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# CHAPTER 5

# Foreign Relations

## A. LITIGATION INVOLVING FOREIGN RELATIONS, NATIONAL SECURITY, AND FOREIGN POLICY ISSUES

### 1. *Animal Science Products v. Hebei Welcome Pharmaceutical Company*

In *Animal Science Products v. Hebei Welcome Pharmaceutical Company*, No. 16-1220, the Supreme Court granted certiorari to consider the proper weight to give to a foreign government's representation of its law. The U.S. Court of Appeals for the Second Circuit had given conclusive weight to the Chinese government's submission that its agency required sellers of vitamin C in the U.S. market to coordinate their export prices and quantities. On March 5, 2018, the United States filed its amicus brief. That brief is excerpted below.

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**A FEDERAL COURT DETERMINING FOREIGN LAW IS NOT BOUND BY THE VIEWS EXPRESSED IN A SUBMISSION FROM THE RELEVANT FOREIGN GOVERNMENT**

Federal Rule of Civil Procedure 44.1 provides that a federal district court faced with a question of foreign law should resolve it as a matter of law and may base its determination on "any relevant material or source." A submission expressing the views of the foreign government is highly relevant, and courts should ordinarily afford such submissions substantial weight. …[T]he ultimate responsibility for determining the governing law lies with the court. The court is neither bound to adopt the characterization urged by the foreign government nor barred from considering materials that support a different interpretation.

**A. Rule 44.1 Grants Federal Courts Broad Latitude To Decide Questions Of Foreign Law Based On Any Relevant Material Or Source**

1. Federal courts encounter questions of foreign law in many different contexts. In some cases, choice-of-law principles point to foreign law as the rule of decision for the parties' dispute. See, *e.g.*, *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 3-4 (1975) (per curiam). In others, foreign law controls or bears upon a specific issue in a case that is otherwise governed by U.S. law:

- As this case illustrates, foreign law may in some circumstances prevent the imposition of liability under the U.S. antitrust laws. See p. 3, *supra*.
- The Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2)(A), impose civil and criminal penalties for the importation of "fish or wildlife taken, possessed, transported, or sold in violation of * * * any foreign law." See, *e.g.*, *United States* v. *Mitchell*, 985 F.2d 1275, 1279-1280 (4th Cir. 1993).
- A mail- or wire-fraud prosecution may be based on a scheme to defraud involving foreign property, which may require "a court to recognize foreign law to determine whether the defendant violated U.S. law." *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005).
- The application of the federal tax laws sometimes turns on "foreign law." *Guardian Indus. Corp.* v. *United States*, 477 F.3d 1368, 1371 (Fed. Cir. 2007) (citation omitted) (credits for payment of foreign taxes).
- A contract governed by foreign law may provide a defense to a claim under federal intellectual-property law. See, *e.g.*, *Bodum USA, Inc.* v. *La Cafetiere, Inc.*, 621 F.3d 624, 625-628 (7th Cir. 2010).
- A foreign law prohibiting disclosure may in some circumstances excuse or affect the remedy for noncompliance with an order requiring the production of documents located abroad. See *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court*, 482 U.S. 522, 544-546 & n.29 (1987) (*Aérospatiale*).
- Federal Rule of Civil Procedure 4(f ), which governs service of process in a foreign country, incorporates "the foreign country's law for service in that country." Fed. R. Civ. P. 4(f )(2)(A); see, *e.g.*, *Prewitt Enters., Inc.* v. *Organization of Petroleum Exporting Countries*, 353 F.3d 916, 923-924 & n.11 (11th Cir. 2003), cert. denied, 543 U.S. 814 (2004).

2. English and American common law treated foreign law "as a question of fact to be pleaded and proved as a fact by the party whose cause of action or defense depend[ed] upon alien law." Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 617 (1967) (Miller). In 1801, this Court endorsed the common-law rule, instructing that "the laws of a foreign nation" must be "proved as facts." *Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1, 37-38 (1801); see, *e.g.*, *Church* v. *Hubbart*, 6 U.S. (2 Cranch) 187, 236-237 (1804) ("Foreign laws are well understood to be facts.").

Treating questions of foreign law as questions of fact "had a number of undesirable practical consequences." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2441, at 324 (3d ed. 2008) (Wright & Miller). Foreign law "had to be raised in the pleadings" and proved "in accordance with the rules of evidence." *Ibid.* Courts were restricted to the evidence submitted by the parties. *Ibid.* And appellate review was deferential and limited to the record made in the trial court. *Ibid.*

After the adoption of the Federal Rules of Civil Procedure in 1938, some federal courts began to invoke state procedures that departed from the common-law approach by allowing courts to take judicial notice of foreign law. Miller 654-656; see Fed. R. Civ. P. 43(a) (1964) (incorporating state evidentiary rules). But those state procedures varied, and some were "time consuming and expensive." Fed. R. Civ. P. 44.1 advisory committee's note (1966) (Adoption) (Advisory Committee's Note).

The process of determining foreign law thus remained "cumbersome." *Pasquantino*, 544 U.S. at 370.

3. In1966, this Court promulgated Rule 44.1 to"furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country." Advisory Committee's Note. The rule accomplishes that goal by providing that, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. The rule also specifies that the court's determination "must be treated as a ruling on a question of law," rather than as a finding of fact. *Ibid.*

Rule 44.1 "improves on [the procedures] available at common law." *Pasquantino*, 544 U.S. at 370. By allowing courts to rely on any relevant material, regardless of its admissibility under the Federal Rules of Evidence, the rule "provides flexible procedures for presenting and utilizing material on issues of foreign law." Advisory Committee's Note. By specifying that the court's determination is a conclusion of law, the rule ensures de novo appellate review. *Ibid.* And by providing that courts are not limited to materials submitted by the parties, the rule recognizes that courts "may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." *Ibid*. The "obvious" purpose of those changes was "to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so." 9A Wright & Miller § 2444, at 338-342.

Courts deciding questions of foreign law under Rule 44.1 rely on a variety of materials, including "[s]tatutes, administrative materials, and judicial decisions"; "secondary sources such as texts and learned journals"; "expert testimony"; and "any other information" that may be probative. 9A Wright & Miller § 2444, at 342-343 (3d ed. 2008 & Supp. 2017). In evaluating those materials, a court "is free * * * to give them whatever probative value [it] thinks they deserve." *Id.* at 343. The guiding principle is that courts "should use the best of the available sources" to reach an accurate interpretation of foreign law. *Bodum USA*, 621 F.3d at 628.

**B. A Foreign Government's Characterization Of Its Own Law Is Ordinarily Entitled To Substantial Weight, But Is Not Binding On Federal Courts**

Federal courts deciding questions of foreign law under Rule 44.1 are sometimes presented with the views of the relevant foreign government. Those views always warrant respectful consideration, and they will ordinarily be entitled to substantial weight. But the appropriate weight in each case will depend on the circumstances, and a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials.

1. Federal courts considering questions of foreign law may be presented with the views of the relevant foreign government through a variety of formal and informal mechanisms. Often, the foreign state (or one of its agencies or instrumentalities) is itself a party to the litigation. See, *e.g.*, *Northrop Grumman Ship Sys., Inc.* v. *Ministry of Def. of the Republic of Venezuela*, 575 F.3d 491, 496-498 & n.8 (5th Cir. 2009); *McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F.3d 1101, 1108-1109 (D.C. Cir. 2001) (*McKesson*), cert. denied, 537 U.S. 941 (2002), vacated

in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1289, 1312 (7th Cir. 1992) (*Amoco Cadiz*).

As this case illustrates, foreign governments (and their agencies and officials) may also express their views through amicus briefs or similar submissions in cases where no foreign governmental entity is a party. Pet. App. 189a-223a; see, *e.g.*, *United States* v. *McNab*, 331 F.3d 1228, 1239-1240 & n.23 (11th Cir. 2003), cert. denied, 540 U.S. 1177 (2004). Alternatively, a party may submit an affidavit or testimony from a foreign official. See, *e.g.*, *United States* v. *Schultz*, 333 F.3d 393, 400-401 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004); *United States* v. *2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1109-1110 (S.D. Fla. 1988). Or a party may rely on an interpretation that the relevant foreign sovereign has issued outside the context of the litigation. See, *e.g.*, *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (letter from a Chilean agency); *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (circular issued by a Mexican agency), cert. denied, 531 U.S. 917 (2000).

2. Neither Rule 44.1 nor any other rule or statute specifically addresses the weight that a federal court determining foreign law should give to the views of the foreign government. As a general matter, courts in deciding such questions should be guided by principles of international comity, "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Aérospatiale*, 482 U.S. at 543 n.27. In other contexts, this Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Id.* at 546. To afford appropriate respect for "[t]he dignity of a foreign state," *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008), a federal court should carefully consider that state's proffered views about the meaning of its own laws.

Granting substantial weight to the views of the relevant foreign government is also eminently sensible. "Among the most logical sources for [a] court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country," who are intimately familiar with the context and nuances of the foreign legal system. *McNab*, 331 F.3d at 1241; cf. *Bodum USA*, 621 F.3d at 638-639 (Wood, J., concurring) (noting the risk that an unaided U.S. reader may "miss nuances in the foreign law"). Ordinarily, a court therefore "reasonably may assume" that interpretations offered by the relevant foreign agencies or officials "are a reliable and accurate source" of the meaning of foreign law. *McNab*, 331 F.3d at 1241.

3. The federal courts have generally adhered to the foregoing principles. Courts have recognized that "a foreign sovereign's views regarding its own laws merit— although they do not command—some degree of deference." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), cert. denied, 539 U.S. 904 (2003); see, *e.g.*, *Access Telecom*, 197 F.3d at 714 ("[C]ourts may defer to foreign government interpretations."); *Amoco Cadiz*, 954 F.2d at 1312 ("A court of the United States owes substantial deference to the construction France places on its domestic law."). In *Abbott*, for example, this Court stated that the views of a Chilean agency were "notable" and "support[ed] the [Court's] conclusion" about the meaning of Chilean law. 560 U.S. at 10.

Courts have not, however, treated a foreign government's characterization of its own law as binding. Instead, they have recognized that the weight given to such a characterization should depend on the circumstances. For example, when "a foreign government changes its original position" or otherwise makes conflicting statements, a court is not bound to accept its most recent statement, or the one offered in litigation. *McNab*, 331 F.3d at 1241; see, *e.g.*, *Export-Import Bank of the Republic of China* v. *Central Bank of Liberia*, No. 15-cv-9565, 2017 WL

1378271, at *4 (S.D.N.Y. Apr. 12, 2017). A court likewise may decline to adopt an interpretation if it is unclear or unsupported, if it fails to address relevant authorities, or if it is implausible in light of other relevant materials. See, *e.g.*, *Themis Capital, LLC* v. *Democratic Republic of Congo*, 626 Fed. Appx. 346, 348 (2d Cir. 2015); *McKesson*, 271 F.3d at 1108-1109.

4. In describing the weight that should be given to a foreign government's views about its own law, parties and lower courts have sometimes borrowed domestic administrative-law standards. See, *e.g.*, Resp. Supp. Br. 2-3; *Amoco Cadiz*, 954 F.2d at 1312. In our view, such analogies are generally unhelpful because those standards are grounded in domestic considerations. For example, courts defer to reasonable agency interpretations under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), in specific circumstances, including when Congress has "delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The standard articulated in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), is more flexible, but it too has domestic-law roots and a specific meaning acquired through repeated domestic applications. See *Mead*, 533 U.S. at 234-235.

Those administrative-law doctrines do not readily translate to the Rule 44.1 context. "[T]he world's many diverse legal and governmental systems" differ greatly from ours and from each other. *McNab*, 331 F.3d at 1237 (citation omitted). The views of foreign governments about those varying systems are presented to the federal courts under a wide range of different circumstances. And the submissions themselves differ greatly in their formality, thoroughness, and authority. See pp. 16-17, *supra*. Deference standards that were crafted for specific areas of federal administrative law and that carry decades of accumulated domestic-law meanings are ill-suited for this very different context.

5. Rather than transplanting a standard from domestic administrative law, a federal court confronted with a disputed question of foreign law should proceed in the same manner as a court facing any other unsettled legal question: By seeking to resolve it "with the aid of such light as is afforded by the materials for decision at hand." *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 227 (1991) (brackets and citation omitted). As this Court emphasized in addressing the analogous problem of determining the law of former Mexican territories before their annexation into the United States, "it has always been held that it is for the court to decide what weight is to be given" to the legal materials available in a particular case. *Fremont* v. *United States*, 58 U.S. (17 How.) 542, 557 (1855).

When those materials include an interpretation by the relevant foreign government, that interpretation should be afforded respectful consideration and will ordinarily be entitled to substantial weight. The precise weight that is appropriate in a particular case will necessarily depend on the circumstances. Those circumstances are too diverse to be reduced to a formula or rule, but the relevant considerations include the interpretation's clarity, thoroughness, and support; its context and purpose; the nature and transparency of the foreign legal system; the role and authority of the entity or official offering the interpretation; its consistency with the foreign government's past positions; and any other corroborating or contradictory materials.

**C. The Court Of Appeals Erred By Treating The Ministry's Amicus Brief As Binding And By Disregarding Other Relevant Materials**

The court of appeals held that, when a foreign government "directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court

is bound to defer." Pet. App. 25a. In applying that standard and concluding that the Ministry's characterization of Chinese law was "reasonable," the court generally limited its inquiry to the four corners of the Ministry's brief and the sources cited therein. *Id.* at 27a-29a. The court also emphasized that a federal court may not "embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations." *Id.* at 26a.

