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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HE NAM YOU, *et al.*, Plaintiffs, v. JAPAN, *et al.*, Defendants.	Case No. C 15-03257 WHA **SUGGESTION OF IMMUNITY AND STATEMENT OF INTEREST SUBMITTED BY THE UNITED STATES OF AMERICA**

Introduction

In response to the Court's Order to Show Cause by Plaintiffs and Notice to the United States dated December 22, 2015, Dkt. No. 157, and pursuant to 28 U.S.C. § 517,[1] the United States respectfully submits this Suggestion of Immunity on behalf of Emperor Akihito and Prime Minister Abe and this Statement of Interest relating to the claims against Japan. The United States has an interest in this action because Emperor Akihito is the sitting foreign head of state of Japan, and Prime Minister Abe is the sitting foreign head of government of Japan, thus raising the question of their immunity from the Court's jurisdiction while in office. Because the Department of State has determined that Emperor Akihito and Prime Minister Abe are immune, the United States respectfully submits that this action cannot proceed against them. The United States also has an interest in responding to the Court's request for the United States' views on whether Plaintiffs' efforts to serve a summons and complaint on Japan in this action should be quashed and whether dismissal or abstention may be warranted. In particular, the United States has a substantial interest in ensuring that foreign states are served properly before they are required to appear in U.S. courts and submits this filing to address the proper procedures for service of process upon Japan in this action. In addition, the United States has an interest in raising our nation's foreign policy with respect to wartime claims against Japan. While this Court may conclude that it is premature to consider this question prior to service upon Japan, the United States notes its position that the political question doctrine bars these types of claims against Japan. Finally, the United States emphasizes that it does not in any way condone the abhorrent conduct that forms the basis of the allegations in Plaintiffs' First Amended Complaint and has condemned it in the strongest possible terms.

[1] 28 U.S.C. § 517 provides that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

Background

Two citizens of the Republic of Korea filed this action on behalf of a putative class of former "comfort women" (including those of other nationalities) against a number of defendants, including Japan (Dkt. No. 22). The First Amended Complaint ("Complaint") alleges that Plaintiffs' treatment by Japanese military forces during World War II violated U.S. and international law, and the causes of action listed include crimes against humanity; cruel, inhuman or degrading treatment; defamation; RICO; intentional infliction of emotional distress; and battery. *Id.* ¶¶ 207-299. Plaintiffs are seeking $10 million per plaintiff in compensatory damages. *Id.* at 65. This Court has dismissed claims against a number of the private defendants on various grounds, including the political question doctrine (citing *Hwang Geum Joo et al. v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), a substantially similar suit, and considering the United States' views in that action), and the statute of limitations. *See, e.g.*, Order Granting Defendant Mitsui & Co. (USA) Inc.'s Motion to Dismiss, Nov. 3, 2015 (Dkt. No. 76); Order Granting Defendants' Motion to Dismiss and Granting in Part Nissan North America's Motion for Summary Judgment, Dec. 14, 2015 (Dkt. No. 151).

On December 22, 2015, the Court issued an Order to Show Cause expressing concern that Plaintiffs' efforts to serve a summons and complaint on Prime Minister Abe and Japan "will interfere with relations between Japan and the United States and that abstention or dismissal may be warranted." Order to Show Cause by Plaintiffs and Notice to the United States, Dec. 22, 2015 (Dkt. No. 157). The Court directed Plaintiffs to "show cause why such process should not be recalled and quashed" by January 14, and it requested that the United States respond by February 11. *Id.* On January 13, Plaintiffs submitted a filing arguing that neither abstention nor dismissal is warranted. Pls. Resp. to Order to Show Cause, Jan. 13, 2016 (Dkt. No. 165). With respect to the claims against Japan, Plaintiffs contend

that the suit accords with the U.S. government's interests, the suit will not cause "diplomatic conflicts," Japan is not immune from the suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1602 *et seq.* (FSIA), and the political question doctrine does not bar the suit. *Id.* at 7-14.

Suggestion of Immunity as to Emperor Akihito and Prime Minister Abe

The United States informs the Court of the interest of the United States in the pending claims against Emperor Akihito, the sitting Head of State of Japan, and Prime Minister Shinzo Abe, the sitting Head of the Government of Japan, and hereby informs the Court that both Emperor Akihito and Prime Minister Abe are immune from this suit. In support of its interest and determination, the United States sets forth as follows:

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 sole authority to determine the immunity from suit of sitting heads of state and of government. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, 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, to recognize Emperor Akihito and Prime Minister Abe's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Thus, no court has ever subjected a sitting head of state or of government to suit once the Executive Branch has determined that he or she is immune.

The Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the Embassy of Japan has formally requested the Government of the United States to determine that Emperor Akihito and Prime Minister Abe are immune from this lawsuit. The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State

recognizes and allows the immunity of Emperor Akihito as a sitting head of state and of Prime Minister Abe as a sitting head of government from the jurisdiction of the United States District Court in this suit." Letter from Katherine D. McManus to Benjamin C. Mizer (copy attached as Exhibit A).

The immunity of foreign states and foreign officials from suit in our courts has different sources. For many years, such immunity was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. *See, e.g., Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore 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."). In 1976, Congress codified the standards governing suit against foreign states in the FSIA, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. 28 U.S.C. §§ 1602 *et seq.*; *see id.* § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

As the Supreme Court explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *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."). Thus, the Executive

Branch retains its historic authority to determine a foreign official's immunity from suit, including the immunity of foreign heads of state and heads of government. *See id*. at 311-12 & n.6 (noting the Executive Branch's role in determining head of state immunity).

The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). Although the doctrine is referred to as "head of state immunity," it applies to heads of government and foreign ministers as well. *See, e.g.*, *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 138-39 (1812) (discussing generally the immunity of foreign ministers in U.S. courts); *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 20-21 (Feb. 14) (Merits) (heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction of foreign states); Restatement (Second) of Foreign Relations Law §§ 65, 66 (1965) (noting that head of state immunity includes heads of government).

In the United States, head of state immunity determinations are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch's immunity determination, declared that such a determination "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. After a Suggestion of Immunity is filed, it is the "court's duty" to surrender jurisdiction. *Id.* at 588. The courts' deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

For the same reason, courts also have routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state and heads of government. *See Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit . . . as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations." (quotation omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."); *Howland v. Resteiner*, No. 07-2332, 2007 WL 4299176, at *2 n.2 (E.D.N.Y. Dec. 5, 2007) (noting "there is no doubt that [the sitting Prime Minister of Grenada] is entitled to immunity from th[e] Court's jurisdiction" after Executive Branch filed Suggestion of Immunity); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110 (D.D.C. 2005) ("When the Executive Branch concludes that a recognized leader of a foreign sovereign [in this case, Prime Minister Ariel Sharon of Israel] should be immune from the jurisdiction of American courts, that conclusion is determinative."); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (holding that the determination of Prime Minister Thatcher's immunity was conclusive in dismissing a suit that alleged British complicity in U.S. air strikes against Libya), *aff'd in part and rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989).

When the Executive Branch determines that a sitting head of state or head of government is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the Executive Branch in these

matters, the Seventh Circuit noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Id.* *See also Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citing *United States v. Lee*, 106 U.S. 196, 209 (1882))); *Ex parte Peru*, 318 U.S. at 588.[2] As noted above, in no case has a court subjected a sitting head of state or head of government to suit after the Executive Branch has determined that the head of state or head of government is immune.[3]

[2] As other courts have explained, the Executive Branch possesses substantial institutional resources and extensive experience with which to conduct the country's foreign affairs. *See, e.g.*, *Spacil*, 489 F.2d at 619; *United States v. Truong Dinh Hung*, 629 F.2d 908, 913–14 (4th Cir. 1980). Furthermore, "in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Spacil*, 489 F.2d. at 619.

[3] Indeed, courts have dismissed a number of cases against heads of state and heads of government). *See, e.g.*, Order at 3, *American Justice Center v. Modi*, No. 14 Civ. 7780 (S.D.N.Y. Jan. 14, 2015) (dismissing the complaint because "in light of the determination by the Executive Branch that Prime Minister Modi is entitled to immunity as the sitting head of a foreign government, he is immune from the jurisdiction of this Court in this suit"); *Tawfik v. al-Sabah*, 2012 WL 3542209, *3-*4 (S.D.N.Y. Aug. 16, 2012); *Manoharan v. Rajapaksa*, 845 F. Supp. 2d 260 (D.D.C. 2012), *aff'd*, 711 F.3d 178 (D.C. Cir. 2013); *Habyarimana v. Kagame*, 821 F. Supp. 2d 1244, 1263 (W.D. Okla. 2011) ("Where the United States' Executive Branch has concluded that a foreign head of state is immune from suit, and where it has urged the Court to take recognition of that fact and to dismiss the suit pending against said head of state, the Court is bound to do so."), *aff'd*, 696 F.3d 1029 (10th Cir. 2012); *Howland v. Resteiner*, 2007 WL 4299176, at *2 (dismissing complaint against Prime Minister of Grenada); *Doe I v. State of Israel*, 400 F. Supp. 2d at 110-11, 122 (dismissing complaint against Prime Minister of Israel); *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 278 (S.D. Tex. 2005) ("The executive's [head of state immunity] determination is not subject to additional review by a federal court."); *Leutwyler v. Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (holding that the Executive Branch's immunity determination on behalf of the Queen of Jordan "is entitled to conclusive deference from the courts"); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 297 (S.D.N.Y. 2001) (dismissing a suit against the President and Foreign Minister of Zimbabwe based upon a Suggestion of Immunity filed by the Executive Branch), *aff'd on other grounds sub nom.*, *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1104, 1119 (D.D.C. 1996) ("The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and courts of the United States are bound to accept such head of state determinations as conclusive."); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (concluding that the recognition by the Executive Branch of King Fahd's immunity as the head of state of Saudi Arabia required dismissal of a complaint against King Fahd for false imprisonment and abuse), *aff'd*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) (recognizing that the determination by the Executive Branch of Haitian President Aristide's immunity was binding on the court and required dismissal of the case).

Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's or head of government's status as the current holder of the office. In this case, because the Executive Branch has determined that Emperor Akihito and Prime Minister Abe, as the sitting head of a foreign state and a foreign government, respectively, enjoy immunity from the jurisdiction of U.S. courts in light of their current status, Emperor Akihito and Prime Minister Abe are entitled to immunity from the jurisdiction of this Court over this suit.

Statement of Interest

The United States has an interest in ensuring that foreign states are served in accordance with the FSIA, which mandates service in a manner that complies with customary international law. The FSIA provides a comprehensive and exclusive scheme for securing jurisdiction over foreign states in U.S. courts. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). The statute establishes a default rule that foreign states are immune from the jurisdiction of U.S. courts, and U.S. courts may exercise jurisdiction over a foreign state only if the action falls within one of the specific exceptions to sovereign immunity set out in the statute. *See* 28 U.S.C. 1604-1605. The FSIA also sets forth the exclusive methods for service of process on foreign states. 28 U.S.C. § 1608(a). The procedures for service in Section 1608(a) are "hierarchical"; "a plaintiff must attempt the methods of service in the order they are laid out in the statute." *Magness v. Russian Federation*, 247 F.3d 609, 613 (5th Cir. 2001). The United States has an important interest in ensuring that foreign states are properly served in accordance with the FSIA's statutory requirements, as this issue has implications for the treatment of the United States in foreign courts. It is thus critical that foreign states have proper notice of a suit before the foreign state is required to appear in U.S. courts, and prior to a U.S. court taking steps that could adversely affect a

foreign state's rights. It appears from the docket that Japan has not yet been served in this case. Prior to proper service upon Japan, it would be inappropriate for the Court to rule in favor of Plaintiffs in connection with the issues raised in their January 13, 2016 filing, including their assertion that Japan does not enjoy immunity from this action under the FSIA and that the suit does not merit dismissal under the political question doctrine. Nor does the United States believe it would be appropriate for this filing to address the Plaintiffs' specific arguments in any detail at this stage.

However, should the Court decide to reach the political question issue and conclude that the D.C. Circuit's decision in *Hwang Geum Joo* provides a sufficient basis for dismissing the claims against Japan in this case at this stage, the United States' view remains that dismissal of these types of claims on political question grounds would also be warranted. As noted earlier, with respect to World War II-era claims against Japan by former "comfort women" from South Korea, China, Taiwan, and the Philippines, both the D.C. Circuit and this Court in this very action have applied the political question doctrine, "defer[ring] to the judgment of the Executive Branch of the United States Government . . . that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States." *Hwang Geum Joo v. Japan*, 413 F.3d at 48, 52-53 (holding that the case "presents a nonjusticiable political question, namely, whether the governments of the appellants' countries resolved their claims in negotiating peace treaties with Japan"); *see He Nam You v. Japan*, No. C 15-03257, 2015 WL 8648569, at *3 (N.D.Cal. Dec. 14, 2015) ("Although *Joo* is not binding in our circuit, it remains the only appellate authority on point . . . and [the court] adopts its thorough reasoning, which was informed by the position of the United States."). The United States' foreign policy determination, set forth in a Statement of Interest and two amicus briefs in the proceedings in *Joo*, that all wartime claims against Japan should be resolved

exclusively through diplomacy, has not changed. It remains in the United States' foreign policy interest, as reflected in the 1951 San Francisco Peace Treaty, for such claims against Japan to be resolved exclusively through government-to-government negotiations, and thus, if the Court decides to reach the issue at this stage, dismissal of the claims against Japan in this lawsuit would also be warranted on political question grounds.

CONCLUSION

For the foregoing reasons, the United States respectfully submits to the Court that Emperor Akihito and Prime Minister Abe are immune in this action, and requests that the Court consider the United States' views set forth in the foregoing Statement of Interest.

Dated: February 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

s/ Kenneth E. Sealls
KENNETH E. SEALLS