Table of Contents

CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs civil actions against foreign states in U.S. courts. The FSIA's various statutory exceptions to a foreign state's immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, 1605B, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2018 in which the United States filed a statement of interest or participated as amicus curiae.

1. Waiver of Immunity under the FSIA

BAE Systems v. Korea, No. 17-1041 (4th Cir. 2018) is discussed in Chapter 5. The section of the Court's opinion discussing the FSIA is excerpted below.

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Korea … contends that the district court erred in refusing to accord it immunity from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (FSIA). That statute provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States" unless one of the enumerated exceptions applies. 28 U.S.C. § 1604. BAE maintains that the district court properly exercised jurisdiction, because two FSIA exceptions apply here: the waiver exception and the commercial activity exception. We review applications of the FSIA *de novo*. *Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 212 (4th Cir. 2011).

The FSIA waiver exception states:

> A foreign state shall not be immune from the jurisdiction of courts of the United States... in any case... in which the foreign state has waived its immunity either explicitly *or by implication*, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver….

28 U.S.C. § 1605(a)(1) (emphasis added). "Waiver under the FSIA is rarely accomplished by implication," and "the implicit waiver provision of §1605(a)(1) must be construed narrowly." *See In re Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999). In enacting the FSIA, however, Congress provided three examples of implicit waivers. *See* H.R. Rep. No. 94-1487, at 18 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6617; S. Rep. No. 94-1310, at 17–18 (1976). These three examples "involve circumstances in which the implicit waiver is unmistakable" and so the FSIA exception applies. *See Tamimi*, 176 F.3d at 278–79. One of these unmistakable implicit waivers occurs when "a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity." *Id.* at 278.

BAE initiated this lawsuit against Korea in November 2014. Korea moved to dismiss the action in September 2015 but did not raise the sovereign immunity defense in that motion. On February 18, 2016, after the district court denied Korea's motion to dismiss, Korea filed an answer to BAE's complaint and several counter-claims against BAE. This was Korea's first responsive pleading. *See* Fed. R. Civ. P. 7 (an answer to a complaint is a "pleading," but a motion to dismiss is not); 28 U.S.C. § 1608(d) (outlining timeline under FSIA for a foreign state to file "an answer or other responsive pleading"). In this initial pleading, Korea failed to assert sovereign immunity but instead asserted counter-claims against BAE for breach of contract, fraud, and negligent misrepresentation. In sum, by February 18, 2016, this litigation had been ongoing for over a year, Korea had not asserted a sovereign immunity defense, and Korea had filed a responsive pleading in the form of an answer and counter-claims. It thus appears that Korea impliedly waived its sovereign immunity defense.

Resisting this conclusion, Korea notes that it filed an amended answer and counter-claims on March 10, 2016, in which it did refer to FSIA. Korea added the following sentence in its amended answer and counter-claims:

> Moreover, Defendants deny that the act upon which BAE TSS bases its claim—Defendants' demand for payment of the amount of the bid bond required by Korean law—falls within the commercial activities exception of the Foreign Sovereign Immunities Act.

Although it referred to the FSIA in this amended answer and counter-claims, even then Korea did not raise the FSIA as an affirmative defense. Rather, Korea simply denied engaging in commercial activity under the FSIA.

Even assuming this statement in the amended answer sufficed to invoke FSIA protections, Korea cannot defeat a holding of implied waiver unless its amended answer and counter-claims rendered its initial answer and counter-claims irrelevant. Korea contends that this is the case, because an amended pleading generally supersedes the original, rendering the original of no legal effect. *See* Appellants/Cross-Appellees Response/Reply Br. at 32–33 (citing *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001)). Regardless of the ordinary

effect of an amended answer on the original answer, a court cannot ignore the original answer for FSIA waiver purposes.

Korea's proposed interpretation—that only the latest amended answer matters for purposes of asserting sovereign immunity under FSIA—stands in tension with the statutory text, which states that a foreign state cannot withdraw an implied waiver once it is made. *See* 28 U.S.C. § 1605(a)(1); *see also Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 621, 625 (4th Cir. 1964) (in pre-FSIA case, finding that Cuba waived its immunity "when it filed answers... without suggesting its immunity," because "once the immunity is waived... it cannot be revived"). Korea's interpretation could lead to absurd results, where a foreign state could avoid implied waiver simply by obtaining permission from a court to file an amended pleading.

We reject such an interpretation. Instead, we hold, as our sister circuits have, that filing a responsive pleading generally provides the last opportunity to assert sovereign immunity. *See Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000) ("If a sovereign files a responsive pleading without raising the defense of sovereign immunity, then the immunity defense is waived."); *Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 326 (2d Cir. 1993) ("[T]he filing of a responsive pleading is the *last chance* to assert FSIA immunity if the defense has not been previously asserted."); *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (describing a responsive pleading as "the point of no return for asserting foreign sovereign immunity"); *cf. Princz v. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) ("[A]n implied waiver depends upon the foreign government's having *at some point* indicated its amenability to suit." (emphasis added)).

Here, Korea participated in the litigation for over a year, including by filing a motion to dismiss and a responsive pleading, without giving any indication it asserted sovereign immunity. For that reason, it waived its immunity defense, and the district court had jurisdiction. The fact that Korea never "raise[d] the defense of sovereign immunity," even in its amended answer and counter-claims, but rather only asserted its actions did not qualify for the commercial activity exception, supports this conclusion.

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2. Expropriation Exception to Immunity

The expropriation exception to immunity in the FSIA provides that a foreign state is not immune from any suit "in which rights in property taken in violation of international law are in issue" and a specified commercial-activity nexus to the United States is present. 28 U.S.C. § 1605(a)(3).

a. Venezuela v. Helmerich & Payne

As discussed in *Digest 2016* at 406-14, the United States filed briefs as amicus curiae both at the petition stage and on the merits in the Supreme Court of the United States in *Venezuela et al. v. Helmerich & Payne Int'l Drilling Co., et al.*, No. 15-423, a case involving the expropriation exception. As discussed in *Digest 2017* at 408-13, the Supreme Court vacated the decision below and remanded. On remand, the U.S. Court of

Appeals for the D.C. Circuit invited the United States to file an amicus brief, which the United States did on January 17, 2018. After oral argument, the D.C. Circuit invited the United States to file a supplemental amicus brief addressing the circumstances under which a state action that depreciates the value of a corporation's shares might constitute an expropriation. The supplemental amicus brief of the United States on remand is excerpted below (with footnotes and hyperlinks omitted) and available at https://www.state.gov/digest-of-united-states-practice-in-international-law/. The amicus brief filed on January 17, 2018 (not excerpted herein) is also available at https://www.state.gov/digest-of-united-states-practice-in-international-law/

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1. As we previously described in the United States' initial amicus brief, under customary international law, foreign shareholders may challenge a state's expropriation only of their own direct rights related to the corporation, as established by municipal law. They may not properly challenge a state's expropriation of the corporation's property on the sole basis that it adversely affected the value of their shares. Initial Amicus Br. 10, 12-13.

The International Court of Justice has explained that a state's obligation to provide compensation for the expropriation of a foreign shareholder's property is governed "by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction." *Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 41 (Feb. 5) (*Barcelona Traction*); see *id.* ¶¶ 44, 47. Thus, in assessing a shareholder's expropriation claim, a court must "assess whether, under [municipal] law, the claimed rights are indeed direct rights of the [owner of the limited liability company], or whether they are rather rights or obligations of the companies." *Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Congo)*, Judgment, 2010 I.C.J. 639, ¶ 114 (Nov. 30) (*Diallo*). States owe no "responsibility towards the shareholders" of companies for financial losses they sustain as a result of state acts "directed against and infringing only the company's rights." *Barcelona Traction*, ¶ 46. But "[w]henever one of [a shareholder's] direct rights is infringed" by the state, the shareholder has a cognizable international expropriation claim. *Id.* ¶ 47; see *id.* (identifying "the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation" as examples of "direct rights of the shareholder" under typical "municipal law").

In its filings before international tribunals, the United States has long recognized the importance of this distinction between shareholder and corporate rights. See, *e.g.*, Submission of the United States, ¶ 9, *GAMI Invs., Inc. v. United Mexican States* (NAFTA/UNCITRAL Arb. Trib. June 30, 2003) (*GAMI* U.S. Submission) ("Under customary international law, no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. Only *direct* loss or damage suffered by shareholders is cognizable.") (footnotes omitted); Memorial on Jurisdiction and Admissibility of Resp't United States at 5, *Methanex Corp. v. United States* (NAFTA/UNCITRAL Arb. Trib. Nov. 13, 2000) ("Neither Article 1116 [of the North American Free Trade Agreement] nor the

principles of customary international law against which it was adopted * * * permit a shareholder to claim in its own right for injuries to a corporation.").

2. The United States also has long recognized that, under customary international law, a state may expropriate a foreign shareholder's direct property rights in two ways: directly or indirectly. As explained below, a direct expropriation of a shareholder's direct rights occurs through a formal expropriation of the shareholder's own property rights (rather than just the corporation's property rights), whereas an indirect expropriation of a shareholder's direct rights occurs through measures that have an effect equivalent to a formal expropriation of the shareholder's own property rights.

First, a state may directly expropriate a foreign shareholder's direct rights. See, *e.g.*, 2012 U.S. Model Bilateral Investment Treaty, Annex B (U.S. Model B.I.T.) ("[A] direct expropriation [occurs under customary international law] where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."). That occurs, for example, when a state formally takes title to the corporation's shares and the rights that accompany them, thereby directly taking ownership of the corporation. See, *e.g.*, *GAMI* U.S. Submission, ¶ 9 (identifying as "an expropriation of the shares" a direct expropriation of shareholders' direct rights); see generally *Diallo*, ¶¶ 99-159 (considering and rejecting claims of direct expropriation of direct rights of the sole owner of two limited liability companies).

Second, a state may indirectly expropriate a shareholder's direct rights. In general, an indirect expropriation occurs "where an action or series of actions by a [state] has an effect equivalent to direct expropriation without formal transfer of title or outright seizure." U.S. Model B.I.T., Annex B; see Restatement (Second) of the Foreign Relations Law of the United States § 192 (Am. L. Inst. 1965) ("Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property, constitutes a taking of the property, * * * even though the state does not deprive him of his entire legal interest in the property."). State responsibility for indirect expropriations of foreign nationals' property is well established in customary international law. See *e.g.*, *In re Claim of Corn Prods. Refining Co.*, No. 1352, Final Decision at 12-13 (Foreign Claims Settlement Comm'n Dec. 15, 1954) (imposition by Yugoslavia of war-profit tax approximately three times the pre-war value of the plant "is nothing else but a total confiscation of the entire property," and so an indirect expropriation of property).

Whether a state has indirectly expropriated a foreign property owner's rights in property is a fact-intensive, case-by-case inquiry that considers, "among other factors," the economic impact of the state action; the extent to which the state action interferes with the property owner's distinct, reasonable investment-backed expectations; and the character of the state action. U.S. Model B.I.T., Annex B; *cf. Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). With respect to the first factor, "for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as to support a conclusion that the property has been 'taken' from the owner." Submission of the United States, ¶ 13, *Lone Pine Res., Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2 (Aug. 16, 2017) (*Lone Pine Res.* U.S. Submission) (quotation marks omitted). But the "adverse effect" of the state's action "on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred." U.S. Model B.I.T., Annex B. Under the second factor, the reasonableness of a foreign property owner's expectations depends "in part on the nature and extent of governmental regulation in the relevant sector." *Lone Pine Res*. U.S.

Submission, ¶ 14 (quotation marks omitted). And the third factor considers such things as whether the state's action was an exercise of its general regulatory power or was instead discriminatory. *Id.* ¶ 15 & n.22.

3. In the case of a foreign shareholder, the indirect-expropriation inquiry focuses on that shareholder's bundle of direct rights, taking into account the domestic-takings rule that a domestic corporation does not have a cognizable claim under international law for a state's taking of property belonging to the domestic corporation *itself*. See, *e.g.*, *Tidewater Inv. SRL v. Bolivarian Rep. of Venezuela*, ICSID Case No. ARB/10/5, Award, ¶ 105 (Mar. 13, 2015) (*Tidewater*) (identifying as factors "useful to consider" and "relevant" to determining whether state indirectly expropriated shareholders' direct rights in one case: whether "(a) The investment has been nationalized or the measure is confiscatory; (b) The investor remains in control of the investment and directs its day-to-day operations, or whether the State has taken over such management and control; (c) The State now supervises the work of employees of the Investment; and (d) The State takes the proceeds of the company's sales"). An indirect expropriation of certain shareholder direct rights would occur if the state prevents shareholders from exercising their rights to declared dividends, to attend and vote in general meetings, or to share in the residual assets of the company on liquidation. *Barcelona Traction*, ¶ 47; see also Restatement (Third) of the Foreign Relations Law of the United States § 712, cmt. g (Am. L. Inst. 1987) (describing state actions that have the effect of "taking" property). Similarly, a state would indirectly expropriate certain shareholder direct rights if it permanently took over management and control of the company, making decisions for the corporation that are reserved to the shareholders. See, *e.g.*, *Starrett Hous. Corp. v. Government of the Islamic Republic of Iran*, Interlocutory Award, 1983 WL 233292, at *25-26 (Iran-U.S. Claims Trib. 1983) (applying principles of international law, concluding that where Iran appointed a manager and where language of a statute "seems to indicate that the right to manage such projects ultimately rests with the Ministry of Housing and Bank Maskan," majority shareholders demonstrated that Iran "had interfered with [their] property rights in the Project to an extent that rendered these rights so useless that they must be deemed to have been taken").

Significantly for present purposes, the United States has long recognized that, as a matter of customary international law, foreign shareholders' direct rights are taken when a state indirectly expropriates the entire enterprise, for example, by permanently depriving shareholders of management and control of the business, completely destroying the beneficial and productive value of the shareholders' ownership of their company, leaving the shareholders with shares that have been rendered useless. See, *e.g.*, Memorial of the United States of America at 90, *Case Concerning Elettronica Sicula S.p.A. (United States v. Italy)* (I.C.J. May 15, 1987) ("[I]t repeatedly has been recognized that interference with management and control sufficient to constitute a 'taking' of property will be considered to have occurred where the foreign investor has no reasonable prospect of regaining management and control."). That principle was recognized in several of the earliest bilateral investment treaties entered into by the United States. See, *e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, art. III, Mar. 12, 1986, Bangl.-U.S., Treaty Doc. 99-23 (including as measures that may be "tantamount to expropriation * * * the impairment or deprivation of [a company's] management").

Notably, international tribunals have also endorsed that principle. See, *e.g.*, *SEDCO, Inc. v. National Iranian Oil Co.*, Interlocutory Award, 1985 WL 324069, at *22 (Iran-U.S. Claims Trib. 1985) ("When, as in the instant case, it also is found that on the date of the government appointment of 'temporary' managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date."); *Tidewater*, ¶¶ 100, 110 (concluding that "the business as a whole had been effectively nationalized" where Venezuela took "possession of the assets and control of the operations" of a foreign-owned company); *cf. Pope & Talbot, Inc. v. Government of Canada*, Interim Award, ¶ 100 (NAFTA/UNCITRAL Arb. Trib. June 26, 2000) (finding no indirect expropriation where, among other things, "the Investor remains in control of the Investment [and] directs the day-to-day operations of the Investment," and where the State did "not take any other actions ousting the Investor from full ownership and control of the Investment"); see *id.* ¶ 96 (stating that provision of North American Free Trade Agreement recognizing indirect expropriation codifies customary international law standard).

4. Importantly, however, a state's expropriation of a corporation's property that does not result in the expropriation of the entire enterprise is not an indirect expropriation of foreign shareholders' direct rights under customary international law, even if it reduces the value of the shares to zero. See *Barcelona Traction*, ¶¶ 48, 52 (rejecting notion of state responsibility for derivative shareholder claims concerning state action that allegedly "emptied [shares] of all real economic content"); see generally Initial Amicus Br. 7-11 (discussing domestic-takings rule).

The same is true under United States law. United States courts have repeatedly recognized that the shareholder standing rule "generally prohibits shareholders from initiating actions to enforce the rights of the corporation." *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990); see, *e.g.*, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 625-34 (D.C. Cir. 2017) (holding that, under applicable Delaware law, breach-of-fiduciary-duty claims of shareholders of Fannie Mae were derivative and so barred because any benefit of recovery would go to the company, but breach-of-contract claims of shareholders of Fannie Mae and Freddie Mac involved shareholders' direct rights and so could proceed in case challenging Federal Housing Finance Agency's conservatorship of those companies). And courts have rejected shareholders' derivative claims even where the government's action allegedly resulted in an extreme devaluation of the company's stock. See *Starr Int'l Co. v. United States*, 856 F.3d 953, 966-73 (Fed. Cir. 2017) (holding that, under applicable Delaware law, the injuries of shareholders of American International Group, Inc. (AIG), alleged to be indistinguishable from the seizure of four out of every five shares of the shareholders' stock, were derivative of the alleged harms of the company, and so shareholders lacked standing to assert claim that the United States' acquisition of AIG equity as part of the government's financial assistance to the company constituted an illegal exaction in violation of the Federal Reserve Act).

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b. Simon v. Hungary

On June 1, 2018, the United States filed an amicus brief in the U.S. Court of Appeals for the D.C. Circuit in *Simon v. Hungary*, No. 17-7146. Plaintiffs are Holocaust survivors who were in Hungary during World War II and their complaint alleges the Republic of Hungary and the state-owned Hungarian railway participated in confiscating the personal property of Hungarian Jews and transporting Hungarian Jews to ghettos and to

concentration and slave-labor camps. This case, and several other cases in which the United States submitted briefs in 2018 which are discussed, *infra*, present the question of whether a court may dismiss or decline to exercise jurisdiction over claims based on the doctrines of international comity and *forum non conveniens* even when the claims are brought under the expropriation exception in the FSIA. The U.S. brief in *Simon v. Hungary*, excerpted below, argues that both doctrines can properly be applied to dismiss claims brought under the expropriation exception. The brief is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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The United States deplores the acts of violence that were committed against plaintiffs and their family members, and supports efforts to provide them with a remedy for the wrongs they suffered. The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era has consistently been motivated by the twin concerns of justice and urgency. No amount of money could provide compensation for the suffering that the victims of Nazi-era atrocities endured. Nevertheless, the moral imperative has been and continues to be to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes. The United States has advocated that concerned parties, foreign governments, and non-governmental organizations act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation.

With respect to Hungary specifically, the 1947 Peace Treaty between Hungary and the Allied Powers (including the United States) contained provisions in Articles 26 and 27 addressing property claims of non-Hungarian and Hungarian nationals. In 1973, the United States reached a claims settlement agreement with Hungary, in which the United States accepted $18.9 million in settlement of claims relating to Hungary's obligations under Articles 26 and 27 of the 1947 Peace Treaty, as well as certain other claims against Hungary. That settlement, however, only resolved individual claims for individuals who were U.S. nationals at the time their claims arose, and hence does not apply to the claims of the named plaintiffs here. More broadly, while the United States continues to advocate for the Hungarian government to resolve remaining Holocaust-era restitution issues, the United States has not had specific substantive involvement in efforts to address the types of property-related claims that are at issue in this case.

Thus, in contrast to the United States' involvement in the establishment of certain Holocaust claims processes in a number of other European countries, such as Germany, Austria, and France, the United States has not participated in efforts of the Republic of Hungary toward establishing a claims mechanism for the Holocaust victims whose claims are at issue in this case and were not resolved by the prior settlement agreements. Nor does the United States have a working understanding of the mechanisms that have been or continue to be available in Hungary with respect to such claims. Accordingly, the United States does not express a view as to whether it would be in the foreign policy interests of the United States for plaintiffs to have sought or now seek compensation in Hungary. The United States therefore takes no position on the

particular facts and circumstances of this case as to whether the district court properly applied the doctrines of prudential exhaustion and *forum non conveniens* to dismiss plaintiffs' claims in favor of litigation in Hungarian courts.

The United States files this brief as amicus curiae, however, in response to the Court's invitation and to express its view that the doctrines of *forum non conveniens* and international comity can, in an appropriate case, be grounds for dismissal of claims brought against a foreign state or its agency or instrumentality under the FSIA's expropriation exception. Plaintiffs cite federal courts' "virtually unflagging obligation" to exercise their jurisdiction, Appellants Br. 29, but that principle does not require U.S. courts to adjudicate claims in circumstances where, for example, such litigation would be at odds with the foreign policy interests of the United States and the sovereign interests of a foreign government.

It is well-established—and plaintiffs themselves acknowledge, Appellants Br. 32—that claims over which a district court has subject matter jurisdiction under the FSIA may be dismissed on the ground of *forum non conveniens*. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983) ("The [FSIA] does not appear to affect the traditional doctrine of *forum non conveniens*."); see also, *e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002) ("[T]he doctrine of *forum non conveniens* remains fully applicable in FSIA cases."); *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela*, S.A., 760 F.2d 390, 394 (2d Cir. 1985) (same). Plaintiffs assert that the availability of *forum non conveniens* makes it unnecessary to apply a doctrine of international comity in appropriate cases, but their argument ignores the critical interests served by comity.