In practical effect, therefore, the court of appeals held that a federal court is bound to adopt a foreign government's submission characterizing its own law—and may not consider other relevant material—so long as that characterization is *facially* reasonable. That rigid rule is inconsistent with the policies underlying Rule 44.1 and with this Court's treatment of analogous submissions from U.S. States. And the court of appeals erred in concluding that its approach was supported by *United States* v. *Pink*, 315 U.S. 203 (1942), or by considerations of comity and reciprocity.

***1. The court of appeals' rule of binding deference is inconsistent with the policies embodied in Rule 44.1***

As the court of appeals observed, Rule 44.1 does not expressly address the weight a federal court should give to a foreign government's submission characterizing its laws. Pet. App. 22a. In at least two respects, however, the court's approach departs from the policies embodied in that rule.

a. Rule 44.1 seeks to align the treatment of foreign and domestic law by providing district courts with broad latitude to "determin[e] foreign law" based on "any relevant material or source." That direction reflects a judgment that "whenever possible issues of foreign law should be resolved on their merits and on the basis of a full presentation and evaluation of the available materials." 9A Wright & Miller § 2444, at 351.

The court of appeals' approach is inconsistent with that sound policy because it precludes a court from considering other relevant material whenever it is presented with a facially reasonable submission from a foreign government. Here, for example, the district court concluded that the Ministry's submissions "fail[ed] to address critical provisions of the [governing legal regime]," Pet. App. 119a, and that they incorrectly implied that a superseded legal regime "was still controlling," *id.* at 132a n.45. The court also highlighted, *inter alia*, China's statement to the WTO that it had "g[i]ve[n] up 'export administration… of vitamin C' " at the end of 2001, *id.* at 74a (citation omitted), and the Chamber's statements that respondents had "voluntarily" agreed on prices and quantities "without any government intervention," *id.* at 173a-174a (citation and emphases omitted).

The court of appeals did not conclude that the district court's reliance on that material was substantively wrong or irrelevant to the proper interpretation of Chinese law. To the contrary, it stated that, "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence * * * would have been entirely appropriate." Pet. App. 30a n.10. But because the Ministry had filed a brief that the court deemed facially reasonable, it concluded that the district court had erred by considering additional material and thereby "embark[ing] on a challenge to [the Ministry's] official representation." *Id.* at 26a. A standard that does not permit a court even to consider such relevant information is inconsistent with federal courts' responsibility to "determin[e] foreign law" based on "any relevant material or source." Fed. R. Civ. P. 44.1.

b. The court of appeals also departed from the policies embodied in Rule 44.1 by placing dispositive weight on the fact that the Ministry had "directly participate[d]" in the litigation by offering what the court called a "sworn evidentiary proffer." Pet. App. 25a; see *id.* at 23a

(distinguishing a case in which the foreign government "did not appear before the court"). That is true for two reasons.

First, the court of appeals' characterization of the Ministry's submission as "a sworn evidentiary proffer," Pet. App. 25a, was inapt. Rule 44.1 abrogated the common-law rule treating questions of foreign law as questions of fact, and it specifies that a district court's determination of an issue of foreign law "must be treated as a ruling on a question of law." Although the Ministry's amicus brief was surely relevant to the district court's determination whether Chinese law required the anticompetitive conduct at issue in this case, that legal brief was neither a "sworn" document nor an "evidentiary proffer." See Pet. Br. 35-36. By the same token, a court that considers but ultimately rejects a foreign government's characterization of its laws does not thereby accuse the foreign government of misrepresenting the pertinent facts. Cf. pp. 26-27, *infra* (explaining that federal courts give significant but not controlling weight to a state attorney general's characterization of state law).

Second, the court of appeals erred by holding that greater deference is required when a foreign government participates directly in litigation. That fact may bear on the weight a foreign government's views should receive. It ensures, for example, that the government has focused on the specific foreign-law issue that is actually before the court. But many other factors also bear on the weight that should be afforded to a foreign government's interpretation, see p. 21, *supra*, and the court of appeals did not explain why it placed dispositive weight on this single consideration. In some circumstances, moreover, a U.S. court might justifiably view a pronouncement prepared for litigation purposes with greater skepticism than it would view a similar pronouncement drafted with no specific controversy in mind. Cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

The court of appeals' rule, moreover, would automatically inure to the benefit of any foreign government that appears in U.S. court as a plaintiff or defendant in a case controlled in whole or in part by its domestic laws—a relatively common occurrence. The court identified no sound reason why a federal court should be bound, in any suit to which a foreign government is a party, by whatever facially reasonable litigating position that party may assert concerning the proper understanding of its own laws. That result would be particularly anomalous because Rule 44.1 allows courts to look beyond the "material presented by the parties" specifically to ensure that courts have the ability to "reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." Advisory Committee Note. That consideration applies with full force when the litigant is a foreign government.

***2. The court of appeals' rule of binding deference is inconsistent with this Court's treatment of analogous submissions from U.S. States***

The court of appeals' rule of binding deference is inconsistent with this Court's approach in the other principal circumstance in which federal courts are presented with the views of other sovereigns on the proper interpretation of their laws. When federal courts receive submissions by U.S. States addressing the proper interpretation of state law, the courts give those submissions significant but not controlling weight. Nothing in the text, history, or purposes of Rule 44.1 suggests that a federal court determining foreign law must give greater weight to the views of a foreign sovereign.

This Court has long held that "[t]he law of any State of the Union * * * is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar* v. *Micou*, 114 U.S. 218, 223 (1885). If the applicable state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983) (per curiam); see *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). Otherwise, a federal court must "consider all of the available legal sources" to predict "how the state's highest court would answer the open questions." 19 Wright & Miller § 4507, at 178-179 (3d ed. 2016); see *Salve Regina Coll.*, 499 U.S. at 227.

In deciding questions of state law, the views of the State as expressed by its attorney general are "entitled to weight." 19 Wright & Miller § 4507, at 157-158; see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 n.30 (1997) (citing with approval an opinion concluding that the "reasoned opinion of [a] State Attorney General should be accorded respectful consideration"). This Court has made clear, however, that those views are not entitled to "controlling weight." *Stenberg* v. *Carhart*, 530 U.S. 914, 940 (2000); see, *e.g.*, *Virginia* v. *American Booksellers Ass'n.*, 484 U.S. 383, 395 (1988). The court of appeals gave no sound reason for requiring that federal courts give greater weight to the views of foreign governments.

***3. This Court's decision in* Pink *does not support the court of appeals' rule of binding deference***

The court of appeals believed that its rigid approach was compelled by this Court's pre-Rule 44.1 decision in *Pink*. Pet. App. 20a, 22a-23a. That is not correct. *Pink* arose out of an action brought by the United States to recover assets of the U.S. branch of a Russian insurance company that had been nationalized in 1918 after the Russian revolution. 315 U.S. at 210. In 1933, the government of the Soviet Union assigned the nationalized assets to the United States. *Id.* at 211. The disposition of the case turned on the extraterritorial effect of the nationalization decree—specifically, whether the decree had reached the assets of the Russian insurance company located in the United States, or instead had been limited to property in Russia. *Id.* at 213-215, 217.

To support its position that the nationalization decree had reached all of the company's assets, the United States obtained an "official declaration by the Commissariat for Justice" of the Russian Socialist Federal Soviet Republic. *Pink*, 315 U.S. at 218. The declaration certified that the decree had reached "the funds and property of former insurance companies * * * irrespective of whether it was situated within the territorial limits of [Russia] or abroad." *Id.* at 220 (citation omitted). This Court held that "the evidence supported [a] finding" that "the Commissariat for Justice ha[d] power to interpret existing Russian law." *Ibid.* "That being true," the Court concluded that the "official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned." *Ibid.*

This Court's treatment of the declaration as conclusive was thus premised on an independent finding about the Commissariat's authority within the Soviet legal system. *Pink*, 315 U.S. at 220. The declaration was also obtained by the United States, through official "diplomatic channels." *Id.* at 218. The Commissariat's declaration was thus in some respects akin to a state supreme court's answer to a question of state law certified by a federal court. Cf. *Arizonans for Official English*, 520 U.S. at 76-77. There was apparently no indication that the declaration was incomplete or inconsistent with the Soviet Union's past statements, and the Court emphasized that the declaration was consistent with expert evidence that "gave great credence to [the] position" that the nationalization decree reached property located abroad. *Pink*, 315 U.S. at 218. The Court's statement that the Commissariat's declaration was "conclusive" under those unusual

circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.

***4. Considerations of reciprocity and comity do not support the court of appeals' rule of binding deference***

The court of appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." Pet. App. 26a. That concern for reciprocity was sound, but it does not support the court's approach. In fact, the opposite is true.

When the United States litigates questions of U.S. law in foreign tribunals, it expects that the views submitted on its behalf will be afforded substantial weight, and that its characterizations of U.S. law will be accepted because they are accurate and well-supported. But the United States historically has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant material. And although other nations' approaches to determining foreign law vary, we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight.

The understanding that a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Those treaties specify that "[t]he information given in reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 147, 154; see Organization of American States, Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 107, 111 (similar). Although the United States is not a party to those treaties, they reflect an international practice that is inconsistent with the court of appeals' approach, and they confirm that the court's rule of binding deference is not supported by considerations of international comity.

**D. This Court Should Vacate The Decision Below And Remand The Case To Allow The Court Of Appeals To Apply The Correct Legal Standard**

Because the court of appeals concluded that the district court was bound to defer to the Ministry's amicus brief, the court did not consider the shortcomings that the district court had identified in the Ministry's submissions or the other aspects of "the district court's careful and thorough treatment of the evidence before it." Pet. App. 30a n.10. The question whether the district court correctly interpreted Chinese law is not before this Court, and we do not take a position on it. But the materials identified by the district court were, at minimum, relevant to the weight that the Ministry's submissions should receive and to the question whether Chinese law required respondents' conduct. This Court should therefore vacate the decision below and remand to allow the court of appeals to consider that question under the correct legal standard.

* * * *

On June 14, 2018, the U.S. Supreme Court vacated and remanded the appellate court's decision, holding that while the court should consider a foreign government's submission, it should also consider other indications and not give the government's statement conclusive effect. The Supreme Court's unanimous opinion is excerpted below (with footnotes omitted).

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When foreign law is relevant to a case instituted in a federal court, and the foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, may the federal court look beyond that official statement? The Court of Appeals for the Second Circuit answered generally "no," ruling that federal courts are "bound to defer" to a foreign government's construction of its own law, whenever that construction is "reasonable." *In re Vitamin C Antitrust Litigation*, 837 F. 3d 175, 189 (2016).

We hold otherwise. A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements. Instead, Federal Rule of Civil Procedure 44.1 instructs that, in determining foreign law, "the court may consider any relevant material or source … whether or not submitted by a party." As "[t]he court's determination must be treated as a ruling on a question of law," Fed. Rule Civ. Proc. 44.1, the court "may engage in its own research and consider any relevant material thus found," Advisory Committee's 1966 Note on Fed. Rule Civ. Proc. 44.1, 28 U.S. C. App., p. 892 (hereinafter Advisory Committee's Note). Because the Second Circuit ordered dismissal of this case on the ground that the foreign government's statements could not be gainsaid, we vacate that court's judgment and remand the case for further consideration.

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At common law, the content of foreign law relevant to a dispute was treated "as a question of fact." Miller, Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 617–619 (1967) (Miller). In 1801, this Court endorsed the common-law rule, instructing that "the laws of a foreign nation" must be "proved as facts." *Talbot* v. *Seeman*, 1 Cranch 1, 38 (1801); see, *e.g.*, *Church* v. *Hubbart*, 2 Cranch 187, 236 (1804) ("Foreign laws are well understood to be facts."). Ranking questions of foreign law as questions of fact, however, "had a number of undesirable practical consequences." 9A C. Wright & A. Miller, Federal Practice and Procedure §2441, p. 324 (3d ed. 2008) (Wright & Miller). Foreign law "had to be raised in the pleadings" and proved "in accordance with the rules of evidence." *Ibid.* Appellate review was deferential and limited to the record made in the trial court. *Ibid.*; see also Miller 623.

Federal Rule of Civil Procedure 44.1, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The Rule specifies that a court's determination of foreign law "must be treated as a ruling on a question of law," rather than as a finding of fact. Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they "may consider any relevant material or source … , whether or not … admissible under the Federal Rules of Evidence." *Ibid.* Appellate review, as is true of domestic law determinations, is *de novo*. Advisory Committee's Note, at 892. Rule 44.1 frees courts "to reexamine and amplify material ... presented by counsel in partisan fashion or in insufficient detail." *Ibid.* The "obvious" purpose of the changes Rule 44.1 ordered was "to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so." Wright & Miller §2444, at 338–342.

Federal courts deciding questions of foreign law under Rule 44.1 are sometimes provided with the views of the relevant foreign government, as they were in this case through the *amicus* brief of the Ministry. See *supra*, at 2– 3. As the Court of Appeals correctly observed, Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government. See 837 F. 3d, at 187. Nor does any other rule or statute. In the spirit of "international comity," *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 543, and n. 27 (1987), a federal court should carefully consider a foreign state's views about the meaning of its own laws. See *United States* v. *McNab*, 331 F. 3d 1228, 1241 (CA11 2003); cf. *Bodum USA, Inc.* v. *La Cafetière, Inc.*, 621 F. 3d 624, 638–639 (CA7 2010) (Wood, J., concurring). But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements, see *supra*, at 5, or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission.

Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Judged in this light, the Court of Appeals erred in deeming the Ministry's submission binding, so long as facially reasonable. That unyielding rule is inconsistent with Rule 44.1 (determination of an issue of foreign law "must be treated as a ruling on a question of law"; court may consider "any relevant material or source") and, tellingly, with this Court's treatment of analogous submissions from States of the United States. If the relevant state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983) (*per curiam*); see *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). But views of the State's attorney general, while attracting "respectful consideration," do not garner controlling weight. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76–77, n. 30 (1997); see, *e.g.*, *Virginia* v. *American Booksellers Assn., Inc.*, 484 U.S. 383, 393–396 (1988). Furthermore, because the Court of Appeals riveted its attention on the Ministry's submission, it did not address other evidence, including, for example, China's statement to the WTO that China had "g[i]ve[n] up export administration …of vitamin C" at the end of 2001. 810 F. Supp. 2d, at 532 (internal quotation marks omitted).

The Court of Appeals also misperceived this Court's decision in *United States* v. *Pink*, 315 U.S. 203 (1942). See 837 F. 3d, at 186–187, 189. *Pink*, properly comprehended, is not compelling authority for the attribution of controlling weight to the Ministry's brief. We note, first, that *Pink* was a pre-Rule 44.1 decision. Second, *Pink* arose in unusual circumstances. *Pink* was an action brought by the United States to recover assets of the U.S. branch of a Russian insurance company that had been nationalized in 1918, after the Russian revolution. 315 U.S., at 210–211. In 1933, the Soviet Government assigned the nationalized assets located in this country to the United States. *Id.*, at 211–212. The disposition of the case turned on the extraterritorial effect of the nationalization decree—specifically, whether the decree reached assets of the Russian insurance company located in the United States, or was instead limited to property in Russia. *Id.*, at 213–215, 217. To support the position that the decree reached all of the company's

assets, the United States obtained an "official declaration of the Commissariat for Justice" of the Russian Socialist Federal Soviet Republic. *Id.*, at 218. The declaration certified that the nationalization decree reached "the funds and property of former insurance companies … irrespective of whether [they were] situated within the territorial limits of [Russia] or abroad." *Id.*, at 220 (internal quotation marks omitted). This Court determined that "the evidence supported [a] finding" that "the Commissariat for Justice ha[d] power to interpret existing Russian law." *Ibid*. "That being true," the Court concluded, the "official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned." *Ibid.*

This Court's treatment of the Commissariat's submission as conclusive rested on a document *obtained by the United States*, through official "diplomatic channels." *Id.*, at 218. There was no indication that the declaration was inconsistent with the Soviet Union's past statements. Indeed, the Court emphasized that the declaration was consistent with expert evidence in point. See *ibid.* That the Commissariat's declaration was deemed "conclusive" in the circumstances *Pink* presented scarcely suggests that all submissions by a foreign government are entitled to the same weight.

The Court of Appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." 837 F. 3d, at 189. The concern for reciprocity is sound, but it does not warrant the Court of Appeals' judgment. Indeed, the United States, historically, has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources.

The understanding that a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Those treaties specify that "[t]he information given in the reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law, Art. 8, June 7, 1968, 720 U. N. T. S. 154; see Inter-American Convention on Proof of and Information on Foreign Law, Art. 6, May 8, 1979, O. A. S. T. S. 1439 U. N. T. S. 111 (similar). Although the United States is not a party to those treaties, they reflect an international practice inconsistent with the Court of Appeals' "binding, if reasonable" resolution.

Because the Court of Appeals concluded that the District Court was bound to defer to the Ministry's brief, the court did not consider the shortcomings the District Court identified in the Ministry's position or other aspects of "the [D]istrict [C]ourt's careful and thorough treatment of the evidence before it." 837 F. 3d, at 191, n. 10. The correct interpretation of Chinese law is not before this Court, and we take no position on it. But the materials identified by the District Court were at least relevant to the weight the Ministry's submissions should receive and to the question whether Chinese law required the Chinese sellers' conduct. We therefore vacate the judgment of the Court of Appeals and remand the case for renewed consideration consistent with this opinion.

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### 2. *Detroit International Bridge Company v. Canada*

On October 15, 2018, the U.S. Supreme Court dismissed the petition for writ of certiorari filed by Detroit International Bridge Company. No. 18-161. See *Digest 2017* at 128-30 for a discussion of the decision by the U.S. Court of Appeals for the D.C. Circuit, rejecting the challenge to the issuance of a permit for construction of a new international bridge.

### 3. *Leibovitch v. Iran*

On February 2, 2018, the United States filed a statement of interest in *Leibovitch v. Iran* in response to the district court's request for U.S. views on whether permitting discovery sought by plaintiffs would "interfere with U.S. foreign policy toward Iran by obstructing a key component of the international nuclear deal." The brief was filed prior to the U.S. announcement that it would cease participating in the Joint Comprehensive Plan of Action ("JCPOA"), the nuclear deal with Iran. See Chapter 19 for discussion of the May 8, 2018 announcement regarding the JCPOA. In *Leibovitch*, plaintiffs sought discovery in order to locate Iranian assets to execute on a judgment against Iran for providing support for a terrorist attack in Israel by the Palestine Islamic Jihad ("PIJ"). The discovery requested pertained to the Boeing Company's transactions with Iran Air, which were permitted by the JCPOA. Boeing argued that the discovery requests would interfere with U.S. foreign policy toward Iran. 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/.

* * * *

This proceeding implicates several important foreign policy interests of the United States, including: the ability of U.S. victims of terrorism to seek compensation for their injuries; implementation of the U.S. commitment under the JCPOA to allow for the sale of commercial passenger aircraft and related parts and services to Iran; and the appropriate scope of discovery into foreign state property in U.S. courts. This Statement of Interest addresses these foreign policy interests in relation to this proceeding and the requested discovery. The United States does not take a position on whether the Court should order the requested discovery, including whether the discovery sought would be relevant to identifying assets that would be subject to execution in satisfaction of a judgment. Instead, and without opining on a number of other issues that are raised by the parties' pleadings, the United States wishes to make clear that the United States is implementing its JCPOA commitments, and that those commitments do not require the Executive Branch to take any specific action with respect to efforts by judgment creditors of Iran to pursue post-judgment discovery or other enforcement proceedings. However, as in any case regarding discovery with respect to a foreign sovereign, if the Court were to determine the requested discovery to be legally appropriate, the United States believes the Court should

supervise such discovery carefully, taking into account the sensitive nature of discovery into property of foreign states and their agencies and instrumentalities.

First, the United States condemns the terrorist actions that gave rise to the case, and expresses its deepest sympathy for the victims and their family members. The United States is committed to vigorously pursuing those responsible for violence against U.S. nationals, and it has an interest in U.S. victims of terrorism being able to seek compensation for their injuries.

Second, the United States remains a participant in the JCPOA and continues to implement its commitments under the deal as part of a broader strategy toward Iran, a key element of U.S. foreign policy. As part of the JCPOA, the United States committed to:

> [a]llow for the sale of commercial passenger aircraft and related parts and services to Iran by licensing the (i) export, re-export, sale, lease or transfer to Iran of commercial passenger aircraft for exclusively civil aviation end-use, (ii) export, re-export, sale, lease or transfer to Iran of spare parts and components for commercial passenger aircraft, and (iii) provision of associated service[s], including warranty, maintenance, and repair services and safety-related inspections, for all the foregoing, provided that licensed items and services are used exclusively for commercial passenger aviation.

JCPOA Annex II § 5.1.1, available at https://www.state.gov/documents/organization/245320.pdf.

The civil aviation-related commitment was—and continues to be—a key component of the sanctions relief provided to Iran under the JCPOA. In furtherance of that commitment, in September 2016, the United States issued a license to Boeing to authorize transactions associated with the proposed sales to Iran Air, as described above. …However, the United States is not a party to any contract or agreement between Boeing and Iran Air and has not taken part in any negotiations between those parties related to transactions contemplated by such an agreement.

As a result, the United States does not have certain information regarding Boeing and Iran Air's commercial arrangements that may be relevant to the Court's question regarding discovery. … Moreover, the JCPOA does not require the United States to take any specific action with respect to efforts by judgment creditors of Iran to pursue post-judgment discovery or other enforcement proceedings, including in the matter pending before the Court, nor do any other U.S. commitments under the JCPOA.

The United States also has a substantial interest in ensuring that any U.S. court supervising post-judgment discovery into presumptively immune foreign-state property carefully adhere to basic principles of relevance and be sensitive to the significant comity, reciprocity, and foreign relations concerns raised by overly broad and burdensome discovery. Any court-ordered discovery in aid of execution on the assets of a foreign state or its agency or instrumentality should, as a general matter, take into consideration whether the discovery is directed at property that would be subject to execution in satisfaction of a judgment pursuant to the Foreign Sovereign Immunities Act, as well as considerations of international comity and the potential reciprocal implications for the United States in foreign courts. See Republic of Argentina v. NML Capital Ltd., 134 S. Ct. 2250, 2258 n.6 (2014) (acknowledging the range of considerations district courts will need to take into account in this context).

* * * *

### 4. *Sokolow*

As discussed in *Digest 2015* at 144-45, the United States filed a statement of interest in a case against the Palestinian Authority ("PA") and the Palestinian Liberation Organization ("PLO") urging the court to take into account national security and foreign policy interests in deciding whether to stay execution of a judgment against the PA and whether to impose a bond requirement pending appeal. On August 31, 2016, the U.S. Court of Appeals for the Second Circuit decided that the district court lacked general or specific personal jurisdiction over the PA and PLO in the case and vacated the judgment of the district court. *Waldman v. PLO*, 835 F.3d 317 (2d. Cir. 2016). Plaintiffs filed a petition for certiorari on March 3, 2017. *Sokolow v. PLO*, No. 16-1071. On June 26, 2017, the Supreme Court invited the United States to file a brief expressing its views. The U.S. brief filed on February 22, 2018 is excerpted below. On April 2, 2018, the Supreme Court denied the petition for certiorari, as the United States recommended.

* * * *

Private actions under the Anti-Terrorism Act are an important means of fighting terrorism and providing redress for the victims of terrorist attacks and their families. The court of appeals held here, however, that this particular action is barred by constitutional constraints on the exercise of personal jurisdiction because the district court had neither general nor specific jurisdiction over respondents in this suit arising from overseas terrorist attacks. Petitioners challenge that conclusion on three grounds: they argue that respondents lack any rights at all under the Due Process Clause of the Fifth Amendment (Pet. 22-27); in the alternative the court of appeals erred in applying principles of personal jurisdiction developed under the Due Process Clause of the Fourteenth Amendment to assess jurisdiction under the Due Process Clause of the Fifth Amendment (Pet. 27-30); and in any event the court of appeals erred in its application of specific-jurisdiction principles to the facts of this case (Pet. 30-34). The court of appeals' rejection of those arguments does not conflict with any decision of this Court, implicate any conflict among the courts of appeals, or otherwise warrant this Court's intervention at this time.

1. The court of appeals' conclusion that respondents are entitled to due process protections does not warrant this Court's review.

a. The court of appeals' determination does not conflict with any decision of this Court. The Fifth and Fourteenth Amendments prohibit the federal government and the States, respectively, from depriving any "person" of "life, liberty, or property, without due process of law." U.S. Const. Amends. V, XIV. …

Because the Due Process Clauses of the Fifth and Fourteenth Amendments "speak[] only of 'persons,' " *Livnat* v. *Palestinian Auth.*, 851 F.3d 45, 48 (D.C. Cir. 2017) (citation omitted), petition for cert. pending, No. 17-508 (filed Sept. 28, 2017), whether an entity receives due process protections depends on whether the entity qualifies as a "person." This Court has recognized one class of entities that are not "persons" for purposes of due process: the States of the Union. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966), abrogated on other grounds by *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612 (2013). In reaching that result, the Court stated only that "[t]he word 'person' in the context of the Due Process Clause of the Fifth

Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." *Ibid.*

This Court has not recognized any other class of entities—whether natural or artificial—as outside the category of "persons" for purposes of due process. It has treated as "persons" domestic and foreign entities of various types, such as corporations. See, *e.g.*, *International Shoe*, 326 U.S. at 316-317 (domestic corporation); *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 750-752 (2014) (German public stock company); *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U.S. 915, 918- 920 (2011) (foreign subsidiaries of a U.S. tire manufacturer). Because this Court's existing jurisprudence has set only States of the Union outside of the category of "persons," this Court's decisions do not establish that foreign entities like respondents are barred from invoking due process protections.

b. The Second Circuit's treatment of respondents as entities that receive due process protections also does not conflict with any decision of another court of appeals. In fact, the decision below accords with the D.C. Circuit's decision in *Livnat*, *supra*, which also held that the PA is entitled to due process protections. 851 F.3d at 48, 50. …

Petitioners err in contending (Pet. 24-25) that the decision below conflicts with federal appellate decisions addressing the status of foreign sovereigns. As petitioners note (Pet. 24), the Second and D.C. Circuits have held that foreign sovereigns lack due process rights—a question on which this Court reserved decision in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 619 (1992) (assessing personal jurisdiction over Argentina under specific-jurisdiction principles, while "[a]ssuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause"). See *Frontera Res. Azerbaijan Corp.* v. *State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 399-400 (2d Cir. 2009); *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002). But as noted above, the Second and D.C. Circuits have recognized that the reasoning of those decisions is limited to sovereigns, and they have held that non-sovereign foreign entities like respondents do receive due process protections. Pet. App. 19a-20a; see *Livnat*, 851 F.3d at 48, 50.

