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CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. UNCITRAL

Emily Pierce, Counselor for the U.S. Mission to the United Nations, delivered remarks on October 9, 2017 at the UN General Assembly Sixth Committee on the report of the United Nations Commission on International Trade Law ("UNCITRAL") on the work of its 50th session. Ms. Pierce's comments are excerpted below and available at https://usun.state.gov/remarks/8020.

* * * *

The United States welcomes the Report of the 50th session of the United Nations Commission on International Trade Law and commends the efforts of UNCITRAL's Member States, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

This session marked a significant anniversary for UNCITRAL. We note that UNCITRAL has accomplished a remarkable amount in its first fifty years, and we look forward to the next fifty years being even more productive.

Regarding the work of UNCITRAL in this past year, we are pleased that, after years of discussions, a Model Law on Electronic Transferable Records was adopted. We encourage states to consider implementing this model law if their domestic law does not already provide an adequate framework enabling the use of electronic equivalents to paper-based transferable documents or instruments in commerce.

We are also pleased that UNCITRAL completed work on a Guide to Enactment for the Model Law on Secured Transactions. This guide will assist states in using the Model Law to reform their domestic legal regime in ways that will facilitate access to credit, particularly for micro, small, and medium-sized enterprises.

With respect to the ongoing work on conciliation, we welcome UNCITRAL's plan to develop a convention, which should help to promote the use of conciliation internationally in the same way that the New York Convention has helped to promote the use of arbitration. In particular, the approach endorsed at the 50th session would ensure that the convention covers not only enforcement of conciliated settlements but the most relevant aspect of recognition of those settlements—the use of settlements in defense against a claim.

We are also encouraged to see UNCITRAL continue to discuss various ways of improving its working methods and becoming even more efficient. At the 50th session, several valuable ideas were discussed, such as the goal of structuring the agenda in a way that permits states to deliberate on the overall work program before the session focuses on individual topics, as well as the goal of relying more on written reports in order to improve utilization of conference time.

Finally, last year we had the pleasure of informing this body that the United States had taken steps toward becoming party to three conventions negotiated at UNCITRAL—namely, that three UNCITRAL conventions had been transmitted to the Senate for its approval. Subsequently, we took this same step with a fourth UNCITRAL convention: in December 2016, the UN Convention on Transparency in Treaty-Based Investor-State Arbitration was also transmitted to our Senate for its approval.

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2. UN Convention on the Assignment of Receivables

On December 13, 2017, Acting Legal Adviser Richard Visek testified before the Senate Committee on Foreign Relations at a hearing on treaties being considered by the Committee. Mr. Visek's testimony includes discussion of the UN Convention on the Assignment of Receivables in International Trade. See Chapter 4 for Mr. Visek's testimony.

3. Securities Convention

The Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary ("Securities Convention") entered into force, including for the United States, on April 1, 2017. See *Digest 2016* at 598-601 regarding U.S. Senate advice and consent to ratification and *Digest 2006* at 936-38 regarding the U.S. statement upon signing. The text of, and further information about the Convention are available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=72.

4. Apostille Convention

On September 6, 2017, the United States provided notice to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, as depositary for the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents ("Apostille Convention"), in support of Kosovo's authority as a sovereign, independent country. The U.S. Declaration follows. More information on U.S.-Kosovo relations is available at https://www.state.gov/r/pa/ei/bgn/100931.htm.

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The Embassy of the United States of America [...] has the honor to convey that, having regard to the July 2016 entry into force of the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("the Apostille Convention") for the Republic of Kosovo, the United States wishes to notify all Contracting States that, consistent with its obligations under the Apostille Convention, the United States will not give legal effect under the Convention to any certification purporting to be an Apostille issued within the territory of Kosovo by an entity other than the designated Kosovo competent authority.

As recognized in Conclusion and Recommendation 7 of the 2016 Special Commission on the Practical Operation of the Apostille Convention, and as memorialized in Paragraph 113 of the Handbook on the Practical Operation of the Apostille Convention, the law of Kosovo determines whether a document is a public document to which the Apostille Convention applies and to which only the competent authorities of Kosovo may affix an Apostille Certificate.

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B. FAMILY LAW

1. Hague Convention on the Civil Aspects of International Child Abduction

On November 29, 2017, the U.S. Court of Appeals for the Second Circuit decided the case, *Marks, acting on behalf of infant children, SM, AM, and BM v. Hochhauser*, 876 F.3d. 416 (2d Cir. 2017). The case was initiated by a father seeking the return of his children from their mother in the United States pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention"), as implemented by the International Child Abduction Remedies Act ("ICARA"). The children and their mother had been living in Thailand with the children's father, but did not return from a trip to New York in 2015. The lower court dismissed the father's petition and he appealed. The Second Circuit affirmed, finding that the claim was barred because the allegedly wrongful retention occurred before the United States accepted Thailand's accession to the Hague Abduction Convention. The court's opinion is excerpted below.

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* * * *

The Convention, a multilateral treaty, governs the wrongful removal and retention of children from their country of habitual residence. … It was adopted in 1980 "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Convention, preamble; …. Article 1 explains that:

> The objects of the present Convention are—
>
> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Convention, art. 1.

A parent seeking the return of a child under the Convention must prove, by a preponderance of the evidence, that: "(1) the child was habitually resident in one State and has been removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner's custody rights under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal or retention." *Gitter*, 396 F.3d at 130-31 (citing 22 U.S.C. § 11603(e)(1)(A)). The Convention ceases to apply "when the child attains the age of 16 years." Convention, art. 4; *see Gitter*, 396 F.3d at 132 n.7.

The Convention permits a parent whose child is "habitually resident" in a contracting State and has been "wrongfully removed to or retained in" a different contracting State to commence proceedings for the return of the child. Convention, arts. 1, 3; *Gitter*, 396 F.3d at 130. A removal or retention is "wrongful" where "it is in breach of rights of custody attributed to a person ..., either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention," and the custody rights were "actually exercised, either jointly or alone," or would have been but for the removal or retention. Convention, art. 3. Proceedings for the return of the child must be brought within one year "from the date of the wrongful removal or retention." Convention, art. 12.

B. *Entry into Force of the Convention*

Article 35 of the Convention provides that it "shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States." Convention, art. 35. Hence, if the removal or retention occurs before the Convention has entered into force between two States, the Convention does not apply.

The Convention does not define "Contracting State," but Articles 37 and 38 provide two separate procedures for countries to accept the Convention. Under Article 37, "[t]he Convention shall be open for signature by the States which were Members of the Hague Conference of Private International Law [the 'CPIL'] at the time of its Fourteenth Session." Convention, art. 37. Once a State signs, the Convention must be "ratified, accepted or approved and the instruments of ratification, acceptance or approval" must be deposited with the Ministry of Foreign Affairs in the Netherlands. Convention, art. 37.

Article 38 provides a second acceptance procedure for states that were not members of the CPIL at the time of its fourteenth session. In lieu of ratification, these states may "accede" to the Convention. Article 38 explains that:

> Any other State may accede to the Convention. ... The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. ... The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Convention, art. 38. As Article 38 makes clear, accession requires the acceptance of other states before the Convention "will enter into force," *i.e.*, the accession has effect only as to Contracting States that "have declared their acceptance of the accession." *Id.*

At the time the Convention was opened for signature, the United States was a member of the CPIL and Thailand was not. *See Convention of 25 October 1980 on the Civil Aspects of Child Abduction: Status Table*, Hague Convention on Private International Law, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (last updated August 2, 2017) ("Contracting State Status Table").

The United States signed the Convention in 1981 and ratified it, thereby becoming a Contracting State, in 1988, and the Convention entered into force in the United States on July 1, 1988. *See* Contracting State Status Table; *Souratgar*, 720 F.3d at 102 n.5. Thailand acceded to the Convention, pursuant to Article 38, on August 14, 2002, and it entered into force in Thailand on November 1, 2002. *Id.* The United States accepted Thailand's accession to the Convention on January 26, 2016. *See Acceptances of Accessions: Thailand*, Hague Conference on Private International Law, https://www.hcch.net/en/instruments/conventions/status-table/acceptances/?mid=670 (last visited Sept. 26, 2017) ("Acceptances of Accessions Table"). The first day of the third calendar month after the United States accepted Thailand's accession was April 1, 2016. *See id.*; Convention, art. 38.