Forum non conveniens applies even in cases involving purely private parties, if the balancing of interests supports resolution of the dispute in a foreign court. International comity is relevant in cases that implicate more significant sovereign interests, by discouraging a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute (or provision for resolution), or otherwise sitting in judgment of the official acts of a foreign government. See generally *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). And despite Congress' enactment of the FSIA to govern foreign sovereign immunity, "the foreign policy implications of the application of that Act obviously occasion a continuing involvement by the Executive" in identifying circumstances in which sovereign interests support application of comity principles. *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 881-82 (D.C. Cir. 1988) (act of state doctrine).

In an appropriate case, and as we explain further below, foreign policy and foreign sovereign interests can support a court's decision to defer to an alternative foreign forum rather than to exercise jurisdiction over claims under the FSIA's expropriation exception. Judicial deference to the Executive's expressed view of the potential impact of litigation on our foreign affairs under a comity analysis derives from "the primacy of the Executive in the conduct of foreign relations." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality op.) (cited with approval in *Millen Indus.*, 855 F.2d at 881). Given the long pendency of this action and the significant questions as to the court's subject matter jurisdiction, however, it would have been advisable in this case for the district court to resolve the question of its jurisdiction under the FSIA before dismissing the case on prudential exhaustion grounds that the district court suggested would permit plaintiffs to return to U.S. courts.

A. A District Court May Dismiss A Case Brought Under The FSIA's Expropriation Exception In Deference To An Alternative Forum As A Matter Of International Comity.

In the view of the United States, a district court may dismiss an action brought under the FSIA's expropriation exception in deference to an alternative available forum as a matter of international comity. Although exhaustion is not mandatory in this context under international or domestic law, it is an available doctrinal basis for declining to exercise jurisdiction in an appropriate case, where consideration of the interests of the United States and the foreign state weighs sufficiently in favor of an adequate alternative forum. Dismissal on international comity grounds can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States, such as in circumstances where U.S. foreign policy is to channel disputes to an alternative forum. The fact the FSIA itself does not impose any exhaustion requirement for expropriation claims under § 1605(a)(3) does not foreclose dismissal on international comity grounds.

"International comity is a doctrine of prudential abstention, one that 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.'" *Mujica v. AirScan Inc*., 771 F.3d 580, 598 (9th Cir. 2014) (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997)). One strain of the doctrine, adjudicatory comity, applies when one country's court declines "to exercise jurisdiction in a case properly adjudicated in a foreign state." *Mujica*, 771 F.3d at 599 (quoting *In re Maxwell Commc'n Corp. PLC by Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

In deciding whether to decline to exercise jurisdiction on adjudicatory comity grounds in deference to a foreign forum, a U.S. court "evaluate[s] several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). The Ninth Circuit, elaborating on those factors in *Mujica*, set out a non-exclusive list of considerations in applying the doctrine of international comity. The Court explained that relevant factors to be considered in assessing U.S. interests included "(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests." Mujica, 771 F.3d at 604.

Comity is closely tied to territoriality, and a court should give less weight to U.S. interests where the activity at issue occurred in a foreign country and involved harms to foreign nationals. Conversely, the analysis of foreign interests, which "essentially mirrors the consideration of U.S. interests," gives weight to a foreign state's "interests in regulating conduct that occurs within their borders" and "involves their nationals." *Mujica*, 771 F.3d at 607; see also, *e.g.*, *Republic of Philippines*, 553 U.S. at 866 (recognizing that a foreign state has "a unique interest" in resolving in its own courts a dispute involving claims arising from "events of historical and political significance for [that state] and its people"); cf. U.S. Amicus Br. Supporting Panel Reh'g or Reh'g En Banc, at 27-28, *Sarei v. Rio Tinto*, PLC, Nos. 02-56256 & -56390 (9th Cir. 2006) ("To reject a principle of exhaustion and to proceed to resolve a dispute arising in another country, centered upon a foreign government's treatment of its own citizens, when a competent foreign court is ready and able to resolve the dispute, is the opposite of the model of 'judicial caution' and restraint contemplated by" *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).).

One critical factor to be considered in determining whether to dismiss on international comity grounds is the foreign policy interests of the United States. In circumstances in which the United States has expressed its foreign policy interests in connection with a particular subject matter or litigation, a court should give substantial weight to the United States' views that those interests support (or weigh against) abstention in favor of a foreign forum that can resolve the dispute. See *Ungaro-Benages*, 379 F.3d at 1236, 1239; *Mujica*, 771 F.3d at 609-10 (giving serious weight to United States' statement that foreign policy interests support dismissal on international comity grounds); cf. *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (recognizing that, where the State Department has suggested that the court should decline to exercise jurisdiction "over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy" (footnote omitted)). Dismissal on international comity grounds can ensure that litigation in U.S. courts does not cause substantial harm to our foreign relations or otherwise conflict with federal foreign policy. Cf. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-20 (2003).

Finally, while the district court did not resolve the outstanding questions relating to its subject matter jurisdiction in this case, we note that the fact a district court has jurisdiction under the FSIA's expropriation exception does not foreclose dismissal on the grounds of international comity. International comity, like *forum non conveniens*, is a federal common-law doctrine of abstention in deference to an alternative forum. Nothing in the text or history of the FSIA suggests that it was intended to foreclose application of those doctrines, or to require a court to exercise jurisdiction in every case. See *Price*, 294 F.3d at 100; *Proyecfin de Venezuela*, 760 F.2d at 394; see also *Millen Indus.*, 855 F.2d at 881-82 (recognizing with approval the "continuing involvement by the Executive" in cases brought under the FSIA); cf. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950-51 (D.C. Cir. 2008) (reviewing the merits of the district court's refusal to dismiss expropriation claim on *forum non conveniens* grounds).

Nor, contrary to plaintiffs' arguments, are all relevant considerations relating to international comity incorporated in the terms of the FSIA's expropriation exception. In appropriate, case-specific circumstances, dismissal on the basis of international comity may be appropriate in claims over which a court has jurisdiction under § 1605(a)(3). In *Scalin v. Societe Nationale des Chemins de Fer Francais*, No. 15-cv-3362 (N.D. Ill.), for example, the United States supported dismissal of an action filed by Holocaust victims against the French national railroad not only on jurisdictional grounds but also on grounds of, *inter alia*, international comity. See Statement of Interest of the United States, Dkt. 63 (Dec. 18, 2015). The United States explained that the U.S. Government had supported the French government's efforts to compensate Holocaust victims and their families, including France's development of an administrative compensation scheme for certain property-related claims of nationals of any country as well as an Executive Agreement between France and the United States that expanded a French pension program for surviving Holocaust deportees and surviving spouses of deportees to cover U.S. citizens and other foreign nationals not previously eligible to receive compensation. The United States explained that it would be in the interests of the United States and France to resolve the plaintiffs' Holocaust-related claims through the commission and programs established by France rather than through litigation in U.S. courts. The United States urged international comity as an independent justification for dismissing the action in deference to the French compensation schemes, and the district court agreed. Mem. Op., Dkt. 83, *Scalin v. Societe Nationale des Chemins de Fer Francais*, No. 15-cv-3362 (N.D. Ill. Mar. 26, 2018). The

case-specific considerations supporting dismissal in that case are not factors that are incorporated into the elements of the FSIA's expropriation exception.

In arguing that the district court erred in recognizing a doctrine of international comity, plaintiffs rely on two district court cases rejecting prudential exhaustion in cases brought under the FSIA's expropriation exception. Appellants Br. 22 (citing *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 169 (D.D.C. 2016), and *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59, 82-83 (D.D.C. 2017)). Those courts, however, viewed the doctrine of prudential exhaustion recognized by the Seventh Circuit in *Fischer v. Magyar Allamvasutak Zrt*., 777 F.3d 847 (7th Cir. 2015), as being based solely on an international-law rule. As the district court here correctly recognized, Fischer can properly be understood to refer to international-law practice not in order to require exhaustion as a binding norm of international law, but by analogy to infer a broader principle of international comity supporting abstention under domestic law. Mem. Op., Dkt. 132, at 16-17.

Indeed, the fact that the defendant in a case brought under the FSIA's expropriation exception is a foreign state may itself be a valid consideration in an international comity analysis, as a suit brought directly against a foreign state can cause more international friction than a suit brought against a state-owned commercial entity. See U.S. Amicus Br., at 15-16, *Kingdom of Spain v. Cassirer*, No. 10-786 (S. Ct. May 27, 2011) (noting that, where a foreign state itself is not a defendant in an action under the FSIA's expropriation exception, the potential foreign relations impact of a suit may be significantly diminished). The FSIA's expropriation exception is unusual in that it provides jurisdiction in cases involving international-law violations almost always committed in a foreign state rather than the types of purely private-law disputes ordinarily brought under the FSIA's other exceptions to sovereign immunity, where the relevant action or at least the gravamen of the claim took place in the United States (aside from the terrorism exception, which itself requires exhaustion of certain other remedies, 28 U.S.C. § 1605A(a)(2)(A)(iii)). Where the contacts between foreign state defendants and the United States are attenuated, that may also be a basis for a court to resolve its own subject matter jurisdiction in a particular case before dismissing claims on international comity grounds. The district court's exhaustion analysis envisioned that plaintiffs could return to U.S. court following litigation in Hungarian courts, and assert the right to pursue claims on the basis that Hungarian remedies were unreasonably withheld. That would extend even further the duration of this litigation, which has already been pending for over seven years. Mem. Op., Dkt. 132, at 17.

It is far from clear, however, that the district court has jurisdiction under the FSIA's expropriation exception. The FSIA's exceptions to immunity were intended by Congress to incorporate "[t]he requirements of minimum jurisdictional contacts" that were generally thought sufficient to support exercise of personal jurisdiction over an out-of-state defendant. H.R. Rep. No. 94-1487, at 13 (1976). Each of Section 1605(a)'s exceptions to immunity "requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction," thereby "prescrib[ing] the necessary contacts which must exist before our courts can exercise personal jurisdiction." *Id*. The commercial activity nexus requirement in the FSIA's expropriation exception should, if applied with appropriate rigor, screen out many cases that would raise significant comity concerns.

In order for the Republic of Hungary to be subject to the district court's subject matter jurisdiction, plaintiffs must establish that expropriated property or any property exchanged for such property is "present in the United States in connection with a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(3). Only the first clause of

§ 1605(a)(3) can be the basis for jurisdiction over the foreign state. See *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1106-08 (D.C. Cir. 2017). This Court previously recognized that the allegations in the first amended complaint were insufficient to exercise subject matter jurisdiction over the Republic of Hungary. *Simon*, 812 F.3d at 148.

Requiring a showing that expropriated property or identifiable property exchanged for such property is present in the United States in connection with the foreign state's commercial activity in this country is consistent with the historic backdrop of the FSIA. Prior to the statute's enactment, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, see, *e.g.*, *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971), with the possible exception of in rem cases in which U.S. courts took jurisdiction to determine rights to property actually situated in the United States. *E.g.*, *Stephen v. Zivnostenska Banka Nat'l Corp.*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), *aff'd*, 186 N.E.2d 676 (N.Y. 1962). In enacting the FSIA and creating for the first time an exception to the *in personam* immunity of a foreign state in certain expropriation cases, Congress adopted an incremental approach that paralleled those few cases in which title to property in the United States had been in issue. In contrast, deeming allegations that the Republic of Hungary seized and liquidated property abroad and commingled it with general revenues in its treasury abroad many decades ago to be sufficient to treat any state-owned property in the United States as "exchanged" for expropriated property would expand the expropriation exception far beyond its intended limits—limits that were also intended to ensure that any exercise of personal jurisdiction over a foreign state defendant would satisfy minimum contacts requirements. See H.R. Rep. No. 94-1487, at 13-14.

Similar concerns are raised by application of a rationale that allegations that a foreign state agency or instrumentality has historically commingled the proceeds of seized and liquidated assets among its assets are sufficient to establish jurisdiction over the agency or instrumentality if it does unrelated business in the United States.

Particularly in light of the underlying purposes of foreign sovereign immunity, it would have been preferable for the district court to resolve its jurisdiction over defendants before dismissing plaintiffs' claims without prejudice on grounds that might not end definitively the litigation in U.S. courts. Cf. *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (recognizing that foreign sovereign immunity protects the foreign state from "trial and the attendant burdens of litigation," not simply "liability on the merits"); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) ("A foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity.").

B. A District Court May Also Abstain From Exercising Jurisdiction Under The FSIA Under The *Forum Non Conveniens* Doctrine.

For similar reasons, although the United States does not take a position an application of *forum non conveniens* to the particular facts and circumstances of this case, it is clear that a district court may decline to adjudicate claims on that basis even where it has or may have subject matter jurisdiction under the FSIA. Under the *forum non conveniens* doctrine, relevant considerations include a range of public and private factors, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981), including the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; and other practical problems relating to trial of the case; administrative burdens on a

court; and the court's familiarity with the law to be applied. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The public interest factors can also include considerations of the foreign relations consequences of adjudication for the United States and the foreign government. See *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1312-13 (11th Cir. 2002). Indeed, because the applicable legal standard for the *forum non conveniens* doctrine is so well established and there is a sizable body of law in which the standard is applied—unlike in the international comity context—it may be advisable for a district court to address *forum non conveniens* first before reaching the question of international comity.

Furthermore, *forum non conveniens* can play an additional, and critical, role in a case brought against a foreign state defendant. The inquiry into jurisdiction under the FSIA can often be time-consuming and difficult. As the Supreme Court recognized in *Verlinden*, a court's application of *forum non conveniens* can help to identify and resolve at the threshold stage cases with only a weak nexus to the United States. 461 U.S. at 490 n.15; see also, *e.g.*, *Proyecfin*, 760 F.2d at 394 (reasoning that *forum non conveniens* will help prevent U.S. courts from becoming "international courts of claims" for "local disputes between foreign plaintiffs and foreign sovereign defendants). Application of the *forum non conveniens* doctrine can assist in identifying cases in which an alternative foreign forum has a closer connection to the underlying parties and/or dispute, thereby avoiding years of litigation over jurisdictional issues, potentially involving intrusive jurisdictional discovery, which can impose substantial burdens on foreign states. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, (2007) (a district court "may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.").

* * * *

c. Philipp v. Germany

On September 4, 2018, the United States filed an amicus brief in support of rehearing en banc in *Philipp v. Germany*, No 17-7064, in the D.C. Circuit. Plaintiffs' claims in this case relate to cultural assets seized by the Nazi regime. The U.S. brief in *Philipp*, like the U.S. brief in *Simon*, discussed *supra*, argues that courts may abstain from exercising jurisdiction in a case brought pursuant to the FSIA's expropriation exception based on the doctrine of international comity. The brief is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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United States courts have long recognized the doctrine of international comity, which permits courts to recognize the "legislative, executive or judicial acts of another nation" giving "due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *see also id.* at 164-65 (citing Joseph Story, *Commentaries on the Conflict of Laws* §§ 33-38 (1834) (describing international comity as a doctrine of "beneficence, humanity, and charity,"

which "arise[s] from mutual interest and utility")); *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370, n.* (1798) (referring to the doctrine of comity of nations).

International comity discourages a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute (or provision for its resolution), or otherwise sitting in judgment of a foreign government's official acts. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."). One strand of comity is "adjudicatory comity," pursuant to which a U.S. court may abstain from exercising jurisdiction in deference to adjudication in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014). This doctrine is one of "prudential abstention," applied "when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *Id.* at 598 (quotations omitted).

In enacting the FSIA, Congress established a comprehensive legal framework governing the immunity of foreign states from the jurisdiction of U.S. courts. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). But the Act was not meant to affect substantive liability or other areas of law. *See Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017) ("[T]he FSIA * * * grant[ed] jurisdiction yet le[ft] the underlying substantive law unchanged." (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983)).

Along these lines, "the doctrine of *forum non conveniens* remains fully applicable in FSIA cases." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002). And this Court has recognized that other common-law principles continue to apply in cases against foreign states following the FSIA's enactment. *See, e.g., Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008) (*forum non conveniens* and act-of-state doctrine); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (political question doctrine).

This Court has also observed that litigation under the FSIA may involve sensitive questions of foreign affairs that "obviously occasion a continuing involvement by the Executive * * * in matters relating to the application of the act of state doctrine and giving appropriate weight to those views." *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 881 (D.C. Cir. 1988) (citations omitted).

Abstention on the basis of international comity, like *forum non conveniens*, is not a jurisdictional doctrine but instead a federal common-law doctrine of abstention in deference to an alternative forum. *See In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998) ("*Forum non conveniens* does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction."). And like the act-of-state doctrine, adjudicatory comity is grounded in concerns that a court's adjudication of a claim may improperly impinge on the sovereignty of a foreign nation. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-39 (1964) (distinguishing between court's jurisdiction over claim against foreign state for expropriation, and the court's application of the act-of-state doctrine to decline to examine the merits). Nothing in the text or history of the FSIA suggests that it was intended to foreclose application of those longstanding common-law doctrines.

Significantly, abstention on adjudicatory comity grounds is akin to other common-law abstention principles applied by federal courts. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (recognizing that a federal court may decline to exercise jurisdiction in deference to predominant State interests under various abstention doctrines, including *Pullman* and *Younger* abstention); *see also id.* at 723 (noting that comity-based abstention stems from a similar premise as *forum non conveniens*). Just as the "longstanding application of [federalism-based abstention] doctrines reflects the common-law background against which the statutes conferring jurisdiction were enacted," *Id.* at 717—that Congress should not be presumed to have intended to override absent clear evidence to the contrary, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)—a court should not presume from statutory silence that the FSIA's immunity provisions were intended to abrogate comity-based abstention. The panel offered no explanation why federal courts should be able to abstain from exercising jurisdiction in deference to a State's interests, but not in deference to the interests of a foreign sovereign.

Notably, the Supreme Court has explicitly left open the possibility that the United States could suggest that "courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity," *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)—abstention based on international comity could be such a basis. *See id.* at 702 (explaining that the Court would give deference to the Executive Branch's foreign policy views in deciding whether to exercise jurisdiction under the FSIA).

Jurisdiction under the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), is unusual in that it typically involves claims alleging international-law violations committed in a foreign state, rather than purely private-law disputes ordinarily brought under the FSIA's other exceptions to sovereign immunity, in which the relevant action (or at least the gravamen of the claim) took place in the United States. This exception thus contemplates particular solicitude for international comity and consideration for whether a plaintiff had exhausted remedies in the country where the alleged expropriation took place. At the very least, the text and history of the FSIA afford no reason to foreclose a court from abstaining as a matter of comity.

B. The Supreme Court's decision in *NML Capital*, 134 S. Ct. 2250, does not preclude a court from abstaining based on adjudicatory comity in a case in which the court has jurisdiction under the FSIA. In *NML Capital*, the Court addressed "[t]he single, narrow question * * * whether the [FSIA] specifies a different rule [for post-judgment execution discovery] when the judgment debtor is a foreign state." 134 S. Ct. at 2255. The Court held that "any sort of immunity defense made by a foreign sovereign in an American court must stand or fall on the Act's text," and that the FSIA does not "forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *Id.* at 2256. The Court noted the concerns raised by Argentina and the United States in arguing for a contrary statutory interpretation regarding the potential affront to foreign states' sovereignty and to international comity resulting from sweeping discovery orders, but held that only Congress could amend the statute to address those concerns. *Id.* at 2258.

The panel relied on *NML Capital* to conclude that, if a court has jurisdiction under the FSIA, it may not abstain from exercising that jurisdiction on comity grounds. Slip Op. 16-17. To be sure, *NML Capital* held that a foreign state's immunity is governed by the FSIA. But the Supreme Court also expressly recognized that, even where a court has jurisdiction under the FSIA, comity might be relevant to other non-immunity determinations in the litigation. *NML Capital*, 134 S. Ct. at 2258 n.6 ("[W]e have no reason to doubt that [a court] may appropriately consider comity interests" in determining the appropriate scope of discovery.).

A court that declines to exercise jurisdiction on international comity grounds is not treating a foreign state as immune. *See, e.g.*, *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir. 2015) (explaining that comity is not "a special immunity defense found in the FSIA"); *cf. Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008) (distinguishing between foreign state's claim to sovereign immunity under the FSIA and its "unique interest in resolving the ownership of or claims to" assets wrongfully taken). The panel thus erred by reading *NML Capital* to resolve an issue not addressed in that case to foreclose application of a long-recognized abstention doctrine.

C. The panel also relied on two provisions of the FSIA in holding that the statute precludes abstention on comity grounds. Neither supports the panel's conclusion.

First, the panel pointed to the FSIA's terrorism exception, which requires a plaintiff in some circumstances to "afford[] [a] foreign state a reasonable opportunity to arbitrate" before bringing suit. 28 U.S.C. § 1605A(a)(2)(A)(iii). The panel reasoned by negative implication that, because a district court *must* dismiss such a claim brought under the FSIA's terrorism exception if the claim is not appropriately exhausted, a district court *cannot* dismiss a claim for failure to exhaust in a foreign forum. Slip Op. 15.