* * * *

Petitioners contend (Pet. 21) that this Court should decide whether respondents are entitled to due process protections in the absence of a conflict because the decision below may "interfere with the Executive's foreign-affairs prerogatives." In the view of the United States, petitioners' approach poses a greater threat of such interference. The power to recognize foreign governments is exclusively vested in the President. *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2086 (2015); see *ibid.* ("Recognition is a topic on which the Nation must speak …with one voice.") (citations and internal quotation marks omitted). The President's recognition of a foreign state "is a 'formal acknowledgement' that a particular 'entity possesses the qualifications for statehood' or 'that a particular regime is the effective government of a state,'" *Id.* at 2084 (quoting 1 Restatement (Third) of Foreign Relations Law of the United States § 203 cmt. a (1987))—not merely a determination that the United States will "accord [a government] certain benefits," Pet. 26. An approach under which courts would assess the extent to which foreign entities operate as "the effective government of a state" or "possess[] the qualifications for statehood," *Zivotofsky*, 135 S. Ct. at 2084 (citation omitted), risks judicial determinations at odds with Presidential determinations underlying recognition.

c. The Court has not seen any need to revisit the scope of the term "person" under the Due Process Clauses since *Katzenbach*, and in any event this case would not be an appropriate vehicle for doing so for two reasons. First, petitioners' argument relies (Pet. 23-24) on analogizing respondents to foreign sovereigns and municipalities, but this Court has not yet passed upon the status of those entities for due process purposes. Second, because respondents are *sui generis* entities with a unique relationship to the United States government, a ruling on whether respondents have due process protections is unlikely to have broad utility in resolving future cases concerning other entities. See Pet. 8-9 (stating that respondents are not recognized as sovereign by the United States but "interact with the United States as a foreign government," "employ 'foreign agents' " that are registered "as agents of the 'Government of a foreign country' " under the Foreign Agents Registration Act of 1938, 22 U.S.C. 611, and "have received over a billion dollars" from the United States in "government-to-government assistance") (citation omitted).

2. Certiorari is also not warranted to consider petitioners' novel argument that federal courts may exercise personal jurisdiction under the Fifth Amendment whenever "a defendant's conduct interfered with U.S. sovereign interests as set out in a federal statute, and the defendant was validly served with process in the United States pursuant to a nationwide-service-of-process provision." …

* * * *

b. The Second Circuit's approach to jurisdiction under the Fifth Amendment also does not conflict with any decision of another court of appeals. Statutes such as the ATA present questions concerning Fifth Amendment jurisdictional limitations because they contain nationwide service-of-process and venue provisions that permit a federal court to exercise jurisdiction over defendants who would not be subject to suit in the courts of the State in which the federal court is located. See Fed. R. Civ. P. 4(k)(1)(A) and (C) (authorizing service of process on a defendant who is not "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located" if service is "authorized by a federal statute"); 18 U.S.C. 2334(a) (providing that an ATA defendant "may be served in any district where the defendant resides, is found, or has an agent").

In analyzing such statutes, courts of appeals generally have adapted Fourteenth Amendment jurisdictional principles to the Fifth Amendment context in the manner that the court below did: by considering a defendant's contacts with the Nation as a whole, rather than only contacts with a particular State, in deciding whether the defendant had the contacts needed for personal jurisdiction. See, *e.g.*, *In re Application to Enforce Admin. Subpoenas Duces Tecum of SEC*, 87 F.3d 413, 417 (10th Cir. 1996) ("When the personal jurisdiction of a federal court is invoked based upon a federal statute providing for nationwide or worldwide service, the relevant inquiry is whether the respondent has had sufficient minimum contacts with the United States."); *Livnat*, 851 F.3d at 55.3 The decision below is consistent with those decisions, because the Second Circuit concluded that the district court lacked jurisdiction on the ground that respondents' contacts with the United States as a whole were inadequate to ground either general or specific jurisdiction. Pet. App. 23a-50a.

Petitioners point to no decision adopting their far broader "sovereign interests" theory, under which the Fifth Amendment's due process limitations are satisfied so long as the "defendant's conduct interfered with U.S. sovereign interests as set out in a federal statute, and

the defendant was validly served with process in the United States pursuant to a nationwide-service-of- process provision." Pet. Reply Br. 11 (emphasis omitted). Indeed, the D.C. Circuit concluded that "[n]o court has ever" adopted such an argument. *Livnat*, 851 F.3d at 54.4

Several courts also have suggested that if a defendant has sufficient contacts, a court must determine that "the plaintiff 's choice of forum [is] fair and reasonable." *Peay* v. *BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000); see *Republic of Panama* v. *BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997); see also *Livnat*, 851 F.3d at 55 n.6 (noting that issue but declining to express a view).

c. Review of petitioners' broad Fifth Amendment arguments would be premature. Few courts have had the opportunity to consider such arguments. And the contours and implications of petitioners' jurisdictional theory—which turns on whether a defendant's conduct "interfered with U.S. sovereign interests as set out in a federal statute," Pet. Reply Br. 11—are not themselves well developed. Under these circumstances, further development in the lower courts is likely to be useful before this Court addresses arguments that the federal courts may, in particular circumstances, exercise personal jurisdiction over civil cases without regard to the principles of specific and general jurisdiction developed under the Fourteenth Amendment.

d. Review of petitioners' theory is not currently warranted on the ground that application of Fourteenth Amendment-derived jurisdictional principles "leaves the [ATA] a practical nullity" and "would bar most suits under the Act based on overseas attacks." Pet. 17. It is far from clear that the court of appeals' approach will foreclose many claims that would otherwise go forward in federal courts. As the court of appeals explained, its approach permits U.S. courts to exercise jurisdiction over defendants accused of targeting U.S. citizens in an act of international terrorism. … It permits U.S. courts to exercise jurisdiction if the United States was the focal point of the harm caused by the defendant's participation in or support for overseas terrorism. …And the court of appeals stated that it would permit U.S. courts to exercise jurisdiction over defendants alleged to have purposefully availed themselves of the privilege of conducting activity in the United States, by, for example, making use of U.S. financial institutions to support international terrorism. See *id.* at 46a-47a (discussing *Licci* v. *Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013)). In addition, nothing in the court's opinion calls into question the United States' ability to prosecute defendants under the broader due process principles the courts have recognized in cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests. See *id.* at 44a; accord *Livnat*, 851 F.3d at 56. Under these circumstances, in the absence of any conflict or even a developed body of law addressing petitioners' relatively novel theory, this Court's intervention is not warranted.

3. Finally, certiorari is not warranted to address the court of appeals' factbound application of established specific-jurisdiction principles. See Pet. 30-34. As a threshold matter, the court of appeals correctly identified those principles. The court analyzed whether "the defendant's suit-related conduct * * * create[d] a substantial connection with the forum State." Pet. App. 32a (quoting *Walden*, 134 S. Ct. at 1121); see *id.* at 33a (framing the inquiry as "whether the defendants' suit-related conduct—their role in the six terror attacks at issue—creates a substantial connection with the forum State pursuant to the ATA"). Petitioners misread the decision below as holding that petitioners could establish specific jurisdiction only if respondents " 'specifically targeted' U.S. citizens or territory." Pet. Reply Br. 11 (quoting Pet. App. 45a). The court of appeals stated that respondents had not "specifically targeted United States citizens," Pet. App. 45a, in distinguishing two cases invoked by petitioners, in which the defendants were accused of providing material support or financing to terrorist organizations

whose "specific aim" was to "target[] the United States," or to "kill Americans and destroy U.S. property," *id.* at 42a, 45a (citations omitted); see *id.* at 42a-45a (discussing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659 (2d Cir. 2013); *United States* v. *al Kassar*, 660 F.3d 108 (2d Cir. 2011), cert. denied, 566 U.S. 986 (2012)). But the court of appeals recognized that specific jurisdiction may exist when "the brunt" or "the focal point" of the harm from an intentional tort is felt in the forum State. *Id.* at 43a (quoting *Calder*, 465 U.S. at 789). The court found petitioners' claims did not meet that standard because Israel, not the United States, was "the focal point of the torts alleged in this litigation." *Ibid.*

* * * *

## B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

### 1. Overview

The Alien Tort Statute ("ATS"), sometimes referred to as the Alien Tort Claims Act ("ATCA"), was enacted as part of the First Judiciary Act in 1789 and is codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." In 2004 the Supreme Court held that the ATS is "in terms only jurisdictional" but that, in enacting the ATS in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual … [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals, including U.S. nationals, for torture and/or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2018 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

### 2. ATS and TVPA Cases Post-*Kiobel*

In 2013, the U.S. Supreme Court dismissed ATS claims in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2013* at 111-17 and *Digest 2011* at 129-36. The majority of the Court reasoned that the principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."

### *a.* Al-Tamimi

As discussed in *Digest 2017* at 131-35, the United States filed briefs in support of its motion to dismiss claims against a former U.S. government official for allegedly enabling unlawful acts against Palestinians by Israel Defense Forces ("IDF"). The district court dismissed and plaintiffs appealed. The section of the July 5, 2018 U.S. brief on appeal to the U.S. Court of Appeals for the D.C. Circuit regarding the TVPA and ATS is excerpted below. *Al-Tamimi v. Adelson*, No. 17-5207 (D.C. Cir. 2019). The section of the brief regarding the political question doctrine is excerpted *infra*.[*] The brief is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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Even if the political question doctrine did not render the plaintiffs' claims non-justiciable, the district court would still lack jurisdiction to hear them because they do not fall within any statutory grant of jurisdiction. The district court did not consider these arguments because all of the plaintiffs' claims were covered by its political question and FTCA rulings. But this Court "may affirm a district court on grounds other than those upon which it relied." *United States Int'l Trade Comm'n v. Tenneco W.*, 822 F.2d 73, 80 (D.C. Cir. 1987).

A. The Alien Tort Statute

The amended complaint invoked the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), as the source of jurisdiction for Count II (war crimes, crimes against humanity, and genocide) and Count III (aiding and abetting the same) for the majority of individual plaintiffs. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013), the Supreme Court held that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." While the presumption is not typically applied to statutes that are "strictly jurisdictional," the Court observed that "the principles underlying the canon" applied equally to the ATS. *Id.* at 116. Specifically, the presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* (quoting *EEOC v. Arabian American Oil. Co.*, 499 U.S. 244, 248 (1991)). "[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." *Id.* Courts faced with claims under the ATS should therefore be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

The Supreme Court explained that "even where" claims asserted under the ATS "touch and concern the territory of the United States," jurisdiction will lie only if the claims "do so with sufficient force to displace the presumption against extraterritorial application" of domestic law.

[*] Editor's note: On February 19, 2019, the Court of Appeals issued its decision, reversing the district court's dismissal for lack of subject matter jurisdiction due to the nonjusticiable political questions raised by the case.

*Kiobel*, 569 U.S. at 124-25. This inquiry takes place against the backdrop of the ATS's function, see *RJR Nabisco, Inc. v. European Cmty*., 136 S. Ct. 2090, 2101 (2016); Kiobel, 569 U.S. at 123-24; *Sosa*, 542 U.S. at 714- 18, 722-24 & n.15, including, for example, to provide redress in situations in which the United States could be viewed as having harbored or otherwise provided refuge to an actual torturer or other "enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

The claims in this case, however, are brought primarily by Palestinians living abroad, seeking recovery for injuries caused by Israeli armed forces or Israeli settlers acting on foreign soil. See Op. 18 (finding that all of the plaintiffs' injuries were suffered in a foreign country). On their face, and absent the identification of any United States interest to support jurisdiction here, such claims to do not displace the presumption against extraterritoriality. The plaintiffs concede that their claims cannot be based on any allegations "which arise out of [Abrams's] eight years of public service as a government employee." Br. 22. Thus, any allegations regarding discussions with Israeli officials must be disregarded (and would be too removed from supposed war crimes and genocide to be controlling in any event).

The remaining allegations relating to Abrams's domestic conduct, most of which concern his public expressive activities, are far too insubstantial to displace the presumption against extraterritorial application. For example, the plaintiffs allege that Abrams published articles, gave speeches, and testified before Congress regarding issues of great public importance. …"A claim is too 'insubstantial and frivolous' to support federal question jurisdiction when it is 'obviously without merit' or when 'its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1194-95 (D.C. Cir. 2004) (quoting *Hagans v. Lavine*, 415 U.S. 528, 538 (1974)). The claims that Abrams's expressive activities—all protected by the core of the First Amendment—amount to war crimes or genocide in a foreign country (or aiding and abetting the same), and that the plaintiffs are entitled to $1 billion in damages as a result, fall within both categories. See, *e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 993 (1982) ("The use of speeches …cannot provide the basis for a damages award."); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[T]he advocacy of a politically controversial viewpoint … is the essence of First Amendment expression.").

Other allegations of wrongdoing are entirely conclusory or threadbare. … Such allegations are insufficient to displace the presumption against extraterritorial application of the ATS. See, *e.g.*, *Mustafa v. Chevron Corp.*, 770 F.3d 170, 190 (2d Cir. 2014) ("[O]ur jurisdictional analysis need not take into account allegations that, on their face, do not satisfy basic pleading requirements.").

Some of the allegations in this category suggest, without providing any details, that Abrams was involved in (or at least physically near) the raising of funds to support the activities alleged to constitute war crimes. … In some non-ATS contexts, the actual solicitation of funds for unlawful foreign activities, or the use of the domestic banking system to transfer funds for use in such activities, might support an application of U.S. law that is not explicitly extraterritorial. Compared to private plaintiffs, the U.S. Government traditionally exercises a considerable "degree of self-restraint and consideration of foreign governmental sensibilities." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) …. Accordingly, Congress may be presumed to require a less substantial domestic nexus in a statute enforced by the government—which can take into account the potential impact on foreign relations in deciding

whether to prosecute an action—than it might require for a statute enforced through private civil actions. See *RJR Nabisco*, 136 S. Ct. at 2110. In the context of the ATS, however, attenuated, vague, and conclusory allegations involving fundraising efforts—like the ones involving Abrams—do not constitute a sufficient domestic nexus to displace the presumption of extraterritoriality. The "need for judicial caution" about "foreign policy concerns" when "considering which claims c[an] be brought under the ATS" may counsel forbearance even in circumstances where an express statutory cause of action under domestic law, reflecting the considered judgment of Congress and the Executive, might be found applicable. *Kiobel*, 569 U.S. at 116.

B. Torture Victim Protection Act

Presumably because the jurisdictional grant in the ATS is limited to suits brought "by an alien," 28 U.S.C. § 1350, the plaintiffs purported to invoke the Torture Victim Protection Act of 1991, Pub L. No. 102-256, 106 Stat. 73 (1992), "on behalf of the U.S. citizen plaintiffs against all Defendants in Count II, similar to and on the same bases as the ATS invoked on behalf of the non-U.S. citizen Plaintiffs." Am. Compl. ¶ 3 (JA __). "Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute." *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir.1995). Moreover, there is no question that "Congress exempted American government officers and private U.S. persons from the statute." *Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C. Cir. 2009). Count II must be dismissed as brought against Abrams by U.S. citizens as well.

* * * *

### *b.* Jesner v. Arab Bank

As discussed in *Digest 2017* at 139-50, the United States filed an amicus brief in *Jesner v. Arab Bank*, No. 16-499, asserting that a corporation can be a defendant in an action under the ATS. The Supreme Court decided the case on April 24, 2018, affirming the decision of the Court of Appeals. Justice Kennedy's opinion reasoning that foreign corporations are not proper defendants in actions under the ATS, in which a majority of the court concurred, is excerpted below.

_____

* * * *

I A

Petitioners are plaintiffs in five ATS lawsuits filed against Arab Bank in the United States District Court for the Eastern District of New York. The suits were filed between 2004 and 2010.

A significant majority of the plaintiffs in these lawsuits—about 6,000 of them—are foreign nationals whose claims arise under the ATS. These foreign nationals are petitioners here. They allege that they or their family members were injured by terrorist attacks in the Middle East over a 10-year period. Two of the five lawsuits also included claims brought by American nationals under the Anti-Terrorism Act, 18 U. S. C. §2333(a), but those claims are not at issue.

Arab Bank is a major Jordanian financial institution with branches throughout the world, including in New York. … Petitioners allege that Arab Bank helped finance attacks by Hamas

and other terrorist groups. Among other claims, petitioners allege that Arab Bank maintained bank accounts for terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers.

Most of petitioners' allegations involve conduct that occurred in the Middle East. Yet petitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists.

* * * *

In addition to the dollar-clearing transactions, petitioners allege that Arab Bank's New York branch was used to launder money for the Holy Land Foundation for Relief and Development (HLF), a Texas-based charity that petitioners say is affiliated with Hamas. According to petitioners, Arab Bank used its New York branch to facilitate the transfer of funds from HLF to the bank accounts of terrorist-affiliated charities in the Middle East.

During the pendency of this litigation, there was an unrelated case that also implicated the issue whether the ATS is applicable to suits in this country against foreign corporations. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F. 3d 111 (CA2 2010). … In *Kiobel*, the Court of Appeals held that the ATS does not extend to suits against corporations. *Id.*, at 120. This Court granted certiorari in *Kiobel*. 565 U. S. 961 (2011).

After additional briefing and reargument in *Kiobel*, this Court held that, given all the circumstances, the suit could not be maintained under the ATS. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 114, 124–125 (2013). The rationale of the holding, however, was not that the ATS does not extend to suits against foreign corporations. That question was left unresolved. The Court ruled, instead, that "all the relevant conduct took place outside the United States." *Id.*, at 124. Dismissal of the action was required based on the presumption against extraterritorial application of statutes.

So while this Court in *Kiobel* affirmed the ruling that the action there could not be maintained, it did not address the broader holding of the Court of Appeals that dismissal was required because corporations may not be sued under the ATS. Still, the courts of the Second Circuit deemed that broader holding to be binding precedent. As a consequence, in the instant case the District Court dismissed petitioners' ATS claims based on the earlier *Kiobel* holding in the Court of Appeals; and on review of the dismissal order the Court of Appeals, also adhering to its earlier holding, affirmed. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144 (2015). This Court granted certiorari in the instant case. 581 U. S. ___ (2017).

Since the Court of Appeals relied on its *Kiobel* holding in the instant case, it is instructive to begin with an analysis of that decision. The majority opinion in *Kiobel*, written by Judge Cabranes, held that the ATS does not apply to alleged international-law violations by a corporation. 621 F. 3d, at 120. Judge Cabranes relied in large part on the fact that international criminal tribunals have consistently limited their jurisdiction to natural persons. *Id.*, at 132– 137.

Judge Leval filed a separate opinion. He concurred in the judgment on other grounds but disagreed with the proposition that the foreign corporation was not subject to suit under the ATS. *Id.*, at 196. Judge Leval conceded that "international law, of its own force, imposes no liabilities on corporations or other private juridical entities." *Id.*, at 186. But he reasoned that corporate liability for violations of international law is an issue of "civil compensatory liability" that

international law leaves to individual nations. *Ibid.* Later decisions in the Courts of Appeals for the Seventh, Ninth, and District of Columbia Circuits agreed with Judge Leval and held that corporations can be subject to suit under the ATS. See *Flomo* v. *Firestone Nat. Rubber Co.*, 643 F. 3d 1013, 1017–1021 (CA7 2011); *Doe I* v. *Nestle USA, Inc.*, 766 F. 3d 1013, 1020–1022 (CA9 2014); *Doe VIII* v. *Exxon Mobil Corp.*, 654 F. 3d 11, 40–55 (CADC 2011), vacated on other grounds, 527 Fed. Appx. 7 (CADC 2013). The respective opinions by Judges Cabranes and Leval are scholarly and extensive, providing significant guidance for this Court in the case now before it.

With this background, it is now proper to turn to the history of the ATS and the decisions interpreting it.

B

Under the Articles of Confederation, the Continental Congress lacked authority to "'cause infractions of treaties, or of the law of nations to be punished.'" *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 716 (2004) (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)). The Continental Congress urged the States to authorize suits for damages sustained by foreign citizens as a result of violations of international law; but the state courts' vindication of the law of nations remained unsatisfactory. Concerns with the consequent international-relations tensions "persisted through the time of the Constitutional Convention." 542 U. S., at 717.

Under the Articles of Confederation, the inability of the central government to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems. …

The Framers addressed these matters at the 1787 Philadelphia Convention; and, as a result, Article III of the Constitution extends the federal judicial power to "all cases affecting ambassadors, other public ministers and consuls," and "to controversies… between a state, or the citizens thereof, and foreign states, citizens, or subjects." §2. The First Congress passed a statute to implement these provisions: The Judiciary Act of 1789 authorized federal jurisdiction over suits involving disputes between aliens and United States citizens and suits involving diplomats. §§9, 11, 1 Stat. 76–79.

The Judiciary Act also included what is now the statute known as the ATS. §9, *id.*, at 76. As noted, the ATS is central to this case and its brief text bears repeating. Its full text is: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. §1350. The ATS is "strictly jurisdictional" and does not by its own terms provide or delineate the definition of a cause of action for violations of international law. *Sosa*, 542 U. S., at 713–714. But the statute was not enacted to sit on a shelf awaiting further legislation. *Id.*, at 714. Rather, Congress enacted it against the backdrop of the general common law, which in 1789 recognized a limited category of "torts in violation of the law of nations." *Ibid.*

In the 18th century, international law primarily governed relationships between and among nation-states, but in a few instances it governed individual conduct occurring outside national borders (for example, "disputes relating to prizes, to shipwrecks, to hostages, and ransom bills"). *Id.*, at 714–715 (internal quotation marks omitted). There was, furthermore, a narrow domain in which "rules binding individuals for the benefit of other individuals overlapped with" the rules governing the relationships between nation-states. *Id.*, at 715. As understood by Blackstone, this domain included "three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Ibid.* (citing 4 W. Blackstone, Commentaries on the Laws of

England 68 (1769)). "It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS." 542 U.S., at 715.

This history teaches that Congress drafted the ATS "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.*, at 720. The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen. See *id.*, at 715–719; *Kiobel*, 569 U. S., at 123–124.

Over the first 190 years or so after its enactment, the ATS was invoked but a few times. Yet with the evolving recognition—for instance, in the Nuremberg trials after World War II—that certain acts constituting crimes against humanity are in violation of basic precepts of international law, courts began to give some redress for violations of international human-rights protections that are clear and unambiguous. In the modern era this began with the decision of the Court of Appeals for the Second Circuit in *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (1980).

In *Filartiga*, it was alleged that a young man had been tortured and murdered by Peruvian police officers, and that an officer named Pena-Irala was one of the supervisors and perpetrators. Some members of the victim's family were in the United States on visas. When they discovered that Pena-Irala himself was living in New York, they filed suit against him. The action, seeking damages for the suffering and death he allegedly had caused, was filed in the United States District Court for the Eastern District of New York. The Court of Appeals found that there was jurisdiction under the ATS. For this holding it relied upon the universal acknowledgment that acts of official torture are contrary to the law of nations. *Id.*, at 890. This Court did not review that decision.

In the midst of debates in the courts of appeals over whether the court in *Filartiga* was correct in holding that plaintiffs could bring ATS actions based on modern human-rights laws absent an express cause of action created by an additional statute, Congress enacted the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U. S. C. §1350. H. R. Rep. No. 102–367, pp. 3–4 (1991) (H. R. Rep.) (citing *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774 (CADC 1984)); S. Rep. No. 102– 249, pp. 3–5 (1991) (S. Rep.) (same). The TVPA—which is codified as a note following the ATS—creates an express cause of action for victims of torture and extrajudicial killing in violation of international law.

After *Filartiga* and the TVPA, ATS lawsuits became more frequent. Modern ATS litigation has the potential to involve large groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. For example, in *Kiobel* the plaintiffs were Nigerian nationals who sued Dutch, British, and Nigerian corporations for alleged crimes in Nigeria. 569 U. S., at 111–112. The extent and scope of this litigation in United States courts have resulted in criticism here and abroad. See *id.*, at 124 (noting objections to ATS litigation by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom).

In *Sosa*, the Court considered the question whether courts may recognize new, enforceable international norms in ATS lawsuits. 542 U. S., at 730–731. The *Sosa* Court acknowledged the decisions made in *Filartiga* and similar cases; and it held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the "historical paradigms familiar when §1350 was enacted." 542 U. S., at 732. The Court was quite explicit, however, in holding that ATS litigation

implicates serious separation-of-powers and foreign-relations concerns. *Id.*, at 727–728. Thus, ATS claims must be "subject to vigilant doorkeeping." *Id.*, at 729.

This Court next addressed the ATS in *Kiobel*, the case already noted. There, this Court held that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts the presumption." 569 U. S., at 124. The Court added that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.*, at 124–125.

II

With these principles in mind, this Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant. It could be argued, under the Court's holding in *Kiobel*, that even if, under accepted principles of international law and federal common law, corporations are subject to ATS liability for human-rights crimes committed by their human agents, in this case the activities of the defendant corporation and the alleged actions of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS. Various *amici* urge this as a rationale to affirm here, while the Government argues that the Court should remand this case so the Court of Appeals can address the issue in the first instance. There are substantial arguments on both sides of that question; but it is not the question on which this Court granted certiorari, nor is it the question that has divided the Courts of Appeals.

The question whether foreign corporations are subject to liability under the ATS should be addressed; for, if there is no liability for Arab Bank, the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless. In addition, a remand to the Court of Appeals would require prolonging litigation that already has caused significant diplomatic tensions with Jordan for more than a decade. So it is proper for this Court to decide whether corporations, or at least foreign corporations, are subject to liability in an ATS suit filed in a United States district court.

Before recognizing a common-law action under the ATS, federal courts must apply the test announced in *Sosa*. An initial, threshold question is whether a plaintiff can demonstrate that the alleged violation is "of a norm that is specific, universal, and obligatory." 542 U. S., at 732 (internal quotation marks omitted). And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. See *id.*, at 732– 733, and nn. 20–21. "[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*, at 727.

It must be said that some of the considerations that pertain to determining whether there is a specific, universal, and obligatory norm that is established under international law are applicable as well in determining whether deference must be given to the political branches. For instance, the fact that the charters of some international tribunals and the provisions of some congressional statutes addressing international human-rights violations are specifically limited to individual wrongdoers, and thus foreclose corporate liability, has significant bearing both on the content of the norm being asserted and the question whether courts should defer to Congress. The two inquiries inform each other and are, to that extent, not altogether discrete.

With that introduction, it is proper now to turn first to the question whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights.

A

Petitioners and Arab Bank disagree as to whether corporate liability is a question of international law or only a question of judicial authority and discretion under domestic law. The dispute centers on a footnote in *Sosa*. In the course of holding that international norms must be "sufficiently definite to support a cause of action," the Court in *Sosa* noted that a "related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.*, at 732, and n. 20.

* * * *

…[T]he Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations. There is at least sufficient doubt on the point to turn to *Sosa*'s second question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS.

B 1

*Sosa* is consistent with this Court's general reluctance to extend judicially created private rights of action. The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has "recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U. S., at 727 (citing *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 68 (2001); *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001)). That is because "the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Ziglar* v. *Abbasi*, 582 U. S. ___, ___ (2017) (slip op., at 12) (internal quotation marks omitted). Thus, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, … courts must refrain from creating the remedy in order to respect the role of Congress." *Id.*, at ___ (slip op., at 13).

This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations. Thus, in *Malesko* the Court held that corporate defendants may not be held liable in *Bivens* actions. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Allowing corporate liability would have been a "marked extension" of *Bivens* that was unnecessary to advance its purpose of holding individual officers responsible for "engaging in unconstitutional wrongdoing." *Malesko*, 534 U. S., at 74. Whether corporate defendants should be subject to suit was "a question for Congress, not us, to decide." *Id.*, at 72.

Neither the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context. In fact, the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS. See *infra*, at 25–26. The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns. See *Kiobel*, 569 U. S., at 116–117. That

the ATS implicates foreign relations "is itself a reason for a high bar to new private causes of action for violating international law." *Sosa, supra*, at 727.

In *Sosa*, the Court emphasized that federal courts must exercise "great caution" before recognizing new forms of liability under the ATS. 542 U. S., at 728. In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case. Either way, absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.

2

Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action. See, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 24 (1990); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 736 (1975). Doing so is even more important in the realm of international law, where "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Sosa*, *supra*, at 726.

Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS created by Congress rather than the courts. As explained above, Congress drafted the TVPA to "establish an unambiguous and modern basis for a cause of action" under the ATS. H. R. Rep., at 3; S. Rep., at 4–5. Congress took care to delineate the TVPA's boundaries. In doing so, it could weigh the foreign-policy implications of its rule. Among other things, Congress specified who may be liable, created an exhaustion requirement, and established a limitations period. *Kiobel*, 569 U. S., at 117. In *Kiobel*, the Court recognized that "[e]ach of these decisions carries with it significant foreign policy implications." *Ibid.* The TVPA reflects Congress' considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.

The key feature of the TVPA for this case is that it limits liability to "individuals," which, the Court has held, unambiguously limits liability to natural persons. *Mohamad* v. *Palestinian Authority*, 566 U. S. 449, 453–456 (2012). Congress' decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case. That decision illustrates that significant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS. It would be inconsistent with that balance to create a remedy broader than the one created by Congress. Indeed, it "would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Sosa*, *supra*, at 726.

According to petitioners, the TVPA is not a useful guidepost because Congress limited liability under that statute to "individuals" out of concern for the sovereign immunity of foreign governmental entities, not out of general hesitation about corporate liability under the ATS. The argument seems to run as follows: The TVPA provides a right of action to victims of torture and extrajudicial killing, and under international law those human-rights violations require state action. For a corporation's employees to violate these norms therefore would require the corporation to be an instrumentality of a foreign state or other sovereign entity. That concern is absent, petitioners insist, for crimes that lack a state-action requirement—for example, genocide, slavery, or, in the present case, the financing of terrorists.

At least two flaws inhere in this argument. First, in *Mohamad* the Court unanimously rejected petitioners' account of the TVPA's legislative history. 566 U. S., at 453, 458–460. The Court instead read that history to demonstrate that Congress acted to exclude all corporate entities, not just the sovereign ones. *Id*., at 459–460 (citing Hearing and Markup on H. R. 1417 before the House Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 2d Sess., 87–88 (1988)); see also 566 U. S., at 461–462 (BREYER, J., concurring). Second, even for international-law norms that do not require state action, plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments. In *Kiobel*, for example, the plaintiffs sought to hold a corporate defendant liable for "aiding and abetting the Nigerian Government in committing," among other things, "crimes against humanity." 569 U. S., at 114; see also, *e.g.*, *Sarei* v. *Rio Tinto, PLC*, 671 F. 3d 736, 761–763 (CA9 2011) (en banc) (corporate defendant allegedly used Papua New Guinea's military to commit genocide), vacated and remanded, 569 U. S. 945 (2013).

Petitioners contend that, instead of the TVPA, the most analogous statute here is the Anti-Terrorism Act. That Act does permit suits against corporate entities. See 18 U. S. C. §§ 2331(3), 2333(d)(2). In fact, in these suits some of the foreign plaintiffs joined their claims to those of United States nationals suing Arab Bank under the Anti-Terrorism Act. But the Anti-Terrorism Act provides a cause of action only to "national[s] of the United States," and their "estate, survivors, or heirs." §2333(a). In contrast, the ATS is available only for claims brought by "an alien." 28 U. S. C. §1350. A statute that excludes foreign nationals (with the possible exception of foreign survivors or heirs) is an inapt analogy for a common-law cause of action that provides a remedy for foreign nationals only.

To the extent, furthermore, that the Anti-Terrorism Act is relevant it suggests that there should be no common-law action under the ATS for allegations like petitioners'. Otherwise, foreign plaintiffs could bypass Congress' express limitations on liability under the Anti-Terrorism Act simply by bringing an ATS lawsuit. The Anti-Terrorism Act, as mentioned above, is part of a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing. The detailed regulatory structures prescribed by Congress and the federal agencies charged with oversight of financial institutions reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism. It would be inappropriate for courts to displace this considered statutory and regulatory structure by holding banks subject to common-law liability in actions filed under the ATS.

In any event, even if the Anti-Terrorism Act were a suitable model for an ATS suit, Congress' decision in the TVPA to limit liability to individuals still demonstrates that there are two reasonable choices. In this area, that is dispositive—Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations.

3

Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent instructions from Congress to do so. It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute. As to the question of adequate remedies, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable. See, *e.g.*, 18 U. S. C. §1091 (criminal prohibition on genocide); §1595 (civil remedy for victims of slavery). And plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. If the Court were to hold that foreign corporations have liability for international-law violations, then

plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities.

As explained above, in the context of criminal tribunals international law itself generally limits liability to natural persons. Although the Court need not decide whether the seeming absence of a specific, universal, and obligatory norm of corporate liability under international law by itself forecloses petitioners' claims against Arab Bank, or whether this is an issue governed by international law, the lack of a clear and well-established international-law rule is of critical relevance in determining whether courts should extend ATS liability to foreign corporations without specific congressional authorization to do so. That is especially so in light of the TVPA's limitation of liability to natural persons, which parallels the distinction between corporations and individuals in international law.

If, moreover, the Court were to hold that foreign corporations may be held liable under the ATS, that precedent-setting principle "would imply that other nations, also applying the law of nations, could hale our [corporations] into their courts for alleged violations of the law of nations." *Kiobel*, 569 U. S., at 124. This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby "hinder[ing] global investment in developing economies, where it is most needed." Brief for United States as *Amicus Curiae* in *American Isuzu Motors, Inc.* v. *Ntsebeza*, O. T. 2007, No. 07–919, p. 20 (internal quotation marks omitted).

In other words, allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights.

It is also true, of course, that natural persons can and do use corporations for sinister purposes, including conduct that violates international law. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions both for the international community and for Congress. So there are strong arguments for permitting the victims to seek relief from corporations themselves. Yet the urgency and complexity of this problem make it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal courts in the United States. Congress, not the Judiciary, is the branch with "the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Kiobel*, 569 U. S., at 116 (internal quotation marks omitted). As noted further below, there are many delicate and important considerations that Congress is in a better position to examine in determining whether and how best to impose corporate liability. And, as the TVPA illustrates, Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS in a timely way.

C

The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. Brief for United States as *Amicus Curiae* 7. But here, and in similar cases, the opposite is occurring.

Petitioners are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank's New York branch and a brief allegation regarding a charity in Texas. The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to "touch and concern" the United States under *Kiobel*. See 569 U. S., at 124–125.

At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. For 13 years, this litigation has "caused significant diplomatic tensions" with Jordan, a critical ally in one of the world's most sensitive regions. Brief for United States as *Amicus Curiae* 30. "Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria." *Id.*, at 31. The United States explains that Arab Bank itself is "a constructive partner with the United States in working to prevent terrorist financing." *Id.*, at 32 (internal quotation marks omitted). Jordan considers the instant litigation to be a "grave affront" to its sovereignty. See Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 3; see *ibid.* ("By exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan's economy and undermine its cooperation with the United States").

This is not the first time, furthermore, that a foreign sovereign has appeared in this Court to note its objections to ATS litigation. *Sosa*, 542 U. S., at 733, n. 21 (noting objections by the European Commission and South Africa); Brief for the Federal Republic of Germany as *Amicus Curiae* in *Kiobel* v. *Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 1; Brief for the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in No. 10– 1491, p. 3. These are the very foreign-relations tensions the First Congress sought to avoid.

Petitioners insist that whatever the faults of this litigation—for example, its tenuous connections to the United States and the prolonged diplomatic disruptions it has caused—the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them. That misses the point. As demonstrated by this litigation, foreign corporate defendants create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.

Like the presumption against extraterritoriality, judicial caution under *Sosa* "guards against our courts triggering …serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Kiobel*, 569 U. S., at 124. If, in light of all the concerns that must be weighed before imposing liability on foreign corporations via ATS suits, the Court were to hold that it has the discretion to make that determination, then the cautionary language of *Sosa* would be little more than empty rhetoric. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.

III

With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.

The political branches can determine, referring to international law to the extent they deem proper, whether to impose liability for human-rights violations upon foreign corporations in this Nation's courts, and, conversely, that courts in other countries should be able to hold United States corporations liable. Congress might determine that violations of international law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations, and so that, even when those efforts cannot be faulted, compensation for injured persons will be a cost of doing business. If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate.

It is still another possibility that, in the careful exercise of its expertise in the field of foreign affairs, Congress might conclude that neutral judicial safeguards may not be ensured in every country; and so, as a reciprocal matter, it could determine that liability of foreign corporations under the ATS should be subject to some limitations or preconditions. Congress might deem this more careful course to be the best way to encourage American corporations to undertake the extensive investments and foreign operations that can be an important beginning point for creating the infrastructures that allow human rights, as well as judicial safeguards, to emerge. These delicate judgments, involving a balance that it is the prerogative of the political branches to make, especially in the field of foreign affairs, would, once again, also be entitled to special respect, especially because those careful distinctions might themselves advance the Rule of Law. All this underscores the important separation-of-powers concerns that require the Judiciary to refrain from making these kinds of decisions under the ATS. The political branches, moreover, surely are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments.

Finally, Congress might find that corporate liability should be limited to cases where a corporation's management was actively complicit in the crime. Cf. ALI, Model Penal Code §2.07(1)(c) (1985) (a corporation may be held criminally liable where "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment"). Again, the political branches are better equipped to make the preliminary findings and consequent conclusions that should inform this determination.

These and other considerations that must shape and instruct the formulation of principles of international and domestic law are matters that the political branches are in the better position to define and articulate. For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.

The judgment of the Court of Appeals is affirmed.

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## C. POLITICAL QUESTION DOCTRINE, COMITY, AND *FORUM NON CONVENIENS*

### 1. International Comity

#### *a.* BAE Systems v. Republic of Korea

On January 16, 2018, the United States filed an amicus brief in the U.S. Court of Appeals for the Fourth Circuit in *BAE Systems Technology Solution & Services, Inc. v. Republic of Korea*, Nos. 17-1041, 17-1070. The U.S. brief addresses two issues, as requested by the court: U.S. national security interests and the plaintiff's argument for an anti-suit injunction. The brief is excerpted below, and available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/. The discussion of whether an anti-suit injunction is appropriate focuses on comity.

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* * * *

This case involves an agreement between a defense contractor and the Republic of Korea, both of which anticipated entering into separate Foreign Military Sales (FMS) contracts with the United States. The district court ultimately found the parties' agreement unenforceable based on its understanding of U.S. national security interests. The court also concluded that those perceived interests justified enjoining Korea from maintaining a breach-of-contract action in Korea (though the court later declined to make its injunction permanent for other reasons).

In response to this Court's invitation, and without opining on any other issues, the United States is filing this amicus brief to make two points. First, U.S. national security interests do not render unenforceable the requirement in the Memorandum of Agreement (MOA) that the contractor use its "best effort" to secure a given price. Enforcing such a provision can present national security benefits by broadening the methods through which foreign governments can access FMS items sold by U.S. defense contractors, which in turn benefits the U.S. government. But enforcement of such provisions can also present national security costs because these provisions may incentivize contractors to act in ways that might be contrary to the U.S. government's interests. In the final calculus, the United States believes that U.S. national security interests do not prohibit enforcement of the provision at issue here. Since the United States is neutral (from a national security perspective) on the agreement's enforcement, it follows that national security interests also do not justify enjoining Korea from maintaining a breach-of-contract action in Korean courts. But in addition, such an antisuit injunction, barring a foreign sovereign from invoking the jurisdiction of its own courts, would be a truly extraordinary remedy with significant consequences for international comity, and its issuance could have significant negative consequences for the U.S. government (which frequently requires its foreign contractors to litigate in the United States). Particularly in a case like this, where the contractor has expressly consented to suit in a foreign forum with significant ties to the case, the requested antisuit injunction is improper.

* * * *

**II. BAE's Requested Antisuit Injunction Is Improper**

For the same reasons that national security concerns do not render the "best effort" clause unenforceable, such concerns also do not justify BAE's requested permanent antisuit injunction. But even if the "best effort" clause was unenforceable, the United States would still view BAE's requested antisuit injunction as inappropriate. Enjoining a foreign sovereign from bringing suit in its own country is an extraordinary remedy that would be rarely (and possibly never) justified. It is not justified here.

The legal standard to be applied in assessing a request for a foreign antisuit injunction is undecided in this Circuit. …

This Court need not take a position in this dispute, however, because both versions of the test appropriately give substantial weight to international comity, and here the comity impact of an antisuit injunction is so substantial that BAE's requested injunction is improper under either standard. BAE is not merely trying to have a U.S. court control the activities in a foreign court (itself a considerable affront to foreign sovereignty that should be done sparingly). Instead, it is attempting to enjoin *a foreign sovereign itself* from maintaining a lawsuit in its own courts, and which seeks to enforce a military procurement-related contract entered into *within its own borders* pursuant to its domestic laws.

Attempting to manage a foreign state's conduct in this manner, within its own territory, departs dramatically from ordinary sovereignty norms. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 79 (3d Cir. 1994) (noting it is "widely accepted that each sovereign nation has the sole jurisdiction to prescribe and administer its own laws, in its own country, pertaining to its own citizens, in its *own* discretion," and ultimately reversing an injunction that sought to prevent the Philippine government from taking retaliatory actions in the Philippines against witnesses in a U.S. judicial proceeding); *cf. Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (recognizing the basic principle that every sovereign state must respect the independence of every other sovereign state, and so the courts of one state do not sit in judgment of the acts of a second, done within its own territory); *id.* at 303-04 (explaining that this principle rests "upon the highest considerations of international comity and expediency," and that failure to honor it could cause international conflict). The drastic nature of BAE's requested remedy is reinforced by the absence of such a remedy in the Foreign Sovereign Immunities Act's text. And that Act's legislative history clarifies that injunctive relief against foreign states should only be permissible "when circumstances [a]re clearly appropriate," H.R. Rep. No. 94-1487, at 22 (1976). There is no indication Congress would have viewed this type of extraordinary relief as appropriate.

Permitting an antisuit injunction in this context would also threaten to cause significant harms to the United States. The laws in many foreign nations do not even permit a court to enter an injunction against a foreign state, and many foreign states will expect the United States to extend them the same respect and courtesy. If U.S. courts fail to do so, this could disrupt our relations with the foreign country. *Cf. Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945) (recognizing that actions affecting foreign state property can cause international disputes). Moreover, the United States engages in extensive overseas activities and is subject to many suits in foreign courts. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017). Because "some foreign states" account for principles of "reciprocity" in their treatment of other sovereign litigants, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), there is a real risk that issuance of an antisuit injunction in cases like this could prompt reciprocal injunctions against the United States.

Finally, the United States regularly signs foreign contracts which require that contract disputes be resolved in U.S. courts. United States interests could thus be significantly hindered if courts let contractors bypass their express consent to a suit in a foreign forum with significant ties to the case. The parties here agree that, at minimum, BAE consented to suit in Korea (their textual dispute concerns whether other fora were also contemplated, *see* Korea Opening Br. 26-33; BAE Opening Br. 47). That forum choice hardly seems opportunistic since the parties' agreement was apparently signed in Korea, *see* JA85, and concerns a purchase by the Korean government. An injunction is inherently an equitable remedy, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006), and so BAE's attempt to backtrack from its previous consent to suit in Korea makes this case a particularly poor candidate to overcome the significant international comity problems that can result from BAE's requested injunction.

* * * *

The Fourth Circuit Court of Appeals issued its decision on March 6, 2018 in *BAE Systems*. The Court affirmed the district court's declaration that BAE had not violated the "best effort" clause of the parties' agreement and also its refusal to issue a permanent antisuit injunction. Sections of the Court's opinion analyzing the forum selection clause of the parties' agreement and the propriety of an antisuit injunction are excerpted below. The Court acknowledged the concerns of international comity raised in the U.S. brief. The Court's discussion of the Foreign Sovereign Immunity Act is excerpted in Chapter 10.

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B. A forum selection clause is permissive unless it contains "specific language of exclusion." *See Albemarle Corp.*, 628 F.3d at 651 (quoting *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 290 (4th Cir. 2007)) (internal quotation marks omitted). "[A]n agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction" in another unless the clause expressly sets forth "specific language of exclusion." *IntraComm*, 492 F.3d at 290 (quoting *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994)) (internal quotation marks omitted).

The forum selection clause at issue here does not contain any "specific language of exclusion." *Id*. Rather, it simply confers jurisdiction on a forum by stating that disputes "shall be resolved through litigation and the Seoul Central Court shall hold jurisdiction." This clause, as the district court noted, differs significantly from forum selection clauses found to be mandatory, which provide that a particular place constitutes the "sole" or "only" or "exclusive" forum.

Contrary to Korea's suggestion, the use of "shall" in the clause does not render it mandatory. As we explained in *IntraComm*, the use of "shall" in a forum selection clause is not dispositive, because, in context, the clause may still "permit[] jurisdiction in one court but … not prohibit jurisdiction in another." *Id.* (discussing *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997)). Nor does holding the clause permissive render it, as Korea suggests, "meaningless and redundant." Appellant's Opening Br. at 30. Korea contends this is so because the BAE-Korea agreement "could always be enforced in the Korean courts." *Id.* at 29–30. But Korea fails to explain why the Seoul Central District Court in particular would

necessarily hold jurisdiction absent this clause.

Because the clause here is permissive, the modified framework outlined in *Atlantic Marine* does not apply, there is no presumption in favor of enforceability, and we proceed with a traditional *forum non conveniens* analysis. Pursuant to that analysis, Korea bears the burden of proving, *inter alia*, that its proposed alternative forum (the Seoul Central District Court) is more convenient in light of the public and private interests involved. *See DiFederico*, 714 F.3d at 800–01. Korea does not even attempt to do this. Accordingly, we agree with the district court that the BAE-Korea agreement's permissive forum selection clause provides no basis for dismissing this action.

* * * *

V. Finally, BAE claims the district court erred by failing to impose a permanent anti-suit injunction barring the Korean government from bringing suit in Korea to enforce the BAE-Korea agreement. After the district court granted summary judgment in favor of BAE, it lifted a preliminary injunction it had previously imposed. The court concluded that if South Korea "proceed[ed] with its claims against BAE in its own courts, BAE may defend against the claims by asserting any claim or issue preclusion that this judgment may afford it under Korean law." We review denial of the permanent anti-suit injunction for abuse of discretion. *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 939 (4th Cir. 1995).

Although a district court with jurisdiction over the parties may prohibit them from proceeding with a lawsuit in a foreign country, the court should use that power "sparingly." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012) (internal quotation marks and citation omitted). Our sister circuits have outlined at least two approaches for determining if a foreign anti-suit injunction is warranted: the "liberal" test and the "conservative" test. Both weigh factors favoring an injunction against the effect of an injunction on international comity. The principal difference is that the liberal approach accords less weight to international comity concerns. *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993). But international comity remains a significant consideration, even in courts endorsing the liberal approach. *See E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990– 91, 994 (9th Cir. 2006) (under the liberal standard, a court must perform a "detailed analysis" to determine whether the impact on international comity would be "tolerable").

In our view, no matter which approach provides the appropriate framework, the district court did not abuse its discretion in denying BAE's petition for a permanent anti-suit injunction. BAE's contention to the contrary rests on two rationales.

First, BAE claims the Korean litigation threatens the district court's jurisdiction, because "the U.S. court system is the proper venue for the dispute," and, absent an injunction, BAE "face[s] the possibility of an inconsistent judgment" in Korea, which "could be enforced in [Korea] or potentially third countries." Appellee/Cross-Appellant's Response/Opening Br. at 40. We agree that a district court may, in certain circumstances, impose an anti-suit injunction to protect its own jurisdiction, even where (as here) it has already rendered its judgment. In that context, the injunction serves to protect the integrity of the district court order in case the foreign forum fails to give *res judicata* effect to the district court judgment. *See Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004).

But parallel proceedings are common, and an anti-suit injunction is not appropriate every time parallel proceedings may occur and litigation in the U.S. court concludes first. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 n.54 (D.C. Cir. 1984) ("[A] showing of harassment, bad faith, or other strong equitable circumstances should ordinarily be required" for a district court to impose an anti-suit injunction in order to protect an existing judgment). Otherwise, such injunctions would be commonplace rather than extraordinary. Here, the Korean litigation is not particularly vexatious or oppressive; indeed, the forum selection clause in the BAE-Korea agreement contemplates (but does not require) litigation in Korea. In sum, we conclude that jurisdictional grounds provide an unconvincing justification for an anti-suit injunction.

BAE also claims an injunction is necessary in order to protect U.S. national security interests. Here, BAE has more solid footing. We have concluded that enforcement of the BAE-Korea agreement runs counter to U.S. national security concerns, and we agree that enforcement by a Korean court may threaten those same concerns. But BAE goes even further, suggesting it would be inconsistent to allow the enforceability of the BAE-Korea agreement to be litigated in Korea after holding, as we do here, that enforcement runs counter to national security interests. *See* Appellee/Cross-Appellant's Response/Opening Br. at 32–33. That line of reasoning is too simplistic, because it ignores international comity concerns that must always be considered in determining whether to issue an anti-suit injunction.

International comity counsels us to give effect, if possible, to the judgments of foreign courts in order to strengthen international cooperation. *See Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895). Here, these comity concerns are near their peak. Even courts following the liberal framework recognize that comity concerns are far greater where an injunction would bar a foreign sovereign (rather than a private party) from litigating a dispute in its own courts. *See Allendale*, 10 F.3d at 428 (suggesting an injunction barring the French government "from litigating a suit on a French insurance policy in a French court" would be "an extraordinary breach of international comity"); *see also Microsoft*, 696 F.3d at 887; *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996). Indeed, an anti-suit injunction here would impinge on the sovereignty of the Korean courts (to hear the case) and the Korean government (to litigate it). And it would do so on a permanent basis, raising even graver comity concerns. Because anti-suit injunctions against foreign sovereigns are so unusual, no circuit precedent (and little out-of-circuit precedent) exists to guide courts in analysis of this issue.

Given all of these circumstances, we can hardly conclude the district court abused its discretion by declining to impose an anti-suit injunction.

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### *b.* 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" ("CIVS," its French acronym). The district court dismissed the case in 2016 due to the failure to exhaust administrative remedies in France. See *Digest 2016* at 337. The district court opinion, issued in 2018, is discussed in Chapter 8. Excerpts below from the U.S. amicus brief in the Seventh Circuit make the argument in favor of affirming dismissal on the basis of international comity. Specifically, the brief argues that international comity, rather than customary international law, is the proper basis on which U.S. courts may consider prudential exhaustion—the discretionary abstention doctrine in which a court declines to exercise jurisdiction in deference to an alternative forum. The brief is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/. See Chapter 10 for excerpts regarding consideration of international comity under the Foreign Sovereign Immunities Act ("FSIA"). Chapter 10 also includes two other cases in which international comity in the context of the FSIA was under consideration: *Simon v. Hungary* and *Philipp v. Germany*.

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**I. Dismissal Is Appropriate as an Exercise of International Comity**

A. After evaluating the adequacy of the CIVS program for addressing plaintiffs' claims, the district court dismissed plaintiffs' suit for failure to exhaust remedies in France. …[T]he district court held that exhaustion of local remedies is required by customary international law. … In the view of the United States, the court's reliance on customary international law was misplaced, but the result it reached was correct as a matter of international comity.

* * * *

…[C]ustomary international law governing state-to-state relations rests on different considerations and may impose different obligations than customary international law addressing the relations between states and individuals. And, as this Court recognized, the Supreme Court has not "definitively" answered the question whether customary international law requires individuals to exhaust domestic remedies before bringing suit against a sovereign in a foreign court for violations of international law. *Abelesz*, 692 F.3d at 679; *see Sosa*, 542 U.S. at 733 n.21 ("We would certainly consider this requirement in an appropriate case."). To determine whether the exhaustion requirement applies to claims by individuals against one state in the courts of another requires a deeper investigation into customary international-law exhaustion principles, which this Court did not undertake. Accordingly, this Court's observation that "there is no reason to think that" the exhaustion requirement applicable to diplomatic protection "is limited to foreign sovereigns" (*Fischer*, 777 F.3d at 859) (emphasis omitted), is not well-supported.

… [I]nternational comity supports dismissal of international-law claims in deference to an available alternative foreign forum. For example, the Court explained that "international comity requires that [local] courts be given the first opportunity to hear the claims." *Fischer*, 777 F.3d at 860; *see also id*. at 854 ("This exhaustion principle [is] based on comity."), 858-59 (same); *Abelesz*, 692 F.3d at 684 ("The requirement of domestic exhaustion is not based on the relative convenience of two nations' courts. It is based on the power of U.S. courts to hear a

claim and the comity between sovereign nations that lies close to the heart of most international law."); *Abelesz*, 692 F.3d at 682 (same). In the view of the United States, international comity is the proper basis for the prudential-exhaustion requirement that this Court described.

…[I]nternational comity supports the district court's dismissal of plaintiffs' claims for failure to exhaust administrative remedies in France. The Court should use this case as an opportunity to clarify that the prudential-exhaustion requirement—a discretionary abstention doctrine in which a court declines to exercise jurisdiction in deference to an alternative forum—is based on international comity, rather than customary international-law principles applicable to diplomatic protection. *See* 7th Cir. R. 40(e).

B. At a general level, international comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having 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). At issue here is the application of "adjudicatory comity" or the "comity of the courts," which "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014). The doctrine is well established in United States law. *See Hilton*, 159 U.S. at 164 (distinguishing between the "comity of the courts" and the "comity of the nation"). Courts apply the doctrine in considering whether to defer not only to foreign court proceedings, but also to claims resolution by foreign non-judicial fora. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1230-32, 1237-40 (11th Cir. 2004) (dismissing claims on international comity grounds in favor of resolution by private foundation established by Germany to hear claims of victims of the Nazi regime).

Most courts, including this Court, have not identified specific factors to be considered in deciding whether to dismiss a suit based on international comity in favor of resolution of the claims in a foreign state's forum. But the Ninth and Eleventh Circuits have identified as central to the inquiry: (1) the United States' interests, including its foreign policy interests; (2) the foreign state's interests, including its interest in addressing matters arising within its territory; and (3) the adequacy of the foreign forum. *See, e.g.*, *Cooper v. Tokyo Electric Power Co.*, 860 F.3d 1193, 1205 (9th Cir. 2017); *Ungaro-Benages*, 379 F.3d at 1238-39; *see also In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996) ("Comity is a doctrine that takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.") (prescriptive comity). That formulation is an accurate distillation of the various factors courts of appeals have considered. *See Mujica*, 771 F.3d at 603- 09 (collecting cases); *Ungaro-Benages*, 379 F.3d at 1238 (same).

If the United States' and the foreign state's interests support claims resolution in the foreign forum, and if the foreign state provides an adequate alternative forum, then a court may dismiss a plaintiff's claims for failure to exhaust local remedies.

C. There is little question that the first two factors, concerning the United States' and foreign sovereign's respective interests, support dismissal of plaintiffs' claims in favor of resolution in France. Plaintiffs allege that the takings occurred in France. App'x A1-A2. Two of the three plaintiffs are French nationals. Dkt. No. 1, ¶¶ 17, 18. France has a significant interest in resolving Holocaust-related claims through the procedures it has established, and it has demonstrated a willingness to do so. A21 (2014 Exec. Agm't, Pmbl.) (noting the French Republic's continuing "commit[ment] to providing compensation for the wrongs suffered by

Holocaust victims deported from France through [administrative] measures to individuals who are eligible under French programs"). And the United States has a longstanding policy supporting the resolution of such claims through reparation mechanisms established by the foreign states in which the claims arose, as reflected in the 2014 Executive Agreement. *See, e.g.*, A22 (2014 Exec. Agm't, Pmbl.) (noting the parties' shared resolve to address compensation claims of Holocaust victims and their families in "an amicable, extra-judicial and non-contentious manner); *see generally Mujica*, 771 F.3d at 604-07 (discussing similar considerations).

There is also little question that the CIVS program provides an adequate alternative to adjudication of plaintiffs' claims in a U.S. court, as the district court concluded. "An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly." *Fischer*, 777 F.3d at 867 (quotation marks omitted) (*forum non conveniens* context); *see Cooper*, 860 F.3d at 1210 ("The analysis used in evaluating the adequacy of an alternative forum is the same under the doctrine of *forum non conveniens* as it is under the doctrine of international comity."). CIVS procedures are informal and so do not require expert advocates, though claimants may be represented by counsel. App'x A8. CIVS personnel assist claimants by performing research on their behalf in specialized archives. App'x A7. CIVS employs relaxed evidentiary standards, and can recommend compensation even in the absence of evidence, and it can rely on good-faith estimates of value. App'x A7, A12. Hearings are sometimes held outside of France to facilitate claimants' participation. App'x A8. Favorable decisions result in compensation. *Id*. And even "if there is no evidence of the type or amount of property confiscated[,] * * * the Commission recommends a lump sum payment of 930 euros in compensation." App'x A12. If claimants are unsatisfied with the award, they may seek review from the French courts. App'x A8. Under these procedures, plaintiffs "will not be deprived of all remedies or treated unfairly." *Fischer*, 777 F.3d at 867.

This Court may "affirm on any ground supported by the record so long as the issue was raised and the non-moving party had a fair opportunity to contest the issue in the district court." *Locke v. Haessig*, 788 F.3d 662, 666 (7th Cir. 2015). It would be appropriate for the Court to affirm the district court's judgment on the basis of international comity. The district court acted well within its discretion in determining that CIVS provides an adequate alternative forum, and in concluding that the interests of the United States and France support consideration of plaintiffs' claims by CIVS. *See Fischer*, 777 F.3d at 866 (abuse of discretion standard applies to district court's determination of adequacy of foreign forum and *forum non conveniens* factors). But even under de novo review, it is apparent that the international comity factors support dismissal of plaintiffs' claims in favor of resolution in France.

D. Plaintiffs do not dispute that the sovereign interests favor resolution of their claims by CIVS. Instead, their opening appellate brief is devoted to the argument that CIVS is not an adequate forum, because it lacks jurisdiction to consider claims of spoliation by SNCF (Br. 16-22) and, in any event, because CIVS procedures do not provide an effective remedy for the claims CIVS considers (Br. 22-30). Those arguments lack merit. The district court did not abuse its discretion in finding CIVS to be an adequate forum.

Plaintiffs identify no French law that clearly excludes SNCF spoliation claims from CIVS's jurisdiction. In the absence of any such limitation, plaintiffs have given no reason to doubt the CIVS Chairman's sworn declaration that CIVS is competent to consider plaintiffs' claims and will do so if plaintiffs submit them. *See* App'x A17 (discussing declaration).

Plaintiffs' arguments concerning the effectiveness of CIVS's procedures are no stronger. They rely, as the district court noted (App'x A23), on anecdotal reports about perceived shortcomings, rather than on any inherent deficiencies in the program. Plaintiffs further rely (Br. 25-28) on a critical report by a French parliamentarian (which they erroneously attribute to the French Senate). But none of this is sufficient to suggest that the district court abused its discretion or otherwise erred in concluding that CIVS is an adequate forum (App'x A18-A22), especially given the endorsement of the United States (and, in addition, the endorsement of CRIF, the largest French Jewish umbrella organization, representing over sixty Jewish organizations in France). …

* * * *

## 2. Political Question: *Al-Tamimi*

As discussed in *Digest 2017* at 155-61, the United States filed briefs in support of its motion to dismiss claims against a former U.S. government official (Elliott Abrams) for allegedly conspiring to enable unlawful actions by Israel Defense Forces against plaintiffs. The district court dismissed the claims and plaintiffs appealed. Excerpts follow from the political question section of the brief of the United States on appeal in the U.S. Court of Appeals for the D.C. Circuit. *Al-Tamimi v. Adelson,* No. 17-5207 (D.C. Cir. 2019). The section of the brief on the ATS and TVPA is excerpted *supra*.[**] The brief is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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The political question doctrine reflects the principle that "courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary." *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (internal quotations omitted). It "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Cases presenting non-justiciable political questions typically include one or more of the following factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision

[**] Editor's note: On February 19, 2019, the Court of Appeals issued its decision, reversing the district court's dismissal for lack of subject matter jurisdiction due to the nonjusticiable political questions raised by the case.

> already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962)…"To find a political question, [the Court] need only conclude that one factor is present," *Schneider*, 412 F.3d at 194, but this case involves several.

1. "There is no question that the first Baker factor is implicated in this case." Op. 6 …. "The conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government …." *Oetjen v. Central Leather Co*., 246 U.S. 297, 302 (1918); see also *Schneider*, 412 F.3d at 195 ("Just as Article I of the Constitution evinces a clear textual allocation to the legislative branch, Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive.").

While "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211 … "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Indeed, "[d]isputes involving foreign relations" present "quintessential sources of political questions." *El-Shifa*, 607 F.3d at 841 (quotation marks omitted).

The plaintiffs here seek to hold various defendants liable for their alleged support of, or participation in, the "settlement enterprise," meaning the establishment of "Israeli civilian communities built on lands occupied or otherwise administered by Israel" in 1967, including East Jerusalem, the West Bank, and the Gaza Strip. … They argue that these settlements amount to theft of Palestinian land by Israeli settlers. …

But as the Supreme Court has explained, "[q]uestions touching upon the history of the ancient city [of Jerusalem] and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015). The plaintiffs' attempt to "have this Court adjudicate the rights and liabilities of the Palestinian and Israeli people" in these areas, *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005), would thrust the judiciary into a realm textually committed to other branches of government. …

Moreover, the political branches are actively engaging with the very questions the plaintiffs asked the district court to address. … The plaintiffs themselves allege that Congress has been involved by holding hearings and issuing "resolutions: (a) condemning Palestinian violence; and (b) cutting off vital humanitarian aid to the Palestinians." Am. Compl. 43. Their complaint makes clear that they intend for this lawsuit to interfere with these ongoing efforts by labeling Abrams's communications with Israeli officials while working in the White House and his testimony before Congress as a private citizen as parts of an unlawful conspiracy, or even war crimes. …

"[C]ourts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy." *El-Shifa*, 607 F.3d at 842; see also *Oetjen*, 246 U.S. at 302 ("[T]he propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). "Whether plaintiffs dress their claims in the garb of … federal statutes, or the [common law of] tort," or the law of nations, "the character of those claims is, at its core, the same: peculiarly volatile, undeniably political, and ultimately nonjusticiable." *Doe I*, 400 F. Supp. 2d at 112.

There are also no "judicially discoverable and manageable standards for resolving" the issues raised in the plaintiffs' complaint. *Baker*, 369 U.S. at 217. The Supreme Court recently recognized that "whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012). And that is precisely what the plaintiffs' complaint called on the district court to do when it brought claims that Israeli settlers, with the assistance of the Israeli armed forces, have engaged in widespread theft of Palestinian land in "Occupied Palestinian Territories," including East Jerusalem. …

Equally as problematic, the plaintiffs invited the district court "to draw some big-picture conclusions" regarding "the settlement enterprise," including whether "the root cause of violence in the Middle East" is "Palestinian farmers and homeowners" or "rabid, rampaging, out-of-control settlers." Am. Compl. 78, 175 … There are no judicially discoverable and manageable standards for determining whether the assertion that "Palestinian farmers are the root cause of violence in the Middle East" is "a complete fabrication," as the plaintiffs allege. *Id*. at 20 …

The presence of these two factors—which have been described as "the most important," *Harbury v. Hayden*, 522 F.3d 413, 419 (D.C. Cir. 2008)—is sufficient to deprive courts of jurisdiction over the plaintiffs' claims, see *Schneider*, 412 F.3d at 194, but several other factors are also implicated by "the centrality of the question of sovereignty over these disputed lands[,] and in particular the ongoing expansion of settlements on those lands." Op. 7. Determining the equities between Israelis and Palestinians in the West Bank, for example, would require "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217; see Op. 8. And the possibility that a court ruling would "conflict with the other branches' sensitive positions regarding the legality and implication of the settlements, broader questions of Israel's sovereignty, and the right to private ownership and control over the disputed lands," Op. 8, risks embarrassing the government through "multifarious pronouncements" on the nature and equities of the conflict. *Baker*, 369 U.S. at 217. As the district court recognized, when a "court is asked to make a determination on issues at the forefront of global relations while the United States government continues to determine how best to approach these same issues, it should decline to weigh in on such sensitive diplomatic and geopolitical matters." Op. 8.

Several of the other *Baker* factors are also implicated by the plaintiffs' claim that alleged actions taken by the Israeli military and Israeli settlers (allegedly supported and encouraged by Abrams) constituted genocide. …The plaintiffs also "request damages in the sum of $1 billion for their damages arising out of the war crimes, crimes against humanity, and genocide committed by the Israeli army and violence-prone settlers." … Some of these damages are specifically traced to official military actions taken by the Israeli government. …

Resolution of these claims would implicate the fourth and sixth Baker factors. Given the level of political and military support provided Israel by the American government, a judicial finding that the Israeli armed forces had committed the alleged offenses would "implicitly condemn American foreign policy by suggesting that the [government's] support of Israel is wrongful." *Doe I*, 400 F. Supp. 2d at 112. