign governments, “the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.” *Id.* at 588 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court instructed that it is “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” *Id.* at 35; see, e.g., *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

In pre-FSIA suits against foreign officials, courts followed the same two-step procedure as in suits against foreign states. See, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Heaney v. Government of Spain*, 445 F.2d 501, 503-506 (2d Cir. 1971) (applying principles articulated by Executive Branch because the Executive did not express a position); see also *Samantar*, 560 U.S. at 311-312.

b. In *Samantar II*, the Fourth Circuit drew a distinction between Executive Branch determinations concerning status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations concerning conduct-based immunities, which the court erroneously considered itself free to second-guess. See 699 F.3d at 769-773.

This Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the *Samantar* Court recognized that the same procedures applied in cases involving the conduct-based immunity of foreign officials. See

560 U.S. at 311-312; see also *id.* at 308 (noting that Samantar was a former official, who would not have status-based immunity). Indeed, the two cases cited by this Court involving foreign officials—*Heaney*, 445 F.2d at 504-505, and *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960)—both concerned consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity. And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department’s recognition of conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see *Samantar*, 560 U.S. at 321-322.

In concluding that conduct-based immunity determinations are not binding on the Judiciary, *Samantar II* relied on two law review articles for the proposition that the Executive’s determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive’s conduct-based determinations are not grounded on a similar “constitutional basis.” *Samantar II*, 699 F.3d at 773. But this Court has long recognized that the Executive’s authority to make foreign sovereign immunity determinations, and the requirement of judicial deference to such determinations, flow from the Executive’s constitutional responsibility for conducting the Nation’s foreign relations, without tying that authority to the more specific recognition power. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity “must be accepted by the courts as a conclusive determination by the political arm of the Government” that “continued retention of the vessel interferes with the proper conduct of our foreign relations”); see also *Hoffman*, 324 U.S. at 34; *Lee*, 106 U.S. at 209; *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-361 (1955); see generally *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (under the Constitution, the Executive is “the guiding organ in the conduct of our foreign affairs”).

The Executive’s authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. See *Samantar*, 560 U.S. at 323. Although foreign state and foreign official immunity are not invariably coextensive in scope, see *id.* at 321, the basis for recognizing the immunity of current and former foreign officials is that “the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.” *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff’d*, 168 U.S. 250 (1897); see *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (foreign officials have immunity “from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority”). As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate much the same considerations of comity and respect for other Nations’ sovereignty as suits against foreign states. See 65 F. at 579; see also *Heaney*, 445 F.2d at 503.

The deference owed to the Executive concerning conduct-based immunity determinations is, therefore, based on the constitutional principle of separation of powers. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (“[T]raditional ways of conducting government... give meaning to the Constitution.”) (citation and internal quotation marks omitted). In the absence of a governing statute such as the FSIA, it continues to be the Executive Branch’s role to determine whether current or former foreign officials are entitled to immunity from suit. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005).

2. The conclusion in *Samantar II* that the Executive’s immunity determinations are not binding in cases involving foreign-official conduct (rather than status) is closely related to

another serious error in that decision: creation of a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms. 699 F.3d at 775-777. In this case, the court of appeals' rejection of immunity for petitioner relied entirely on *Samantar II*'s erroneous holding that "foreign official immunity could not be claimed 'for *jus cogens* violations, even if the acts were performed in the defendant's official capacity.'" Pet. App. 78a (quoting *Samantar II*, 699 F.3d at 777); see *id.* at 79a.

a. The *per se* rule of non-immunity created by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the United States specifically asked the court in *Samantar II* not to address the argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. U.S. Amicus Br. at 19 n.3, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. Oct. 24, 2011). The court's decision is thus inconsistent with the basic principle that Executive Branch immunity determinations establish "substantive law governing the exercise of the jurisdiction of the courts." *Hoffman*, 324 U.S. at 36.

Indeed, both before and after this Court's decision in *Samantar*, the United States has suggested immunity for former foreign officials who were alleged to have committed *jus cogens* violations. See U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004); U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); see also Suggestion of Immunity at 6, *Doe v. De León*, No. 11-cv-01433 (D. Conn. Sept. 7, 2012); Statement of Interest at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 10-cv-5381 (E.D.N.Y. Dec. 17, 2012); Suggestion of Immunity at 9, *Doğan v. Barak*, No. 15-cv-08130 (C.D. Cal. June 10, 2016). The courts deferred to the United States' Suggestions of Immunity in those cases. See *Ye*, 383 F.3d at 626-627; *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Doe v. De León*, 555 Fed. Appx. 84, 85 (2d Cir.), cert. denied, 135 S. Ct. 78 (2014); *Rosenberg v. Pasha*, 577 Fed. Appx. 22, 23-24 (2d Cir. 2014); *Doğan v. Barak*, No. 15-cv-08130, 2016 WL 6024416, at *10 (C.D. Cal. Oct. 13, 2016), appeal pending, No. 16-56704 (9th Cir. docketed Nov. 14, 2016).

b. Respondent argues (Br. in Opp. 23-25) that a foreign official can never be immune from a suit involving allegations of *jus cogens* violations because such acts are "by definition, *ultra vires*" and so "cannot be officially 'authorized' by a state" (*id.* at 24). That argument is mistaken.

In *Samantar*, this Court unanimously held that courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before enactment of the FSIA. See 560 U.S. at 321-325; see also *id.* at 311-312 (concluding that if the Executive does not make an immunity determination in a particular case, the court is to look to principles articulated by the Executive Branch rather than independently creating its own standard). In making conduct-based immunity determinations, the Executive Branch considers whether to credit a foreign state's representation that the defendant's conduct was undertaken in his or her official capacity. See *Doğan*, WL 6024416 at *3, *9 (discussing diplomatic note endorsing defendant's conduct as acts taken in official capacity); *id.* at *7 (noting that State Department's suggestion of immunity was based on determination that suit challenged "exercise of [defendant's] official powers"). A categorical bar on conduct-based immunity whenever a plaintiff alleges a violation of a *jus cogens* norm, regardless of the foreign government's representations and the views of the Executive Branch, would unduly constrain the Executive's authority to determine the principles governing the immunity of foreign officials.

B. This Court Should Deny Certiorari

Although the court of appeals' controlling precedent is erroneous for the reasons stated above, its judgment affirming denial of petitioner's immunity is in accord with the Executive Branch's determination that petitioner is not immune. As in *Samantar*, this Court's review therefore is not warranted, although review may be warranted in the future in an appropriate case raising similar issues.

1. Earlier in this litigation, the United States informed the district court that the government was "not in a position to present views to the Court concerning this matter at this time." Pet. App. 28a (quoting statement of interest). At that time, the government was still engaged in diplomatic discussions with the Somali Government, with which the United States had established diplomatic relations only the year before. The United States' diplomatic engagement with Somalia led to discussions in 2014 in which the representative of Somalia stated that Somalia did not seek immunity for petitioner—a statement that was subsequently memorialized in a diplomatic note from the United States. See 13-1361 U.S. Amicus Br. at App. 3a-5a. More recently, discussions with Somalia resulted in a January 2017 letter from the then-President of the country, Hassan Sheikh Mohamud, which was sent to the State Department through diplomatic channels. See App., *infra*, 6a-8a. That letter waived any immunity petitioner might have claimed from this suit. The Executive Branch recognizes President Mohamud's letter as the official position of the Somali Government, and it accepts Somalia's waiver of any immunity from this suit, including any immunity its former official might have claimed.

Because the Executive Branch has now determined that petitioner is not immune from this suit, it is clear that the judgment of the court of appeals is consistent with the Executive Branch's determination, even if the rationale for the court's judgment is erroneous. In light of the unusual circumstances presented here— involving the need for extended diplomatic engagement with a newly recognized foreign government— review of the court of appeals' decision is not warranted.

2. As petitioner explains (Pet. 8-11), the Fourth Circuit's reasoning in *Samantar II*, on which the court of appeals relied in this case, is inconsistent with *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), and *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). In those decisions, which pre-dated this Court's decision in *Samantar*, the Second and Seventh Circuits held that no categorical exception to immunity exists in a case involving alleged violations of *jus cogens* norms, because courts must defer to an immunity determination by the Executive Branch in such a case (as in other cases). See *Rosenberg*, 577 Fed. Appx. at 23-24 (following *Matar* and acknowledging conflict with Fourth Circuit); *Matar*, 563 F.3d at 13-15; *Ye*, 383 F.3d at 625-627 (involving a head of state); see also *Estate of Kazemi v. Islamic Republic of Iran*, 2014 SCC 62, ¶ 106 (Can.) (recognizing conflict and declining to recognize a *jus cogens* exception to official immunity).

An appellate decision holding that courts need not defer to the Executive's immunity determination and applying a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would therefore warrant review by this Court at an appropriate time. The issue of the respective roles of the Executive Branch and the courts in identifying the controlling principles of foreign official immunity, in light of this Court's determination that such immunity is "governed by the common law," *Samantar*, 560 U.S. at 325, is working its way through the lower courts. See, e.g., *Doğan v. Barak*, No. 15-cv-08130, 2016 WL 6024416, at *10 (C.D. Cal. Oct. 13, 2016) ("Because the common law immunity inquiry centers on what conduct the

Executive has seen fit to immunize, courts are not free to carve out such an exception.”) (citation omitted), appeal pending, No. 16-56704 (9th Cir. docketed Nov. 14, 2016). This Court therefore may well have an opportunity to consider the issue in the future.

* * * *

3. Immunity of Former Defense Minister of Israel

As discussed in *Digest 2016* at 450-52, the United States filed a suggestion of immunity in the U.S. District Court for the Central District of California in *Doğan et al. v. Barak*, No. 2:15-CV-08130. On July 26, 2017, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit in *Doğan*, No. 16-56704, supporting affirmance of the district court’s dismissal of the case in deference to the State Department’s determination of the immunity of Ehud Barak. Excerpts follow from the U.S. brief, which is available in full at <http://www.state.gov/s/l/c8183.htm>.

* * * *

THE DISTRICT COURT PROPERLY DEFERRED TO THE STATE DEPARTMENT’S DETERMINATION THAT EHUD BARAK IS IMMUNE FROM THIS SUIT

Governing precedent of the Supreme Court and this Court requires a court to dismiss a civil suit against a foreign official when the State Department determines that the official is immune from suit. The district court correctly complied with that precedent in dismissing plaintiffs’ suit in light of the Executive Branch’s suggestion of immunity on behalf of Ehud Barak. In urging this Court to reverse, plaintiffs ignore that precedent. They also ignore the fact that no court has ever required a foreign official to be subject to suit after the State Department has determined that the official is immune. The Court should decline plaintiffs’ invitation to be the first court to do so.

I. *Samantar* and *Chuidian* Make Clear That the State Department’s Determinations Are Controlling Under the Common Law of Foreign-Official Immunity

In *Samantar v. Yousuf*, a case, like this one, involving the conduct-based immunity of a former foreign official, the Supreme Court held that the FSIA left in place the State Department’s common-law authority to determine the immunity of foreign officials, as it had previously determined the immunity of foreign states. See 560 U.S. 305, 321-25 (2010). The pre-FSIA immunity decisions that the Supreme Court cited in *Samantar* confirm that the State Department’s determination regarding immunity is, and long has been, binding in judicial proceedings. See *Samantar*, 560 U.S. at 311-12. In *Ex parte Peru*, for example, the Supreme Court held that in suits against foreign governments, “the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.” 318 U.S. 578, 588 (1943) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In *Republic of Mexico v. Hoffman*, the Court instructed that it is “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” 324 U.S. 30, 35 (1945); see also *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

The Supreme Court recognized that the same procedure “was typically followed when a foreign official asserted immunity.” *Samantar*, 560 U.S. at 312; see, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Heaney v. Government of Spain*, 445 F.2d 501, 503-06 (2d Cir. 1971) (applying principles articulated by the State Department because the Executive Branch did not express a position in the case). The Supreme Court explained that when Congress enacted the FSIA, thereby codifying the principles of foreign-state immunity, it left in place “the State Department’s role in determinations regarding individual official immunity.” *Samantar*, 560 U.S. at 323.

This Court has also recognized that, if the FSIA does not govern the immunity of foreign officials from suit, the State Department’s determinations are controlling. In *Chuidian v. Philippine National Bank*—another suit against a foreign official not entitled to status-based immunity—this Court explained that

[t]he principal distinction between pre-1976 common law practice and post-1976 statutory practice is the role of the State Department. If individual immunity is to be determined in accordance with the Second Restatement [which describes the common-law regime], presumably we would once again be required to give conclusive weight to the State Department’s determination of whether an individual’s activities fall within the traditional exceptions to sovereign immunity.

912 F.2d 1095, 1102 (9th Cir. 1990) (citing *Ex parte Peru*, 318 U.S. at 589, and Restatement (Second) of the Foreign Relations Law of the United States § 69 n.1 (1965)). *Chuidian* held that Congress intended the FSIA to codify the principles governing foreign-official immunity, in part because this Court concluded that Congress did not intend to create “a bifurcated approach to sovereign immunity.” *Id.* The Supreme Court disagreed with that assessment and held that Congress did, indeed, intend such an approach. See *Samantar*, 560 U.S. at 322-323. But the Supreme Court did agree with *Chuidian*’s assessment of the controlling nature of the State Department’s immunity determinations under the common-law procedure that predated the FSIA. See *id.* at 311 (explaining that if the Executive Branch suggested immunity, “the district court surrendered its jurisdiction”).

Samantar and *Chuidian* resolve this appeal. The State Department determined that Ehud Barak is immune from plaintiffs’ suit, and the district court accepted that determination as controlling and dismissed the suit. ER 27. This Court should affirm.

II. Plaintiffs’ Contrary Arguments Lack Merit

Plaintiffs make a number of arguments urging the Court to ignore the State Department’s immunity determination. All of those arguments fail to engage the precedent discussed above; none has merit.

A. Plaintiffs’ principal argument (Br. 12-32) is that, in their view, the TVPA abrogated foreign-official immunity, and that judicial deference to the State Department’s determination of foreign-official immunity offends the separation of powers by permitting the Executive Branch to override the will of Congress. The premise is mistaken. The TVPA does not address, let alone abrogate, the common-law immunity of foreign officials.

In the TVPA, Congress created a right of action against, and imposed a corresponding monetary liability on, “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation,” subjects an individual to torture or extrajudicial killing. TVPA § 2(a), 106

Stat. 73. Plaintiffs do not contend that the TVPA expressly abrogates foreign-official immunity. Instead, they argue that the TVPA's text eliminates a foreign official's immunity because the right of action "makes no exception" for officials (Br. 13), in contrast to the Anti-Terrorism Act, which excludes foreign officials acting within their official capacities from its right of action (Br. 14). But that argument confuses the scope of a right of action with the separate question of immunity from suit.

When Congress creates a right of action, it defines the class of persons who may potentially be held liable for wrongful conduct. The TVPA includes within its scope any individual acting under actual or apparent authority or color of law, which includes a foreign official acting in his or her official capacity; the Anti-Terrorism Act excludes such foreign officials. But whether a defendant may be immune from suit under a specific statute is an issue that is distinct from the scope of a cause of action.

For example, 42 U.S.C. § 1983 creates a right of action against "[e]very person who, under color of [law], deprives another of his or her legal rights. The Supreme Court has described Section 1983 as a statute that "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Nevertheless, because the distinction between the creation of a right of action and immunity from suit is "an entrenched feature" of American law, *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012), the Supreme Court has interpreted Section 1983's right of action "in harmony with general principles of tort immunities and defenses rather than in derogation of them," *Imbler*, 424 U.S. at 418. The text of the TVPA defines the scope of a right of action and identifies a class of persons who may be liable. But it, like Section 1983, simply does not address the immunities that may be available to a defendant.

Plaintiffs next argue that the TVPA's legislative history demonstrates that Congress intended to abrogate foreign-official immunity. Br. 16-21. That, too, is mistaken. As an initial matter, the House and Senate reports expressly observed that the TVPA would not affect status-based immunities such as diplomatic or head-of-state immunity, as plaintiffs acknowledge. S. Rep. No. 102-249, at 7-8 (1991); H.R. Rep. No. 102-367, at 5 (1991); see Br. 17.

Plaintiffs argue, however, that the Senate Judiciary Committee clearly intended to abrogate the immunity of former officials in suits under the TVPA. Br. 17. Even assuming that statement in a committee report would suffice, what the committee said was both significantly less definitive and premised on an erroneous view of the law. The report expressed the view that to support an official's claim of immunity, the official's state would have to "admit some knowledge or authorization of relevant acts." S. Rep. No. 102-249, at 8. But the committee believed that, "[b]ecause all states are officially opposed to torture and extrajudicial killing," states would be unlikely to make such an admission. *Id.* Accordingly, as the district court concluded, the TVPA's legislative history does not clearly demonstrate an intent by Congress to abrogate a foreign official's immunity in suits under the TVPA, "at least where the sovereign state officially acknowledges and embraces the official's acts." ER 26. Moreover, consistent with this Court's then-recent decision in *Chuidian*, the Senate Judiciary Committee erroneously assumed that a foreign official's immunity would be governed by the FSIA. See S. Rep. No. 102-249, at 8. As explained above, however, see *supra* pp. 12-13, the FSIA did not disturb the preexisting authority of the Executive Branch to determine the immunity of foreign officials from suit.

Plaintiffs contend that the district court's conclusion creates a "blanket exception" (Br. 13) to the TVPA and establishes a categorical immunity any time a foreign state endorses its official's conduct (Br. 18, 21, 47), which, plaintiffs say, conflicts with the TVPA's purpose of

holding accountable foreign government officials who engage in torture or extrajudicial killing (Br. 15-16). Plaintiffs misdescribe the district court's holding. See also, *e.g.*, Br. 24 (incorrectly suggesting that district court recognized "absolute immunity for acts of torture"); *id.* at 25, 30, 48 (similar). The district court did not hold that foreign officials would be entitled to immunity in suits under the TVPA any time the official's state endorses the official's alleged conduct. It held that a foreign official is entitled to immunity in any civil suit in which the State Department has determined that the official is immune. ER 15, 27.

The State Department does not invariably determine that foreign officials sued under the TVPA are immune. See, *e.g.*, *Yousuf v. Samantar*, 699 F.3d 763, 777- 78 (4th Cir. 2012) (discussing State Department's determination that former Somali official was not immune in TVPA suit in the circumstances of that case). Although the State Department takes into account whether a foreign state "asserts that the actions of its official were authorized acts taken in an official capacity" in making an immunity determination (ER 93), that factor is not controlling (see *id.*). Thus, for example, even if a foreign state purports to endorse the acts of a former foreign official, the State Department would not determine that the former foreign official is immune from suit if it concludes that the acts alleged were not taken in an official capacity. For these same reasons, the district court's interpretation of the TVPA as leaving in place the State Department's authority to determine a foreign official's immunity from suit does not "render the TVPA a nullity" (Br. 27), any more than the availability of qualified immunity renders 42 U.S.C. § 1983 a nullity. Moreover, a plaintiff could pursue a claim under the TVPA when a defendant is sued for acts taken not in an official capacity but under "color of law" (TVPA § 2(a), 106 Stat. 73; see, *e.g.*, *Kadic v. Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995)), or when the State Department accepts a foreign state's waiver of its official's immunity (see, *e.g.*, *Mamani v. Berzain*, Nos. 07-22459, 08-21063, 2009 WL 10664387, at *13 (S.D. Fla. Nov. 25, 2009), *rev'd in part on other grounds* by 654 F.3d 1148 (11th Cir. 2011)).

Plaintiffs further invite the Court to consider domestic immunity law, especially as it relates to suits under 42 U.S.C. § 1983. Br. 21-27. To the extent Section 1983 is relevant to the question here, it supports the government's position. As noted above, see *supra* p. 16, the Supreme Court has interpreted Section 1983 in harmony with principles of tort immunity. The Court has done so because in construing that statutory right of action, it "proceed[s] on the assumption that common-law principles of ... immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (quoting *Pulliam v. Allen*, 466 U.S. 522, 529 (1984)) (omission in original). Finding no such clear intent in Section 1983, the Supreme Court "time and again" has recognized common-law immunity principles as precluding suit under that statute. *Rehberg*, 566 U.S. at 361 (discussing cases). As we have explained above, see *supra* pp. 15-18, the TVPA evinces no "clear legislative intent" to abrogate the State Department's authority to make controlling immunity determinations in suits against foreign officials. See also *Manoharan v. Rajapaksa*, 711 F.3d 178, 179-80 (D.C. Cir. 2013) (*per curiam*) (holding that TVPA does not clearly abrogate head-of-state immunity).

Because the TVPA does not abrogate foreign-official immunity, judicial deference to the State Department's immunity determinations does not "override the will of Congress." Br. 30 (some capitalization and emphasis omitted).

B. Plaintiffs next argue that this Court should follow the Fourth Circuit's decision on remand in *Samantar* in holding that there is no constitutional basis for the Executive Branch's determinations of conduct-based foreign-official immunity, and that courts may craft their own

principles governing the immunity of former officials, including a categorical exception to immunity for alleged *jus cogens* violations. Br. 32-41; 50-53; see *supra* p. 9, n.1 (explaining the difference between conduct- and status-based immunity), p. 9 (explaining the concept of *jus cogens*). But the distinction plaintiffs seek to make between the State Department's authority to make status- and conduct-based immunity determinations conflicts with the governing Supreme Court precedent.

As an initial matter, the Supreme Court in *Samantar* did not distinguish between conduct- and status-based immunities. Rather, in explaining that courts historically deferred to the State Department's foreign-official immunity determinations, the Court cited two cases involving consular officers who were entitled only to conduct-based immunity for acts carried out in their official capacities. See *Samantar*, 560 U.S. at 312 (discussing *Heaney*, 445 F.2d 501, and *Waltier*, 189 F. Supp. 319). And in reasoning that Congress did not intend to modify the established practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department's recognition of conduct-based immunity of individual foreign officials. See *id.* at 321-22 (citing *Greenspan*, 1976 WL 841). Most significantly, *Samantar* itself involved claims against a former foreign official who would be entitled only to conduct-based immunity, if any. *Id.* at 308. The Supreme Court nevertheless gave no qualification to its holding that, in enacting the FSIA, Congress did not wish to alter "the State Department's role in determinations regarding individual official immunity." *Id.* at 323; see *id.* at 325-26 (remanding the case for consideration of whether the former official "may be entitled to immunity under the common law").

More fundamentally, the Fourth Circuit's holding on remand in *Samantar* and plaintiffs' argument endorsing that decision both rest on the premise that the Supreme Court's pre-FSIA foreign sovereign immunity decisions are based solely on the President's constitutional authority to recognize foreign states. See, e.g., Br. 36 (discussing *Yousuf*, 699 F.3d at 722); see generally U.S. Const. art. II, § 3; *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). That constitutional power supports the State Department's status-based determinations, plaintiffs argue, but not its conduct-based determinations. See Br. 36-37. Again, the premise is mistaken.

The Supreme Court's pre-FSIA decisions recognize that the State Department's authority to make foreign sovereign immunity determinations, and the courts' obligation to defer to those determinations, flow from the Executive Branch's constitutional responsibility for conducting the Nation's foreign relations, not only from its more specific recognition power. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that continuation of the suit "interferes with the proper conduct of our foreign relations"); *Hoffman*, 324 U.S. at 34 (stating that courts will "surrender[]" jurisdiction upon a suggestion of immunity "by the political branch of the government charged with the conduct of foreign affairs"); see also *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-61 (1955) (stating that "[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit," and that judicial deference rests on the need to avoid interfering with the United States' "diplomatic relations").

As plaintiffs point out (e.g., Br. 37), the President's general foreign-affairs powers are not exclusive and are shared in many contexts with Congress. Congress thus could codify some aspects of foreign-official immunity if it chose to do so. But in the absence of an applicable statute (such as the FSIA), it continues to be the role of the Executive Branch, not the courts, to

determine the principles governing foreign-official immunity from suit. That role is supported by the President's constitutional foreign relations authority.

By contrast, courts have no authority to create federal common-law principles of foreign-official immunity, absent Executive Branch guidance. The Supreme Court in *Samantar* made clear that a court is required to "surrender[] its jurisdiction" when the Executive Branch files a suggestion of immunity. 560 U.S. at 311. And when the Executive Branch does not participate in the litigation, courts must "inquire[] whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 312 (second alteration in original; quotation marks omitted); see *id.* at 323 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.").

Plaintiffs' proposal that the Court create a *jus cogens* exception to foreign-official immunity would bring to the fore the question of the courts' authority to create federal common-law immunity principles in a manner not presented by the Fourth Circuit's remand decision in *Samantar*. In *Samantar*, the State Department determined that the former foreign official was not immune from suit. See 699 F.3d at 777-78. Thus, the Fourth Circuit's judgment was at least consistent with the Executive Branch's immunity determination. In this case, by contrast, the State Department has determined that Ehud Barak is immune. Were the Court to accept plaintiffs' invitation and declare that Barak is not immune simply because plaintiffs allege a *jus cogens* violation, it would be the first court to require a foreign official to be subject to suit notwithstanding the State Department's determination that the official is immune from suit.

C. Finally, plaintiffs urge the Court to reject the State Department's immunity determination because it "is entirely silent on the foreign policy implications of this case" and so is not "reasonable." Br. 42 (*italics omitted*). That argument misperceives both the nature of the State Department's immunity determinations and the judicial role.

In making immunity determinations, the State Department takes "into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law." ER 93. In doing so, the State Department may consider "the overall impact of [the suit] on the foreign policy of the United States." *Ibid.* But there is no requirement that the Executive Branch articulate the extent and basis of that conclusion. Under the common law of foreign-state and foreign-official immunity, the Executive Branch's foreign-policy considerations are not subject to judicial review. See, e.g., *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive."); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("The State Department is to make this determination, in light of the potential consequences to our own international position."); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (*per curiam*) ("We think that the doctrine of separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his [immunity] conclusion.").

* * * *

C. HEAD OF STATE IMMUNITY

President and Prime Minister of Laos

On July 13 2017, the United States filed a suggestion of immunity on behalf of both the president and prime minister of Laos. See *Digest 2016* at 459-60 for discussion of a separate suggestion of immunity in a different case against the heads of state and government in Laos, *Hmong v. Lao People's Democratic Republic*.^{****} The July 13, 2017 suggestion of immunity is excerpted below, omitting footnotes and sections that were previously argued in *Hmong*. The suggestion of immunity in its entirety, and its exhibits, are available at <http://www.state.gov/s/l/c8183.htm>. The statement of interest filed as part of the July 13, 2017 submission by the United States is discussed in Section A.5., *supra*. On July 31, 2017, the court dismissed the case for lack of subject matter jurisdiction, also dismissing with prejudice the claims against the president and prime minister in recognition of the U.S. suggestion of immunity. *Savang v. Lao People's Democratic Republic*, No. 16-cv-02037 (E.D. Ca. 2017).

* * * *

The United States respectfully informs the Court of its interest in the pending claims against President Bounnhang, Laos's sitting head of state, and Prime Minister Thongloun, its sitting head of government, and hereby informs the Court that both officials are immune from suit. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has the sole authority to determine the immunity from suit of incumbent heads of state and heads of government. The interest of the United States in this matter arises from a determination by the Executive Branch, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, that President Bounnhang and Prime Minister Thongloun are immune from this suit. As discussed more fully below, this determination is controlling and is not subject to judicial review. Indeed, the United States is aware of no case in which a court has ever subjected a sitting head of state or head of government to suit once the Executive Branch has determined that he or she is immune.

Here, the Office of the Legal Adviser of the U.S. Department of State has informed the U.S. Department of Justice that the government of Laos has formally requested that the United States recognize President Bounnhang's and Prime Minister Thongloun's immunity from this lawsuit. See Dep't of State Letter, *supra*. The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of

^{****} Editor's note: On August 18, 2017, the district court entered its judgment denying plaintiffs' motion to amend their complaint and effectively dismissing the *Hmong 1* case. However, the court's opinion was not based on immunity but rather the requirement in *Kiobel* that ATS claims sufficiently touch and concern the United States to displace the presumption against extraterritoriality. *Hmong 1*, No. 2:15-cv-02349-TLN-AC (E.D. Ca.).

President Bounnhang as a sitting head of state and Prime Minister Thongloun as a sitting head of government from the jurisdiction of the United States District Court in this suit.” *Id.*

* * * *

D. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Determinations under the Foreign Missions Act

By Foreign Missions Act determinations dated August 31, 2017, the State Department restricted entry or access to multiple facilities leased or owned by the Government of the Russian Federation (in New York, Washington, D.C., and San Francisco) pursuant to section 204(b) of the Foreign Missions Act (22 U.S.C. § 4304(b)). 82 Fed. Reg. 44,484 & 44,485 (Sep. 22, 2017).

As discussed in *Digest 2016* at 462-63, the State Department had previously restricted entry or access to other Russian facilities in the United States in response to Russia’s interference in the 2016 U.S. election and a pattern of harassment of U.S. diplomats overseas. Russia responded in July 2017 by ordering the United States to reduce its diplomatic presence in Russia. The United States made the reductions as directed by the Russian government. On August 31, 2017, the State Department announced that it would require the closure of specified facilities in New York, Washington, D.C., and San Francisco to achieve parity with the Russians with respect to the number of consulates. In an August 31, 2017 State Department press statement, available at <https://www.state.gov/r/pa/prs/ps/2017/08/273738.htm>, Department Spokesperson Heather Nauert explained:

The United States has fully implemented the decision by the Government of the Russian Federation to reduce the size of our mission in Russia. We believe this action was unwarranted and detrimental to the overall relationship between our countries.

In the spirit of parity invoked by the Russians, we are requiring the Russian Government to close its Consulate General in San Francisco, a chancery annex in Washington, D.C., and a consular annex in New York City. These closures will need to be accomplished by September 2.

With this action both countries will remain with three consulates each. While there will continue to be a disparity in the number of diplomatic and consular annexes, we have chosen to allow the Russian Government to maintain some of its annexes in an effort to arrest the downward spiral in our relationship.

The United States hopes that, having moved toward the Russian Federation’s desire for parity, we can avoid further retaliatory actions by both sides and move forward to achieve the stated goal of both of our presidents: improved relations between our two countries and increased cooperation on

areas of mutual concern. The United States is prepared to take further action as necessary and as warranted.

The State Department also held a special briefing on August 31, 2017 regarding Russia. The transcript of the briefing, excerpted below, is available at <https://www.state.gov/r/pa/prs/ps/2017/08/273751.htm>.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ...So ... in San Francisco, what we required to be closed was the Russian consulate general, and there is also an official residence, so that's what they will be closing there. And in Washington, D.C. and New York, they have a number of annexes that have different offices. The annex in Washington, D.C. ...currently houses their trade mission and the one in New York also houses a trade mission.

Regarding previous actions, the actions that this government took in December—I think you all know the reasons why we took those steps. It had to do with harassment of our diplomats and interference in our domestic affairs, in our elections. So I think those actions spoke for themselves. I think that we are responding in this instance to the Russian desire for parity in the diplomatic relationship, and we have taken these steps in that measure, in that spirit, and it is our hope that the Russians will recognize that since they were the ones who started the discussion on parity and we're responding and complying with what they required of us.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ... Russian consulates, I can't really speak to how large each of them are, but they have four consulates now. They'll be going down to three. They're all on the smaller side compared to the embassy. San Francisco is the one that is the oldest and most established ... of the four. So I think in looking at which annexes or which consulates to close, we weighed a variety of criteria, and that just for a variety of reasons appeared to be the one that made the most sense.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ... Secretary Tillerson phoned [Foreign Minister] Lavrov today to inform him that we had met their required reduction in size by their deadlines. And he also informed him of our plans to close the facilities in question. There was also a meeting between our acting Assistant Secretary for European and Eurasian Affairs John Heffern, who conveyed the decisions and our response to the Russian Deputy Chief of Mission Dmitry Zhirnov.

...[W]e are not expelling any Russians at this time. We have informed the Russians that they may be reassigned to other diplomatic or consular posts in the United States if they choose to do so.

* * * *

SENIOR ADMINISTRATION OFFICIAL: I don't have information with me on other trade missions, but ... those activities can be carried out in other annexes or other locations if they choose to do so.

In terms of what will happen to the buildings, ... the buildings that are owned by the Russians will continue to be owned by the Russians, and it will be up to them to determine whether they wish to sell those or dispose in some other way. They just will not be authorized for diplomatic or consular activities, and ... they won't be recognized as such. I think at least one of the facilities is leased, so I would presume they're just going to end their lease for that facility.

... the only authorized activities would be the protection and maintenance of the property.

* * * *

SENIOR ADMINISTRATION OFFICIAL: I think I didn't say anything about how long-term this was. I mean, certainly we continue to want to improve our relations between the two countries. We have areas of contention between our countries and concerns that the Russian side has not addressed. So I can't really say that this is permanent. Certainly, if the Russian side wanted to try to address some of our concerns, we would always be willing to listen and keep an open mind, because our fundamental goal is to find a way to improve the relations between our countries.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ... I'm confirming the Russians required that we reduce our presence to a total of 455, so I'm confirming that we have met that requirement.

* * * *

SENIOR ADMINISTRATION OFFICIAL: ... Let me just say that the Russian requirement had an impact on both Russian and American staff. And we've had to respond in both taking care of the Americans and the Russians in different ways. So I'm not really prepared to go into any details there.

* * * *

SENIOR ADMINISTRATION OFFICIAL: So ... in terms of our visa processing, we had to temporarily suspend it because of the disruption caused, and we will be resuming shortly visa processing but at a much reduced rate because of the reduction in personnel.

* * * *

2. Enhanced Consular Immunities

As discussed in *Digest 2016* at 463, Section 501 of the Department of State Authorities Act, Fiscal Year 2017, P.L. 114-323, codified at 22 U.S.C. §254c, amended the Diplomatic Relations Act (22 U.S.C. §254c) to include permanent authority for the Secretary of State

to extend enhanced privileges and immunities to consular posts and their personnel. See also *Digest 2015* at 436-37.

In 2017, the United States signed two bilateral agreements, under which, upon entry into force, the United States and the other party reciprocally extend enhanced protections for consular posts, consular officers and consular employees and their family members. On January 19, 2017, the “Agreement Between the Government of the United States of America and the Government of the Republic of India Regarding Consular Privileges and Immunities” was signed. It entered into force upon signature. On March 17, 2017, the “Agreement Between the Government of the United States of America and the Government of the Hellenic Republic Regarding Consular Privileges and Immunities” was signed. The Agreement is not yet in force.

E. INTERNATIONAL ORGANIZATIONS

1. International Organizations Immunities Act

On January 12, 2017, President Obama designated the World Organisation for Animal Health (“OIE”) as a public international organization entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act (“IOIA”). 82 Fed. Reg. 5323 (Jan. 17, 2017). The President made the designation pursuant to section 1 of the IOIA (22 U.S.C. 288), finding that OIE is a public international organization in which the United States participates within the meaning of the IOIA. *Id.*

2. *Hilt Construction v. Permanent Mission of Chad*

On May 3, 2017, the United States filed a statement of interest in *Hilt Construction & Management Corp. v. Permanent Mission of Chad to the UN in New York*, No. 16-Civ-6421 (S.D.N.Y.). Plaintiff obtained a default judgment against the Chad Mission for its alleged failure to pay \$1,400,460.00 for renovation services performed by Hilt on property owned by the Mission. Plaintiff’s counsel then sought to enforce the judgment without seeking further assistance from the court by subpoenaing Bank of America where the Chad Mission has its official account. Excerpts follow from the U.S. statement of interest explaining the immunity of UN mission property from attachment. The statement in its entirety is available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

I. ... CHAD’S UN MISSION PREMISES AND OFFICIAL BANK ACCOUNT ...ARE IMMUNE FROM ENFORCEMENT ACTION

Under international agreements to which the United States is a party, Plaintiff cannot enforce its judgment against property on UN Mission premises or UN Mission bank accounts

used for official Mission purposes. While the FSIA identifies limited exceptions to the presumption of foreign state immunity, *see* 28 U.S.C. § 1610(a), the FSIA does not displace immunities enjoyed by foreign state property under international agreements to which the United States was a party at the time of the statute's enactment. 28 U.S.C. § 1609 (providing that the FSIA provisions addressing the immunity from attachment and execution of a foreign state's property are "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act."); *767 Third Avenue Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 298 (2d Cir. 1993) ("Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act.").

At the time the FSIA was enacted, the United States had already entered into several international agreements which establish its obligations to protect the property of UN missions from interference. The Vienna Convention on Diplomatic Relations ("Vienna Convention"), to which both the United States and Chad are parties, provides that "[t]he premises of the mission, their furnishings and other property thereon ... shall be immune from search, requisition, attachment or execution." Vienna Convention, art. 22, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. The Vienna Convention also provides that "the receiving state shall accord full facilities for the performance and functions of the mission." *Id.* art. 25. Diplomats accredited to the United Nations and the permanent missions through which they operate receive the same protections afforded to diplomatic missions, including to diplomatic property, under these provisions of the Vienna Convention. In particular, the U.N. Charter provides that the representatives of its Members shall "enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." U.N. Charter, art. 105, para. 2, June 26, 1945, 59 Stat. 1031, T.S. No. 993. The UN Headquarters Agreement further specifies that representatives to the U.N. "shall ... be entitled ... to the same privileges and immunities ... as [the United States] accords to diplomatic envoys accredited to it." Agreement Between the U.N. and the United States Regarding the Headquarters of the U.N., art. V, § 15, June 26, 1947, T.I.A.S. 1676.

In interpreting these international agreements, the Second Circuit Court of Appeals has held that the protections afforded to diplomatic missions and their property under the Vienna Convention extend to permanent missions to the U.N. *See 767 Third Avenue Assocs.*, 988 F.2d at 298 (determining that the Vienna Convention, which codified principles of customary international law concerning diplomatic relations, establishes the inviolability of permanent missions to the U.N.). Accordingly, property on UN mission premises, like property on embassy premises, is immune from attachment or execution. *See* Vienna Convention art. 22(3). This Court in fact noted that "foreign missions and their premises are immune from attachment and execution under the Vienna Convention" in its decision dismissing Plaintiff's original action due to improper service of the complaint. *Hilt Constr. & Mgmt. Corp.*, 2016 WL 3351180, at *6–7. Accordingly, Plaintiff is clearly foreclosed from executing upon personal property on Chad's Mission premises, and the New York City Marshal's Notice must be vacated.

Further, courts have drawn on these international agreements to recognize that bank accounts of UN missions that are used for mission purposes are immune from enforcement as well, because a mission's access to its bank funds in the receiving state is critical to the mission enjoying "full facilities for the performance and functions of the mission." For example, in *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations*, 796 F. Supp. 761, 763 (S.D.N.Y. 1992), despite the entry of a default judgment against Uganda's U.N.

mission, the court held that “attachment of defendant’s bank account is in violation of the United Nations Charter and the Vienna Convention because it would force defendant to cease operations.” Similarly, in *Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172, 2011 WL 5245206, at *4 (E.D.N.Y. Nov. 2, 2011), the court vacated the plaintiff’s execution of a default judgment against the bank accounts of Congo’s U.N. Mission on the ground that “[b]ank accounts used by the mission for diplomatic purposes are immune from execution under [Article 25 of the Vienna Convention] as facilities necessary for the mission to function.” (citing *Sales v. Republic of Uganda*, No. 90 Civ. 3972, 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993)).

Here, Ambassador Alifei has submitted a sworn statement that the bank account restricted by Plaintiff’s restraining notice is used by the Mission for the fulfilment of its diplomatic duties and general operations. *See* Alifei Aff. ¶ 6. Indeed, Ambassador Alifei attests that without access to the bank account, the Mission cannot continue to perform its official functions or to pay its employees. *See id.* ¶¶ 6, 7. He further states that the account is not used for commercial purposes. *See id.* ¶ 6. Any additional investigation into the complete range of uses is unnecessary, as courts have held that a mission official’s sworn statement is sufficient to establish that the mission’s bank account is used for diplomatic purposes, even if it were possible that a portion of the account funds other activities. *See e.g., Sales*, 1993 WL 437762, at *2 (rejecting plaintiff’s contention that some funds may be used for non-diplomatic purposes and noting, to remain consistent with principles of sovereign immunity, reliance on the foreign state’s declaration as to use of an account is necessary to avoid “painstaking examination of the Mission’s budget and books of account”); *Liberian E. Timber Corp. v. Gov’t of Republic of Liberia*, 659 F. Supp. 606, 610 (D.D.C. 1987) (“Indeed, a diplomatic mission would undergo a severe hardship if a civil judgment creditor were permitted to freeze bank accounts used for the purposes of a diplomatic mission for an indefinite period of time until exhaustive discovery had taken place to determine the precise portion of the bank account used for commercial activities.”).

Because the Chad Mission’s bank account supports its diplomatic activities and operations, it constitutes mission property immune from enforcement. Accordingly, Plaintiff’s restraint on its account should be vacated to ensure compliance with the United States’ international obligations and to permit Mission operations to continue, and the associated information subpoena seeking information about the account should also be withdrawn.

II. PLAINTIFF’S ... EFFORTS ARE IMPERMISSIBLE UNDER THE FSIA

Even if the property at issue were not immune from enforcement under the United States’ international agreements, Plaintiff’s efforts to enforce the default judgment would be impermissible under the FSIA. Section 1609 of the FSIA states, “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.” 28 U.S.C. § 1609.

Section 1610(c) prohibits the restriction of a foreign state’s property unless, after a reasonable period of time has elapsed from the entry of judgment and the provision of any notice required under Section 1608(e), the court issues an order permitting attachment or execution. “[E]xecution depends on a judicial determination that the property at issue falls within one of the exceptions to immunity....” *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011).

Here, there is no indication in the docket that Plaintiff sought an order from the Court or that the Court determined that personal property at the Chad Mission or the Chad Mission’s bank

account were not immune from enforcement. *See generally* Dkt. That the Court granted Plaintiff's request for a default judgment is immaterial, as the decision as to whether a foreign state is liable in an action is separate from the subsequent determination concerning the way in which the judgment may be enforced, if at all. *See, e.g., Avelar*, 2011 WL 5245206, at *5 n.8 (“[T]he FSIA requires that any steps taken by a judgment creditor to enforce the judgment must be pursuant to a court order authorizing the enforcement, independent of the judgment itself, and not merely the result of the judgment creditor’s unilateral delivery of a writ to the sheriff or marshal.”). Moreover, to the extent that Plaintiff’s notices were properly executed under New York State law, these procedures do not satisfy the FSIA such that the property of a foreign state may be attached. *See, e.g., First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 256 (S.D.N.Y. 2000), *aff’d sub nom. First City, Texas Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002) (vacating restraining notice as plaintiff failed to seek a court order pursuant to §1610(c) before serving it); *Trans Commodities, Inc. v. Kazakstan Trading House*, No. 96 CIV. 9782, 1997 WL 811474, at *2 (S.D.N.Y. May 28, 1997) (finding restraining notice to be “procedurally defective” under the FSIA).

In addition, a foreign government’s failure to appear to contest a judgment or enforcement action does not constitute a waiver of immunity such that attachment of property is proper without an express determination by the court that an exception to immunity applies. *See, e.g., Walters*, 651 F.3d at 293-94. In any event, it is unclear whether the Chad Mission was served with a copy of the default judgment in the manner required by the FSIA and thus had knowledge of it, as Plaintiff has not filed an affidavit of service. *See* 28 U.S.C. § 1608(e) (requiring a copy of any default judgment be sent to the foreign state in the same manner prescribed for service of process, set forth in § 1608(a)). Moreover, Plaintiff’s counsel signed the restraining notice issued to Bank of America three days *before* the Court filed the default judgment, despite the fact that enforcement against a foreign state’s property is not permitted without a court order issued “a reasonable time” after the entry of judgment and the provision of requisite notice. *See* Exhibit A annexed to Donovan Dec., p. 4, Dkt No. 16; 28 U.S.C. § 1610(c). Plaintiff therefore has failed to comply with the requirements of the FSIA governing the enforcement of judgments, and as a result, even if the property at issue could be attached, which it cannot, Plaintiff’s restraining notice would be improper.

* * * *

3. *Laventure v. United Nations*

As discussed in *Digest 2014* at 434-47, *Digest 2015* at 437-46, and *Digest 2016* at 463-68, both the federal district court and the appeals court in *Georges v. United Nations*, No. 13-7146 (2015) and 834 F.3d 88 (2d Cir. 2016), respectively, agreed with the United States that the UN and UN officials are immune from a suit alleging their liability for a cholera outbreak in Haiti. A second suit was filed alleging UN officials’ liability for the cholera outbreak in Haiti, *Laventure v. UN*, No. 14-1611 (E.D.N.Y.). Excerpts follow from the May 24, 2017 U.S. letter to the court in response to its invitation for U.S. views. The submission in its entirety is available at <https://www.state.gov/s/l/c8183.htm>.

* * * *

...Pursuant to 28 U.S.C. § 517, the United States files this Statement of Interest, explaining that the United Nations is absolutely immune from suit and service of process under the Convention on Privileges and Immunities of the United Nations (“General Convention”). In light of the UN’s immunity, the Court lacks subject matter jurisdiction over the UN. *See Georges v. United Nations*, 834 F.3d 88, 98 (2d Cir. 2016). Similarly, the individual UN defendants enjoy immunity for their official actions, and two of the individual defendants, by virtue of their high-ranking positions, also enjoy diplomatic immunity.

BACKGROUND

I. PLAINTIFFS’ COMPLAINT

Plaintiffs allege that the United Nations (“UN”), the United Nations Stabilization Mission in Haiti (“MINUSTAH”) and certain UN officials are responsible for an epidemic of cholera that broke out in Haiti in 2010, killing approximately 9,000 Haitians and injuring approximately 700,000 more. First Amended Complaint (FAC) ¶ 1. ECF No. 5. Specifically, they allege the UN negligently caused the cholera epidemic by failing to screen Nepalese peacekeeping forces who were deployed to Haiti in October 2010, despite a known outbreak of cholera in Nepal, *id.* ¶¶ 1, 5, 75-89, and by failing to use adequate sanitation for the peacekeepers, which allegedly led to the contamination of a major Haitian water supply. *Id.* ¶¶ 3-5, 90-104.

Plaintiffs also allege that the UN failed to establish a claims commission to address third-party claims of individuals injured by the cholera epidemic, purportedly in violation of the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti (“Status of Forces Agreement” or “SOFA”). *Id.* ¶¶ 7, 17, 27, 189-91. Plaintiffs allege they made claims for compensation and remediation to the UN and that the UN “refused to substantively respond to the claims.” *Id.* ¶¶ 193-94. Plaintiffs also allege that the General Convention requires the UN to provide for appropriate modes of settlement for third-party private law claims, including those arising from the cholera epidemic in Haiti. *Id.* ¶¶ 16, 192. *See General Convention, adopted* Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, § 29. Plaintiffs allege that, despite this obligation, the UN has not provided plaintiffs with any relief. FAC ¶ 192.

The Laventures (Marie, Maggie, Sane, and Carmen) are Haitian or U.S. citizens who allege that their parents died in the cholera epidemic, and bring suit on behalf of themselves and the estates of their parents. *Id.* ¶¶ 20-24. In addition, there are 2641 named plaintiffs on Exhibit 1 to the First Amended Complaint who are allegedly either individuals who were infected by the epidemic or, if deceased, representatives of estates of individuals who died in the epidemic. *Id.* ¶ 26 & Exhibit 1. Plaintiffs also bring suit on behalf of a putative class of similarly situated individuals and seek compensatory and punitive damages in an amount to be determined at trial. *Id.* ¶ 44.

In addition to the UN and MINUSTAH, which is a subsidiary organ of the UN and thus part of the UN, plaintiffs also named six individual defendants: (i) former UN Secretary-General Ban-Ki Moon, who as the former chief administrative officer of the UN is alleged to have had overall responsibility for the management of the UN and its operations; (ii) Assistant Secretary-General Edmond Mulet, the former Special Representative of the Secretary-General and Head of MINUSTAH from March 2010 to May 2011, who is alleged to have had overall authority for the

UN's conduct in Haiti during that period; (iii) Chandra Srivastava, former Chief Engineer for MINUSTAH, who is alleged to have been responsible for the environmental and sanitation units in Haiti during October 2010; (iv) Paul Aghadjanian, former Chief of Mission Support for MINUSTAH, who is alleged to have been responsible for managerial, logistical, and administrative support in Haiti during 2010; (v) Pedro Medrano, former Assistant Secretary-General and UN Senior Coordinator for the Cholera Response to Haiti, who was alleged at the time the First Amended Complaint was filed to have been responsible for coordinating the UN's cholera response in Haiti; and (vi) Miguel de Serpa Soares, current Under-Secretary-General for Legal Affairs, who is alleged to be responsible for all legal issues arising from the UN's cholera response. *Id.* ¶¶ 29-36. *See also* Letter from Stephen Mathias, Assistant Secretary-General for Legal Affairs to the Permanent Representative of the United States Mission to the United Nations (May 2, 2017 Letter) (attached hereto as Exhibit A).

II. PROCEDURAL HISTORY

In response to plaintiffs' request, this Court stayed the case in March 2015 to await the Second Circuit's decision in *Georges v. United Nations*, which involved a similar suit brought against the UN (including MINUSTAH), former Secretary-General Ban, and Assistant Secretary-General Mulet by victims of the Haitian cholera outbreak. ECF No. 8. In August 2016, the *Georges* panel affirmed the district court's ruling that the defendants were immune from suit under the General Convention. *Georges*, 834 F.3d 88, 98 & n.64 (2d Cir. 2016). The plaintiffs did not inform the Court of the Second Circuit's decision. As a result, on March 30, 2017, this Court issued an order to the plaintiffs to show cause why their suit should not be dismissed for lack of jurisdiction in light of the *Georges* immunity decision or, in the alternative, for failure to prosecute. ECF No. 13.

In response, plaintiffs argued that in *Georges* the Second Circuit upheld the UN's immunity on the "narrow" ground that the UN's obligation to provide for appropriate modes of settlement for third-party private law claims under Section 29 of the General Convention is not a condition precedent to the UN having immunity against such claims. Plaintiffs' Response to Order to Show Cause (Plaintiffs' Response) at 2. ECF No. 14. According to plaintiffs, the Second Circuit's holding does not render their case "moot," because plaintiffs (unlike the plaintiffs in *Georges*) take the position that the UN is not immune because it purportedly "has repeatedly and expressly waived sovereign immunity on multiple occasions..." *Id.* at 8. Plaintiffs seek permission to file a new amended complaint adding additional plaintiffs, and they also intend to move for a default judgment.

After this Court invited the Government to file a letter expressing its views on plaintiffs' motion to amend their complaint to add additional plaintiffs and to move for default judgment, on April 20, 2017, the Department of Justice filed a Notice of Potential Participation indicating that it would decide whether to file a Statement of Interest by May 24, 2017, and if so would file the statement no later than that date as well. ECF No. 16.

The UN has requested that the United States inform the Court of the UN's immunity and that of its named officials from this suit. *See* May 2, 2017 Letter. Exhibit A.

DISCUSSION

I. THE ABSOLUTE IMMUNITY OF THE UN

A. UN's Immunity

Absent an express waiver, the UN is absolutely immune from suit and all legal process. The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such

privileges and immunities as are necessary for the fulfillment of its purposes.” The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, art 105.1. The General Convention, adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, defines the UN’s privileges and immunities by providing that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” General Convention, art. II, sec. 2 (emphasis added).

The United States understands the General Convention to mean what it unambiguously says: the UN enjoys absolute immunity from “every form of legal process,” including suit and service of process, unless the UN has “expressly waived” its immunity in a “particular case.” Courts routinely recognize the UN’s absolute immunity from suit absent an express waiver on the part of the UN. “Under the [General] Convention the United Nations’ immunity is absolute, subject only to the organization’s express waiver thereof in particular cases.” *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y.1987) (Nickerson, J.). “[W]here, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs’ claims against the United Nations for lack of subject matter jurisdiction.” *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008), *aff’d*, 597 F.3d 107, 112 (2d Cir. 2010). In addition, the UN enjoys immunity from suit under the International Organizations Immunity Act (“IOIA”), 22 U.S.C. § 288a(b). *Brzak*, 597 F.3d at 112.

The UN’s immunity under the General Convention extends to MINUSTAH, which is a UN peacekeeping mission that reports directly to the Secretary-General and the Security Council, and is therefore an integral part of the UN. In addition, the Status of Forces Agreement between the UN and Haiti explicitly provides that MINUSTAH “shall enjoy the privileges and immunities... provided for in the [UN General] Convention.” Status of Forces Agreement, art. III, § 3. Accordingly, MINUSTAH is entitled to the same immunities established by the General Convention. *See, e.g., Emmanuel v. United States*, 253 F.3d 755, 756 (1st Cir. 2001) (noting that immunity applies to the UN Mission in Haiti pursuant to the Status of Forces Agreement); *see also Sadikoglu v. UN Development Programme*, No. 11-Civ-0294 (PKC), 2011 WL 4953994 at * 3 (S.D.N.Y. Oct. 14, 2011) (ruling that “because UNDP — as a subsidiary program of the UN that reports directly to the General Assembly — has not waived its immunity,” the General Convention “mandates dismissal . . . for lack of subject matter jurisdiction”).

B. Contrary To Plaintiffs’ Allegations, The UN Has Not Waived Its Immunity

Plaintiffs mistakenly assert that the UN “has repeatedly and expressly waived sovereign immunity on multiple occasions.” Plaintiffs’ Response at 8. To the contrary, the UN has asserted its own and its officials’ right to immunity. The attached May 2, 2017 letter from the UN expressly requests that “the competent United States authorities [] take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials... .” *See* May 2, 2017 Letter at 2. Exhibit A.

Although plaintiffs allege that the UN’s failure to establish a claims commission constitutes a “violation” of the SOFA, FAC ¶ 191, and further allege that the UN committed a “violation” of the General Convention by failing to provide a mode of settlement for cholera-based claims, *id.* ¶ 192, this does not constitute a waiver of the UN’s immunity, which, as noted, must be “expressly waived” by the organization in a “particular case.” General Convention, art. II, § 2. As the Second Circuit explained in *Brzak*, “[a]lthough the plaintiffs argue that purported

inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention]." *Brzak*, 597 F.3d at 112

Moreover, the plaintiffs in *Georges* also argued that the UN lacked immunity because it had failed to provide a remedy for their cholera-related claims. *See, e.g.*, Reply Brief for Appellants at 3-19. 2015 WL 5693482. The Second Circuit rejected this argument, however, noting that its conclusion was consistent with its decision in *Brzak*, "in which we held that the purported inadequacies of the UN's dispute resolution mechanism did not result in a waiver of absolute immunity from suit." *Georges*, 834 F.3d at 97 n.48 (citing *Brzak*, 597 F.3d at 112). Clearly, then, whether the UN has established a claims commission or other means by which aggrieved persons can seek compensation is irrelevant to the question of waiver.

Plaintiffs also allege that the UN waived its immunity based on 1996 and 1997 reports from the Secretary General that state that the UN is liable for damages to innocent third parties, as well as a 1998 General Assembly resolution that the UN would agree to liability for third-party claims resulting from the activities of peacekeeping operations. Plaintiffs' Response at 8-9. According to plaintiffs, in light of these reports and the UN General Assembly resolution, the SOFA "permitted entry of U.N. troops only on condition of paying for injuries they caused." *Id.* at 9. These various actions by the Secretary General and General Assembly do not constitute an express waiver by the UN of its immunity from legal process in United States courts in this case. *See* General Convention § 2 (the UN is immune unless "in any particular case" it expressly waives its immunity). Instead, the UN actions referred to by plaintiffs appear, at most, to express a general commitment to provide for compensation for injury to innocent third parties during the course of peacekeeping operations, which is what the SOFA itself states.

Because the UN has not expressly waived its or its component's immunity in this case, the UN and MINUSTAH are entitled to immunity from legal process and suit.

II. THE IMMUNITY OF THE INDIVIDUAL DEFENDANTS

The UN has also asserted the immunity of the individual defendants in this case. *See* May 2, 2017 Letter at 2. Exhibit A. As the United States explains below, pursuant to the General Convention, current and former U.N. officials named as defendants enjoy immunity for any past official acts. In addition, current Under-Secretary-General Soares and Assistant Secretary-General Mulet, by virtue of their high-ranking positions, enjoy diplomatic immunity from suit pursuant to the Vienna Convention on Diplomatic Relations ("Vienna Convention"), 23 U.S.T. 3227, TIAS No. 7502, 500 UNTS 95.

Official Acts Immunity. The UN Charter provides that "officials of the Organization shall ... enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion [sic] of the organization." UN Charter, art. 105, § 2. Article V, Section 18(a) of the General Convention provides that UN officials are "exempt from legal process in respect of words spoken or written and all acts performed by them in their official capacity...." Under section 18(a), both current and former UN officials, regardless of rank, enjoy immunity from suit for all acts performed in their official capacity. *See Van Aggelen v. United Nations*, 311 F. App'x 407, 409 (2d Cir. Feb. 20, 2009) (applying such immunity to a UN official who did not enjoy diplomatic immunity). Likewise, former as well as current UN officials enjoy immunity for their official acts under the IOIA, 22 U.S.C. § 288d(b). *De Luca v. UN*, 841 F. Supp. 531, 534 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir. 1994). Consequently, all the individual defendants enjoy immunity for their official acts under Section 18(a) of the General Convention and the IOIA.

Diplomatic Immunity. In addition to immunity for their official acts, current Under Secretary-General Soares and Assistant Secretary-General Mulet enjoy diplomatic immunity as well. Article V, Section 19 of the General Convention provides that, in addition to the immunities specified in Section 18, “the Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law.” *Id.*, art. V, § 19. In the United States, the privileges and immunities enjoyed by diplomats are governed by the Vienna Convention, which entered into force with respect to the United States in 1972. 23 U.S.T. 3227, TIAS No. 7502, 500 U.N.T.S. 95. Article 31 of the Vienna Convention provides that diplomatic agents “enjoy immunity from the civil and administrative jurisdiction” of the receiving State — here, the United States — except with respect to: (a) privately-owned real estate; (b) performance in a private capacity as an executor, administrator, heir, or legatee; and (c) professional or commercial activities other than official functions. None of these exceptions are at issue here. Accordingly, they enjoy immunity from this suit. *See Georges*, 848 F.3d at 92, 98 n.64 (affirming dismissal of Ban and Mulet on the grounds of diplomatic immunity).

III. PLAINTIFFS HAVE NOT ADEQUATELY SERVED THE DEFENDANTS

Plaintiffs do not appear to have adequately served any of the defendants. The UN’s May 2017 letter states that, notwithstanding attempts by the plaintiffs to serve it by facsimile, the UN has not waived its immunity as to service. May 2, 2017 Letter at 3. Exhibit A. As noted, the UN, in the absence of a waiver, enjoys immunity from “every form of legal process[.]” General Convention § 2, which includes service of process in a civil suit. The UN’s letter further points out that although the UN Headquarters Agreement provides for the Secretary-General to provide for conditions of service within the Headquarters District, the Secretary-General has not, in fact, done so. UN’s May 2, 2017 Letter at 3-4. Exhibit A. As a result, any attempts by plaintiffs to serve the UN and the individual defendants within the Headquarters District would be ineffectual.

The docket in this case indicates that plaintiffs attempted to serve all of the defendants by personal service on Ban in June 2014. However, former Secretary-General Ban enjoyed diplomatic immunity as of 2014, and therefore enjoyed personal inviolability, which rendered service on him ineffective. *See Tachiona v. Mugabe*, 386 F.3d. 205, 223 (2d Cir. 2004) (unless one of the three exceptions to immunity from civil suit apply, service of process on an individual enjoying diplomatic immunity is improper). Furthermore, an individual who enjoys inviolability cannot be served even as a means of serving parties who do not enjoy immunity. *See id.* at 224 (dismissing non-immune entity whom plaintiffs attempted to serve through inviolable individuals). Accordingly, to the Government’s knowledge, there has not been effective service on any of the defendants in this case.

* * * *

The United States filed a reply letter on July 7, 2017 in further support of its statement of interest filed on May 24, 2017. The July 7, 2017 submission is excerpted below and available in its entirety at <https://www.state.gov/s/l/c8183.htm>.

* * * *

Plaintiffs do not dispute that only an express waiver by the UN of its immunity can be effective. Rather, plaintiffs contend that the General Convention's requirement that waiver be express "in any particular case" does not actually require that the UN waive its immunity in connection with this specific case, provided it has issued an *a priori* waiver covering the circumstances of this suit. Mem. of Law in Opp. to the Gov't Statement of Interest ("Pl. Opp.") (ECF No. 21) at 6-8. Plaintiffs provide no citation to a case in which any court has found that the UN has submitted itself to the court's jurisdiction in a tort case under any circumstances, let alone via an advance waiver of immunity. Plaintiffs, therefore, fail to provide any support for this Court to find that the General Convention's express waiver provision includes instances where the UN somehow issues a waiver of some yet unknown future case or claim. On the contrary, courts have consistently found the UN to have retained its immunity from tort claims. *E.g.*, *Georges*, 834 F.3d at 98; *Brzak*, 597 F.3d at 112; *Bisson v. United Nations*, 2008 WL 375094 (S.D.N.Y. 2008). *See also Emmanuel v. United States*, 253 F.3d 755, 757 (1st Cir. 2001) (discussing the UN's absolute immunity to claims for torts allegedly committed in Haiti).

The Court need not reach the issue of whether the UN could validly issue an advance waiver of its immunity to tort claims, however, because plaintiffs have failed to cite any evidence that would come close to constituting an advance waiver that would satisfy the General Convention's requirement that the UN waive its immunity with respect to a particular case. *See* UN General Convention art. II, § 2. Instead, plaintiffs rely chiefly on two reports of the Secretary-General from the 1990s that expressly state that the UN is immune from suit in domestic courts, and a General Assembly resolution adopting the reports. Pl. Opp. at 9-12.

Report 389, dated September 20, 1996, sought to address "the scope of United Nations liability for activities of United Nations forces, procedures for the handling of third-party claims and limitations of liability." A/51/389 at 1. Pl. Opp., Exhibit B. The report stated that "the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in performance of their duties." A/51/389 at 4 ¶ 7. The UN, however, did not state or intend that such claims be resolved in domestic courts. Instead, the UN intended to resolve such claims by means of a UN-created standing claims commission that would settle claims "resulting from damage caused by members of the [UN] force in the performance of their official duties and *which for reasons of immunity of the Organization and its Members could not have been submitted to local courts.*" *Id.* (emphasis added). In other words, the rationale for a standing claims commission was precisely because the UN retained its immunity from suit in domestic courts. This report, which predates the events in this case by approximately 14 years, does not remotely satisfy the General Convention's requirement for an express waiver.

The other Secretary-General report relied upon by plaintiffs, dated May 21, 1997, analyzes "the provisions of article 51 of the model status-of-forces agreement, elaborates criteria and guidelines for implementing the principles of financial and temporal limitations on the liability of the United Nations and proposes modalities for establishing these limitations in a legally binding instrument." A/51/903 at 1. Opp., Exhibit C. Like the previous report, it expressly recognized that the UN is immune from suit in domestic courts. Again, this immunity was cited as the rationale for proposing to establish a standing-claims commission, which would serve "as a mechanism for the settlement of disputes of a private law character to which the United Nations peacekeeping operation or any member thereof is a party and *over which the local courts have no jurisdiction because of the immunity of the Organization or its members.*"

A/51/903 at 4 ¶ 7 (emphasis added).

Both reports, and the 1998 General Assembly resolution (52/247) adopting them, Opp., Exhibit D, are consistent with the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti (“MINUSTAH SOFA”), which provides both that the MINUSTAH (a component of the UN) will enjoy immunity under the General Convention (SOFA ¶ 15) and that tort claims can be brought before a standing claims commission (¶ 55). In short, none of the documents plaintiffs rely on constitute an expression that the UN would submit itself to the jurisdiction of the courts, as opposed to making voluntary payments or payments directed by standing commissions. Read as a whole, the documents cited by plaintiffs express an intention by the UN to resolve its liability for torts in fora other than courts.

While no standing-claims commission was established in Haiti, the Second Circuit in *Georges* held that the UN’s obligation to provide for an alternate forum for dispute resolution was not a condition precedent to its immunity from suit, 834 F.3d at 97, and plaintiffs forswear any intent to argue otherwise here. Pl. Opp. at 13.

In short, plaintiffs have failed to allege any plausible evidence that the UN has expressly waived its immunity from suit in this case. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (“A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.”). Instead, to the contrary, plaintiffs have provided evidence that the UN has always intended to retain its immunity in connection with torts arising out of its peacekeeping operations, and the UN has expressly asserted its immunity here via its May 2, 2017 letter. *See* SOI at 4. Under the facts presented, plaintiffs have not met their burden of establishing the Court’s jurisdiction.

With respect to the individual defendants, plaintiffs fail to advance any argument that Under-Secretary-General Serpa Soares and Assistant Secretary-General Mulet do not enjoy diplomatic immunity, or that the six individual defendants do not enjoy immunity for their official acts. Nor do they argue that the acts for which the individual defendants have been sued are not official acts. The closest plaintiffs come to a waiver argument with respect to the individual defendants is their statement that UN General Assembly resolution 52/247, which addresses tort claims against the UN, is “binding on the UN and its officials.” Opp. at 12. There are at least two clear defects with such a waiver argument. First, UNGA resolution 52/247 says nothing whatsoever about claims against, or the responsibility of, UN officials; it only addresses the “liability” of the UN itself. Second, only the Secretary-General—not the General Assembly—has the authority to waive the immunity of UN officials. General Convention art. III, § 20. No such waiver has occurred. Accordingly, even if plaintiffs are attempting to make a waiver argument with respect to the individual defendants, it is unavailing. They too are immune under the General Convention and the IOIA.

With respect to service of the summons and complaint, plaintiffs argue that their attempts at service via facsimile on the UN and personally on then-Secretary-General Ban should be deemed sufficient. Pl. Opp. at 17-19. But plaintiffs’ alleged compliance with the requirements of due diligence and due process under U.S. domestic law do not meet the United States’ international obligations. In particular, plaintiffs’ asserted attempt to serve the UN by fax, *see* Pl. Opp. at 18, is ineffectual given the inviolability of the UN headquarters district and the requirement that the Secretary-General must consent to the conditions under which any service of process might be permitted in the headquarters district. Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947,

61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Oct. 21, 1947), art. III, § 9(a); *see also* SOI at 7. The Secretary-General has not established any such conditions. Exhibit A to the SOI at 3-4.

As to service on then-Secretary-General Ban, plaintiffs attempt to distinguish *Tachiona v. Mugabe*, 386 F.3d 205, 223 (2d Cir. 2004), on the ground that there was no waiver of immunity in that case, as there purportedly was in this. Pl. Opp. at 19. For the reasons set forth above, plaintiffs' waiver argument—that the UN's general commitment to be liable for tort claims before UN-created standing claims commissions arising out of peacekeeping operations is tantamount to an express waiver of immunity from suit here—should not persuade the court. But in any event, a statement in the 1990s regarding the UN's potential liability for a class of tort claims did not waive a future Secretary-General's personal inviolability with respect to acceptance of service of process in this suit. *Tachiona* governs the attempt to serve Ban: service was ineffective both as to him and as to the other defendants, including the UN.

* * * *

The United States filed a further letter on July 18, 2017 in response to plaintiffs' request to file a further sur-reply. The July 18, 2017 submission is excerpted below and available in its entirety at <https://www.state.gov/s/l/c8183.htm>.

* * * *

In support of their proposed sur-reply, Plaintiffs erroneously contend that the United States does not contest that (i) the UN's acceptance of liability constitutes an agreement "to be bound under law or justice," and (ii) such an agreement could constitute an express waiver of immunity. Pls. Mot for Leave at 1. Based on this incorrect premise, Plaintiffs argue the Government has introduced a new factual dispute in its reply about "the United Nations' intent and understanding of what it means to 'accept liability.'" *Id.* These contentions are plainly groundless. First, the United States *does* contest Plaintiffs' legal theory and has repeatedly explained that it rejects their claim that the UN's potential acceptance of liability before a standing claims commission could ever amount to an *express* waiver by the UN of its immunity in a U.S. court. SOI at 5; Supp. SOI at 2-3. Such an argument would read the word "express" out of the General Convention and require embracing an implied theory of waiver that is at odds with the language of the General Convention and that has been rejected by binding Second Circuit precedent. SOI at 5 (citing *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010) (explaining that although Plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention]")). Second, it was not the Government but Plaintiffs who raised the issue of the UN's "intent" in their opposition, when they argued (incorrectly) that the UN materials constituted "a clear, unambiguous manifestation of the intent to waive" immunity. *See* Pl. Opp. at 5; *id.* at 13 (quoting *United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063, at *2 (S.D.N.Y. Feb. 26, 2007)). Plaintiffs have now had two briefs to set forth their arguments about the significance of the UN materials discussed above and there are no grounds for a third.

There are no also grounds for ordering discovery in this case, including Plaintiffs' request for sensitive internal deliberations from the UN leading up to public statements issued by the UN this past year about the Haiti cholera outbreak, including Secretary-General Ban's apology. Pls. Mot for Leave at 2-3 & n.7. Such internal materials are irrelevant to the question of whether the UN expressly waived its immunity. As Plaintiffs themselves assert, for the UN to expressly waive its immunity, there must be "a clear and unambiguous manifestation of the intent to waive" on the part of the U.N. Pl. Opp. at 13 (quoting *Chalmers*, 2007 WL 624063, at *2). No discovery is required to determine whether the UN has *unambiguously* and *expressly* waived its immunity from suit in this case. The materials before this Court make plain on their face that the

UN has not unambiguously and expressly waived its immunity in this particular case. On the contrary, as demonstrated by the UN's May 2, 2017 letter, the UN has unambiguously and expressly *asserted* its immunity. *See* SOI (Exhibit A). As was true in *Georges*, dismissal of Plaintiffs' complaint on immunity grounds is therefore warranted. *See Georges v. United Nations*, 834 F.3d 88, 98 (2d Cir. 2016). Plaintiffs' discovery demands are without merit and if allowed would in themselves infringe upon the UN's immunity.

In particular, any order from this Court compelling the UN to provide discovery would constitute "legal process" and thus run counter to the General Convention's grant of immunity to the UN. General Convention, art. II, § 2 (stating that UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"); *see also Chalmers*, 2007 WL 624063 at *1-3 (in a case involving a subpoena *duces tecum* to the UN, denying a motion to compel the production of documents from the UN, citing the UN's immunity under the General Convention as well as the International Organizations Immunities Act ("IOIA," 22 U.S.C. §§ 288a(b))). Such an order would also infringe upon the United Nations' archival immunity. *See* General Convention Section 4 (stating that the "archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located").

Likewise an order compelling the testimony of any of the individual defendants, or other UN officials, would run counter to the United States' treaty obligations. The Government has explained that these defendants enjoy immunity, *see* SOI 5-7, and Plaintiffs have not contested this point. Under the General Convention, UN officials with the rank of Assistant Secretary-General or higher enjoy the privileges and immunities accorded to diplomatic envoys in accordance with international law. UN General Convention Section 19. These immunities include immunity from compulsory testimony. *See* Vienna Convention on Diplomatic Relations ("VCDR") art. 31(2) ("A diplomatic agent is not obliged to give evidence as a witness."). Further, former high-level UN officials, including former Secretary-General Ban, enjoy residual testimonial immunity with respect to matters within their former official capacity. *See* VCDR art. 39(2) (even after a diplomatic agent's functions have come to an end, "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist"). Indeed, all officials of the UN are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity...." General Convention Section 18(a). *Accord* IOIA, 22 U.S.C. § 288d(b).

On August 24, 2017, the court dismissed the *Laventure* case for lack of subject matter jurisdiction (also denying the motion for a sur-reply). The *Laventure* plaintiffs have appealed to the U.S. Court of Appeals for the Second Circuit. The district court's opinion is excerpted below and available at <https://www.state.gov/s/l/c8183.htm>.

1. Immunity of UN and MINUSTAH

The Charter of the UN, which was ratified and entered into force with respect to the United States in 1945, provides that the UN “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.” U.N. Charter art. 105 The Convention on the Privileges and Immunities of the United Nations (“CPIUN”), which was adopted in 1946 and came into force with respect to the United States in 1970, specifies that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” CPIUN art. II, § 2, 21 U.S.T. 1418; *Brzak v. United Nations*, 597 F.3d 107, 110-11 (2d Cir. 2010); *Georges*, 84 F. Supp. 3d at 248.

Thus, by its own terms, the CPIUN requires courts to recognize and to respect the UN's “immunity from every form of legal process” unless “in any particular case” the UN “expressly” waives its immunity. CPIUN art. II, § 2; *see also, e.g., Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) ...

Here, in a letter addressed to Ambassador Nikki Haley, the UN states that it has “not waived, and indeed, expressly maintains the privileges and immunities of the United Nations and its officials in respect of this case.” UN Letter at 3. Also, the letter requests that “competent United States authorities ... take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials.” *Id* at 2.

Plaintiffs nevertheless argue that the UN has expressly waived its immunity for harm caused by the Haitian cholera outbreak. Plaintiffs' argument rests primarily on two related reports published by the Secretary-General in 1996 and 1997, both of which were adopted by the UN General Assembly in 1998. PL Mem. at 9-14. These two reports—namely, Report A/51/389 (published in 1996) and Report A/51/903 (published in 1997 as a supplement to Report A/51/389)—outline the manner in which the UN would accept liability for damages caused by UN peacekeeping operations, provided that such damages did not result from “operational necessity.” Report A/51/389 dated Sept. 20, 1996, Dkt. No. 21-2 (“Report 389”); Report A/51/903 dated May 21, 1997, Dkt. No. 21-3 (“Report 903”). By agreeing to accept liability for its activities, plaintiffs contend that the UN expressly waived its immunity for purposes of this lawsuit. PL Mem. at 8-14; PL OTC Response at 8-9.

As the Government notes, however, both reports contemplate that claims against the UN would be resolved by non-judicial means, including through UN-established standing claims commissions, given that domestic courts—because of the broad immunity available to the UN and its officials—would not adjudicate such claims. *See* Gov't Reply at 2-3; Report 389 at 4 ii 7 (discussing settlement “by means of a standing claims commission claims ... which for reasons of immunity of the Organization and its Members could not have been submitted to local courts”); Report 903 at 4 ii 7 (discussing “standing claims commission as a mechanism for the settlement of disputes ... over which the local courts have no jurisdiction because of the immunity of the Organization or its members”). By agreeing to accept liability for its actions

through the channels outlined in these reports, there is no indication that the UN was waiving immunity it enjoys in domestic courts.

Plaintiffs complain that the UN failed to create a standing claims commission to address injuries caused by the cholera outbreak, while contending that the SOFA between the UN and the Haitian government required it to create one. 2d Am. Compl. ¶ 7, 60. The Second Circuit, however, has concluded that the failure to create an adequate dispute-resolution mechanism does not constitute an express waiver of immunity secured by the CPIUN. *See Brzak*, 597 F.3d at 112 (“Although the plaintiffs argue that purported inadequacies with the United Nations’ internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word ‘expressly’ out of the CPIUN.”); *see also Georges*, 84 F. Supp. 3d at 249 (“[C]onstruing the UN’s failure to provide ‘appropriate modes of settlement’ for Plaintiffs’ claims as subjecting the UN to Plaintiffs’ suit would read the strict express waiver requirement out of the CPIUN.”).

Finally, plaintiffs fail to offer any plausible explanation for why these UN reports, which predate Haiti’s cholera outbreak by more than a decade, constitute an express waiver of immunity in this “particular case.” CPIUN art. II, § 2. Even if the reports had indicated that the UN was generally willing to subject itself to lawsuits in certain circumstances, the reports would still not establish that the organization had waived its immunity here. For these reasons, the Court concludes, consistent with the Government’s view, that the CPIUN immunizes the UN from this suit. ...

As a UN subsidiary, MINUSTAH enjoys the same privileges and immunities as the UN under the CPIUN. *See Georges*, 84 F. Supp. 3d at 249 (“MINUSTAH, as a subsidiary body of the UN, is also immune from suit”); *Sadikoglu v. United Nations Dev. Programme*, No. 11-CV-294 (PKC), 2011WL4953994, at *3 (S.D.N.Y. Oct. 14, 2011) (noting that “scope of immunity for the UN and its subsidiary bodies derives” from the “UN Charter” and “CPIUN”). Consequently, the Court lacks subject-matter jurisdiction over plaintiffs’ claims against both the UN and MINUSTAH.

2. Immunity of Individual Defendants

The CPIUN provides that UN officials “shall ... be immune from legal process in respect of ... all acts performed by them in their official capacity,” unless this immunity is waived by the Secretary-General or the Security Council. CPIUN art. V, §§ 18, 20. Thus, absent waiver, the CPIUN immunizes UN “officials sued for acts performed in their official capacities.” *D’Cruz v. Annan*, No. 05-CV-8918 (DC), 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005), *aff’d*, 223 F. App’x 42 (2d Cir. 2007) (internal quotation marks omitted). UN officials also enjoy immunity for their official acts under the International Organizations Immunities Act (“IOIA”), Pub L. No. 79-291, 59 Stat. 669, 672 (1945) (codified at 22 U.S.C. § 288 *et seq.*). Specifically, the IOIA provides that UN “officers and employees are ‘immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as ... officers ... or employees except insofar as such immunity may be waived’ by the United Nations.” *Id* (quoting 22 U.S.C. § 288d(b)).

Here, plaintiffs have sued the individual defendants in their official capacities, and there is no indication that any relevant actions of the individual defendants fell outside the scope of their official duties. Further, there is no indication that the UN, or any of its organs, waived the immunity available to the individual defendants. To the contrary, the UN has expressly maintained their right to immunity. UN Letter at 3. For these reasons, the Court concludes, consistent with the Government’s view, that the individual defendants are immune from suit

under the CPIUN and IOIA. Consequently, the Court lacks subject-matter jurisdiction over the claims against them.

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4. ***Zuza v. OHR***

As discussed in *Digest 2016* at 468-71, and *Digest 2015* at 450-53, *Zoran Zuza v. Office of the High Representative, et al.*, No. 16-7027, concerns immunities under the IOIA. The United States filed a statement of interest in the district court and an *amicus* brief in the Court of Appeals asserting immunity of the OHR and its officers and employees. On May 30, 2017, the Court of Appeals issued its decision, affirming the district court's dismissal of the case. Excerpts follow from the Court's opinion (with footnotes omitted). *****

* * * *

Zuza's challenges on appeal are many. We have fully considered each but find none persuasive. We limit our discussion to one—namely, whether Ashdown and Inzko were entitled to immunity, even if section 8(a)'s requirements were not met until August 2015 or later. We review the district court's resolution of this question of law *de novo*. *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 280 (D.C. Cir. 2014). We agree that the district court lacked subject matter jurisdiction regardless of the date Ashdown and Inzko's immunity vested.

The IOIA's text compels our conclusion. It entitles qualifying officers and employees to immunity not only from "suit" but also from "legal process." 22 U.S.C. § 288d(b). Legal process is an expansive term. It refers broadly to "[t]he proceedings in any action." BLACK'S LAW DICTIONARY 1399 (10th ed. 2014); *see* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1808 (1993) (defining process to include "the course of procedure in a judicial action or in a suit in litigation"). As we have explained, IOIA immunity, "where justly invoked, properly shields defendants not only from the consequences of litigation's results but also from the burden of defending themselves." *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) (internal quotation marks omitted). For these reasons, IOIA immunity does not operate only at a lawsuit's outset; it compels prompt dismissal even when it attaches mid-litigation.

This is not an anomalous conclusion. Courts have found that other forms of immunity acquired *pendente lite* mandate dismissal of a validly commenced lawsuit. *See, e.g., Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328, 1329–30 (11th Cir. 1984) ("[D]iplomatic immunity ... serves as a defense to suits already commenced."). And that makes sense. Federal courts are tribunals of "limited jurisdiction," possessing "only that power authorized by Constitution and statute[.]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When intervening events deprive a court of its adjudicative authority, the litigation must end. For example, an action may be dismissed upon the repeal of the jurisdictional statute under which the case was brought.

***** Editor's note: On April 16, 2018, the Supreme Court denied the petition for certiorari in the case.

Landgraf v. USI Film Prod., 511 U.S. 244, 274 (1994). Or it may end when the President exercises his lawful authority to restore a nation’s previously abrogated sovereign immunity. *Republic of Iraq v. Beaty*, 556 U.S. 848, 866 (2009). Circumstances vary but the guiding principle is the same: Removing judicial power to adjudicate a case compels its dismissal.

So too here. Seagroves’s letter left no doubt that Ashdown and Inzko had been “duly notified to and accepted by the Secretary of State as a representative, officer, or employee[.]” 22 U.S.C. § 288e(a). Under these circumstances, they are “immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees[.]” *Id.* §288d(b). Accordingly, we affirm the district court’s judgment.

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Cross References

Alien Tort Statute and Torture Victims Protection Act, **Ch. 5.B.**

Warfaa v. Ali, **Ch. 5.B.2.d.**

UN Committee on Host Country (regarding Russian property in the U.S.), **Ch. 7.A.6.b.**

ILC's work on Immunity, **Ch. 7.C.1.**

Aviation v. United States, **Ch. 8.D.2.a.**

Russia sanctions, **Ch. 16.A.7.**