There is no evidence, however, that in enacting the terrorism exception some twenty years after the FSIA was originally enacted, Congress intended to foreclose the possibility that a court might abstain from exercising jurisdiction under other exceptions based on common-law abstention. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. The Act's expropriation exception does not require exhaustion, but neither does it forbid a court from abstaining in deference to an alternative forum. The panel's reasoning would also appear to foreclose dismissal on *forum non conveniens* grounds, despite binding circuit precedent to the contrary. *Price*, 294 F.3d at 100.

Furthermore, abstention on comity grounds is not, as the panel seemed to understand it, an exhaustion requirement. Rather, it reflects the principle that, in an appropriate case, a foreign sovereign may have a greater interest in resolving a particular dispute than does the United States, and U.S. interests are better served by deferring to that sovereign's interests. That may mean deferring to an alternative forum, *e.g.*, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004); deferring to a foreign law that strips plaintiffs of standing to bring suit, *e.g.*, *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993); or giving conclusive weight to the foreign state's resolution of a dispute, *e.g.*, *Mujica*, 771 F.3d at 614-15. The FSIA requirement to arbitrate terrorism claims before bringing suit does not suggest that Congress intended to prohibit a court from deferring to the foreign state's interests in a claim brought under a different provision of the Act.

The panel also erred in claiming support for its position from 28 U.S.C. § 1606, which provides that, "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under [28 U.S.C. §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," with the exception of punitive damages. Slip Op. 15-16. The panel appeared to believe that provision requires a court to treat foreign states the same as private defendants. Slip Op. 16 ("[Section 1606] permits only defenses * * * that are equally available to private individuals").

Even under the panel's reasoning, its conclusion was erroneous. Just as private individuals may invoke *forum non conveniens* as a basis for a court to abstain from exercising jurisdiction, *see* Slip Op. 16, private parties may similarly seek abstention on the basis of adjudicatory comity. *See, e.g.*, *Mujica*, 771 F.3d at 615; *Ungaro-Benages*, 379 F.3d at 1238. In

asserting that a private individual cannot invoke a sovereign's right to resolve disputes against it, the panel construed comity far more narrowly than the doctrine has been applied.

The panel erred in ruling that a court may not abstain, on international comity grounds, from adjudicating a claim over which the court has jurisdiction under the FSIA.

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d. Scalin v. SNCF

On November 13, 2018, the United States filed an amicus brief in the U.S. Court of Appeals for the Seventh Circuit in *Scalin v. SNCF*, No. 18-1887. The case involves claims by heirs of French Holocaust victims transported by French railroad SNCF to Nazi concentration camps for SNCF's alleged expropriation of property. The United States filed a statement of interest in the case at the district court level. See *Digest 2015* at 311-15. The statement of interest explained the U.S. policy supporting resolution of Holocaust-related claims through mechanisms established by foreign states, such as France's "Commission for the Compensation of Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force during the Occupation" (known as "CIVS," its French acronym). The district court dismissed the case due to the failure to exhaust administrative remedies in France. See Chapter 8 for discussion of the court's opinion. Excerpts below from the U.S. amicus brief in the Seventh Circuit discuss the applicability of requirements such as exhaustion and the doctrine of *forum non conveniens* in the context of the FSIA. The section from the brief on international comity is discussed in Chapter 5. The brief is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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Plaintiffs also argue that a recent decision of the D.C. Circuit demonstrates that exhaustion is not a condition for the exercise of jurisdiction under the FSIA's expropriation exception. Br. 13-15 (discussing *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 415-16 (D.C. Cir. 2018)). As an initial matter, the district court did not hold that the FSIA requires exhaustion. App'x A5 ("[T]he FSIA does not itself impose a statutory exhaustion requirement."). *Philipp* held that Congress's regulation of suits against foreign states through the enactment of the FSIA abrogated case-by-case application of foreign sovereign-specific, common-law doctrines such as international comity. 894 F.3d at 413-15. On that basis, the D.C. Circuit disagreed with this Court's application of the exhaustion requirement to claims under the expropriation exception. *Id*. at 416 ("[The FSIA] leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity."). A D.C. Circuit decision does not, of course, overrule Seventh Circuit precedent.

In any event, as the United States has explained in an amicus brief supporting rehearing en banc in *Philipp*, the D.C. Circuit's holding is based on a mistaken inference. *See* Brief for the United States as Amicus Curiae in Support of Rehearing En Banc, *Philipp v. Federal Republic of*

Germany, 894 F.3d 406, 2018 WL 4385105 (D.C. Cir. Sept. 14, 2018) (No. 17-7064). Congress comprehensively codified the principles governing foreign state immunity and district court jurisdiction over suits against foreign states. But nothing in the text or history of the FSIA suggests that Congress intended to abrogate prudential doctrines unrelated to jurisdiction. *See, e.g.*, H.R. Rep. No. 94-1487, at 20 (1976) ("Since, however, [the expropriation exception] deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable."). Indeed, *Philipp* itself acknowledges (894 F.3d at 416) the continuing applicability of the *forum non conveniens* doctrine, which requires consideration of factors that overlap extensively with those relevant to international comity.

Philipp relied on the Supreme Court's decision in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), in holding that the FSIA supplants common-law doctrines like international comity. 894 F.3d at 415. But *NML Capital* addressed "[t]he single, narrow question * * * whether the [FSIA] specifies a different rule" for post-judgment execution discovery "when the judgment debtor is a foreign state" than when the debtor is a private party. 134 S. Ct. at 2255. The Court held that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id*. at 2256; *see id*. (holding that the FSIA does not limit post-judgment discovery). *NML Capital* thus focused solely on whether courts may rely on extra-statutory doctrines in resolving disputes concerning a foreign state's immunity. To the limited extent it addressed whether courts may rely on common-law doctrines such as international comity to address matters not bearing on immunity, it recognized that such reliance is appropriate. *See id*. at 2258 n.6 ("[W]e have no reason to doubt that" a court "may appropriately consider comity interests" in determining the appropriate scope of discovery.).

The Supreme Court's recognition that courts may properly apply international-comity principles in suits under the FSIA is not surprising. A district court's decision to abstain from exercising FSIA jurisdiction on adjudicatory comity grounds is akin to other common-law abstention principles applied by federal courts under other jurisdictional statutes. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (recognizing abstention doctrines under which U.S. courts decline to exercise jurisdiction in deference to U.S. State proceedings). Like international comity, domestic abstention doctrines are rooted in "deference to the paramount interests of another sovereign." *Id*. And like the FSIA, other statutes granting jurisdiction are enacted against "the common-law background" in which courts exercised equitable discretion to decline to adjudicate certain classes of cases. *Id*. at 717. There is no reason to think that, in enacting the FSIA, Congress intended to divest the courts of their historic power to dismiss suits on international comity grounds. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (stating that, in the absence of an evident "statutory purpose to the contrary," Congress legislates with an expectation that courts will apply well-established common-law principles).

II. Dismissal Also Is Appropriate Under the *Forum Non Conveniens* Doctrine

In the alternative, this Court may affirm the district court's dismissal of plaintiffs' claims under the *forum non conveniens* doctrine. *See Locke*, 788 F.3d at 666 (court of appeals may affirm on any basis supported by the record). "[T]he focus [of the inquiry] is the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Fischer*, 777 F.3d at 866 (quotation marks omitted). The analysis begins with a presumption in favor of the plaintiffs' choice of forum. *Id*. at 871. That presumption is rebuttable if the alternative forum is adequate (*id*. at 867), and if private and public interests support resolution of the claims in the alternative forum (*id*. at 867). *See id*. at 871. Private interests

include such things as the relative ease of access to sources of proof; the availability of effective administrative procedures for presenting evidence to the adjudicator; and ease of enforcement. *Id*. at 868. Public interests include the interest in having local disputes decided locally; application of local law by a local forum; and avoidance of problems stemming from conflicts of law or application of foreign law. *Id*.

For the reasons provided above, and as the district court determined, CIVS provides an adequate forum for resolution of plaintiffs' claims. The private and public interest factors also support dismissal.

The only consideration that supports adjudication of plaintiffs' suit in the district court is the preference given to a plaintiff's chosen forum. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). "When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable." *Id*. (quotation marks omitted). In this case, two of the three plaintiffs are French citizens who reside in France, lessening the preference given to plaintiffs' chosen forum. *See, e.g., Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005) ("[T]he degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on the degree of convenience reflected by the choice in a given case.") (quotation marks omitted).

Moreover, the private- and public-interest factors rebut any preference that would otherwise be given to plaintiffs' choice of forum. *See Fischer*, 777 F.3d at 871. With respect to the private interests: sources of proof are in France; CIVS provides assistance in searching for relevant evidence; and awards, when granted, are made without the need for compulsory process. Similarly, the relevant public interest factors support resolution by CIVS. France has a significant and longstanding interest in providing compensation, using its own procedures, for the Nazi atrocities committed in its territory. And a judgment in plaintiffs' favor would conflict with the United States' longstanding policy favoring resolution of Holocaust-related claims through remedies, including administrative remedies, provided by the foreign state, rather than litigation in U.S. courts.

III. Plaintiffs Failed to Allege Facts Supporting Jurisdiction Under the Expropriation Exception

Finally, this Court may affirm the judgment because the district court lacked jurisdiction over plaintiffs' suit. As this Court has explained, the FSIA's expropriation exception applies "only where (1) rights in property are in issue; (2) the property was taken; (3) the taking was in violation of international law; and (4) at least one of the two nexus requirements is satisfied." *Fischer*, 777 F.3d at 854. Plaintiffs' complaint fails adequately to plead a factual claim necessary for the second element: that SNCF took the property of plaintiffs' relatives.

* * * *

Scalin, like the other two plaintiffs, alleges that she "believes that her grandparents, like all the victims, had Property with them and that Property was taken." Dkt. No. 1, ¶ 16 (Compl.). Plaintiffs' conclusory statements are the sort of "naked assertion[s] devoid of further factual enhancement," and a "formulaic recitation of [an] element[]" of the expropriation exception, *Iqbal*, 556 U.S. at 678 (first alteration in original), that is insufficient to satisfy the plausibility standard.

Plaintiffs therefore failed to adequately allege facts that would support jurisdiction under the expropriation exception.

* * * *

3. Service of Process

a. Harrison v. Sudan

As discussed in *Digest 2015* at 386-89, *Digest 2016* at 420, and *Digest 2017* at 419-20, the United States consistently argued, in the district court and the U.S. Court of Appeals for the Second Circuit in *Harrison v. Sudan*, that service on a foreign sovereign through delivery of a summons and complaint to the Foreign Minister, via its embassy in the United States, does not fulfill the requirements of the FSIA. In 2017, the Republic of Sudan filed a petition in the U.S. Supreme Court for a writ of certiorari and the Supreme Court invited the views of the United States. *Sudan v. Harrison*, No. 16-1094. On May 22, 2018, the United States filed its brief in the U.S. Supreme Court. The brief urges the Court to first consider the petition for certiorari in *Kumar v. Sudan*, No. 17-1269, or to consolidate the case with *Kumar* for consideration of the merits.[*] The U.S. brief is excerpted below.

_____

* * * *

…[T]he court of appeals erred by holding that the FSIA, 28 U.S.C. 1608(a)(3), permits service on a foreign state "via" or in "care of " the foreign state's diplomatic mission in the United States. Pet. App. 13a. That decision contravenes the most natural reading of the statutory text, treaty obligations, and the FSIA's legislative history, and it threatens harm to the United States' foreign relations and its treatment in courts abroad. The decision below also squarely conflicts with a recent decision of the Fourth Circuit, *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 158 (2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018), and is in significant tension with decisions of the Seventh and D.C. Circuits. As the parties in both this case and *Kumar* now recognize, the question presented warrants this Court's review. See Resps. Supp. Br. 1-2; Resp. to Pet. at 1-2, *Kumar*, *supra* (No. 17-1269).

This case, however, has potential vehicle problems that could complicate the Court's consideration. Because *Kumar* appears to present a more suitable vehicle for addressing the question presented, the petition for a writ of certiorari in this case should be held pending the Court's consideration of the petition in *Kumar*, and then disposed of as appropriate. In the alternative, this Court may wish to grant certiorari in both cases and consolidate them for review.

[*] Editor's Note: The Supreme Court issued its decision on March 26, 2019, holding that the FSIA requires civil service of process by mail to be completed by mail directly to the foreign minister's office in the foreign state.

A. The Foreign Sovereign Immunities Act Does Not Permit A Litigant To Serve A Foreign State By Requesting That Process Directed To The Foreign Minister Be Mailed To The State's Embassy In The United States

The FSIA's text, the United States' treaty obligations, and the statute's legislative history all demonstrate that Section 1608(a)(3) does not permit a litigant to serve a foreign state by requesting that process directed to the state's minister of foreign affairs be mailed to the state's embassy in the United States.

1. a. Section1608(a) provides four exclusive, hierarchical means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a). The provision at issue here, Section 1608(a)(3), permits a litigant to serve a foreign state "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3).

Although Section 1608(a)(3) does not expressly identify the location of service, the most natural understanding of the text is that it requires delivery to the ministry of foreign affairs at the foreign state's seat of government. The statute mandates that service be "addressed and dispatched * * * to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). It is logical to conclude that delivery should be made to that official's principal place of business, *i.e.*, the ministry of foreign affairs in the foreign state's seat of government. See *Kumar*, 880 F.3d at 155 (Section 1608(a)(3) "reinforce[s] that the location must be related to the intended recipient."). A state's foreign minister does not work in the state's embassies throughout the world, and nothing in the statute suggests that Congress expected foreign ministers to be served at locations removed from their principal place of performance of their official duties. See *ibid.*

If Congress had intended to permit service "via" a foreign embassy in the United States, *e.g.*, Pet. App. 101a, it would have provided that service be addressed to the foreign state's ambassador, or to an agent, rather than "addressed and dispatched * * * to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). Indeed, the neighboring provision, Section 1608(b), which governs service on a foreign state agency or instrumentality, expressly provides for service by "delivery * * * to an officer, a managing or general agent, or to any other [authorized] agent." 28 U.S.C. 1608(b)(2). Congress's failure to include similar language in Section 1608(a) underscores that it did not envision that service would be sent to a foreign state's embassy, with embassy personnel effectively functioning as agents for forwarding service to the head of the ministry of foreign affairs. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

b. The court of appeals drew different inferences from the statutory text. It noted that in contrast to Section 1608(a)(3), Section 1608(a)(4) specifies that papers may be mailed "to the Secretary of State *in Washington, District of Columbia*." Pet. App. 99a. As the Fourth Circuit explained, however, reliance on Section 1608(a)(4) is unpersuasive: Unlike Section 1608(a)(3), Section 1608(a)(4) "directs attention to one known location for one country—the United States—and so can be easily identified." *Kumar*, 880 F.3d at 159.

The court of appeals also was of the view that "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C. * * * could reasonably be expected to result in delivery to the intended person." Pet. App. 98a. But Section 1608(a)'s exclusive methods of service require "strict compliance." *Kumar*, 880 F.3d at 154; *Magness* v. *Russian*

Fed'n, 247 F.3d 609, 615 (5th Cir.), cert. denied, 534 U.S. 892 (2001); *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995). But see *Peterson* v. *Islamic Republic Of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service based on substantial compliance with Section 1608(a)). By contrast, where Congress envisioned an actual-notice standard, it said so expressly: Section 1608(b) contains a "catchall * * * expressly allowing service by any method 'reasonably calculated to give actual notice.' " *Kumar*, 880 F.3d at 154 (quoting 28 U.S.C. 1608(b)(3)); see also, *e.g.*, *Transaero*, 30 F.3d at 154.

2. The United States' treaty obligations further demonstrate that Section 1608(a)(3) does not permit a litigant to serve a foreign state by having process mailed to the foreign state's embassy in the United States.

a. The [Vienna Convention on Diplomatic Relations or] VCDR, which the United States signed in 1961 and ratified in 1972, and which "codified longstanding principles of customary international law with respect to diplomatic relations," *767 Third Ave. Assocs.* v. *Permanent Mission of The Republic of Zaire to the United Nations*, 988 F.2d 295, 300 (2d Cir.), cert. denied, 510 U.S. 819 (1993), establishes certain obligations of the United States with respect to foreign diplomats and diplomatic premises in this country. See *Boos* v. *Barry*, 485 U.S. 312, 322 (1988). Article 22, Section 1 of the VCDR provides that "[t]he premises of " a foreign state's "mission shall be inviolable," and "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR, art. 22, sec. 1, 23 U.S.T. 3237, 500 U.N.T.S. 106. Mission inviolability means, among other things, that "the receiving State * * * is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises." Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016) (Denza).

Section 1608(a)(3) should be interpreted in a manner that is consistent with the United States' treaty obligations. See, *e.g.*, *Cook* v. *United States*, 288 U.S. 102, 120 (1933); 1 Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict * * * with an international agreement of the United States."). Construing Section 1608(a)(3) to require that process be mailed to the ministry of foreign affairs in the foreign state ensures that the inviolability of foreign embassies within the United States is maintained.

By contrast, the court of appeals' determination that a litigant may serve a foreign state by directing process to be mailed to the foreign state's embassy in the United States is inconsistent with the inviolability of mission premises recognized by the VCDR. The Executive Branch has long interpreted Article 22 and the customary international law it codifies to preclude a litigant from serving a foreign state with process by mail or personal delivery to the state's embassy. See *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) ("The establishment by one country of a diplomatic mission in the territory of another does not * * * empower that mission to act as agent of the sending state for the purpose of accepting service of process.") (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep't of State, to John W. Douglas, Assistant Att'y Gen., U.S. Dep't of Justice (Aug. 10, 1964)). This interpretation of the VCDR "is entitled to great weight," *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (citation omitted), in light of "the Constitution's grant to the Executive Branch * * * of broad oversight over foreign affairs," *Kumar*, 880 F.3d at 157. See *id.* at 158 (the Executive Branch's "longstanding policy and interpretation" of Article 22 is "authoritative, reasoned, and entitled to great weight").

The Executive Branch's interpretation also reflects the prevailing understanding of Article 22. As a leading treatise explains, it is "generally accepted" that "service by post on mission premises is prohibited." Denza 124. Other treatises are in accord. See James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) (Article 22 "protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). Other countries also share this understanding. See, *e.g.*, Pet. Supp. Br. App. 2a (Note Verbale from the Republic of Austria to the State Department); Kingdom of Saudi Arabia Amicus Br. 12-14. And domestically, the Fourth and Seventh Circuits have recognized that attempting to serve a party in a foreign country "through an embassy [in the United States] is expressly banned * * * by [the VCDR]." *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007), cert. denied, 552 U.S. 1231 (2008); see *Kumar*, 880 F.3d at 157.

The Convention's drafting history is to the same effect. See *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017) (considering treaty drafting history); *Medellin* v. *Texas*, 552 U.S. 491, 507-508 (2008) (same). In a report accompanying a preliminary draft of the VCDR, the United Nations International Law Commission explained:

> [N]o writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

U.N. Int'l L. Comm'n, *Report of the Commission to the General Assembly, Doc. A/3623*, 2 Y.B. Int'l L. Comm'n 131, 137 (1957).

b. In light of this prevailing understanding, this Office is informed that the United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy. When a foreign litigant or court officer purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign ministry in the forum state, explaining that the United States does not consider itself to have been served consistent with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. See 2 U.S. Dep't of State, *Foreign Affairs Manual* § 284.3(c) (2013). The United States has a strong interest in ensuring that its courts afford foreign states the same treatment to which the United States believes it is entitled under customary international law and the VCDR. See, *e.g.*, *Kumar*, 880 F.3d at 158 (recognizing importance of reciprocity interest); *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984) (United States' interest in reciprocal treatment "throw[s] light on congressional intent").

c. Although the court of appeals acknowledged that the Executive Branch's treaty interpretation "is to be afforded 'great weight,' it summarily rejected [the government's] position." *Kumar*, 880 F.3d at 159 n.11 (citation omitted); see Pet. App. 109a. The court acknowledged that "service on an embassy or consular official would be improper" under the VCDR, Pet. App. 106a, but it believed "[t]here is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy," *id.*

at 101a; see *id.* at 14a. But as the Fourth Circuit stated, that is an "artificial" and "non-textual" distinction. *Kumar*, 880 F.3d at 159 n.11; see *id.* at 157 (distinction arises from "meaningless semantic[s]"). In either case, the suit is against the foreign state. See 28 U.S.C. 1603(a); *El-Hadad* v. *United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against the state); *Gray* v. *Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816, 820 (S.D.N.Y.) (holding that permanent mission of foreign country to the United Nations is a "foreign state" under the FSIA), aff 'd, 580 F.3d 1044 (2d Cir. 1978). And in either case, mailing service to the embassy treats it as the state's "de facto agent for service of process," in violation of the VCDR's principle of mission inviolability. *Kumar*, 880 F.3d at 159 n.11.

The court below also suggested that service "via" petitioner's embassy complied with the VCDR because the embassy consented to service by "accept[ing]" the papers. Pet. App. 107a. But the VCDR provides that "agents of [a] receiving State may not enter [a mission], *except with the consent of the head of the mission*." Art. 22, sec. 1, 23 U.S.T. 3237, 500 U.N.T.S. 106 (emphasis added). "Simple acceptance of the certified mailing from the clerk of court [by an embassy employee] does not demonstrate a waiver [of the VCDR]." *Kumar*, 880 F.3d at 157 n.9. And no record evidence suggests that petitioner's Ambassador to the United States—the head of the mission—was aware of, much less consented to receive, respondents' service of process.

3. The FSIA's legislative history confirms that Congress intended the statute to bar service by mail to a foreign state's embassy.

a. An early draft of the FSIA permitted service on a foreign state by "registered or certified mail * * * to the ambassador or chief of mission of the foreign state" in the United States. S. 566, Sec. 1(1) [§ 1608], 93d Cong., 1st Sess. (1973). The State Department recommended removing that method based on its view that it would violate Article 22 of the VCDR. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976) (House Report); *Service of Legal Process by Mail on Foreign Governments in the U.S.*, 71 Dep't St. Bull., No. 1840, at 458, 458-459 (Sept. 30, 1974). A subsequent version of the bill eliminated that method of service. H.R. 11315, Sec. 4(a) [§ 1608], 94th Cong., 1st Sess. (1975).

In addition, the House Report accompanying the bill that became the FSIA explained that some litigants had previously attempted to serve foreign states by "mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state." House Report 26. The Report described this practice as having "questionable validity" and stated that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR]." *Ibid.* Thus, "[s]ervice on an embassy by mail would be precluded under th[e] bill." *Ibid.*; see *Kumar*, 880 F.3d at 156 (relying on this legislative history); *Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (same).

b. The court of appeals disregarded this legislative history because the House Report "fail[ed] to" distinguish "between '[s]ervice on an embassy by mail,' and service on a minister [of] foreign affairs via or care of an embassy." Pet. App. 102a (citation and emphases omitted). But as discussed above, see p. 15, *supra*, that distinction is merely "semantic." *Kumar*, 880 F.3d at 157.

In any event, the court of appeals misread the legislative history. The House Report disapproved of "attempting to commence litigation against a foreign state" by "mailing * * * a copy of the summons and complaint *to* a diplomatic mission of the foreign state." House Report 26 (emphasis added). Congress thus sought to prevent parties from completing service by mailing process papers to an embassy, regardless of whether the papers are directed to the

ambassador—which the court of appeals agreed would violate the statute and the VCDR, see Pet. App. 106a—or to the foreign minister, as occurred here.

B. Certiorari Is Warranted, But *Kumar* Presents A Better Vehicle For The Court's Review

1. As all parties now recognize, the question presented warrants this Court's review.

a. The decision below squarely conflicts with the Fourth Circuit's decision in *Kumar*, *supra*. In both cases, a group of victims of the USS *Cole* bombing allege that petitioner provided material support for the attack. And in both cases, the victims attempted to effect service by requesting that the clerk send documents, directed to the Minister of Foreign Affairs, to the Embassy of the Republic of Sudan in Washington, D.C. The Second Circuit upheld that method of service, while the Fourth Circuit determined that it fails to satisfy 28 U.S.C. 1608(a)(3). See *Kumar*, 880 F.3d at 159 (acknowledging split). Such disparate results on similar facts warrant this Court's review. See Resp. to Pet. at 4, *Kumar*, *supra* (No. 17-1269).

Moreover, the court of appeals' decision is in significant tension with decisions of the Seventh and D.C. Circuits. Although those courts have not directly addressed the method of service respondents attempted here, they have considered closely related questions.

In *Barot* v. *Embassy of The Republic of Zambia*, 785 F.3d 26 (2015), the D.C. Circuit recounted that the plaintiff 's first effort to serve her former employer, the Zambian Embassy, had failed to comply with the FSIA because service was "attempted * * * at the Embassy in Washington, D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, as the Act required." *Id.* at 28. After describing the plaintiff 's further failed attempts at service, the court determined that she should be "afford[ed] * * * the opportunity to effect service pursuant to 28 U.S.C. 1608(a)(3)," which "requires serving a summons, complaint, and notice of suit, * * * that are 'dispatched by the clerk of the court,' and sent to the 'head of the ministry of foreign affairs' in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency." 785 F.3d at 29-30 (citation omitted); see *Gates* v. *Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir.) (litigant complied with Section 1608(a)(3) by addressing service to the Syrian Ministry of Foreign Affairs), cert. denied, 565 U.S. 945 (2011); *Transaero*, 30 F.3d at 154 (Section 1608(a)(3) "mandates service of the Ministry of Foreign Affairs.").

The Seventh Circuit has similarly rejected the idea that service through an embassy comports with the FSIA. In considering attempted service of a motion on a foreign instrumentality, the court explained that "service through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law." *Autotech*, 499 F.3d at 748; see *Alberti*, 705 F.2d at 253 (service on the ambassador is "simply inadequate" under Section 1608(a)(3)).

b. The decision below also threatens harm to the United States' foreign relations. The United States has substantial interests in ensuring that foreign states are served properly before they are required to appear in U.S. courts, and in preserving the inviolability of diplomatic missions under the VCDR. Moreover, the United States routinely objects to attempts by foreign courts and litigants to serve the United States by delivery to U.S. embassies, and thus has a significant reciprocity interest in the treatment of U.S. missions abroad. At the same time, if this Court grants certiorari and holds that respondents' method of service was improper, respondents may be able to correct the deficient service by requesting that the clerk of court send "a copy of the summons and complaint and a notice of suit * * * to the head of the ministry of foreign affairs" of the Republic of Sudan in Khartoum, Sudan. 28 U.S.C. 1608(a)(3); cf. *Kumar*, 880

F.3d at 160 (remanding to the district court "with instructions to allow Kumar to perfect service of process in a manner consistent with this opinion").

2. Although the question presented warrants this Court's review, this case could prove to be a problematic vehicle for resolving it.

Petitioner first challenged respondents' method of service on appeal from the entry of turnover orders filed in the District Court for the Southern District of New York to execute on the default judgment issued by the District Court for the District of Columbia. Petitioner has filed a motion to vacate the underlying default judgment, which remains pending. See 10-cv-1689 D. Ct. Doc. 55 (June 14, 2015); Pet. 11; Pet. App. 96a n.1; Fed. R. Civ. P. 60(b). Petitioner has not asked the district court to hold its proceedings in abeyance pending this Court's review of the petition for a writ of certiorari. Thus, the district court could vacate or amend its judgment at any time, calling into question the continued validity of the turnover orders at issue here and perhaps mooting this case. See *Walker* v. *Turner*, 22 U.S. (9 Wheat.) 541, 549 (1824).

For example, petitioner's motion to vacate argues, *inter alia*, that the award of punitive damages—which comprise 75% of the judgment, see Pet. App. 22a—is impermissibly retroactive. See 10-cv-1689 D. Ct. Doc. 55-1, at 33-34. The bombing of the USS *Cole* occurred in October 2000, but the statutory provision authorizing punitive damages, 28 U.S.C. 1605A, was enacted in 2008, see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338. Petitioner's motion to vacate therefore contends that the award of punitive damages was improper because Congress did not clearly indicate its intent for the punitive-damages provision to apply retroactively. 10-cv-1689 D. Ct. Doc. 55-1, at 31-34; see generally *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994).

In *Owens* v. *Republic of Sudan*, 864 F.3d 751 (2017), petitions for cert. pending, No. 17-1236 and No. 17-1268 (filed Mar. 2, 2018), the D.C. Circuit accepted petitioner's argument (which in that case supported petitioner's challenge to damages arising from another incident, see *id.* at 762). The court held that Section 1605A operates retroactively, but that Congress did not make "a clear statement authorizing punitive damages for past conduct," and it therefore vacated the punitive damages award under the FSIA. *Id.* at 816; see *id.* at 815-817. In light of the change in controlling circuit precedent, the district court may amend the underlying judgment in this case, which could in turn raise questions about the turnover orders' continued validity.

3. The petition for a writ of certiorari in *Kumar* presents the same question as does this case. See Pet. at i, *Kumar* v. *Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018). *Kumar*, which arises on direct review of a motion to vacate a default judgment, appears to present a better vehicle for this Court's consideration. *Id.* at 16-17.

The Republic of Sudan, petitioner here and respondent in *Kumar*, states that it is "indifferent" as to which petition this Court grants, but it suggests that *Kumar* presents its own vehicle problems. Resp. to Pet. at 4, 7, *Kumar*, *supra* (No. 17-1269); see generally *id.* at 4-7. Those issues do not appear to present significant vehicle problems. For example, respondent in *Kumar* notes, *id.* at 5, that petitioners there have been granted time to effect proper service on remand from the Fourth Circuit's decision, and that respondent in *Kumar* will then move to dismiss the complaint on other bases. But no such motion has been filed. And even if litigation of such a motion proceeds in the district court, that would not foreclose this Court from deciding the question presented, which would determine whether the default judgment in that case should have been set aside and thus whether the proceedings on remand should have occurred in the first place.

Because the question presented warrants review, and because *Kumar* provides a better vehicle for this Court's consideration, this Court should grant the petition for a writ of certiorari in *Kumar*, and hold this petition pending its disposition of that case. In the alternative, to ensure that the Court may decide the question presented, the Court may wish to grant certiorari in both cases and consolidate them for review.

* * * *

b. Kumar v. Sudan

As discussed in *Digest 2017* at 420-25, the United States filed an amicus brief in *Kumar v. Sudan*, No. 16-2267, in the U.S. Court of Appeals for the Fourth Circuit, in support of reversal of the district court decision construing the FSIA as authorizing service on a foreign state by mail addressed to the foreign minister at the state's embassy in the United States. On January 19, 2018, the Fourth Circuit issued its decision adopting the Department's view that the FSIA's service provisions do not permit service of process on a foreign state by mail sent to the foreign state's embassy in the United States addressed to the foreign minister. The panel agreed that this method of service is not consistent with the statute's legislative history, the VDCR, or the Department's considered views. The decision rejects the reasoning of the Second Circuit in *Harrison v. Republic of Sudan*, which reached the opposite result (as discussed, *supra*). Excerpts follow from the Fourth Circuit opinion. A petition for certiorari has been filed in *Kumar*, as discussed, *supra*.

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* * * *

For over a decade, family members of United States sailors killed in the bombing of the *U.S.S. Cole* have pursued litigation in federal court against the Republic of Sudan for its alleged support of Al Qaeda, which was responsible for the bombing. This appeal arises from the latest suit wherein the district court denied Sudan's motion to vacate the default judgments entered against it. Because the Appellees' method of serving process did not comport with the statutory requirements of 28 U.S.C. § 1608(a)(3), we hold the district court lacked personal jurisdiction over Sudan. Accordingly, we reverse the district court's order denying Sudan's motion to vacate, vacate the judgments, and remand with instructions.

* * * *

II.

Sudan contends the district court lacked personal jurisdiction over it because Kumar did not properly effectuate service of process as required under the FSIA. Specifically, it contends that mailing service to the Sudanese embassy in Washington, D.C., does not satisfy 28 U.S.C. § 1608(a)(3) and contravenes the 1961 Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes ("Vienna Convention"), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, which provides that a foreign state's diplomatic mission is inviolable. If the district court lacked

personal jurisdiction, then the judgment against Sudan is void. *Koehler v. Dodwell*, 152 F.3d 304, 306–07 (4th Cir. 1998) ("[A]ny judgment entered against a defendant over whom the court does not have personal jurisdiction is void.").

Because the issue before us is one of statutory interpretation, we review de novo the district court's conclusion that Kumar's method of serving process satisfied § 1608(a)(3). *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010).

A.

The Federal Rule of Civil Procedure governing service of process provides that "[a] foreign state …must be served in accordance with 28 U.S.C. § 1608," *i.e.*, the FSIA. Fed. R. Civ. P. 4(j)(1). That statute, in turn, describes four methods of serving process on a foreign state, listed in hierarchical order. § 1608(a).

* * * *

The question before the Court, then, is limited to whether Kumar satisfied § 1608(a)(3), which allows service by mail "requiring a signed receipt[] to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state." Specifically, we must decide whether Kumar satisfied the "addressed and dispatched to" requirement when he submitted the packet to be mailed by the clerk of court to the Sudanese embassy in Washington, D.C. Sudan does not contest compliance with the other components of service under subsection (a)(3) and the record shows Kumar instructed the clerk of court to send the requisite documents via the United States Postal Service's certified mail system, which is "a[] form of mail requiring a signed receipt." Consequently, our review is limited to whether delivering process to a foreign nation's embassy and identifying the head of that nation's ministry of foreign affairs as the recipient satisfies subsection (a)(3)'s requirement that the mailing is "addressed and dispatched to the head of the ministry of foreign affairs of the foreign state."

B.

As always, our duty in a case involving statutory interpretation is "to ascertain and implement the intent of Congress." *Broughman*, 624 F.3d at 674. We begin with the statute's text. *Ross v. R.A. North Dev., Inc.* (*In re Total Realty Mgmt., LLC*), 706 F.3d 245, 254 (4th Cir. 2013). …

We begin with a general observation: based on § 1608(a)'s four precise methods for service of process and how that language contrasts with § 1608(b), subsection (a) requires strict compliance. Subsection (b), which applies in suits against "an agency or instrumentality of a foreign state," contains both specific methods of serving process, § 1608(b)(1)–(2), and a catchall provision expressly allowing service by any method "reasonably calculated to give actual notice," § 1608(b)(3). Although Congress authorized an array of specific and general service options under subsection (b), it did not include a similar catchall provision in subsection (a). This contrast between two subsections of the same statute suggests that Congress intended that the four methods authorized under subsection (a) be the exclusive and explicit means of effectuating service of process against foreign states. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). In other words, had Congress intended for a non-delineated method or actual notice to satisfy the requirements for serving process on a

foreign state, it would have indicated as much by including a similar "reasonably calculated" provision in subsection (a). It did not do so.

Thus, a court cannot excuse noncompliance with the specific requirements of § 1608(a). *See Magness v. Russ. Federation*, 247 F.3d 609, 612–617 (5th Cir. 2001) ("Based on [other decisions], the express language of section 1608(a), and the United States' interest in ensuring that the proper officials of a foreign state are notified when a suit is instituted, we hold that plaintiffs must strictly comply with the statutory service of process provisions when suing a foreign state …under section 1608(a)."); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153–54 (D.C. Cir. 1994) ("We hold that strict adherence to the terms of 1608(a) is required."). In short, "[l]eniency" when applying § 1608(a) "would disorder the statutory scheme" Congress enacted. *Transaero*, 30 F.3d at 154.

We now turn to what, specifically, subsection (a)(3) requires of a plaintiff. First, we note the text does not specify a geographic location for the service of process. Instead, subsection (a)(3) requires that the mailing of process be "addressed and dispatched" to the head of the ministry of foreign affairs. This phrase does not meaningfully limit the geographic location where service is to be made, though it does reinforce that the location must be related to the intended recipient. *See* address, *Oxford English Dictionary* (defining the verb "address" as "[t]o send in a particular direction or towards a particular location" or "[t]o direct (a written communication) to a specific person or destination," "[t]o direct to the attention of, communicate to"); dispatch, *Oxford English Dictionary* (defining the verb "dispatch" as "[t]o send off post-haste or with expedition or promptitude (a messenger, message, etc., having an express destination). The word regularly used for the sending of official messengers, and messages, of couriers, troops, mails, telegrams, parcels, express trains, packet-boats, etc."). As we discuss below, our sister circuits have held that subsection (a)(3) is satisfied where process is mailed to the head of the ministry of foreign affairs at the ministry of foreign affairs' address in the foreign state. *See, e.g.*, *Gates v. Syrian Arab Republic*, 646 F.3d 1, 4–5 (D.C. Cir. 2011); *Peterson*, 627 F.3d at 1129. But Kumar contends that subsection (a)(3)'s silence as to geographic location for the mailing means that the statute does not *require* service to be sent to the foreign state *and* that it allows service delivered to the foreign state's embassy in the United States.

Although Kumar does not advocate such an extreme position, the view that subsection (a)(3) only requires a particular recipient, and not a particular location, would allow the clerk of court to send service to *any* geographic location so long as the head of the ministry of foreign affairs of the defendant foreign state is identified as the intended recipient. That view cannot be consistent with Congress' intent: otherwise, service via General Delivery in Peoria, Illinois could be argued as sufficient.

While it is true that subsection (a)(3) does not specify delivery only at the foreign ministry in the foreign state's capital, Kumar's premise that subsection (a)(3) does not require service to be sent there does not lead to his conclusion that service at the embassy satisfies the obligation under subsection (a)(3). The statute is simply ambiguous as to whether delivery at the foreign state's embassy meets subsection (a)(3) given that while the head of a ministry of foreign affairs generally oversees a foreign state's embassies, the foreign minister is rarely—if ever—present there. Serving the foreign minister at a location removed from where he or she actually works is at least in tension with Congress' objective, even if it is not strictly prohibited by the statutory language.

Because the plain language of subsection (a)(3) does not fully resolve the issue before us, we turn elsewhere for guidance as to Congress' intent. *See Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) ("[I]f the text of a statute is ambiguous, we look to other indicia of congressional intent such as the legislative history to interpret the statute."). Here, the FSIA's legislative history, coupled with the United States' obligations under the Vienna Convention, as well as the "great weight" accorded the State Department's interpretation of such foreign treaty matters, lead us to the conclusion that subsection (a)(3) is not satisfied by delivery of process to a foreign state's embassy.

To understand this interplay, we first observe the obligation under the Vienna Convention that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention, *supra* art. 22, ¶ 1. Elsewhere, the Vienna Convention protects the inviolability of diplomatic agents. *See id.* art. 29.

The House Judiciary Committee Report regarding the enactment of § 1608(a) shows that the statute is meant to account for the United States' rights and obligations under the Vienna Convention. *See* H.R. Rep. No. 94–1487 (1977), *as reprinted in* 1976 U.S.C.C.A.N. 6604. The FSIA—including § 1608 in its present form—was first enacted in 1976, four years after the Vienna Convention entered into force for the United States. *See Tabion v. Mufti*, 73 F.3d 535, 538 n.5 (4th Cir. 1996). Congress knew and considered the Convention's obligations in drafting the FSIA. Specifically, the first draft of the bill allowed for service on a foreign state by "registered or certified mail… to the ambassador or chief of mission of the foreign state." S. 566, 93d Cong. § 1608 (2d Sess. 1973). The Department of State recommended removing that option based on its view that this method of service would violate Article 22 of the Vienna Convention. *See* H.R. Rep. No. 94–1487, at 26, *as reprinted in* 1976 U.S.C.C.A.N., at 6625; 71 Dep't of State Bull. 458, 458–59 (1974).

The House Report also took "[s]pecial note" of a "means… currently in use in attempting to commence litigation against a foreign state." H.R. Rep. No. 94–1487, at 26, *as reprinted in* 1976 U.S.C.C.A.N., at 6625. Describing "the mailing of a copy of the summons and complaint *to* a diplomatic mission of the foreign state" as a means of serving process that was "*of questionable validity*," the House Report states that "[s]ection 1608 *precludes this method* [*of service*] so as to *avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations*[.]" *Id.* (emphases added). The Report then reiterates "[s]ervice *on* an embassy by mail would be precluded under this bill." *Id.* (emphasis added). Thus, the House Report confirms that Congress did not intend § 1608 to allow for the mailing of service "to" or "on" a diplomatic mission as such a method would transgress the treaty obligations of the United States under the Vienna Convention.

* * * *

In foreign affairs matters such as we consider here, we afford the view of the Department of State "substantial deference." *See Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) …. This judicial deference stems in part from the Constitution's grant to the Executive Branch—not the Judicial Branch—of broad oversight over foreign affairs. *Compare* U.S. Const. art. 2, § 2, cl. 2, *and* § 3 (reserving to the Executive Branch the ability to "make Treaties" and "receive Ambassadors and other public Ministers"), *with* U.S. Const. art. 3 (containing no similar oversight of foreign affairs). In this case, the State Department contends that service at an embassy does not satisfy subsection (a)(3) and is inconsistent with the United States' obligations

under the Vienna Convention. *See* Br. for the United States as Amicus Curiae in Supp. of Reversal 11 ("There is an international consensus that a litigant's service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in" Article 22 of the Vienna Convention).

Relatedly, the Court properly considers the diplomatic interests of the United States when construing the Vienna Convention and the FSIA. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that, in construing the FSIA, courts should consider the United States' interest in reciprocal treatment abroad). The United States has represented that it routinely "refuses to recognize the propriety of a private party's service through mail or personal delivery to a United States embassy." Br. for the United States as Amicus Curiae in Supp. of Reversal 13. The following example illustrates the wisdom of deferring to the State Department's interpretation in this area: As noted, citing the Vienna Convention's provisions, the Secretary of State "routinely refuses to recognize" attempts to serve process on the United States by mail sent to U.S. embassies in foreign states. *See* Br. for the United States as Amicus Curiae in Supp. of Reversal 13–14. The legitimacy and sustainability of that position would be compromised were we to countenance Kumar's method of serving process to the Sudanese embassy. Why would a foreign judiciary recognize the United States' interpretation of the Vienna Convention when it comes to rejecting service of process via its own embassies if that same method for purposes of serving process on foreign states were permitted in the United States? Clearly, the United States cannot expect to receive treatment under the Vienna Convention that its own courts do not recognize in similar circumstances involving foreign states. This dilemma is avoided by the construction of subsection (a)(3) urged by the State Department. We find its longstanding policy and interpretation of these provisions authoritative, reasoned, and entitled to great weight.

In view of the ambiguity in § 1608(a)(3) as to the place of service, we conclude the legislative history, the Vienna Convention, and the State Department's considered view to mean that the statute does not authorize delivery of service to a foreign state's embassy even if it correctly identifies the intended recipient as the head of the ministry of foreign affairs. Put another way, process is not properly "addressed and dispatched to" the head of the ministry of foreign affairs as required under § 1608(a)(3) when it is delivered to the foreign state's embassy in Washington, D.C.

* * * *

Our holding conflicts with the view of the Second Circuit, which has held that serving Sudan's head of the ministry of foreign affairs in a package that was delivered by certified mail to the Sudanese embassy in Washington, D.C., satisfies § 1608(a)(3). *Harrison v. Republic of Sudan* (*Harrison I*), 802 F.3d 399, 402–06 (2d Cir. 2015), *reh'g denied*, 838 F.3d 86 (*Harrison II*) (2d Cir. 2016) … For the reasons we've already explained, we find the Second Circuit's reasoning weak and unconvincing.

* * * *

c. Fontaine v. Chile

The United States filed a statement of interest in *Fontaine v. Chile* in federal district court on March 30, 2018. The U.S. statement, filed before the Supreme Court had issued a decision in *Sudan v. Harrison*, asserts that attempted service of process by mail on a foreign mission in the United States is invalid. The plaintiff, Carolina Fontaine, brought the action *pro se* against the Permanent Mission of Chile to the UN and three current or former staff of the Mission, alleging inappropriate conduct toward her as an employee. Excerpts follow from the U.S. statement of interest, which is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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* * * *

A. The FSIA, Which Provides the Exclusive Means for Service on a Foreign State, Does Not Authorize Service by Mail on a Foreign State's Mission to the United Nations

The FSIA, which provides the exclusive means of serving a foreign state, does not permit a foreign state to be served by mail to a state's mission to the United Nations. Consequently, the Mission has not been properly served, and the Court lacks personal jurisdiction over the Mission.

The FSIA provides the exclusive basis for jurisdiction over foreign states in federal and state courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Section 1608 of the FSIA provides the exclusive means for effecting service of process on a foreign state or an agency or instrumentality of a foreign state. *See* 28 U.S.C. § 1608; *Harrison v. Republic of Sudan*, 802 F.3d 399, 403 (2d Cir. 2015) ("*Harrison I*"), *adhered to on denial of reh'g*, 838 F.3d 86 (2d Cir. 2016) ("*Harrison II*"). The FSIA demands "strict adherence to [the FSIA's] terms, not merely substantial compliance" when seeking service on a foreign state. *Finamar Investors, Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 117 (S.D.N.Y. 1995); *see also Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001); *Transaero, Inc. v. La Fuerza Boliviano*, 30 F.3d 148, 154 (D.C. Cir. 1994). Unless a foreign sovereign is properly served under Section 1608, a court lacks personal jurisdiction over it. 28 U.S.C. § 1330(b); *see also Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 55 (2d Cir. 2016).

A foreign state's mission to the United Nations is properly considered to be the foreign state itself, rather than an agency or instrumentality of the state, for purposes of the FSIA. *Lewis & Kennedy, Inc. v. Permanent Mission of Republic of Botswana to U.N.*, No. 05 Civ. 2591 (HB), 2005 WL 1621342, at *3 (S.D.N.Y. July 12, 2005) ("It is well settled that a country's permanent mission to the United Nations is a foreign state for the purposes of § 1608."); *Gray v. Permanent Mission of People's Republic of Congo to U.N.*, 443 F. Supp. 816, 820 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). Thus, the relevant service requirements are provided by section 1608(a), which governs service on a foreign state itself, not 1608(b), which governs service on an agency or instrumentality of a state.

Section 1608(a) prescribes four methods of service in descending order of preference, meaning that a plaintiff must attempt service by the first method or determine that it is unavailable before attempting the next method. *See, e.g.*, *Harrison I*, 802 F.3d at 403; *Magness*, 247 F.3d at 613. In order, these methods are: (1) a preexisting special arrangement for service between the parties; (2) an applicable international convention on service of judicial documents;

(3) service sent to the head of the state's foreign affairs ministry by mail requiring signed receipt, dispatched by the clerk of court, and accompanied by a translation of the summons, the complaint, and a notice of suit into the official language of the defendant; or (4) service provided by the Department of State via diplomatic channels to the foreign state. *See* 28 U.S.C. § 1608(a). Delivery by mail of a summons and complaint to a foreign state's mission to the United Nations is not on this list, and therefore is not an effective means of service. The Court therefore lacks personal jurisdiction over the Mission.

B. The FSIA Requires a Foreign State Be Given 60 Days to Respond to a Complaint

Separately, the summons issued to the Mission failed to comply with FSIA § 1608(d), which requires that a properly served foreign state (or its agency or instrumentality) be given 60 days after service to answer or otherwise respond to the complaint. 28 U.S.C. § 1608(d). Therefore, the 21-day deadline set forth in the summons issued to the Mission is not valid.

C. Because the Mission's Premises Are Inviolable, Process May Not Be Served on Any Defendant by Sending Mail to the Mission

In addition, the attempted service of all four defendants by mail sent to the Mission was improper because it contravenes the inviolability of the premises of a foreign state's mission to the United Nations, as established by several treaties to which the United States is a party. The United States' interpretation of these obligations is owed deference given the Government's strong interests in conducting foreign policy. Three treaties to which the United States is a party provide that diplomats accredited to the United Nations (and, by extension, the permanent missions through which they operate) receive the same protections as diplomats and embassies under the Vienna Convention on Diplomatic Relations ("VCDR"), to which both the United States and Chile are parties. *See Tachiona v. United States*, 386 F.3d 205, 221-24 (2d Cir. 2004); *767 Third Avenue Assocs.*, 988 F.2d 295, 297-99 (2d Cir. 1993). The VCDR in turn obligates "the United States, in its role as a receiving state of foreign missions, … to protect and respect the premises of any foreign mission located within its sovereign territory." *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 159 (D.D.C. 2009), *aff'd*, 618 F.3d 19 (D.C. Cir. 2010). Specifically, it provides that "[t]he premises of the mission shall be inviolable." VCDR, art. 22, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, T.I.A.S. 7502. A foreign state's mission to the United Nations enjoys this protection. *767 Third Avenue Assocs.*, 988 F.2d at 297 ("Applicable treaties …establish that Zaire's Permanent Mission [to the United Nations] is inviolable." (internal citations omitted)).

Although the VCDR does not define the term "inviolable," it is broadly construed internationally. The principle of inviolability is understood to preclude, among other things, service of process on an embassy, diplomatic mission, or consulate general—whether on the inviolable diplomat or mission for itself or as an agent for the foreign government or a private, non-immune party. The drafters' commentary on Article 22 confirms this understanding:

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

Int'l L. Comm'n, Report of the Commission to the General Assembly, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1, https://goo.gl/26RrG3 (Commission Report). U.S. courts have similarly understood the principle. *See, e.g.*, *Tachiona*, 386 F.3d at 222, 224 (holding that the VCDR's "inviolability principle precludes service of process on a diplomat as an agent of a foreign government"); *767 Third Ave. Assocs.*, 988 F.2d at 301 (noting that "process servers may not even serve papers without entering at the door of a mission because that would constitute an infringement of the respect due to the mission"); *Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012) ("Under the Vienna [Convention on Consular Relations], '[s]ervice of process at…consular premises is prohibited.'" (quoting Restatement (Third) of Foreign Relations § 466 n.2 (1987))); *40 D 6262 Realty Corp. v. United Arab Emirates Government*, 447 F. Supp. 710, 711 (S.D.N.Y. 1978) (holding that the plaintiff's attempted service on foreign government by affixing notice to premises in question and mailing notice to permanent mission was improper, and court therefore lacked jurisdiction).

The Second Circuit's recent decisions in *Harrison I* and *Harrison II* do not affect this analysis. In *Harrison*, the plaintiffs sued Sudan and attempted to serve the foreign government by mailing a copy of the summons and complaint to Sudan's Minister of Foreign Affairs at the address of the Sudanese Embassy in Washington, D.C., rather than to the ministry of foreign affairs in Khartoum. *Harrison I*, 802 F.3d at 401. Relying on the FSIA provision that permits foreign states to be served by mailing the summons and complaint "to the head of the ministry of foreign affairs of the foreign state concerned," 28 U.S.C. § 1608(a)(3), the Second Circuit held that service was effected properly. 802 F.3d at 406.

The United States respectfully disagrees with the Second Circuit's holdings in *Harrison*, but in any event, the decisions are factually distinguishable. In contrast to *Harrison*, the summons directed to the foreign state here was not addressed to the minister of foreign affairs of Chile, nor did it purport to be sent via Chile's embassy. And the decision in *Harrison II* denying rehearing expressly stated that its holding did not authorize service on a foreign state via a foreign state's mission to the United Nations, which is what occurred here. *See Harrison II*, 838 F.3d at 94 & n3. Furthermore, the Court emphasized its view that under the particular facts of the case before it, Sudan had consented to the entry into its premises by accepting the mailed service package without promptly rejecting or returning it. *Id*. at 95. Here, in contrast, Chile immediately sent a diplomatic note to the United States Department of State objecting to service at its mission, requesting its assistance and invoking the protections of the VCDR and the United Nations Headquarters Agreement.

Finally, even if there were uncertainty about whether treaties oblige the United States to ensure the inviolability of foreign states' missions to the United Nations, the Court owes deference to the United States' interpretation. *See Medellín v. Texas*, 552 U.S. 491, 513 (2008) (the United States' interpretation of a treaty is "entitled to great weight"). The United States has strong interests in ensuring that foreign sovereigns are not required to respond or appear in U.S. courts unless properly served under the FSIA. The United States has long maintained that it may only be served abroad through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. Thus, the United States consistently rejects attempted service via direct delivery to a U.S. embassy, consulate, or other mission abroad. When a foreign court or litigant purports to serve the United States through an embassy, consulate, or other mission, the United States sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly and thus

will not appear in the case or honor any judgment that may be entered. Moreover, when foreign courts attempt to serve U.S. diplomats or other mission personnel through delivery of papers to our embassies overseas, the United States regularly objects based on the inviolability of our embassies and on the ground that neither our embassies nor the U.S. government can be treated as agents for service of process upon individuals. Any disturbance in American courts of the strict service rules set out in the FSIA and principles of inviolability set forth in the VCDR and the U.N. agreements discussed above would undermine the Government's longstanding interpretations of those legal instruments, and runs the risk of exposing U.S. diplomatic premises to similar treatment. *See Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1995) (FSIA's purposes include "according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts").

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4. Execution of Judgments against Foreign States: *Rubin v. Iran*

As discussed in *Digest 2017* at 429-44, *Digest 2016* at 435-36, and *Digest 2015* at 396-400, the United States has argued that section 1610(g) of the FSIA should not be interpreted as a freestanding exception to the immunity of state property. Section 1610(g) provides that, for individuals holding judgments against a foreign state under section 1605A of the FSIA, "the property of a foreign state," as well as the "property of" its agency or instrumentality, "is subject to attachment in aid of execution, and execution, …as provided in this section." In 2017, the United States filed amicus briefs in *Bank Melli v. Bennett*, No 16-334*,* and *Rubin v. Iran*, No. 16-534, urging the Supreme Court to grant certiorari in *Rubin* on the question of whether 1610(g) creates a freestanding exception to attachment immunity. The Supreme Court granted the petition for certiorari in *Rubin*, limited to that one question.

On February 21, 2018, the Supreme Court issued its opinion, holding that Section 1610(g) does not provide a freestanding basis for parties holding a judgment to attach and execute against the property of a foreign state, but that the immunity of the property must be considered under provisions within §1610 to allow for execution. The Supreme Court opinion in *Rubin*, which is consistent with the U.S. view, is excerpted below (with footnotes omitted). On March 5, 2018, the Supreme Court denied the petition for certiorari in *Bennett*.

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On September 4, 1997, Hamas carried out three suicide bombings on a crowded pedestrian mall in Jerusalem, resulting in the deaths of 5 people and injuring nearly 200 others. Petitioners are United States citizens who were either wounded in the attack or are the close relatives of those who were injured. In an attempt to recover for their harm, petitioners sued Iran in the District Court for the District of Columbia, alleging that Iran was responsible for the bombing because it

provided material support and training to Hamas. At the time of that action, Iran was subject to the jurisdiction of the federal courts pursuant to 28 U. S. C. §1605(a)(7) (1994 ed., Supp. II), which rescinded the immunity of foreign states designated as state sponsors of terrorism with respect to claims arising out of acts of terrorism. Iran did not appear in the action, and the District Court entered a default judgment in favor of petitioners in the amount of $71.5 million.

When Iran did not pay the judgment, petitioners brought this action in the District Court for the Northern District of Illinois to attach and execute against certain Iranian assets located in the United States in satisfaction of their judgment. Those assets—a collection of approximately 30,000 clay tablets and fragments containing ancient writings, known as the Persepolis Collection—are in the possession of the University of Chicago, housed at its Oriental Institute. University archeologists recovered the artifacts during an excavation of the old city of Persepolis in the 1930's. In 1937, Iran loaned the collection to the Oriental Institute for research, translation, and cataloging.

Petitioners maintained in the District Court, *inter alia*, that §1610(g) of the FSIA renders the Persepolis Collection subject to attachment and execution. The District Court concluded otherwise and held that §1610(g) does not deprive the Persepolis Collection of the immunity typically afforded the property of a foreign sovereign. The Court of Appeals for the Seventh Circuit affirmed. 830 F. 3d 470 (2016). As relevant, the Seventh Circuit held that the text of §1610(g) demonstrates that the provision serves to identify the property of a foreign state or its agencies or instrumentalities that are subject to attachment and execution, but it does not in itself divest that property of immunity. The Court granted certiorari to resolve a split among the Courts of Appeals regarding the effect of §1610(g). 582 U. S. ___ (2017). We agree with the conclusion of the Seventh Circuit, and therefore affirm.

* * * *

II

We turn first to the text of the statute. Section 1610(g)(1) provides that certain property will be "subject to attachment in aid of execution, and execution, upon [a §1605A] judgment *as provided in this section*." (Emphasis added.) The most natural reading is that "this section" refers to §1610 as a whole, so that §1610(g)(1) will govern the attachment and execution of property that is exempted from the grant of immunity as provided elsewhere in §1610. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 487 (1999) (noting that the phrase "[e]xcept as provided in this section" in one subsection serves to incorporate "the rest of" the section in which the subsection appears).

Other provisions of §1610 unambiguously revoke the immunity of property of a foreign state, including specifically where a plaintiff holds a judgment under §1605A, provided certain express conditions are satisfied. For example, subsection (a) provides that "property in the United States … used for a commercial activity in the United States … shall not be immune" from attachment and execution in seven enumerated circumstances, including when "the judgment relates to a claim for which the foreign state is not immune under section 1605A … ." §1610(a)(7). Subsections (b), (d), and (e) similarly set out circumstances in which certain property of a foreign state "shall not be immune." And two other provisions within §1610 specifically allow §1605A judgment holders to attach and execute against property of a foreign state, "[n]otwithstanding any other provision of law," including those provisions otherwise granting immunity, but only with respect to assets associated with certain regulated and

prohibited financial transactions. See §1610(f)(1)(A); Terrorism Risk Insurance Act of 2002 (TRIA), §201(a), 116 Stat. 2337, note following 28 U. S. C. §1610.

Section 1610(g) conspicuously lacks the textual markers, "shall not be immune" or "notwithstanding any other provision of law," that would have shown that it serves as an independent avenue for abrogation of immunity. In fact, its use of the phrase "as provided in this section" signals the opposite: A judgment holder seeking to take advantage of §1610(g)(1) must identify a basis under one of §1610's express immunity-abrogating provisions to attach and execute against a relevant property.

Reading §1610(g) in this way still provides relief to judgment holders who previously would not have been able to attach and execute against property of an agency or instrumentality of a foreign state in light of this Court's decision in *Bancec*. Suppose, for instance, that plaintiffs obtain a §1605A judgment against a foreign state and seek to collect against the assets located in the United States of a state-owned telecommunications company. Cf. *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (CA11 1999). Prior to the enactment of §1610(g), the plaintiffs would have had to establish that the *Bancec* factors favor holding the agency or instrumentality liable for the foreign state's misconduct. With §1610(g), however, the plaintiffs could attach and execute against the property of the state-owned entity regardless of the *Bancec* factors, so long as the plaintiffs can establish that the property is otherwise not immune (*e.g.*, pursuant to §1610(a)(7) because it is used in commercial activity in the United States).

Moreover, our reading of §1610(g)(1) is consistent "with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U. S. 303, 314 (2009) (internal quotation marks omitted). Section 1610 expressly references §1605A judgments in its immunity-abrogating provisions, such as 28 U.S.C. §§1610(a)(7), (b)(3), (f)(1), and §201 of the TRIA, showing that those provisions extend to §1605A judgment holders' ability to attach and execute against property. If the Court were to conclude that §1610(g) establishes a basis for the withdrawal of property immunity any time a plaintiff holds a judgment under §1605A, each of those provisions would be rendered superfluous because a judgment holder could always turn to §1610(g), regardless of whether the conditions of any other provision were met.

The Court's interpretation of §1610(g) is also consistent with the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state's commercial acts. See *Verlinden*, 461 U. S., at 487– 488. Indeed, the FSIA expressly provides in its findings and declaration of purpose that

> "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." §1602.

This focus of the FSIA is reflected within §1610, as subsections (a), (b), and (d) all outline exceptions to immunity of property when that property is used for commercial activity. The Court's reading of §1610(g) means that individuals with §1605A judgments against a foreign state must primarily invoke other provisions revoking the grant of immunity for property related to commercial activity, including §1610(a)(7), unless the property is expressly carved out in an

exception that applies "[n]otwithstanding any other provision of law," §1610(f)(1)(A); §201(a) of the TRIA. That result is consistent with the history and structure of the FSIA.

Throughout the FSIA, special avenues of relief to victims of terrorism exist, even absent a nexus to commercial activity. Where the FSIA goes so far as to divest a foreign state or property of immunity in relation to terrorism-related judgments, however, it does so expressly. See §§1605A, 1610(a)(7), (b)(3), (f)(1)(A); §201(a) of the TRIA. Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for §1605A judgment holders absent a clearer indication of Congress' intent.

III A

Petitioners resist that the phrase "as provided in this section" refers to §1610 as a whole and contend that Congress more likely was referencing a specific provision within §1610 or a section in the NDAA. That explanation is unpersuasive.

Petitioners first assert that "this section" might refer to procedures contained in §1610(f). Section 1610(f) permits §1605A judgment holders to attach and execute against property associated with certain regulated and prohibited financial transactions, §1610(f)(1), and it provides that the United States Secretary of State and Secretary of the Treasury will make every effort to assist in "identifying, locating, and executing against the property of [a] foreign state or any agency or instrumentality of such state," §1610(f)(2). Petitioners point out that paragraph (1) of subsection (f) has never come into effect because it was immediately waived by the President after it was enacted, pursuant to §1610(f)(3). So, the argument goes, it would make sense that Congress created §1610(g) as an alternative mechanism to achieve a similar result.

This is a strained and unnatural reading of the phrase "as provided in this section." In enacting §201(a) of the TRIA, which, similar to 28 U. S. C. §1610(f), permits attachment and execution against blocked assets, Congress signaled that it was rescinding immunity by permitting attachment and execution "[n]otwithstanding any other provision of law." See §201(a) of the TRIA. Had Congress likewise intended §1610(g) to have such an effect, it knew how to say so. Cf. *Bank Markazi* v. *Peterson*, 578 U. S. ___, ___, n. 2 (2016) (slip op., at 4, n. 2) (noting that "[s]ection 1610(g) does not take precedence over 'any other provision of law,' as the TRIA does").

Petitioners fare no better in arguing that Congress may have intended "this section" to refer only to the instruction in §1610(f)(2) that the United States Government assist in identifying assets. Section 1610(f)(2) does not provide for attachment or execution at all, so petitioners' argument does not account for the lack of textual indicators that exist in provisions like §§1610(a)(7) and (f)(1) that unambiguously abrogate immunity and permit attachment and execution.

Finally, petitioners assert that "this section" could possibly reflect a drafting error that was intended to actually refer to §1083 of the NDAA, the Public Law in which §1610(g) was enacted. This interpretation would require not only a stark deviation from the plain text of §1610(g), but also a departure from the clear text of the NDAA. Section 1083(b)(3) of the NDAA provides that "Section 1610 of title 28, United States Code, is amended… by adding at the end" the new subsection "(g)." 122 Stat. 341. The language "this section" within (g), then, clearly and expressly incorporates the NDAA's reference to "Section 1610" as a whole. There is no basis to conclude that Congress' failure to change "this section" in §1610(g) was the result of a mere drafting error.

B

In an effort to show that §1610(g) does much more than simply abrogate the *Bancec* factors, petitioners argue that the words "property of a foreign state," which appear in the first substantive clause of §1610(g), would otherwise be rendered superfluous because the property of a foreign state will never be subject to a *Bancec* inquiry. By its plain text, §1610(g)(1) permits enforcement of a §1605A judgment against both the property of a foreign state and the property of the agencies or instrumentalities of that foreign state. Because the *Bancec* factors would never have applied to the property of a foreign state, petitioners contend, those words must signal something else: that §1610(g) provides an independent basis for the withdrawal of immunity.

The words "property of a foreign state" accomplish at least two things, however, that are consistent with the Court's understanding of the effect of §1610(g). First, §1610(g) serves to identify in one place all the categories of property that will be available to §1605A judgment holders for attachment and execution, whether it is "property of the foreign state" or property of its agencies or instrumentalities, and commands that the availability of such property will not be limited by the *Bancec* factors. So long as the property is deprived of its immunity "as provided in [§1610]," all of the types of property identified in §1610(g) will be available to §1605A judgment holders.

Second, in the context of the entire phrase, "the property of a foreign state against which a judgment is entered under section 1605A," the words "foreign state" identify the type of judgment that will invoke application of §1610(g); specifically, a judgment held against a foreign state and entered under §1605A. Without this opening phrase, §1610(g) would abrogate the *Bancec* presumption of separateness in all cases, not just those involving terrorism judgments under §1605A. The words, "property of a foreign state," thus, are not rendered superfluous under the Court's reading because they do not merely identify a category of property that is subject to §1610(g) but also help inform when §1610(g) will apply in the first place. Indeed, §1610(g) would make no sense if those words were removed.

* * * *

B. HEAD OF STATE AND OTHER FOREIGN OFFICIAL IMMUNITY

President of the Democratic Republic of the Congo

On December 3, 2018, the United States filed a suggestion of immunity on behalf of the then-president of the Democratic Republic of the Congo, Joseph Kabila.[**] The suggestion of immunity is excerpted below, omitting lengthy footnotes. The full text is available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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[**] Editor's note: In January 2019, the court dismissed the claims against Kabila.

The United States respectfully submits this Suggestion of Immunity in response to this Court's request for its views, see Dkt. 141, and to inform the Court that President Joseph Kabila, the sitting head of state of the Democratic Republic of the Congo, is immune from this suit. In support of its Suggestion of Immunity, the United States sets forth as follows:

1. The United States has an interest in this action because President Kabila is the sitting head of a foreign state, thus raising the question of President Kabila's immunity from the Court's jurisdiction while in office. 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 authority to determine the immunity from suit of sitting heads of state and 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 President Kabila's immunity from this suit. 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 to suit once the Executive Branch has determined that he or she is immune.

2. The Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the Democratic Republic of the Congo has formally requested the Government of the United States to determine that President Kabila is 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 President Kabila as a sitting head of state from the jurisdiction of the United States District Court in this suit." Letter from Jennifer G. Newstead to Joseph H. Hunt (copy attached as Exhibit A).

3. For many years, the immunity of both foreign states and foreign officials 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 Foreign Sovereign Immunities Act, 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.").

4. As the Supreme Court has 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 & n.6 (noting the Executive Branch's role in determining head of state immunity).

5. 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).

6. 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 pre-FSIA 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).

7. 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—even for acts committed prior to assuming office—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."); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. …[F]lexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision."); *Howland v. Resteiner*, No. 07-CV-2332, ECF No. 27, at 5 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. 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.

8. 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. After a head of state or head of government leaves office, however, that individual generally retains residual immunity only for acts taken in an official capacity while in that position. See 1 Oppenheim's International Law 1043–44 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). In this case, because the Executive Branch has determined that President Kabila, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, President Kabila is entitled to immunity from the jurisdiction of this Court over this suit.

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C. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Determination under the Foreign Missions Act

a. Closure of Seattle Consulate of the Russian Federation

By Foreign Missions Act determination dated April 19, 2018, the State Department restricted entry or access to 3726 East Madison Street, Seattle, Washington, effective April 24, 2018. The determination was made pursuant to section 204(b) of the Foreign Missions Act (22 U.S.C. § 4304(b)). 83 Fed. Reg. 19,393 (May 2, 2018). The location had served as a consulate for the Government of the Russian Federation. As discussed in Chapter 9, the closure of the Seattle consulate was one of several U.S. measures taken to hold Russia accountable for destabilizing actions it has taken in other countries, including the use of a nerve agent on a British citizen and his daughter.

As discussed in *Digest 2016* at 462-63, and *Digest 2017* at 456-59, the State Department previously restricted entry or access to other Russian facilities in the United States in response to Russia's interference in the 2016 U.S. election and a pattern of harassment of U.S. diplomats overseas and to achieve parity in the number of consulates.

b. Closure of PLO office

See Chapter 17 for discussion of the U.S. determination under, among other authorities, the Foreign Missions Act, that the Office of the General Delegation of the Palestine Liberation Organization located in Washington, D.C., must cease all public operations.

2. Venezuela

On May 23, 2018, the Department of State declared the Chargé d'Affaires of the Venezuelan embassy and the Deputy Consul General of the Venezuelan consulate in Houston *personae non grata*. See Department press statement, available at https://www.state.gov/responding-to-unjustified-diplomatic-actions-in-venezuela/. The action was taken pursuant to Article 9 of the Vienna Convention on Diplomatic Relations and Article 23 of the Vienna Convention on Consular Relations. The two officials were directed to leave the United States within 48 hours. The press statement provides the reason for the action:

> This action is to reciprocate the Maduro regime's decision to declare the Chargé d'Affaires and Deputy Chief of Mission of the U.S. Embassy in Caracas *personae non grata*. The accusations behind the Maduro regime's decision are unjustified; our Embassy officers have carried out their official duties responsibly and consistent with diplomatic practice and applicable provisions of the Vienna Convention on Diplomatic Relations. We reject any suggestion to the contrary.

3. Enhanced Consular Immunities

As discussed in *Digest 2016* at 463, Section 501 of the Department of State Authorities Act, Fiscal Year 2017, P.L. 114-323, codified at 22 U.S.C. §254c, amended the Diplomatic Relations Act (22 U.S.C. §254c) to include permanent authority for the Secretary of State to extend enhanced privileges and immunities to consular posts and their personnel. See also *Digest 2015* at 436-37.

The "Agreement Between the United States of America and the Portuguese Republic Regarding Consular Privileges and Immunities," signed on December 14, 2017, entered into force on October 4, 2018. Under that agreement the United States and Portugal reciprocally extend enhanced protections for consular posts, consular officers and consular employees and their family members. The agreement entered into force after an exchange of diplomatic notes between the parties, informing each other that they had completed internal procedures for entry into force. The exchange of notes and the full text of the Agreement are available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

4. Protection of Diplomatic and Consular Missions and Representatives

On October 18, 2018, Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations, delivered remarks at a meeting of the Sixth Committee on "Consideration of Effective Measures to Enhance the Protection, Security, and Safety of Diplomatic and Consular Missions and Representatives." Mr. Simcock's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-84-consideration-of-effective-measures-to-enhance-the-protection-security-and-safety-of-diplomatic-and-consular-missions-and-representative/.

* * * *

It is essential for the normal conduct of relations among states that the rules protecting the sanctity of ambassadors, other diplomats, and consular officials are respected. These rules enable such officials to carry out their vital functions.

It is also crucial to protect diplomats from harmful acts by non-state actors. In recent years, we have seen increasing attacks on diplomatic and consular officials, and more often, such attacks have involved non-state armed groups and have become more brazen. In October 2017, a fourteen-year-old suicide bomber detonated a vest inside Kabul's International zone on a busy public street, approximately 425 meters from the U.S. Embassy. Several people were killed, including a contractor working for the U.S. government. ISIS-K claimed responsibility for the attack. In 2016, U.S. embassy and consulate facilities faced attacks, shots, or blast from improvised explosive devices in Yemen, Turkey, Pakistan, Bangladesh, and Haiti, among other places. There have been a number of other attacks on our facilities and personnel around the world. The United States is, of course, not alone in this regard. We must be unequivocal in universally condemning such brutal acts by armed groups.

As the nature and circumstances of attacks on diplomatic and consular personnel have evolved, so too must our preventive and protective measures. Any steps that are necessary and appropriate to protect a mission, and thus that would be required of the receiving state, will depend on the potential threats to a particular mission in that state. The United States seeks to ensure that all U.S. diplomats and consular officials benefit from enhanced security training and good personal security practices to help mitigate the risks our personnel face every day. Moreover, we rely on the collaboration of our partners in the receiving state to facilitate such protection and prevention. Thus, our missions overseas often work with local law enforcement and other authorities to prepare for eventualities, for instance by conducting drills and sharing information when appropriate.

Mr. Chairman, we appreciate the opportunity that this discussion affords to reemphasize the importance of these issues. The international community has a vital stake in the protection of diplomats, because diplomacy is the foundation of international relations. We must stand together, united against those forces in this world that wish harm to our diplomats. This partnership is strengthened by continuing to develop means to prevent violence before it occurs and responding to it as appropriate.

* * * *

D. INTERNATIONAL ORGANIZATIONS

1. International Organizations Immunities Act: *Jam v. IFC*

On July 31, 2018, the United States filed a brief as amicus curiae in the U.S. Supreme Court in a case involving the International Organizations Immunities Act ("IOIA"). *Jam v. Int'l Finance Corp.*, No. 17-1011. Excerpts follow from the U.S. amicus brief.[***]

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The United States' participation in international organizations is a critical component of the Nation's foreign relations and reflects an understanding that robust multilateral engagement is a crucial tool in advancing national interests. The United States participates in or supports nearly 200 international organizations and other multilateral entities, including major international financial institutions such as the International Monetary Fund (IMF) and the World Bank. The United States contributes billions of dollars annually to those organizations and entities. In recognition of the United States' leadership role, nearly 20 international organizations are headquartered in the United States, and many others have offices here. For these reasons, the United States has a substantial interest in the proper interpretation of the provisions of the International Organizations Immunities Act (IOIA or Act), 22 U.S.C. 288 *et seq.*, that define international organizations' amenability to suit in the United States.

STATEMENT

1. a. Congress enacted the IOIA in 1945 to provide certain privileges and immunities to international organizations, their officers, and employees. See Pub. L. No. 79-291, 59 Stat. 669 (22 U.S.C. 288, *et seq.*). The Act defines "international organization" as "a public international organization in which the United States participates" pursuant to a treaty or an Act of Congress, and which is designated by the President in an Executive Order "as being entitled to enjoy the privileges, exemptions, and immunities" provided by the Act. 22 U.S.C. 288; see, *e.g.*, Exec. Order No. (EO) 9698, 11 Fed. Reg. 1809 (1946) (designating, among others, the United Nations and the Pan American Union). The Act then grants such international organizations the capacity to contract, to acquire and dispose of real and personal property, and to sue "to the extent consistent with the instrument creating them," 22 U.S.C. 288a(a), as well as a series of privileges, exemptions, and immunities. See 22 U.S.C. 288a-288e.

Some of these privileges, exemptions, and immunities are provided by reference to comparable privileges, exemptions, and immunities enjoyed by foreign states. Of greatest relevance here, the Act provides:

[***] Editor's note: On February 27, 2019, the Supreme Court issued its discussion, holding that the IOIA grants international organizations the same immunity from suit as foreign governments receive under the FSIA.

> International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

22 U.S.C. 288a(b). With respect to customs duties and taxes imposed on imported items, the registration of foreign agents, and the treatment of official communications, the IOIA likewise grants international organizations the "privileges, exemptions, and immunities * * * accorded under similar circumstances to foreign governments." 22 U.S.C. 288a(d). And the IOIA similarly affords the representatives of foreign governments to international organizations, the officers and employees of such organizations, and immediate family residing with such individuals "the same privileges, exemptions, and immunities" under immigration law "as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families." 22 U.S.C. 288d(a).

Other privileges, exemptions, and immunities are provided without reference to those enjoyed by foreign governments. The property and assets of international organizations, for example, are "immune from search, unless such immunity [is] expressly waived, and from confiscation." 22 U.S.C. 288a(c). Similarly, international organizations are "exempt" from all federal property taxes. 22 U.S.C. 288c. Representatives of foreign governments to international organizations, as well as officers and employees of such organizations, are "immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions," absent waiver by the foreign government or the international organization. 22 U.S.C. 288d(b). And the "baggage and effects" of those persons and their families are admitted into the United States "free of customs duties" or importation taxes. 22 U.S.C. 288b.

Finally, the IOIA authorizes the President to "withhold or withdraw," or to "condition or limit," any of the privileges, exemptions, and immunities provided by the Act "in the light of the functions performed by any [designated] international organization." 22 U.S.C. 288. It further authorizes the President to revoke an entity's designation as an international organization if the President determines that the organization or its personnel have "abuse[d] * * * the privileges, exemptions, and immunities provided [by the Act] or for any other reason." *Ibid.*

b. When Congress enacted the IOIA in 1945, the immunity of foreign states was determined by a "two-step procedure." *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010). First, a foreign state "could request a 'suggestion of immunity' from the State Department." *Ibid.* (citation omitted). "If the request was granted, the district court surrendered its jurisdiction." *Ibid*. Second, if the State Department did not inform the court of its views concerning the foreign state's immunity, the court "had authority to decide for itself whether all the requisites for such immunity existed," *i.e.*, "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id*. at 311-312 (citations omitted).

* * * *

c. Congress subsequently enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, codifying, "as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488. The FSIA now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a U.S. court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, foreign states

and their agencies and instrumentalities are immune unless a claim falls within one of the statute's specified exceptions. 28 U.S.C. 1604. The exceptions permit, *inter alia*, certain actions against a foreign state that arise out of its commercial activities, 28 U.S.C. 1605(a)(2), and certain torts committed in the United States, 28 U.S.C. 1605(a)(5).

2. a. Respondent International Finance Corporation (IFC) is an international organization established by an international agreement to which the United States is a party. See Articles of Agreement of the International Finance Corporation, *entered into force* July 20, 1956, 7 U.S.T. 2197, T.I.A.S. No. 3620 (Articles of Agreement). The IFC's purpose is "to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas," by among other things, making investments in cases "where sufficient private capital is not available on reasonable terms." *Id*. art. I, I(i). The Articles of Agreement provide that "[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office" or other specified connection. *Id*. art. VI, § 3. Actions "brought by members" of the IFC "or persons acting for or deriving claims from members" are prohibited. *Ibid*. The Articles of Agreement further provide for the immunity of IFC property from "seizure, attachment or execution before the delivery of final judgment against Corporation." *Ibid*.

Shortly after the United States signed the Articles of Agreement, Congress enacted the International Finance Corporation Act, authorizing the President "to accept membership for the United States" in the IFC. Pub. L. No. 84-350, § 2, 69 Stat. 669 (1955) (22 U.S.C. 282). The statute also provides for original jurisdiction in United States district courts over any suit brought against the IFC "in accordance with the Articles of Agreement." *Id*. § 8 (22 U.S.C. 282f). And it provides "full force and effect in the United States" to, among other provisions, article VI, § 3 of the Articles of Agreement, relating to the IFC's amenability to suit. *Id*. § 9 (22 U.S.C. 282g). The President subsequently designated the IFC as an international organization "entitled to enjoy the privileges, exemptions, and immunities conferred by" the IOIA. EO 10,680, 21 Fed. Reg. 7647 (1956).

b. Petitioners are residents of India who live near the Tata Mundra Power Plant in Gujarat. Pet. App. 2a. The IFC provided a loan of $450 million to the owner of the plant for its construction and operation. *Id.* at 3a. In accordance with IFC policy, the loan agreement contained provisions designed to protect local communities, requiring the loan recipient to manage environmental and social risks posed by the financed project. *Id.* at 3a, 25a. The IFC retained supervisory authority over the plant owner's compliance with the environmental and social risks provisions and could revoke financial support for noncompliance. *Id.* at 3a. According to an audit conducted by the IFC's ombudsman, the owner of the plant did not comply with the environmental and social risks provisions; the IFC, however, did not revoke the plant's financing. *Ibid*.

Petitioners sued the IFC, asserting claims that "are almost entirely based on tort," but raising one claim as alleged third-party beneficiaries of the environmental and social risks provisions of the loan agreement. Pet. App. 3a. The district court dismissed petitioners' suit, concluding that it was barred by the court of appeals' decision in *Atkinson* v. *Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998). Pet. App. 29a- 30a, 37a-38a.

In *Atkinson*, the court of appeals held that, in providing international organizations with the "same immunity * * * as is enjoyed by foreign governments," 22 U.S.C. 288a(b), Congress intended to adopt foreign sovereign immunity law "only as it existed in 1945— when immunity of foreign sovereigns was absolute." 156 F.3d at 1341. The court reasoned that the statutory text

lacked "a clear instruction as to whether Congress meant to incorporate into the IOIA subsequent changes to the law of immunity of foreign sovereigns." *Ibid*. But it believed that by authorizing the President to modify a designated organization's immunities for abuse or other reasons under 22 U.S.C. 288, Congress "delegate[d] to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F.3d at 1341. The court also found telling a statement in the Senate Report explaining that the President could restrict an international organization's immunity if it engaged in "activities of a commercial nature." *Ibid*. (quoting S. Rep. No. 861, 79th Cong., 1st Sess., 2 (1945) (Senate Report)).

Noting that it was bound by *Atkinson*'s interpretation, the court of appeals in this case affirmed the district court's dismissal of petitioners' suit. Pet. App. 4a- 7a.2 Judge Pillard concurred for the same reason, but wrote separately to express the view that *Atkinson* was wrongly decided. *Id.* at 12a-22a. Judge Pillard reasoned that "[w]hen a statute incorporates existing law by reference, the incorporation is generally treated as dynamic, not static," and incorporates changes to the incorporated body of law. *Id.* at 12a-13a. She concluded that *Atkinson* was mistaken in relying on the President's ability under the IOIA to restrict international organizations' immunity, because, in her view, that authority is "organization- and function-specific" and does not authorize the President generally to modify the applicable standard. *Id.* at 13a-14a. And she noted that Congress had considered and rejected a provision that would have expressly granted absolute immunity to international organizations. *Id.* at 14a-15a (discussing H.R. 4489, 79th Cong., 1st Sess. § 2(b)). Judge Pillard further explained that *Atkinson*'s static interpretation conflicted with the "considered view" of the State Department that international organizations are subject to suit for commercial activities by virtue of the FSIA's enactment. *Id.* at 15a. Finally, Judge Pillard stated that it made no sense to permit commercial suits against a foreign state acting alone, but not when states act in concert through an international organization. *Id.* at 16a.

* * * *

ARGUMENT

THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT AFFORDS DESIGNATED INTERNATIONAL ORGANIZATIONS THE SAME JURISDICTIONAL IMMUNITY AS IS CURRENTLY ENJOYED BY FOREIGN STATES

The IOIA provides that international organizations "enjoy the same immunity from suit * * * as is enjoyed by foreign governments." 22 U.S.C. 288a(b). The text, structure, and history of the Act, as well as Executive Branch practice and related congressional enactments, all confirm that the jurisdictional immunity afforded by the Act is the jurisdictional immunity currently enjoyed by foreign states and as it might be modified over time, not as it existed when the Act was enacted in 1945. The court of appeals' contrary determination is incorrect, would present practical difficulties for federal courts, and is not justified by the policy concerns that respondents invoke.

A. The Text, Structure, And History Of The IOIA Support Application Of The Same Immunity Enjoyed By Foreign States To International Organizations

1. In construing Section 288a(b), this Court should "begin, as always, with the text of the statute." *Permanent Mission of India to the U.N.* v. *City of N.Y.*, 551 U.S. 193, 197 (2007). Section 288a(b) provides simply that "[i]nternational organizations * * * shall enjoy the same

immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. 288a(b). On its face, the plain text of this provision strongly suggests that the Act affords international organizations the immunity that is enjoyed by foreign governments today, not the immunity enjoyed by foreign governments in 1945.

a. To begin, Congress's use of the present tense—"as is enjoyed"—supports that interpretation. … Here, because Section 288a employs the present tense to make the comparison to foreign sovereign immunity, the statute is most naturally read to refer to the immunity granted to foreign sovereigns at the time that the statute is applied, not some 70 years in the past. "Congress could have phrased its requirement in language that looked to the past"—here, by referring to a foreign government's immunity on the IOIA's enactment date—"but it did not choose this readily available option." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). "[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of [the Court's] own." *Murphy* v. *Smith*, 138 S. Ct. 784, 788 (2018).

b. Congress's choice of words is particularly instructive here, in light of background principles of statutory interpretation for references of this sort. As one prominent treatise explains, "[w]hen a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption." 2B Norman J. Singer, et al., *Sutherland Statutes & Statutory Construction* § 51:7 (7th ed. rev. 2012) (citation omitted); see, *e.g.*, *El Encanto, Inc.* v. *Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016); *United States* v. *Rodriguez-Rodriguez*, 863 F.2d 830, 831 (11th Cir. 1989); cf. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 7, at 90 (2012) ("A legal text referring to a statutorily defined term is understood to have a silent gloss, 'as the definition may be amended from time to time.'").

This proposition well pre-dates the IOIA's enactment. See 2 J.G. Sutherland, *Sutherland Statutes & Statutory Construction* § 405, at 789 (John Lewis ed. 1904) (citing, *e.g.*, *Culver* v. *People*, 43 N.E. 812, 814 (Ill. 1896)). And it reaffirms the most natural reading of the text. See *Gaston* v. *Lamkin*, 21 S.W. 1100, 1103 (Mo. 1893) (describing the typical statute to which this principle applies as one that refers "generally to the established law, by some such expression as 'the same as is provided for by law' in given cases") (citation omitted).

2. This interpretation of Section 288a(b) is further supported by the structure of the IOIA. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

While Congress defined some privileges and immunities of international organizations and their officers and employees by reference to the immunity of foreign governments, it defined other privileges and immunities under a specific substantive standard. *Compare* 22 U.S.C. 288a(b) and (d), 288d, *with* 22 U.S.C. 288a(c), 288c, and 288d(b); see pp. 2-4, *supra*. This distinction suggests that, if Congress had intended to adopt a particular fixed standard for international organizations' immunity from suit, it would have done so expressly. See *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

That is especially so here, given that in the international community at the time of the IOIA's enactment, there were "two conflicting concepts of sovereign immunity, each widely held and firmly established." *Tate Letter*, 425 U.S. at 711. Although the State Department still subscribed to the absolute theory of immunity in 1945, international consensus had been trending towards the restrictive theory. *Id.* at 712-713. And, when the State Department formally adopted the restrictive theory just seven years later, it explained that it had been considering the change "for some time." *Id.* at 711; pp. 4-6, *supra*; see *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed * * * to ascertain the reason as well as the meaning of particular provisions in it.") (citation omitted).

In fact, in suits filed not directly against foreign sovereigns, but instead in *in rem* suits against foreign state-owned merchant vessels, the State Department by 1945 had declined to recognize immunity. *The Pesaro*, for example, was an admiralty suit brought against an Italian state-owned vessel operated by employees of a government ministry "engaged in commercial trade carrying passengers and goods for hire." 277 F. 473, 473-474 (S.D.N.Y. 1921). The State Department informed the court that "government-owned merchant vessels" or privately owned vessels requisitioned by foreign states and "employed in commerce" are not "entitled to the immunities accorded public vessels of war." *Id*. at 479 n.3; 3 see 2 Green Haywood Hackworth, *Digest of International Law* § 173, at 438-439 (1941) (reproducing letter from Fred K. Nielsen, Solicitor for Department of State, to Julian W. Mack, U.S. District Judge (Aug. 2, 1921)); see also *id.* at 423-465 (discussing State Department practice between 1914 and 1938 concerning immunity of state-owned merchant vessels).

Then, just months before Congress enacted the IOIA, this Court deferred to the State Department's decision to refrain from suggesting immunity for a vessel that was owned by the Republic of Mexico, but in the possession of a private corporation that had contracted with Mexico to use the vessel for commercial purposes, with a share of the profits paid to Mexico. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945). The State Department "certified that it recognize[d]" Mexico's ownership, but "refrained from certifying that it allow[ed] the immunity." *Id.* at 36. Relying heavily on the State Department's statement, the Court held that the suit could proceed. *Id*. at 38; see *ibid*. ("[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.").

When the State Department adopted the restrictive theory in 1952, it noted "the importance played by cases involving public vessels in the field of sovereign immunity." *Tate Letter*, 425 U.S. at 713; see, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (noting that "[a]lthough the narrow holding of *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)] was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns"). In light of the State Department's own practice in such cases leading up to enactment of the IOIA, developments in foreign sovereign immunity law could be expected. Congress therefore would have had reason to directly enact a standard of absolute immunity for international organizations, if that is what it sought to afford regardless of any future developments in the law.

3. Finally, the drafting history of the IOIA also supports an interpretation of Section 288a(b) that ties an international organization's jurisdictional immunity to that accorded foreign states at the time of suit.

a. As originally passed by the House of Representatives, what is now Section 288a(b) expressly defined the immunity standard for international organizations. The bill provided: "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy immunity from suit and every form of judicial process [unless waived]." H.R. 4489, 79th Cong. § 2(b) (passed by the House of Representatives, Nov. 20, 1945); see 91 Cong. Rec. 10,867 (1945). If the House's version had been enacted, there could be no question that such organizations would be entitled to absolute immunity from suit, regardless of any departure from such immunity for foreign governments. But, of course, that did not occur. Instead, the Senate amended Section 288a(b), stripping the grant of absolute immunity and replacing it with a reference to "the same immunity * * * as is enjoyed by foreign governments." H.R. 4489, 79th Cong. § 2(b) (passed by the Senate, Dec. 20, 1945); see 91 Cong. Rec. 12,432 (1945). The House accepted the Senate amendment without objection. 91 Cong. Rec. 12,532 (1945).

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442–443 (1987); accord *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001). There is no sound basis for departing from that principle here.

b. Indeed, other aspects of the legislative history confirm the significance of that change. By contrast to Section 288a(b), the Senate left unchanged other provisions that expressly define certain privileges and immunities. *Compare* H.R. 4489, 79th Cong. §§ 2(c), 3, 6, and 7(b) (passed by the House, Nov. 20 1945), *with* IOIA §§ 2(c), 3, 6, and 7(b), 59 Stat. 669, 671, 672; see Pet. App. 14a-15a (Pillard, J., concurring) (noting comparison). The Senate Report explained that, "[i]n general," the amended bill would provide "privileges and immunities * * * similar to those granted by the United States to foreign governments and their officials," except that, in some circumstances, it would confer "somewhat more limited" protections. Senate Report 3. The examples of the more limited privileges and immunities identified by the Senate Report are those for which Congress expressly identified the applicable standard. *Ibid.*

The Senate Report thus reflects Congress's intent that international organizations' immunity track the immunity of foreign states, except where Congress specified a lower standard. See also 91 Cong. Rec. at 12,531 (explaining that "all of th[e Senate's] amendments limited provisions that were unanimously passed by the House"). Nothing in the legislative history suggests that Congress intended for international organizations to have greater immunity than that enjoyed by foreign states, as would be the case under the court of appeals' view.

4. Despite the text, structure, and history of Section 288a(b), the court of appeals reiterated its conclusion from *Atkinson* v. *Inter-American Development Bank*, 156 F.3d 1335 (1998), that Section 288a grants international organizations "complete immunity" from suit, "unless it is waived or the President intervene[s]." Pet. App. 6a. For that conclusion, the *Atkinson* court relied on two observations, neither of which supports its interpretation of Section 288a(b). See 156 F.3d at 1341.

a. First, the *Atkinson* court reasoned that, in authorizing the President to "modify, condition, limit, and even revoke" what the court believed was "the otherwise absolute immunity of a designated organization," Congress created "an explicit mechanism for monitoring the immunities of designated international organizations." 156 F.3d at 1341 (citing 22 U.S.C. 288). According to the court, Congress's choice "to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances" is incompatible with the view that Congress intended international organizations' immunity to track developments in foreign sovereign immunity. *Ibid*. The court of appeals erred.

The IOIA authorizes the President to restrict the immunities provided to international organizations in two ways: (1) it gives the President authority to "revoke the designation of any international organization" if the President determines that the international organization has "abuse[d]" the privileges, exemptions, or immunities conferred by the IOIA or "for any other reason"; and (2) it permits the President "to withhold or withdraw from any [international] organization or its officers or employees any of the privileges, exemptions, and immunities provided for" by the IOIA, or to "condition or limit" such protections, "in the light of the functions performed by any such international organization." 22 U.S.C. 288.

The statutory authority to revoke a specific organization's status for abuse or other reason does not address the immunity standard applicable to international organizations generally. And the authority to modify the immunities afforded to "any such organizations or its officers or employees," "in light of the functions performed by any such organization," is not inconsistent with the prospect that the immunity afforded international organizations, as a class, may be altered through other means. As Judge Pillard observed (Pet. App. 13a), the President's authority under Section 288 is most naturally read as focusing on the need for discretion to adjust a *specific* organization's immunity, if the extension of the full immunities provided by the statute would be inappropriate in light of the *specific* purposes of the organization. Indeed, that is how the President has exercised his Section 288 authority in the past. But assuming that Section 288 would also permit the President to modify certain immunities afforded to international organizations on a more categorical basis, the provision's focus on the functions performed and immunities enjoyed by specific organizations does not suggest that Section 288 was intended to exclude all other means—including future legislation—of broadly altering the immunity principles applicable to foreign governments and therefore to international organizations generally.

b. Second, the *Atkinson* court found support for its reading of Section 288a(b) in a passage from the Senate Report observing that the authority given to the President in Section 288 would permit "the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature." 156 F.3d at 1341 (quoting Senate Report 2). In the court's view, that reference indicated that the "concerns that motivated the State Department to adopt the restrictive immunity approach" in the *Tate Letter* "(and Congress to codify those principles in the FSIA in 1976) were apparently taken into account by the 1945 Congress." *Ibid*.

The court's reading of the legislative history, however, is mistaken. The Senate Report was responding to a concern that particular organizations might abuse the immunities provided by the bill. As Representative Robertson explained, the amendment ensured that, "if some organization starts functioning here and goes beyond the scope for which it was created, let us say [it] starts into business over here," Section 288 would allow the President to appropriately respond. 91 Cong. Rec. at 12,530; see *ibid*. (noting the "very hypothetical case" that a foreign

representative to the United Nations "would open up a shipping business"); see also 91 Cong. Rec. at 12,432 (explaining that the Senate's amendments, including authorizing the President to withdraw immunities, were for the "purpose of safeguarding against the possibility of abuse of privilege"). The legislative history does not suggest that Section 288a was intended to lock in the scope of immunity that organizations received as a general matter.

Moreover, even if Congress did expect Section 288 to provide the President a mechanism for adjusting the privileges and immunities of all international organizations in the event such organizations began to be formed with the purpose of participating in commercial activities, that would not support the court of appeals' interpretation of Section 288a(b). As discussed above, there is no indication from the text or legislative history that Congress intended Section 288 to provide the *sole* mechanism for addressing such developments. In any event, preventing foreign sovereigns from claiming immunity for commercial activities was not the only motivation for adopting the restrictive theory. See *Tate Letter*, 425 U.S. at 714 (noting that the restrictive theory was most consistent with the United States' "subjecting itself to suit in [U.S.] courts in both contract and tort"); 28 U.S.C. 1605(a)(1)-(6) (providing exceptions to jurisdictional immunity unrelated to commercial activities, *e.g.*, for certain domestic torts).

B. The Conduct Of The Political Branches Following Enactment Of The IOIA Supports Affording International Organizations The Jurisdictional Immunity Currently Enjoyed By Foreign Sovereigns

The conduct of the Executive Branch under the IOIA and subsequent congressional enactments further support the view that the standard set out in Section 288a(b) follows changes in foreign sovereign immunity law. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 385-386 (2000) (while this Court "do[es] not unquestioningly defer to the legal judgments expressed in Executive Branch statements when" interpreting a federal statute, it has "consistently acknowledged that the 'nuances' of 'the foreign policy of the United States …are much more the province of the Executive Branch and Congress than of this Court' ") (citation omitted).

1. The cooperative process followed by the Executive Branch and Congress in recognizing immunity for international organizations demonstrates that the political Branches have long followed this interpretation of the immunities afforded by Section 288a(b). The privileges and immunities in the IOIA are typically provided to international organizations through a three-part process. The Executive Branch enters into an agreement with one or more foreign governments to form an international organization. See, *e.g.*, Articles of Agreement of the International Development Association, *entered into force*, Sept. 24, 1960, 11 U.S.T. 2284, T.I.A.S. No. 4607. Congress (or the Senate through its consent to a treaty) authorizes participation by the United States in the international organization. See, *e.g.*, 22 U.S.C. 284 (authorizing the President "to accept membership" in the International Development Association). And the President issues an Executive Order recognizing the organization as an international organization within the meaning of the IOIA, entitled to the protections that Act affords. See, *e.g.*, EO 11,966, 42 Fed. Reg. 4331 (1977) (designating the International Development Association as a "public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]").

Some agreements creating international organizations, however, require the member states to afford the organization specific immunities beyond those expressly provided by the IOIA. The agreement establishing the World Trade Organization (WTO), for example, requires member states to afford it absolute immunity from suit in their courts, unless waived by the

WTO. See Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), art. VIII(4), *entered into force* Jan. 1, 1995, 1867 U.N.T.S. 154 (requiring members to provide the privileges and immunities provided by the Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), *entered into force* Dec. 2, 1948, 33 U.N.T.S. 261); Specialized Agencies Convention, art. III, § 4 (affording UN specialized agencies "immunity from every form of legal process," unless waived).

For such organizations, mere designation under the IOIA would not fulfill the United States' international commitment precisely because the IOIA does not confer absolute immunity from suit. In those circumstances, where the agreement was not a self-executing treaty, Congress has either (1) authorized the President to implement the immunity provisions in the applicable agreement, see, *e.g.*, 19 U.S.C. 3511(b) (authorizing the President to implement the WTO Agreement's immunity provisions); or (2) provided such immunity by separate legislation, see, *e.g.*, 22 U.S.C. 286h (giving "full force and effect in the United States" to immunity provisions of the Articles of Agreement of the IMF, *entered into force* Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39).

Such legislation ensures that, notwithstanding the United States' adoption of the restrictive theory or any future developments in foreign sovereign immunity, the United States fulfills its obligations to the international organization. But, under the court of appeals' interpretation of Section 288a, such legislation would be redundant.

2. The provision of privileges and immunities for the Organization of American States (OAS) is similarly instructive. The OAS was formed in 1951 in its current structure through a multilateral treaty that provided that the organization would enjoy "such legal capacity, privileges and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." Charter of the Organization of American States, art. 103, *entered into force*, Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361. After the Charter was ratified by the United States, the President designated the OAS as an international organization "entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]." EO 10,533, 19 Fed. Reg. 3289 (1954).

Forty years later, the United States agreed to afford the OAS more extensive immunity. In 1994, the Senate gave its advice and consent to the ratification of the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, *signed at Washington* May 14, 1992, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992); 140 Cong. Rec. 28,361 (1994). In contrast to the OAS Charter, the Headquarters Agreement provides the OAS with absolute immunity from suit. See art. IV, § 1 ("The Organization shall enjoy immunity from suit and every form of judicial process [absent waiver].").

Because the Headquarters Agreement was self-executing, see S. Treaty Doc. No. 40, at III, no Act of Congress was needed to afford the OAS the absolute immunity it now required. But in submitting the Headquarters Agreement to the President, the State Department made clear that by affording the OAS "full immunity from judicial process," the agreement went "beyond the usual United States practice of affording restrictive immunity," "[i]n exchange" for requiring the organization to "'make provision for appropriate modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the Foreign Sovereign Immunities Act.' " *Id.* at VI.

3. Indeed, the State Department has repeatedly expressed the same view about the scope of jurisdictional immunity afforded to international organizations under the IOIA since the United States' adoption of the restrictive theory of foreign sovereign immunity. See Letter from Roberts B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n 2 (June 24, 1980) ("By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character."); Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., OAS 2 (Mar. 24, 1977) (*Vagts Letter*) (stating that the IOIA "links" the jurisdictional immunity of international organizations and that of foreign sovereigns), available at D. Ct. Doc. No. 22-7, at 41-42 (Sept. 18, 2015); Pet. Br. 8- 9 (collecting additional Executive Branch statements).

This longstanding interpretation—evinced by actions of both political Branches—of the privileges and immunities afforded by the IOIA in order to fulfill the United States' international obligations deserves deference.

C. The Court of Appeals' View Of International Organization Immunity Would Present Practical Problems And Is Not Required By Respondent's Policy Concerns

Adopting the court of appeals' view of the jurisdictional immunities afforded international organizations under Section 288a(b) would present practical difficulties and is not justified by the policy concerns asserted by respondent.

1. As an initial matter, if Section 288a(b) were interpreted to incorporate the law of foreign sovereign immunity as it existed in 1945, courts would then need to decide whether Congress intended to incorporate the substantive rules of foreign sovereign immunity applicable in 1945 or the procedural ones. As noted above, in 1945, federal courts followed a "two-step procedure" for determining the immunity of a foreign state from a particular suit. *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010). The foreign state first could ask the State Department for a "suggestion of immunity." *Ibid*. (citation omitted). If the State Department obliged, "the district court surrendered its jurisdiction." *Ibid*. Otherwise, the court would generally "decide for itself whether all the requisites for such immunity existed," applying the "established policy" of the State Department. *Id*. at 311-312 (citation omitted).

The court of appeals and respondent have both assumed that, if Section 288a(b) incorporates foreign sovereign immunity law as it existed in 1945, it incorporates only the *substantive* standards—the then-"established policy," *Samantar*, 560 U.S. at 312, of the State Department—not the two-step procedure. See *Atkinson*, 156 F.3d at 1341; Br. in Opp. 14. But neither the court nor respondent explains why that would be so. See *Vagts Letter* 1 (indicating that the State Department initially filed suggestions of immunity for international organizations following the enactment of the IOIA).

Moreover, even if the static view of Section 288a(b) would incorporate only the substantive standards that prevailed in 1945, there could remain some uncertainty in determining the contours. Section 288a(b) affords "international organizations, their property and their assets * * * the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. 288a. Although the State Department generally afforded "virtually absolute immunity" from suit to foreign governments in 1945, *Verlinden*, 461 U.S. at 486, there was some uncertainty regarding the immunity of state-owned merchant vessels. *Compare The Pesaro*, 277 F. at 479 n.3 (noting the State Department's view that no immunity should be provided "government-owned merchant vessels * * * employed in commerce"), with *Berizzi*

Bros. Co. v. *Steamship Pesaro*, 271 U.S. 562, 570 (1926) (affording immunity to the same ship, despite the State Department's views); cf. *Hoffman*, 324 U.S. at 35 n.1 (criticizing without expressly overruling *Berizzi Bros.*). And the State Department had also expressed the view that "agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoyed no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here." *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929).

Under the court of appeals' view, courts would therefore have to determine any disputed metes and bounds of foreign sovereign immunity, as they existed in the policies of the State Department and in federal courts some 70 years in the past—and perhaps in circumstances that neither ever faced or that did not closely fit the situation of a particular international organization. Cf. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 699 (2004) (refusing to adopt an interpretation of the FSIA that would require courts, in some cases, "to follow the same ambiguous and politically charged standards that the FSIA replaced") (internal quotation marks and citation omitted).

2. In their response to the certiorari petition, respondent raised policy concerns about an interpretation of Section 288a(b) under which an international organization's immunity would conform to that of a foreign state at the time of suit. "The role of this Court," however, "is to apply the statute as it is written," regardless whether it thinks "some other approach might 'accor[d] with good policy.' " *Burrage* v. *United States*, 571 U.S. 204, 218 (2014) (citation omitted; brackets in original). In any event, respondent's concerns are misplaced.

a. Respondent contends that such an interpretation would be "inconsistent with the principles animating international-organization immunity," which, respondent suggests, include that an individual member " 'ought not be able to exercise power, through its national courts, over the execution of the Organization's functions' " that are " 'determined * * * collectively.' " Br. in Opp. 22 (citation omitted). But when member states determine that the functions of an international organization require a particular level of immunity, they are free to specify as much in the agreement establishing the organization—and they have done so. See pp. 25-28, *supra*; see also, *e.g.*, Agreement Establishing the Asian Development Bank, art. 50, *entered into force* Aug. 22, 1996, 17 U.S.T. 1418, T.I.A.S. No. 6103 (providing Asian Development Bank "immunity from every form of legal process, except in cases arising out of or in connexion with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities"); 22 U.S.C. 285g (giving "full force and effect" to Article 50 "in the United States"). The scope of the immunity afforded by the IOIA will have no effect on the United States' fulfillment of these international obligations. See *Bzrak* v. *United Nations*, 597 F.3d 107, 112 (2d Cir.) (declining to determine the scope of immunity afforded the United Nations under the IOIA, because the Convention on Privileges and Immunities of the United Nations, *entered into force* Apr. 29, 1970, 21 U.S.T. 1418, T.I.A.S. No. 6900, directly granted the UN absolute immunity), cert. denied, 562 U.S. 948 (2010).

b. Respondent also expresses concern (Br. in Opp. 22) that, under the restrictive theory of immunity, "nearly all of the[] activities" of some international organizations might be subject to lawsuits in U.S. courts. But the FSIA's commercial-activity exception is not an authorization of just any commercial suit. Rather, it imposes a number of requirements including, for example, that the action be "based upon a commercial activity carried on *in the United States*," 28 U.S.C. 1605(a)(2) (emphasis added). This Court has construed that language to permit suit only when the " 'particular conduct' that constitutes the 'gravamen' of the suit" is commercial activity

occurring in the United States. *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396 (2015) (citation omitted). When the gravamen of a complaint is conduct that was either not of a commercial nature or occurred abroad, the commercial-activity exception does not apply, even if the suit is otherwise related to the defendant's domestic commercial activities. *Id*. at 396-397. Incorporating the FSIA standard of immunity for international organizations is therefore unlikely to open the floodgates of litigation, even against international organizations, like the IFC, that "focus on financial transactions." Br. in Opp. 22.

Moreover, international organizations can further reduce their exposure to litigation in other ways by, for example, clarifying whether commercial agreements are intended to create third-party-beneficiary rights. Cf. Pet. App. 9a & n.4 (noting that petitioners raise a "third party beneficiary claim" based on environmental and social risks provisions in the loan agreement). Other defenses, such as *forum non conveniens*, may also be available. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981).

In any event, there is no indication that, when Congress enacted the IOIA, such policy concerns led it to provide international organizations greater immunity from suit than that conferred on foreign states. To the contrary, the legislative history is replete with statements reflecting a commitment to put international organizations' immunity on par with that afforded to foreign sovereigns. See, *e.g.*, Senate Report 1 ("The basic purpose of this title is to confer upon international organizations * * * privileges and immunities of a governmental nature."); *id.* at 2 ("[I]n cases where th[e] Government associates itself with one or more foreign governments in an international organization, there exists at the present time no law * * * extend[ing] privileges of a governmental character."); *id.* at 4 (Section 288a extends to international organizations the privileges and immunities "accorded foreign governments under similar circumstances"). And Congress enacted text precisely crafted to that purpose. Foreign governments engaged in commercial activities within the United States are subject to suit in U.S. courts. 28 U.S.C. 1605(a)(2). That the IOIA leaves respondent also subject to suit in similar circumstances is consistent with Congress's judgment in Section 288a(b).

* * * *

2. *Laventure v. United Nations*

As discussed in *Digest 2017* at 462-74, in *Laventure v. UN*, No. 14-1611 (E.D.N.Y.), the United States asserted immunity for the UN and UN officials and the district court dismissed. Plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit. The United States filed an amicus brief in support of affirmance on February 5, 2018. The U.S. brief is excerpted below and available in its entirety at https://www.state.gov/digest-of-united-states-practice-in-international-law/. On December 28, the Second Circuit issued its opinion affirming the dismissal, concluding that "the United Nations enjoys absolute immunity from the instant suit and that the UN has not expressly waived its immunity." *Laventure v. UN*, No. 17-2908 (2d. Cir.). The Court also reasoned that, "because we have rejected that argument [of waiver], we conclude that MINUSTAH and the individual defendants are similarly immune from this suit." *Id*.

* * * *

The member states of the UN conferred absolute immunity on the UN in order to allow it to perform its vital missions without facing the threat of lawsuits in multiple countries; contradictory court orders issued by tribunals around the world; judicial intervention in sensitive policy and operational matters; and the diversion of resources (provided by the member states) to the burdens and expenses of litigation.

The United States has regularly asserted the absolute immunity of the UN with respect to lawsuits filed against that organization in domestic courts, and courts, including this Court, have consistently upheld the immunity of the UN and its integral component, defendant-appellee the United Nations Stabilization Mission in Haiti ("MINUSTAH"). The same is true when individual officials and employees of the UN are sued for activities performed in their official capacity, as is the case here for defendants-appellees … Because the UN and its officials are immune from suit, this Court should affirm the district court's judgment dismissing this action for lack of subject matter jurisdiction.

STATEMENT OF THE CASE

A. International Treaty Background

On June 26, 1945, representatives from fifty nations, including the United States, signed the Charter of the United Nations ("UN Charter"). *See* U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153. … The UN Charter further specifies that the UN "shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions" and "such privileges and immunities as are necessary for the fulfillment of its purposes." *Id.* arts. 104, 105.

The day after the UN Charter was signed, the UN's Preparatory Committee, consisting of one representative from each of the UN Charter signatories, began meeting to propose recommendations as to the UN's organization and the type of "legal capacity" and "immunities" that the UN Charter conferred upon the UN. *See* Report of the Preparatory Commission of the United Nations, U.N. Doc. PC/20, at 5, Chapter VII (1945). Based on those recommendations, on February 13, 1946, the UN General Assembly adopted the Convention on the Privileges and Immunities of the United Nations (cited herein as "CPIUN" though it is sometimes referred to as the "General Convention"), Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, *entered into force with respect to the United States* Apr. 29, 1970, 21 U.S.T. 1418.

Article II of the CPIUN addresses the UN's property, funds, and assets. Article II, Section 2 specifically provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." CPIUN, art. II, § 2.

Article VIII of the CPIUN addresses dispute resolution procedures. Article VIII, Section 29 provides: "The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law charter to which the United Nations is a party." CPIUN, art. VIII, § 29.

B. The UN's Role in Haiti

MINUSTAH was a UN peacekeeping mission established by the UN Security Council. The UN Security Council established MINUSTAH on April 30, 2004, with a mission to, *inter alia*, "ensure a secure and stable environment within which the constitutional and political process in Haiti can take place." S.C. Res. 1542, para. 7(I)(a) (Apr. 30, 2004). On July 9, 2004, the UN and the Government of Haiti entered into the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti. A86–98 ("Status of Forces Agreement" or "SOFA"). The Status of Forces Agreement explicitly provides that MINUSTAH "shall enjoy the privileges and immunities …provided for in the [General] Convention." SOFA para. 3 (A87). In the aftermath of the devastating earthquake in Haiti in January 2010, the UN Security Council increased MINUSTAH's authorized force levels to 8,940 troops and 3,711 police to support the country's recovery, reconstruction, and stability. S.C. Res. 1908 (Jan. 19, 2010). MINUSTAH's mandate was terminated by the UN Security Council effective October 15, 2017. S.C. Res. 2350 (Apr. 13, 2017), para. 1.

C. Prior Proceedings

The Laventures (Marie, Maggie, Sane, and Carmen) are Haitian or United States citizens who allege that their parents died in the cholera epidemic that broke out in Haiti in 2010, killing approximately 9,000 Haitians and injuring approximately 700,000 more. The Laventures and 2,641 other named plaintiffs brought this putative class action against the UN, MINUSTAH, and six current or former UN officials.

Plaintiffs allege that the UN, MINUSTAH, and UN officials negligently caused the cholera outbreak in Haiti by failing to screen Nepalese peacekeeping forces who were deployed to Haiti in October 2010, despite a known outbreak of cholera in Nepal, and by failing to use adequate sanitation for the peacekeepers, which allegedly led to the contamination of a major Haitian water supply. A158. Plaintiffs also allege that the UN failed to establish a claims commission to address third-party claims of individuals injured by the cholera epidemic, purportedly in violation of the Status of Forces Agreement and the CPIUN. A162.

The district court initially stayed this case to await this Court's decision in *Georges v. United Nations*, No. 15-455. That case involved a similar suit brought against the UN, Secretary-General Ban, and former Under Secretary-General Mulet by victims of the Haitian cholera outbreak. *See Georges v. United Nations*, 834 F.3d 88 (2d Cir. 2016). There, as here, the plaintiffs claimed that the UN had an obligation under Section 29 of the CPIUN to create a settlement mechanism to address claims by victims of the cholera outbreak, and that the UN's failure to do so subjected it to suit in courts of the United States. This Court rejected that challenge and affirmed the district court's decision to dismiss the case for lack of subject matter jurisdiction. *Id.* at 98 & n.64. Nothing in the CPIUN, this Court explained, suggested that the creation of an alternative dispute resolution mechanism was a "condition precedent" to the UN's immunity. *Id.* at 97.

* * * *

The district court dismissed this suit for lack of subject matter jurisdiction, and held that each of the defendants was entitled to immunity from this suit. As that court explained, the CPIUN by its very terms requires courts "to respect the UN's 'immunity from every form of legal process' unless 'in any particular case' the UN 'expressly' waived its immunity." …

ARGUMENT

I. The District Court Correctly Dismissed This Case …

It is well established that the UN and its subsidiary organ MINUSTAH are absolutely immune from suit in domestic courts. *See, e.g. Georges v. United Nations*, 834 F.3d 88 (2d Cir. 2016); *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010). As the district court here appropriately determined, the Convention on the Privileges and Immunities of the United Nations grants the United Nations "immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." CPIUN art. II, sec. 2. Appellants here have failed to allege any plausible evidence that the UN has expressly waived immunity from suit for itself or its component MINUSTAH in this case.

A. The UN and MINUSTAH Enjoy Absolute Immunity from Suit

Absent an express waiver, the UN is absolutely immune from suit and all legal process.

…

The United States understands the CPIUN to mean what it unambiguously says: the UN enjoys absolute immunity from "every form of legal process," including suit and service of process, unless the UN has "expressly waived" its immunity in a "particular case." *See Georges*, 834 F.3d at 94; *Medellin v. Texas*, 552 U.S. 491, 513 (2008) ("[T]he United States' interpretation of a treaty is entitled to great weight."). This immunity extends to MINUSTAH, which was a UN peacekeeping mission that reported directly to the Secretary-General and the Security Council, and was therefore an integral part of the UN. *See Emmanuel v. United States*, 253 F.3d 755, 756 (1st Cir. 2001). In addition, the Status of Forces Agreement between the UN and Haiti explicitly provides that MINUSTAH "shall enjoy the privileges and immunities … provided for in the [UN General] Convention." SOFA, para. 3 (A87). Accordingly, MINUSTAH is entitled to the same immunities established by the CPIUN. *See Emmanuel*, 253 F.3d at 756.

Appellants do not dispute that only an express waiver by the UN of its immunity can be effective. They have further disclaimed any argument that the UN cannot assert its immunity until it has established a binding claims-resolution process, as such an argument is squarely foreclosed by *Georges*. Instead, Appellants argue that the UN issued a general waiver of immunity for all torts arising out of peacekeeping operations. In doing so, however, the Appellants do not point to any statement by the UN or any of its constituent parts that expressly states that the organization will be subject to the legal processes of its member states, nor any statement that the UN will be liable to plaintiffs bringing claims in domestic courts arising out of peacekeeping operations in Haiti. Appellants rely chiefly on two reports of the Secretary-General from the 1990s that discuss the organization's procedures for settling third-party claims that arise from the UN's peacekeeping operations, and a General Assembly resolution adopting the recommendations made in those reports. These documents do not constitute an express waiver of the UN's immunity from legal processes in courts of the United States.

The first report relied upon by Appellants, Report 51/389, dated September 20, 1996, was submitted "in response to a recommendation of the Advisory Committee on Administrative and Budgetary Questions" that the Secretary-General issue a report analyzing the UN's "current procedures on settling third-party claims" after the issue was studied by the organization's Legal Counsel. U.N. Doc. A/51/389, at 3 (A99– 100). As that report explained, a proper evaluation of the UN's procedures for handling third party claims required a description of "the scope of United Nations liability…in relation to the types of damage most commonly encountered in the practice of United Nations operations." *Id.*

In that vein, Report 51/389 began with a description of when the United Nations would be liable—though non-judicial settlement procedures—for damages occurring from its peacekeeping operations. Consistent with the fact that the report was written for the purpose of analyzing the UN's settlement procedures, the report goes on to describe the organization's current procedures and the problems encountered by it. And the report concludes with several proposals to change those procedures that the General Assembly might wish to consider, including creating a type of statute of limitations on claims, as well as placing a cap on payment awards for economic and non-economic losses.

Though Report 51/389 states that the UN "has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties," U.N. Doc. A/51/389, at 4 (A101), nothing in the report states that the UN intends for such claims to be resolved in domestic courts. On the contrary, the report makes clear that UN-created standing claims commissions must address claims "resulting from damage caused by members of the [UN] force in the performance of their …official duties" because such claims "could not have been submitted to local courts" "for reasons of immunity of the Organization and its Members." *Id.*

The second report, Report 51/903, dated May 21, 1997, was issued as a supplement to Report 51/389 in response to a request by the Advisory Committee on Administrative and Budgetary Questions for the Secretary-General to make specific recommendations for implementing the proposals recommended in Report 389. U.N. Doc. A/51/903 (A113–131). Like Report 51/389, this later report expressly recognized that the UN is immune from suit in domestic courts. *Id.* at 4 (A116). Again, this immunity was cited as the rationale for proposing the establishment of standing claims commissions to adjudicate disputes and serve "as a mechanism for the settlement of disputes of a private law character to which the United Nations peacekeeping operation or any member thereof is a party and over which the local courts *have no jurisdiction because of the immunity* of the Organization or its members." *Id.* (emphasis added).

Accordingly, both reports, and the 1998 General Assembly resolution that adopted them, G.A. Res. 52/247 (July 17, 1998) (A132–35), are consistent with the basic principle that the UN is *not* subject to legal processes in domestic courts, and that it could only be liable through non-judicial modes of dispute resolution. The plain text of these documents simply does not subject the UN to the legal processes of courts in the United States in *any* case, and surely not to cases arising from peacekeeping operations that began decades after the documents were signed.

Appellants' arguments to the contrary focus too narrowly on the fact that these documents use the word "liability." According to Appellants (Br. 20–31), the mere use of this word in the Secretary-General's reports *requires* the UN to be held accountable in any forum for damages caused by its peacekeeping operations. In making such an argument, however, Appellants entirely ignore the context of the word "liability" within those documents. As explained, the stated purpose of these reports was to "evaluate the current procedures for handling third-party claims and propose new or modified procedures that will simplify and streamline *the settlement* of claims." U.N. Doc. A/51/389 (A101) (emphasis added). When the excerpts of the documents on which Appellants rely are read in this context, it is abundantly clear that any use of the word "liability" refers to when the UN will pay for third-party claims through internal settlement procedures or standing claims commissions, but not through domestic courts. Section II of Report 51/389, for example, details the situations in which the UN will *not* be liable to third parties through its internal settlement procedures. As that section explains, "[c]laims resulting from the operational necessity of a peacekeeping operation would thus be

excluded from the scope of competence of the standing claims commission." *Id.* (A103–104). Similarly, Report 51/903, which supplements Report 51/389, sets forth temporal and financial limitations on claims that the UN's procedures may consider. A117–121.

Indeed, the UN has long taken the position that it can be "liable" for tort claims without waiving its immunity from the jurisdiction of local courts. In 1965, for example, the Secretary-General described the UN's "liability" for tort claims brought by Belgian citizens (A468) that were resolved by a payment to Belgium that was to be made "without prejudice to the privileges and immunities enjoyed by the United Nations." A469. Despite Appellants' claims to the contrary, nothing in either Report 51/389, Report 51/903, or General Assembly Resolution 52/247 suggests that the UN would be liable for tort claims under a judicial process. On the contrary, the documents themselves explain that the reason such procedures are necessary is because the UN and its members are immune from suit in local courts.

Appellants also suggest (Br. 38–39) that these documents' reference to the UN's immunity is meaningless, purportedly because they refer to this immunity in the past tense. But the UN has continued to assert its immunity long since these documents were issued, and indeed, the 2004 Status of Forces Agreement with Haiti, which was entered into well after the documents that allegedly waived the UN's immunity, continues to assert the UN's immunity, A96–97, and states that "[t]hird- party claims for property loss or damage and for personal injury …which cannot be settled through the internal procedures of the United Nations," shall be settled by a standing claims commission.

To be sure, the UN has not established a standing claims commission to resolve claims resulting from the UN's peacekeeping operations in Haiti. This Court, however, has expressly concluded that the failure to create an adequate dispute-resolution mechanism does not constitute an express waiver of immunity. *See Brzak*, 597 F.3d at 112 ("Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the CPIUN."). And this Court in *Georges* made clear that the UN's failure to establish a standing claims commission is not a condition precedent to asserting immunity. *Georges*, 834 F.3d at 90, 97. These precedents squarely foreclose Appellants' attempts to claim that the UN's use of the word "liability" in the Secretary-General reports opens the organization up to the judicial processes of "any other court of competent jurisdiction" (Br. 20) simply because they have not established any "binding" settlement mechanisms.

Appellants' arguments also ignore the requirement that waiver of immunity be made in reference to a "particular case." CPIUN art. II, § 2. The documents on which they rely, of course, were made in the 1990s and make no reference to Appellants' case or to the Haitian cholera outbreak generally. Appellants claim that this is irrelevant because the reports by the Secretary-General constitute an *a priori* waiver covering the circumstances of this suit, simply because the documents refer to "liability" for damages resulting from UN peacekeeping operations in a general and aspirational sense. The plain import of this argument is that the UN should therefore have been subject to suit in *every* case since the publications of these reports about standing claims commissions, with no geographic limitation. But Appellants point to no case in which any court has found that the UN has submitted itself to the court's jurisdiction in a tort suit under *any* circumstances, let alone via an advance waiver of immunity. On the contrary, courts have consistently found the UN to have retained its immunity from tort claims, including tort claims arising out of the events in Haiti. *E.g.*, *Georges*, 834 F.3d at 98; *Brzak*, 597 F.3d at 112; *Emmanuel*, 253 F.3d at 757.

In short, there is no plausible reading of these documents that suggests that they were intended to waive the immunity of the UN and its subsidiary organ MINUSTAH and subject them to the conflicting jurisdiction of domestic courts, regardless whether, as Appellants argue, the documents use the word "liability." As the district court correctly recognized, those documents plainly contemplate that any "liability" against the UN would be resolved through non-judicial means. SPA8.

Such a statement cannot constitute an express waiver of immunity from "any legal process" in the courts of the United States. CPIUN art. II, sec. 2.

B. The Individual Defendants Also Enjoy Immunity

The district court also appropriately concluded that the individual defendants in this case are immune from suit. …

Under Section 18(a), both current and former UN officials, regardless of rank, enjoy immunity from suit for all acts performed in their official capacity. *See Van Aggelen v. United Nations*, 311 F. App'x 407, 409 (2d Cir. 2009) (applying such immunity to a UN employee who did not enjoy diplomatic immunity). Likewise, former as well as current UN officials enjoy immunity for their official acts under the International Organizations Immunities Act, 22 U.S.C. § 288d(b). *De Luca v. United Nations*, 841 F. Supp. 531, 534 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir. 1994). Consequently, all of the individual defendants enjoy immunity for their official acts under Section 18(a) of the CPIUN and the IOIA. The UN has not waived this immunity, and indeed, has expressly asserted these officials' immunity in reference to this suit. …

In addition to immunity for their official acts, Under Secretary-General Soares also enjoys diplomatic agent-level immunity. Article V, Section 19 of the CPIUN provides that, in addition to the immunities specified in Section 18, "the Secretary-General and all Assistant Secretaries-General shall be accorded…the privileges and immunities…accorded to diplomatic envoys, in accordance with international law." CPIUN art. V, § 19.

In the United States, the privileges and immunities enjoyed by diplomats are governed by the Vienna Convention on Diplomatic Relations, which entered into force with respect to the United States on December 13, 1972. 23 U.S.T. 3227, TIAS No. 7502, 500 U.N.T.S. 95. Article 31 of the Vienna Convention provides that diplomatic agents "enjoy immunity from [the] civil and administrative jurisdiction" of the receiving State—here, the United States—except with respect to: (a) privately-owned real estate; (b) performance in a private capacity as an executor, administrator, heir, or legatee; and (c) professional or commercial activities other than official functions. None of these exceptions are at issue here. 23 U.S.T. at 3240. Accordingly, Under-Secretary Soares enjoys immunity from this suit. *See Georges*, 834 F.3d at 92, 98 n.64 (affirming dismissal of Secretary-General Ban and Assistant Secretary-General Mulet on the grounds of diplomatic immunity).

Appellants' only argument against this immunity is that it is derivative of the UN's immunity, which, according to Appellants, has been waived. As already explained *supra* Part I, however, the UN has not waived its immunity, or the immunity of its officials, with respect to this case.

* * * *

Cross References

Scalin v. SNCF, **Ch. 5.C.1.b**
Scalin v. SNCF, **Ch. 8.A**
*Libya claims litigation (*Aviation *and* Alimanestianu*),* **Ch. 8.D.2**
Russia, **Ch. 9.A.5**
*Service of process on foreign government (*Micula v. Romania*),* **Ch. 15.C**
Closure of the PLO office in Washington, **Ch. 17.A.1**