II. *Application*

Two principal issues are presented. First, Marks argues that the district court erred in concluding that retention is a singular event and fixing a particular date of the allegedly wrongful retention because the term "retention" itself implies ongoing activity. Second, Marks argues that the Convention entered into force between the United States and Thailand in 2002, when Thailand acceded to the Convention, rather than April 1, 2016, after the United States accepted Thailand's accession. If Marks is correct as to the first issue, we would not need to reach the second issue as the "retention" would then have continued past April 1, 2016.

A. *Retention*

The first question is whether "retention" for these purposes is a singular or a continuing act. We agree with the district court that "retention" is a singular and not a continuing act.

> " 'The interpretation of a treaty, like the interpretation of a statute, begins with its text.' " *Abbott*, 560 U.S. at 10, 130 S.Ct. 1983 …. The text of a treaty is to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31.1 *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; …. The Supreme Court has also noted, in the context of the Convention, that the views of the Executive Branch are entitled to "great weight." *Abbott*, 560 U.S. at 15, 130 S.Ct. 1983. Finally, in interpreting the Convention in particular, our cases have also relied on the report of Elisa Pérez–Vera, "the official Hague Conference reporter for the Convention." Dep't of State, Hague Int'l Child Abduction Convention; Text and Legal

Analysis, 51 Fed. Reg. at 10,503 (1986) ("State Dep't Legal Analysis"); *see, e.g.*, *Gitter*, 396 F.3d at 129 & n.4; *Blondin v. Dubois*, 189 F.3d 240, 246 & n.5 (2d Cir. 1999).

The Convention specifies when the "removal or retention of a child is to be considered wrongful," Convention, art. 3, but it does not define the term "retention." Hence, we look to the ordinary meaning of "retention." The word, however, has more than one ordinary meaning. "Retention" means "the act of retaining or state of being retained." *Retention*, Webster's Third New Int'l Dictionary (1961) ("Webster's"). "Retain" can mean "restrain" or "prevent" or "to hold or continue to hold in possession or use." *Retain*, Webster's. Hence, looking just at the plain meaning of the word, "retention" can be a singular act or, as Marks argues, an ongoing, continuous act.

Notwithstanding this ambiguity, there are a number of considerations that demonstrate that "retention" is a singular act for the purpose of the Convention—"wrongful retention" occurs when one parent, having taken the child to a different Contracting State with permission of the other parent, fails to return the child to the first Contracting State when required. *See generally Taveras v. Morales*, 22 F.Supp.3d 219, 231-32 (S.D.N.Y. 2014).

Other provisions of the Convention suggest that retention is a singular act. Article 35 provides that the Convention "shall apply as between Contracting States only to wrongful removals or retentions occurring *after* its entry into force in those States." Convention, art. 35 (emphasis added). Article 12 provides that proceedings for the return of a child must be brought within one year "from the date of the wrongful removal or retention." Convention, art. 12. These provisions contemplate a singular act, and the provisions would make little sense if "retention" were a continuous, ongoing state. A retention that began before the Convention's entry into force would still be actionable as long as the child was not returned before the Convention entered into force. Similarly, under Marks's interpretation, the one-year time limitation would have no effect, for the "retention" would continue as long as the child was not returned to the first Contracting state. The structure and context of the Convention suggest that "retention" is a single act—one that must occur after the Convention takes force and less than a year before the commencement of proceedings.

Foreign courts that have interpreted Article 35 have concluded that retention is a single act. In the consolidated cases of *In re H.* and *In re S.* [1991] 2 AC 476, the House of Lords held that "both removal and retention are events occurring on a specific occasion," explaining that Article 12 expressly contemplates wrongful removals and retentions as specific occasions. 2 AC at 488, 499; *see also Kilgour v. Kilgour*, [1987] SC 55 (Scot.) ("[O]ne is in my view given a very firm indication indeed that the retention in question is an initial act of retention ... and that the Convention is not primarily concerned ... with the new state of affairs which will follow on such initial acts and which might also be described as retention."). Although the colloquial meaning of retention could suggest a continuous state of affairs, no court has endorsed this perspective. Lynda R. Herring, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. Int'l L. & Com. Reg. 137, 162 (1994) ("Some contention has been raised as to the issue of retroactivity, as some applicants have argued that a wrongful retention is a 'continuing offense' such that an order for return could still be granted once the Convention became effective between Contracting States. The case law on this point makes it explicit that such a contention will not prevail.").

The State Department, in its "Legal Analysis" of the Convention, has explained the distinction between "removal" and "retention" as follows:

> Generally speaking, "wrongful removal" refers to the taking of a child from the person who was actually exercising custody of the child. "Wrongful retention" refers to the act of keeping the child without the consent of the person who was actually exercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period.

State Dep't Legal Analysis., 51 Fed. Reg. at 10503. This language suggests that "retention" is a singular act—such as the failure of Hochhauser to return the Children to Thailand at the end of the authorized visit to the United States.

Finally, the observations of the official reporter of the Convention also suggest that retention is a singular act:

> The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence.

Elisa Pérez–Vera, *Explanatory Report: Hague Conference on Private International Law,* in 3 Acts and Documents of the Fourteenth Session 426, 458, ¶ 108 (1982).

Accordingly, we conclude that the Convention contemplates that "retention" occurs on a fixed date. Here, that date was October 7, 2015…

B. *Applicability of the Convention*

As noted above, the key dates are as follows: The United States signed the Convention in 1981 and it came into force in the United States in 1988. Thailand was not an original signatory and did not accede to the Convention until 2002, when the Convention entered into force in Thailand. The United States did not accept Thailand's accession to the Convention until January 26, 2016. *See* Acceptances of Accessions Table.

Marks argues that the Convention entered into force between the United States and Thailand in 2002 when Thailand acceded to the Convention, even though the United States did not formally accept Thailand's accession until 2016. We disagree.

Marks's argument is belied by the plain wording of the Convention. Article 38 provides that an accession "will have effect only" as to relations between an acceding State and Contracting States that "declared their acceptance of the accession." Convention, art. 38. Article 38 further provides that "[t]he Convention will *enter into force* as between the acceding State and the State that has declared its acceptance of the accession *on the first day of the third calendar month after the deposit of the declaration of acceptance*." Convention, art. 38 (emphasis added). Hence, the Convention enters into force as between an acceding State and a Contracting State that accepts the accession "on the first day of the third calendar month after" the acceptance. As the CPIL's website on the Convention reports, the United States accepted Thailand's accession on January 26, 2016, and the Convention entered into force as between the two countries on April 1, 2016. *See* Acceptances of Accessions Table ; *accord Souratgar*, 720 F.3d at 102 n.5 ("Under Article 38, one state's accession will have effect with respect to another contracting state only after such other state has declared its acceptance of the accession ....

Singapore's accession was accepted by the United States on February 9, 2012 and entered into force on May 1, about three weeks before [the wrongful removal].") (citations omitted).

The State Department has reached the same conclusion: "Article 35 limits application of the Convention to wrongful removals or retentions occurring after its entry into force *between* the two relevant Contracting States." State Dep't Legal Analysis, 51 Fed. Reg. at 10509 (emphasis added). The State Department also notes that "under Article 38 the Convention ... enters into force only between [acceding] States and member Contracting States which specifically accept their accession to the Convention." *Id.* at 10514. Clearly, the Convention did not come into force between Thailand and the United States until after the latter accepted the former's accession.

This interpretation conforms to the academic consensus on the issue. …

Marks relies heavily on a decision of the United States District Court for the Northern District of Illinois holding that "Article 35 requires only that the wrongful removal or retention at issue occur after the Convention enters into force individually in the acceding State and in the State to which the child was removed to or is retained." *Viteri v. Pflucker*, 550 F.Supp.2d 829, 839 (N.D. Ill. 2008). We decline to adopt the reasoning of the *Viteri* court. Not only is its conclusion inconsistent with the plain wording of the Convention, the *Viteri* court expressly stated that it lacked the benefit of the State Department's interpretation of Article 35. *See id.* at 837 (noting that "the parties [did not] offer any executive interpretation of this portion of the Convention to which this court would defer.").

Marks also points out that the State Department has noted that "countries *may* agree to apply the Convention retroactively to wrongful removal and retention cases arising prior to its entry into force for those countries." State Dep't Legal Analysis 51 Fed. Reg. at 10514 (emphasis added). He suggests that we adopt this "liberal interpretation of Article 35" contemplated by the State Department. Pet.-Appellant Br. at 22. As he acknowledges, however, the State Department has not endorsed this reading of Article 35. *See* State Dep't Analysis, 51 Fed. Reg. at 10,514. Nor is there any indication that Thailand has.

Accordingly, we conclude that the Convention does not "enter into force" until a ratifying state accepts an acceding state's accession and that Article 35 limits the Convention's application to removals and retentions taking place after the Convention has entered into force between the two states involved. Thus, because the Convention did not enter into force between the United States and Thailand until April 1, 2016, after the allegedly wrongful retention of the Children in New York on October 7, 2015, the Convention does not apply to Marks's claim and the district court did not err in dismissing his petition.

* * * *

2. Hague Child Support Convention

On January 1, 2017, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance entered into force for the United States. See *Digest 2007* at 769-70 regarding the conclusion of the Child Support Convention and the U.S. statement upon signing the Convention. For the text of the Convention, see https://www.hcch.net/en/instruments/conventions/full-text/?cid=131.

C. INTERNATIONAL CIVIL LITIGATION

1. *Water Splash, Inc. v. Menon*

In January 2017, the United States filed a brief as *amicus curiae* in the Supreme Court of the United States in *Water Splash, Inc. v. Menon*, No. 16-254. The issue in the case is whether the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention") authorizes service of process by mail. Article 10 of the Hague Service Convention enumerates three alternatives to service via the Central Authorities identified pursuant to the Convention, including "(a) the freedom to send judicial documents, by postal channels, directly to persons abroad." The appeals court in Texas held that the plaintiff, a U.S. corporation, had not properly served its former employee, a citizen of Canada, in a suit alleging the employee had given proprietary designs and drawings to a competitor. The trial court in Texas had authorized service by mail after the corporation claimed inability to serve the former employee in Texas. The employee failed to appear and the trial court granted a default judgment to the corporation. The U.S. brief, excerpted below, urges the Supreme Court to reverse the Texas appeals court.

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* * * *

1. Article 10(a) of the Convention states that, if "the State of destination does not object," the Convention "shall not interfere with * * * the freedom to send judicial documents, by postal channels, directly to persons abroad." App., *infra*, 2a. Unlike the other two paragraphs of Article 10, which reference methods to "effect service of judicial documents," *id.* at 3a, Article 10(a)'s reference to postal channels does not use the term "service." It must not, however, be viewed in isolation. In context, its reference to "send[ing] judicial documents" is readily understood as referring to the sending of documents through postal channels for purposes of service. The court of appeals' contrary reading would transform Article 10(a) into a bizarre and solitary interloper—the only portion of the Convention that would be about something other than service of documents.

a. The full title of the Hague Service Convention indicates that it is concerned with "Service Abroad." Its preamble explains that the Convention was intended "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time," and to "simplify[] and expedit[e]" the procedures for doing so. App., *infra*, 1a. Then, in establishing the general scope of the Convention, Article 1 provides that it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Ibid.*

As this Court has previously explained, the Convention's negotiating history demonstrates that its applicability was consciously limited to instances requiring the transmission of documents to other countries for purposes of "service of process in the technical sense." *Schlunk*, 486 U.S. at 700. A preliminary draft of Article 1 referred to "all cases in which there are grounds *to transmit or to give formal notice of* a judicial or extrajudicial document in a civil or

commercial matter to a person staying abroad." *Id.* at 700-701 (translating the French text from 3 Conférence de la Haye de Droit International Privé, *Actes et Documents de la Dixième Session* 65 (1965)). That preliminary draft, however, was criticized for "suggest[ing] that the Convention could apply to transmissions abroad that do not culminate in service." *Id.* at 701. As a result, the final version of Article 1 was revised, such that the Convention now "applies only to documents transmitted for service abroad." *Ibid.* The decision below cannot be reconciled with this Court's authoritative construction of Article 1 and the negotiating history upon which the Court relied.

The Court's reading of Article 1 is buttressed by the many other provisions of the Convention that are expressly tied to service of process rather than transmission of documents for some other purpose. Article 5 obliges a Central Authority that receives a request for service either to "serve the document" or to "arrange to have it served." 20 U.S.T. 362, 658 U.N.T.S. 167. Article 8 permits a contracting state to "effect service of judicial documents" through its diplomatic or consular agents, and Article 9 permits the use of consular or diplomatic channels "to forward documents, for the purpose of service." App., *infra*, 2a; see, *e.g.*, *id.* at 3a (Art. 11) (permitting contracting states to agree to alternate channels of transmission "for the purpose of service of judicial documents"); Art. 13, 20 U.S.T. 364, 658 U.N.T.S. 171 (restricting grounds upon which a state may refuse to comply with "a request for service" that complies with the Convention); Art. 14, 20 U.S.T. 364, 658 U.N.T.S. 171 (providing that disputes over "the transmission of judicial documents for service" will be settled diplomatically); App., *infra*, 5a (Art. 19) (providing that the Convention will not alter a contracting state's law permitting other methods of transmission "of documents coming from abroad, for service within its territory").

Because the scope of the entire Convention thus was intentionally limited to "documents transmitted for service abroad," *Schlunk*, 486 U.S. at 701, there is no reason to infer that Article 10(a) was intended, through the word "send," to refer exclusively to unspecified uses of postal channels that do *not* involve service of process. Rather, the language in Article 10(a) preserving the freedom to "send" judicial documents, by postal channels, "directly" to persons abroad can be explained by the fact that, in contrast to Article 10(a), all other methods of service identified in the Convention require the affirmative engagement of an intermediary to effect "service." The word "send" in Article 10(a) is the most natural way to describe the using of "postal channels" as an alternative way of effecting service—"directly"—without invoking an intermediary.

b. Moreover, the only provision of the Convention that refers to Article 10 does not give any indication that paragraph (a) was seen as unique or as being about a different topic than is the rest of the Convention. Article 21 directs each contracting state to give formal notice (to the Ministry of Foreign Affairs of the Netherlands) of any "opposition" that the contracting state has "to the use of methods of transmission pursuant to [A]rticles 8 and 10." App., *infra*, 6a. Article 8 applies only to "service of judicial documents," as do paragraphs (b) and (c) of Article 10. *Id.* at 2a-3a. Article 21 thus indicates that the drafters perceived no categorical difference between the types of transmission of judicial documents addressed by those provisions and the type of transmissions governed by Article 10(a).

2. The negotiating history of Article 10(a) itself also provides strong support for the view that it refers to service of process. See *Saks*, 470 U.S. at 400 (recognizing that, in interpreting a treaty, "it is proper * * * to refer to the records of its drafting and negotiation").

The Rapporteur's report on the final text of the Convention, as adopted in the plenary session of the Hague Conference, "states that, except for minor editorial changes, Article 10 of the Convention corresponds to" the same article in an earlier draft. 1 Ristau § 4-3-5, at 205. The report about that draft version of Article 10, in turn, had explained as follows:

> a) Postal channels (para. 1)
>
> Paragraph 1 [designated "(a)" in the final text] of Article 10 corresponds to paragraph 1 of Article 6 of the 1954 Convention.
>
> *****
>
> The provision of paragraph 1 also permits service * * * by telegram if the state where *service* * * * is to be made does not object.
>
> The Commission did not accept the proposal that postal channels be limited to registered mail.

Ibid. (brackets in original) (translated by Ristau from the original French). The report about the draft version of Article 10 also noted that, as was the case under the similar provision of the earlier convention, service of process could be made by postal channels only if it was also "authorized by the law of the forum state." *Ibid*. Thus, the description of the earlier draft of Article 10 demonstrates that the drafters intended for the provision to permit service of process by postal channels in the absence of the receiving state's objection pursuant to Article 21.

3. That construction is also supported by the derivation of the parallel phrase in the French version of the Convention. The French text—which, according to the Convention's final clause, is "equally authentic" with the English text, 20 U.S.T. 367, 658 U.N.T.S. 181—contains the same potential anomaly, using a different word in Article 10(a) than in Article 10(b) and (c). But "the verb '*adresser*' * * * , rendered in English by the verb 'send', had been used in substantially the same context in the three predecessor treaties [about civil procedure] drafted in The Hague [in 1896, 1905, and 1954]." 2016 *Handbook* ¶ 279, at 91. Even though the verb "*adresser* " is not actually "equivalent to the concept of '*service*,' " it had "been consistently interpreted" in the earlier treaties "as meaning service or notice." *Ibid*. The drafters accordingly would have expected the same interpretation to apply to the term's appearance in the Hague Service Convention. In addition, Article 10(a) of the Hague Service Convention replaced Article 6(1) of the 1954 Convention (for states that were parties to both). See 1 Ristau § 4-3-5, at 204; see also Art. 22, 20 U.S.T. 366, 658 U.N.T.S. 177. In light of that history, it would be particularly incongruous if the similar French text in Article 10(a) were construed as eliminating the earlier understanding that postal channels could indeed be used for service when it is authorized by the law of the forum state and the receiving state does not object. See 1 Ristau § 4-3-5, at 205.

4. Other evidence contemporaneous with the negotiation of the Convention also supports the conclusion that Article 10(a) refers to service of process. Philip W. Amram was the member of the United States delegation who was the "principal American spokesman in the Committee of the Conference that produced the [Convention]." S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 5 (1967) (S. Exec. Rep. No. 6) (reprinting statement of Deputy Legal Adviser Richard D. Kearney). In an article dated just a few months before the Convention's signing (and nine months after "[t]he final text of the Convention * * * was developed," 1 Ristau § 4-1-1, at 145), he summarized the Convention and stated that "Article 10 permits direct service by mail * * * unless th[e] state objects to such service." Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965).

Thus, when read in the context of the Convention, its negotiation history, the predecessors to the parallel French text, and contemporaneous statements by one of its drafters, the text of Article 10(a) is best construed as permitting service of process through postal channels.

B. The Executive Branch Has Consistently Interpreted Article 10(a) To Permit Service Of Process By Postal Channels

"It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.' " *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184185 (1982)). The decision below, however, contradicts the Executive Branch's longstanding position that Article 10(a) refers to service of process, not to the sending of documents for other unspecified purposes.

1. When President Johnson transmitted the Convention to the Senate in 1967 for its advice and consent, his transmittal letter noted that "[t]he provisions of the convention are explained in the report of the Secretary of State transmitted herewith." *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message from the President of the United States*, S. Exec. C, 90th Cong., 1st Sess. 1 (1967). The accompanying report explained that "Articles 8 through 11 provide for channels of service entirely outside the central authority." *Id*. at 4. It further stated that "Article 10 permits direct service by mail or by any persons who are competent for that purpose in the state addressed unless that state objects to such service." *Id*. at 5 (emphasis added).

Consistent with that construction, U.S. delegate Amram testified before the Senate Foreign Relations Committee that use of the Central Authority is "not obligatory" and that "[o]ptional techniques" include, "unless the requested State objects, direct service by mail." S. Exec. Rep. No. 6, at 13 (citing Article 10).

2. Since the United States ratified the Convention, the Executive Branch has consistently adhered to that construction of Article 10(a). In 1980, the Administrative Office of the U.S. Courts sent a memorandum to all United States District Court Clerks requesting, based on advice from the Department of State, that they "refrain from sending summonses and complaints by international mail to foreign defendants in those countries" that had "made a reservation with respect to Article 10(a) of the Convention." 2 Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law 1981–1988*, at 1447 (1994). Service by mail to defendants in non-objecting countries was not seen as a problem in the context of the Convention.

In 1989, the Eighth Circuit became the first federal court of appeals to hold that the Convention does not permit service by registered mail on a defendant in a foreign country. See *Bankston*, 889 F.2d at 174. A few months later, the Deputy Legal Adviser, Alan J. Kreczko, sent a letter to the Administrative Office of the U.S. Courts and the National Center for State Courts that expressed the Department of State's disagreement with the *Bankston* decision. See *United States Department of State Opinion Regarding the Bankston Case and Service by Mail to Japan under the Hague Service Convention*, 30 I.L.M. 260, 260-261 (1991) (reprinting excerpts of March 14, 1990 letter). That letter concluded that "the decision of the Court of Appeals in *Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country." *Id*. at 261.

That view continues to be reflected on the Department of State's website, which explains that "[s]ervice by registered or certified mail, return receipt requested is an option in many countries in the world," but that "[s]ervice by registered mail should * * * not be used in the countries party to the Hague Service Convention that objected to the method described in Article 10(a) (postal channels)." U.S. Dep't of State, Bureau of Consular Affairs, *Legal Considerations: International Judicial Assistance: Service of Process*,

https://travel.state.gov/content/travel/en/legal-considerations/judicial/ service-of-process.html (last visited Jan. 24, 2017).

The Court should give great weight to the Executive Branch's contemporaneous, longstanding, and consistent interpretation of Article 10(a). See, *e.g.*, *Medellin* v. *Texas*, 552 U.S. 491, 513 (2008).

C. Other Parties To The Convention Agree That Article 10(a) Permits Service By Postal Channels

Because a treaty is "in its nature a contract between . . . [N]ations," the Court has recognized its "responsibility to read the treaty in a manner consistent with the *shared* expectations of the contracting parties." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232-1233 (2014) (citations and internal quotation marks omitted). As a result, the views of the other states that are parties to the treaty are "entitled to considerable weight." *Abbott*, 560 U.S. at 16 (citations omitted). With respect to the Hague Service Convention, many of the United States' treaty partners have consistently indicated—both singly and in joint Special Commissions periodically convened to assist in the Convention's implementation—that Article 10(a) permits "service" through postal channels, so long as the receiving state has not exercised its right under Article 21 to object to that form of service.

1. In formally giving notice to the Ministry of Foreign Affairs of the Netherlands of their ratification or accession to the Convention (Article 21), several contracting states—including Canada—have made clear their understanding that Article 10(a) of the Convention refers to using postal channels for service of process, not sending documents for other purposes. In its 1988 accession to the Convention, Canada declared, under a heading referring to Article 10(a), that "Canada does not object to service by postal channels." In 1990, Pakistan declared that it does not object to "service by postal channels directly to the persons concerned (Article 10(a))." In 2009, the Republic of Latvia, citing Article 10(a), declared that it "does not object to the freedom to send a judicial document, by postal channels, directly to an addressee within the Republic of Latvia * * * if the document to be served" satisfies certain conditions. In 2010, Australia referred to Article 10(a) when declaring that "Australia does not object to service by postal channels, where it is permitted in the jurisdiction in which the process is to be served" and the documents are "sent via registered mail." In 2016, Vietnam declared that it does not oppose "the service of documents through postal channels mentioned in paragraph a of Article 10" if the documents are "sent via registered mail with acknowledgment of receipt."

Other contracting states have expressly *objected* to "service" pursuant to Article 10(a) or to having documents "served" through "postal channels." By doing so, they have made clear their shared understanding that Article 10(a) would otherwise have permitted service by mail. Similarly, at least 13 states have declared their objection to all of the methods of transmission in Article 10 and described them collectively as involving "service," without discriminating between paragraph (a) and the rest. Under the decision below, objections to "service" through postal channels would effectively be rendered meaningless; those states would have exercised their Article 21 power to object to Article 10(a) by objecting to something that Article 10(a) had not allowed in the first place.

To be sure, the declarations of some states have referred to the "sending," "transmitting," or "transmission" of documents under Article 10, or have referred to "service or transmission" or "transmission and service" under Article 10. Such formulations do not clearly express a view on whether Article 10(a) refers to service. But no country has affirmatively indicated—either in its formal reservations, declarations, or objections, or, to our knowledge, anywhere else—that it

shares the understanding of the decision below that Article 10(a) does *not* refer to service of process.

2. Nor are we aware of any foreign courts that have adopted the view of the decision below. To the contrary, several have expressly stated their understanding that Article 10(a) permits "service" through postal channels. For instance, an Ontario appellate court recently explained that "art. 10 of the Hague Service Convention provides that documents can be served directly by postal channels or local judicial officers of the state of destination, unless that state objects." *Wang* v. *Lin* (2016), 132 O.R. 3d 48, 61 (Can. Ont. Sup. Ct. J.). That statement was consistent with earlier Ontario cases that had recognized the validity of service by mail on persons located in states that have not objected to Article 10(a). In 1999, the Court of Justice of the European Union repeated without disagreement an Italian court's recognition that "Article 10(a) * * * allows service by post." In 2000, a Greek Court of Appeal held that an Italian judgment was enforceable against a defendant that had been served in Greece by registered mail, because Greece had not yet objected to Article 10(a), which "envisaged" the "possibility of serving judicial documents in civil and commercial cases through postal channels." In 1987, the Chancery Division of the English High Court concluded that the "service of a * * * summons by post on a resident of Belgium" was valid because Belgium had not objected to Article 10(a). Such reasoning remains hornbook law in the United Kingdom.

In other words, we have no basis to doubt the Ninth Circuit's conclusion that foreign courts are "essentially unanimous" in disagreeing with the reasoning of *Bankston* and the decision below. *Brockmeyer,* 383 F.3d at 802; cf. 2016 *Handbook* ¶ 274, at 89 n.379 ("Space does not allow us to refer to the numerous decisions of other States expressly supporting the view that Art. 10(a) allows for service of process.").

3. Contracting states to the Convention have also collectively expressed their views about Article 10(a) in other ways. In particular, several Special Commissions have been convened by the Hague Conference on Private International Law to assist in the implementation of the Convention by providing a "forum for Contracting States to raise issues with the practical operation of the Convention, including differences with other States." 2016 *Handbook* ¶ 105, at 38.20 Those Special Commissions have produced multiple reports making it clear that Article 10(a) is universally regarded by the contracting states as involving service.

The first such Special Commission was convened in 1977 and included 28 experts from 18 states and three international organizations. See *Report on the Work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (21-25 November 1977),* 17 I.L.M. 319, 319 (1978). Those experts deemed Article 10(a) to be about service of documents, not transmission for other purposes. Thus, the portion of the 1977 report addressing the use of postal channels said that "[i]t was determined [by the Special Commission] that most of the States made no objection to the *service* of judicial documents coming from abroad directly by mail in their territory." *Id*. at 326 (emphasis added). And, in light of the Article 21 power to object, the report further observed that "[t]he States which object to the utilisation of *service* by post sent from abroad are known thanks to the declarations made to the Ministry of Foreign Affairs." *Id*. at 329 (emphasis added).

A second Special Commission was convened in 1989, with representatives from 22 states that were members of the Hague Conference. *Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18*

March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ¶ 2, at 2 (Apr. 1989), https://assets.hcch.net/upload/scrpt89e_20.pdf. The resulting report on the Special Commission's work criticized "certain courts in the United States" for having concluded that "service of process abroad by mail was not permitted under the Convention." *Id.* ¶ 16, at 5. The report explained that "the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers," and further that "theoretical doubts about the legal nature" of "service by mail" are "unjustified" when a contracting state has not declared reservations about Article 10(a). *Ibid.*

In 2003, a third Special Commission produced a set of conclusions and recommendations that were unanimously approved by representatives from 57 states that were members of the Hague Conference. *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions* ¶ 1, at 3 (Oct./Nov. 2003), https://assets.hcch.net/upload/wop/ lse_concl_e.pdf (*2003 Conclusions and Recommendations*). In those conclusions, the Special Commission "reaffirmed its clear understanding that the term 'send' in Article 10(a) is to be understood as meaning 'service' through postal channels." *Id.* ¶ 55, at 11. There could scarcely be clearer evidence that the decision below is out of step with the views of the parties to the Convention.

The Special Commissions have also supported the preparation of a "practical handbook" about the operation of the Convention by the Permanent Bureau of the Hague Conference. Like the reports of the Special Commissions themselves, the last three editions of that handbook (in 1992, 2006, and 2016) have consistently described Article 10(a) as permitting the "service" of documents through postal channels, and they have expressly criticized the minority of U.S. courts that, like the decision below, have concluded otherwise. The 2016 version of the *Handbook* reiterates frustration that the Deputy Legal Adviser's 1990 letter about *Bankston* "does not seem to have had the desired effect," and notes that "only courts in the United States have had difficulties with the interpretation of [Article 10(a)]." 2016 *Handbook* ¶ 274, at 89. It rejects the Eighth Circuit's decision in *Bankston*, agrees with the Ninth Circuit's decision in *Brockmeyer* sustaining service by mail, and squarely concludes that "[s]ervice by mail under Article 10(a) is possible and effective." *Id.* ¶ 280, at 91.

In sum, there is overwhelming support for the conclusion that the United States' treaty partners construe Article 10(a) to permit service of process by postal channels. This Court should construe the Convention in light of that widely shared understanding.

D. Policy Concerns Do Not Support The Lower Court's Reading Of Article 10(a)

Although the decision below rests principally on the supposed textual disparity between "sending" and "serving" documents, it also suggests that its conclusion is supported by policy considerations. J.A. 55-56. In particular, the court of appeals suggested that the mail is too uncertain for service of process, especially when the Convention's drafters contemplated the use of other methods of service, including diplomatic channels and contracting states' Central Authorities. *Ibid.*; see *Nuovo Pignone*, 310 F.3d at 384-385. Those concerns are not well founded, and United States courts should not second-guess the comparative reliability of service by mail in countries that have not seen fit to lodge their own objections under Article 21.

There is no basis for the implication that postal channels are less likely to give foreign defendants notice of a suit "in sufficient time to defend the allegation." *Nuovo Pignone*, 310 F.3d at 384. Diplomatic channels are the "most time-consuming form of transmission." 2016 *Handbook* ¶ 239, at 76. And postal channels are not necessarily slow. Indeed, the drafters contemplated that postal channels could include service "by telegram." 1 Ristau § 4-3-5, at 205.

The 2003 Special Commission recognized "the increasing use of private courier services for the expeditious transmission of documents" and "concluded that for the purposes of Article 10(a) the use of a private courier was the equivalent of the postal channel." *2003 Conclusions and Recommendations* ¶ 56, at 11.

Such courier services will often be significantly faster than the Convention's other channels. Many of the countries that allow for service by mail indicate that service through their Central Authorities takes weeks or months. Others do not indicate how long service through their Central Authorities will take—resulting in a level of uncertainty and delay for litigants. As in the United States, where a service request through the Central Authority will involve a $95 fee, service through Central Authorities in other countries may also involve higher costs than service by postal channels. The United States favors a reading that, consistent with the purpose of the Convention, presents litigants with efficient and cost-effective options for service abroad.

Nor is there any basis to think that postal channels are simply too "unreliable," when compared with Central Authorities. Indeed, "[t]he postal channel * * * is commonly used" for the initial transmission of a document *to the Central Authority* abroad, and—after the Central Authority effects service—the postal channel may again be used to return the certificate of service. 2016 *Handbook* ¶ 134, at 46; see *id*. ¶ 212, at 69. And, when there is uncertainty about whether a mailed document was actually received, Article 15 provides protections for defendants, generally requiring proof that the document was served as required by the receiving state or that it was "actually delivered," and that service or delivery was effected in due time. App., *infra*, 3a.

Construing Article 10(a) as precluding service of process by postal channels would make cross-border service of process more burdensome and would cause a substantial increase in the number of requests for service submitted to Central Authorities. Factoring in the execution time and cost associated with sending requests through foreign Central Authorities (or with the other methods of service in the Convention), the result may have a detrimental effect on U.S. and foreign litigants in cross-border litigation—disserving the Convention's express purpose of "simplifying and expediting" service abroad. App., *infra*, 1a (Pmbl.).

* * * *

The Supreme Court issued its decision in *Water Splash* on May 22, 2017. Excerpts follow from the opinion (with footnotes omitted).

_____

* * * *

In interpreting treaties, "we begin with the text of the treaty and the context in which the written words are used." *Schlunk*, 486 U. S., at 699 (internal quotation marks omitted). For present purposes, the key word in Article 10(a) is "send." This is a broad term, and there is no apparent reason why it would exclude the transmission of documents for a particular purpose (namely, service). Moreover, the structure of the Hague Service Convention strongly counsels against such a reading.

The key structural point is that the scope of the Convention is limited to service of documents. Several elements of the Convention indicate as much. First, the preamble states that the Convention is intended "to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time." (Emphasis added.) And Article 1 defines the Convention's scope by stating that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*." (Emphasis added.) Even the Convention's full title reflects that the Convention concerns "Service Abroad."

We have also held as much. *Schlunk*, 486 U. S., at 701 (stating that the Convention "applies only to documents transmitted for service abroad"). As we explained, a preliminary draft of Article 1 was criticized "because it suggested that the Convention could apply to transmissions abroad that do not culminate in service." *Ibid.* The final version of Article 1, however, "eliminates this possibility." *Ibid.* The wording of Article 1 makes clear that the Convention "applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended." *Ibid.*

In short, the text of the Convention reveals, and we have explicitly held, that the scope of the Convention is limited to service of documents. In light of that, it would be quite strange if Article 10(a)—apparently alone among the Convention's provisions—concerned something other than service of documents.

Indeed, under that reading, Article 10(a) would be superfluous. The function of Article 10 is to ensure that, absent objection from the receiving state, the Convention "shall not interfere" with the activities described in 10(a), 10(b) and 10(c). But Article 1 already "eliminates [the] possibility" that the Convention would apply to any communications that "do not culminate in service," *id.*, at 701, so it is hard to imagine how the Convention could interfere with any non-service communications. Accordingly, in order for Article 10(a) to do any work, it *must* pertain to sending documents for the purposes of service.

Menon attempts to avoid this superfluity problem by suggesting that Article 10(a) does refer to serving documents—but only *some* documents. Specifically, she makes a distinction between two categories of service. According to Menon, Article 10(a) does not apply to *service of process* (which we have defined as "a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action," *id.*, at 700)). But Article 10(a) does apply, Menon suggests, to the service of "post-answer judicial documents" (that is, any additional documents which may have to be served later in the litigation). Brief for Respondent 30–31. The problem with this argument is that it lacks any plausible textual footing in Article 10.

If the drafters wished to limit Article 10(a) to a particular subset of documents, they presumably would have said so—as they did, for example, in Article 15, which refers to "a writ of summons or an equivalent document." Instead, Article 10(a) uses the term "judicial documents"—the same term that is featured in 10(b) and 10(c). Accordingly, the notion that Article 10(a) governs a different set of documents than 10(b) or 10(c) is hard to fathom. And it certainly derives no support from the use of the word "send," whose ordinary meaning is broad enough to cover the transmission of *any* judicial documents (including litigation-initiating documents). Nothing about the word "send" suggests that Article 10(a) is *narrower* than 10(b) and 10(c), let alone that Article 10(a) is somehow limited to "post-answer" documents.

Ultimately, Menon wishes to read the phrase "send judicial documents" as "serve a subset of judicial documents." That is an entirely atextual reading, and Menon offers no sustained argument in support of it. Therefore, the only way to escape the conclusion that Article

10(a) includes service of process is to assert that it does not cover service of documents at all—and, as shown above, that reading is structurally implausible and renders Article 10(a) superfluous.

B

The text and structure of the Hague Service Convention, then, strongly suggest that Article 10(a) pertains to service of documents. The only significant counterargument is that, unlike many other provisions in the Convention, Article 10(a) does not include the word "service" or any of its variants. The Article 10(a) phrase "send judicial documents," the argument goes, should mean something different than the phrase "effect service of judicial documents" in the other two subparts of Article 10.

This argument does not win the day for several reasons. First, it must contend with the compelling structural considerations discussed above. See *Air France* v. *Saks*, 470 U.S. 392, 397 (1985) (treaty interpretation must take account of the "context in which the written words are used"); cf. *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. ___, ___ (2013) (slip op., at 13) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices").

Second, the argument fails on its own terms. Assume for a second that the word "send" must mean something other than "serve." That would not imply that Article 10(a) must *exclude* service. Instead, "send[ing]" could be a broader concept that includes service but is not limited to it. That reading of the word "send" is probably *more* plausible than interpreting it to exclude service, and it does not create the same superfluity problem.

Third, it must be remembered that the French version of the Convention is "equally authentic" to the English version. *Schlunk*, 486 U. S., at 699. Menon does not seriously engage with the Convention's French text. But the word "adresser"—the French counterpart to the word "send" in Article 10(a)—"has been consistently interpreted as meaning service or notice." Hague Conference on Private Int'l Law, Practical Handbook on the Operation of the Service Convention ¶279, p. 91 (4th ed. 2016).

In short, the most that could possibly be said for this argument is that it creates an ambiguity as to Article 10(a)'s meaning. And when a treaty provision is ambiguous, the Court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Schlunk*, *supra*, at 700 (internal quotation marks omitted). As discussed below, these traditional tools of treaty interpretation comfortably resolve any lingering ambiguity in Water Splash's favor.

III

Three extratextual sources are especially helpful in ascertaining Article 10(a)'s meaning: the Convention's drafting history, the views of the Executive, and the views of other signatories.

Drafting history has often been used in treaty interpretation. See *Medellín* v. *Texas*, 552 U. S. 491, 507 (2008); *Saks*, *supra*, at 400; see also *Schlunk*, *supra*, at 700 (analyzing the negotiating history of the Hague Service Convention). Here, the Convention's drafting history strongly suggests that Article 10(a) allows service through postal channels.

Philip W. Amram was the member of the United States delegation who was most closely involved in the drafting of the Convention. See S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 5 (App.) (1967) (S. Exec. Rep.) (statement of State Department Deputy Legal Adviser Richard D. Kearney). A few months before the Convention was signed, he published an article describing and summarizing it. In that article, he stated that "Article 10 permits direct service by mail

…unless [the receiving] state objects to such service." The Proposed International Convention on the Service of Documents Abroad, 51 A. B. A. J. 650, 653 (1965).

Along similar lines, the Rapporteur's report on a draft version of Article 10—which did not materially differ from the final version—stated that the "provision of paragraph 1 also permits service… by telegram" and that the drafters "did not accept the proposal that postal channels be limited to registered mail." 1 Ristau §4–3–5(a), at 149. In other words, it was clearly understood that service by postal channels was permissible, and the only question was whether it should be limited to registered mail.

The Court also gives "great weight" to "the Executive Branch's interpretation of a treaty." *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010) (internal quotation marks omitted). In the half century since the Convention was adopted, the Executive has consistently maintained that the Hague Service Convention allows service by mail.

When President Johnson transmitted the Convention to the Senate for its advice and consent, he included a report by Secretary of State Dean Rusk. That report stated that, "Article 10 permits direct service by mail… unless [the receiving] state objects to such service." Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message From the President of the United States, S. Exec. Doc. C, 90th Cong., 1st Sess., 5 (1967).

In 1989, the Eighth Circuit issued *Bankston*, the first Federal Court of Appeals decision holding that the Hague Service Convention prohibits service by mail. 889 F. 2d, at 174. The State Department expressed its disagreement with *Bankston* in a letter addressed to the Administrative Office of the U. S. Courts and the National Center for State Courts. See Notice of Other Documents (1), United States Department of State Opinion Regarding the *Bankston* Case and Service by Mail to Japan Under the Hague Service Convention, 30 I. L. M. 260, 260–261 (1991) (excerpts of Mar. 14, 1990, letter). The letter stated that "*Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country." *Id.*, at 261. The State Department takes the same position on its website.

Finally, this Court has given "considerable weight" to the views of other parties to a treaty. *Abbott*, 560 U. S., at 16 (internal quotation marks omitted); see *Lozano* v. *Montoya Alvarez*, 572 U. S. ___, ___ (2014) (slip op., at 9) (noting the importance of "read[ing] the treaty in a manner consistent with the *shared* expectations of the contracting parties" (internal quotation marks omitted)). And other signatories to the Convention have consistently adopted Water Splash's view.

Multiple foreign courts have held that the Hague Service Convention allows for service by mail. In addition, several of the Convention's signatories have either objected, or declined to object, to service by mail under Article 10, thereby acknowledging that Article 10 encompasses service by mail. Finally, several Special Commissions—comprising numerous contracting States—have expressly stated that the Convention does not prohibit service by mail. By contrast, Menon identifies no evidence that any Opinion of the Court signatory has ever rejected Water Splash's view.

In short, the traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail. To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail. Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not "interfere with …the freedom" to serve documents through postal channels. In other words, in cases governed by the Hague Service

Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law. See *Brockmeyer*, 383 F. 3d, at 803–804.

Because the Court of Appeals concluded that the Convention prohibited service by mail outright, it had no occasion to consider whether Texas law authorizes the methods of service used by Water Splash. We leave that question, and any other remaining issues, to be considered on remand to the extent they are properly preserved.

For these reasons, we vacate the judgment of the Court of Appeals, and we remand the case for further proceedings not inconsistent with this opinion.

* * * *

2. *DA Terra Siderurgica LTDA v. American Metals International*

As discussed in *Digest 2016* at 605-13, in 2016, the United States submitted an *amicus* brief in *DA Terra Siderurgica LTDA v. American Metals International*, No. 15-1133, 15-1146 (2d. Cir.). The Court of Appeals for the Second Circuit issued its decision on January 18, 2017. On March 2, 2017, the Court issued an amended opinion, holding that the district court erred in determining that the New York Convention and the Federal Arbitration Act ("FAA") required confirmation prior to enforcement and erred in dismissing the fraud claims. The opinion as amended agrees with the views expressed in the U.S. brief that an arbitral award-creditor need not "confirm" a foreign arbitral award under the New York Convention before seeking to "enforce" that award; and that an award-creditor may enforce a foreign arbitral award directly against alleged alter egos or successors. Excerpts follow (with footnotes omitted) from the amended opinion.

* * * *

On April 18, 2013, appellants filed an action to enforce their foreign arbitral award in the district court for the Southern District of New York, seeking to enforce the award against SBT's "alter egos" and "successor[s] in interest" as well as to recover on state law fraud claims (the "Enforcement Action"). App'x at 37. On July 30, 2013, appellees filed a motion to dismiss the Enforcement Action on the grounds that, among other things, forum in the United States was improper (forum non conveniens), that the action was an improper effort to modify the award, and that appellants were precluded from asserting the state law fraud claims because their fraud claims had been denied by the ICC Paris. Appellants assert that while briefing was "ongoing" in the Enforcement Action, unbeknownst to appellants, SBT was deleted from the Swiss Commercial Register on September 30, 2013. Appellants' Br. at 19 (citing App'x at 1249 & n.6). Appellants also allege that appellees never disclosed this fact to the district court in their reply brief or in any of their other motions in the Enforcement Action.

On April 9, 2014 and again on March 16, 2015, the district court dismissed the Enforcement Action, holding that appellants could enforce the award only after the award was confirmed in Switzerland or another court of competent jurisdiction, and dismissed the state law

fraud claims on the basis that appellants were precluded from asserting them. Enforcement Decision, 2015 WL 1190137, at *1, *8 *9 (dismissing enforcement action); *CBF Indústria de Gusa S/A/ v. AMCI Holdings, Inc.*, 14 F. Supp. 3d 463, 473 79 (S.D.N.Y. 2014) (hereinafter "Initial Order") (dismissing enforcement claim for failure to file confirmation action and dismissing fraud claims). The district court held that under *Orion Shipping & Trading Co., Inc. v. E. States Petroleum Corp.*, 312 F.2d 299, 301 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963), appellants could not pursue enforcement of an arbitral award under the Convention for the Enforcement and Recognition of Foreign Arbitral Awards (the "New York Convention") and its implementing legislation, Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.*, without first confirming the award. Enforcement Decision, 2015 WL 1190137, at *8 *9; Initial Order, 14 F. Supp. 3d at 476 79. The district court held that *Orion* required a two step process by which appellants were required to confirm the award prior to seeking enforcement of that award. Initial Order, 14 F. Supp. 3d at 478 79. Appellants had proposed a "carve out" whereby confirmation was not required when confirmation was made impossible by appellees' alleged fraudulent acts. *See* Enforcement Decision, 2015 WL 1190137, at *8. Appellants argued in support that the confirmation "'prerequisite should not apply where alter ego defendants, through their own intentional wrongdoing, foreclosed any opportunity to confirm the award." *Id.* (internal quotation marks and citation omitted). The district court rejected appellants' argument, reasoning that this proposed exception would "undermine 'the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" *Id.* at *9 (quoting *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005)).

The district court also dismissed appellants' five causes of action for fraud on the basis that the claims sought "a remedy previously sought by [appellants] in the ICC [a]rbitration" and therefore were barred under a theory of issue preclusion. Initial Order, 14 F. Supp. 3d at 480. The district court observed that, as it sat in secondary jurisdiction with regard to appellants' arbitral award, it could not modify that award either during the enforcement of the award or pursuant to appellants' fraud based causes of action. Enforcement Decision, 2015 WL 1190137, at *9 (citing Initial Order, 14 F. Supp. 3d at 480); Initial Order, 14 F. Supp. 3d at 480.

VIII. The Confirmation Action

In response to the district court's initial ruling that *Orion* required appellants to confirm their award prior to seeking its enforcement, appellants initiated an action on April 29, 2014 to confirm the arbitral award in the same district court (the "Confirmation Action"). As a legal entity, however, SBT was effectively a nullity after it was deleted from the Swiss Commercial Register. …As a result, the district court held that, under Rule 17(b) of the Federal Rules of Civil Procedure, SBT lacked capacity to be sued because it was no longer a corporate entity according to Swiss law. *CBF Indústria de Gusa S/A v. Steel Base Trade AG*, No. 14 Civ. 3034, 2015 WL 1191269, at *3 (S.D.N.Y. Mar. 16, 2015) (hereinafter "Confirmation Decision").

The district court also held that appellees were not judicially estopped from asserting SBT's lack of capacity as a defense. Appellants had argued that "[appellees] asserted repeatedly that Switzerland and France provided adequate forums for [appellants'] claims [against SBT] and, indeed, were the proper forums for this action[,]" thereby estopping appellees from arguing SBT lacked capacity to be sued in any fora. Confirmation Decision, 2015 WL 1191269, at *3 (internal quotation marks omitted). The district court noted that, under Second Circuit precedent, a party may be judicially estopped from asserting a position if "(1) the party took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some

manner, such as by rendering a favorable judgment." *Id.* (quoting *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 80 (2d Cir. 2001) and citing *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6- 8 (2d Cir. 1999)). The district court noted that "[t]he purposes of the doctrine are to preserve the sanctity of the oath and to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings." *Id.* (quoting *Mitchell*, 190 F.3d at 6). But the district court held that, because the Enforcement Action was not dismissed on the grounds of forum non conveniens, the second prong of *Holtz* did not apply and appellees were therefore not judicially estopped from making the argument that SBT presently lacked capacity to be sued. *Id.* at *4.

IX. Appeal

Appellants timely filed their appeals from both the Enforcement Decision (No. 15 1133) and the Confirmation Decision (No. 15 1146). In their consolidated appeals, appellants argue, in relevant part, that: (1) the district court erred in holding that *Orion Shipping & Trading Co.*, 312 F.2d at 300 01, required appellants to confirm their foreign arbitral award prior to enforcement; (2) the district court erred in dismissing appellants' fraud claims on the basis of issue preclusion; and (3) the district court erred in determining that equitable estoppel did not preclude appellees from using SBT's immunity from suit as a basis for dismissing the Confirmation Action.

Appellees contest each of appellants' arguments and further argue in response that this court should affirm the district court's dismissal of appellants' Enforcement Action and Confirmation Action on the alternative grounds of forum non conveniens and international comity.

DISCUSSION

I. The District Court Erred in Holding Appellants were Required to Confirm their Foreign Arbitral Award Prior to Enforcement

* * * *

This action arises under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. The United States acceded to the New York Convention on September 30, 1970, and it entered into force in the United States on December 29, 1970. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (hereinafter "N.Y. Convention"). The New York Convention only applies to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" and to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." N.Y. Convention, art. I(1). According to the Restatement (Third) of the U.S. Law of International Commercial Arbitration, an arbitral award is "made" in the country of the "arbitral seat," which is "the jurisdiction designated by the parties or by an entity empowered to do so on their behalf to be the juridical home of the arbitration." Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration §1 1 (s), (aa) (Am. Law Inst., Tentative Draft No. 2, 2012). Thus, the New York Convention applies to arbitral awards "made" in a foreign country that a party seeks to enforce in the United States (known as foreign arbitral awards), to arbitral awards "made" in the United States that a party seeks to enforce in a different country, and to nondomestic arbitral awards that a party seeks to enforce in the United States. *See, e.g.*, Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration §1 1 (i), (k), (o) (Am. Law Inst., Tentative Draft No. 2, 2012).

Here, the parties set the seat of the arbitration as the ICC Paris in Paris, France. The arbitral award which appellants seek to enforce was rendered by the ICC Paris under French law. Initial Order, 14 F. Supp. 3d at 474. The parties are thus correct that the New York Convention governs this case as a matter of international arbitration law. Since the arbitral award was made in France while recognition and enforcement is sought in the Southern District of New York, this litigation presents a classic case of a foreign arbitral award.

Under the New York Convention, the country in which the award is made "is said to have *primary* jurisdiction over the arbitration award." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007) (internal quotation marks omitted) (hereinafter "*Karaha Bodas 2d Cir.*"). "The [New York] Convention specifically contemplates that the state in which, or under the law of which, [an] award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (citing N.Y. Convention, art. V(1)(e)). Here, that country is France because the parties agreed to arbitrate before the ICC Paris. "All other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award." *Karaha Bodas 2d Cir.*, 500 F.3d at 115 n.1 (citation omitted). "[C]ourts in countries of *secondary* jurisdiction may refuse enforcement only on the limited grounds specified in Article V" of the New York Convention. *Id.* (citation omitted); *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 23 ("[T]he [New York] Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the [New York] Convention."). The district court here sits in secondary jurisdiction with respect to the foreign arbitral award at issue. Initial Order, 14 F. Supp. 3d at 474.

Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201 *et seq.*, implements the United States' obligations under the New York Convention. *See Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Section 203 provides that original jurisdiction for "[a]n action or proceeding falling under the [New York] Convention" lies in the United States federal district courts. 9 U.S.C. § 203. Under Section 202, actions or proceedings that "fall[] under the [New York] Convention" include "arbitration agreement[s] or arbitral award[s] arising out of a legal relationship, whether contractual or not, which is considered as commercial" between any parties, *unless* both parties are citizens of the United States *and* "that relationship involves [neither] property located abroad, [nor] envisages performance or enforcement abroad, [n]or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. As the instant case involves non U.S. citizens—all of the appellants, for example, are Brazilian corporate entities—this case properly falls under Chapter 2 of the FAA as well as under the New York Convention.

"The goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n. 15 (citations omitted). Thus, both the New York Convention and its implementing legislation in Chapter 2 of the FAA "envision a single- step process for reducing a foreign arbitral award to a domestic judgment." Amicus Curiae Memorandum Br. at 6.

Under the New York Convention, this process of reducing a foreign arbitral award to a judgment is referred to as "recognition and enforcement." N.Y. Convention, arts. III, IV, V. "Recognition" is the determination that an arbitral award is entitled to preclusive effect; "Enforcement" is the reduction to a judgment of a foreign arbitral award (as contrasted with a nondomestic arbitral award, discussed below). Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration §11(l), (z) (Am. Law Inst., Tentative Draft No. 2, 2012). Recognition and enforcement occur together, as one process, under the New York Convention. N.Y. Convention, arts. III, IV, V.

Chapter 2 of the FAA implements this scheme through Section 207, which provides that any party may, "[w]ithin three years after an arbitral award… is made, … apply to any court having jurisdiction under this chapter for an order confirming the award." 9 U.S.C. § 207. Additionally, Chapter 2 of the FAA provides that "[t]he court shall confirm the award unless it finds one of the 34 grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention" at Article V. 9 U.S.C. § 207. Read in context with the New York Convention, it is evident that the term "confirm" as used in Section 207 is the equivalent of "recognition and enforcement" as used in the New York Convention for the purposes of foreign arbitral awards. As the United States as *amicus curiae* explained, "the 'confirmation' proceeding under Chapter Two of the FAA fulfills the United States' obligation under the [New York] Convention to provide procedures for 'recognition and enforcement' of [New York] Convention arbitral awards." Amicus Curiae Memorandum Br. at 7. A single proceeding, therefore, "facilitate[s] the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 67 (5th Cir. 2003) (footnote omitted).

This, in fact, was the entire purpose of the New York Convention, which "succeeded and replaced the Convention on the Execution of Foreign Arbitral Awards ('Geneva Convention'), Sept. 26, 1927, 92 L.N.T.S. 301." *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 22. "The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad[.]" *Id.* (citation omitted). This was known as the "double *exequatur*" requirement, and the New York Convention did away with it "by eradicating the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad." *Id.* (citations omitted) (stating that the New York Convention "intentionally liberalized procedures for enforcing foreign arbitral awards" (internal quotation marks and citations omitted)).

* * * *

c. Applicable Law for an Enforcement Action

Here, appellants properly sought to have the district court enforce a foreign arbitral award under its secondary jurisdiction. On remand, therefore, we instruct the district court to evaluate appellants' Enforcement Action, particularly appellants' effort to reach appellees as alter egos of SBT, under the standards set out in the New York Convention, Chapter 2 of the FAA, and applicable law in the Southern District of New York.

The New York Convention provides that a signatory State "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." N.Y. Convention, art. III. The New York Convention clarifies that this means that "[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." *Id.* Thus, the question of whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter ego liability, or any other legal principle concerning the enforcement of awards or judgments, is one left to the law of the enforcing jurisdiction, here the Southern District of New York, under the terms of Article III of the New York Convention.

. * * * *

Thus, it appears that the sole issue at present for the district court to consider on remand pertains to the liability of appellees for satisfaction of appellants' foreign arbitral award as alter-egos of the award debtor under the applicable law in the Southern District of New York. We leave further legal and factual development of this issue, and any other barriers to enforcement that appellees may argue on remand, to the district court.

II. The District Court Erred in Dismissing Appellants' Fraud Claims Under the Doctrine of Issue Preclusion

The district court dismissed appellants' five causes of action for fraud on the basis that these claims sought "a remedy previously sought by [appellants] in the ICC Arbitration …[and] are therefore barred." Initial Order, 14 F. Supp. 3d at 480 (citations omitted).

We understand the district court's finding to be one of as issue preclusion, *i.e.*, that appellants, having already had a "full and fair opportunity" to litigate their fraud claims and having received an unfavorable determination from the ICC Paris, are not permitted to relitigate the issue in the federal district court in an attempt to achieve a more favorable outcome. ...The mere fact, however, that an issue appears to have been resolved by an earlier arbitration does not necessarily mean that issue preclusion applies. "An arbitration decision may effect [issue preclusion] in a later litigation . . . [only] if the proponent can show with clarity and certainty that the same issues were resolved." *Bear, Stearns & Co., Inc. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005) (internal quotation marks and citation omitted).

* * * *

Here, appellants argue that they were denied a full and fair opportunity to litigate the merits of their fraud claims due to appellees' fraud and misconduct before the ICC Paris. Specifically, appellants claim that appellees misled the ICC Paris as to the extent of the fraud committed by appellees, thereby leading the ICC Paris to issue an unfavorable decision on the issue which appellees now seek to enforce for purposes of issue preclusion.

…Given appellants' assertions of fraud on the part of appellees, …we find the district court's application of the equitable doctrine of issue preclusion was inappropriate. On remand, appellants should be allowed to conduct discovery with respect to the fraud claims. Appellees may be given the opportunity to re raise the issue preclusion issue after discovery at the district court's discretion.

III. The Court Declines to Affirm the Rulings of the District Court on the Alternative Grounds of Forum Non Conveniens and International Comity

In addition to challenging appellants' affirmative arguments on appeal, appellees also urge this court to affirm the district court's dismissal of appellants' Enforcement Action on the alternative grounds of forum non conveniens and international comity. "It is well settled that we may affirm [a district court's decision] on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 157 58 (2d Cir. 2015) (internal quotation marks and citations omitted). We, however, have "discretion to choose not to do so based on prudential factors and concerns." *Id.* at 158…

We decline to affirm the district court's dismissal on the alternative grounds of forum non conveniens and international comity here. We leave these issues for consideration by the district court in the first instance should appellees choose to raise them again.

* * * *

3. *Mobil Cerro Negro, Ltd. v. Venezuela*

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. The decision refers extensively to the U.S. *amicus* brief and is excerpted in Chapter 10.A.1.

Cross References

Child Abduction, **Ch. 2.B.2.**
UN Convention on the Assignment of Receivables in International Trade, **Ch. 4.A.1.**
Cooper v. TEPCO *(comity, forum non conveniens)*, **Ch. 5.C.4.**
Application of the FSIA in Enforcement of ICSID Arbitration Awards, **Ch. 10.A.1.**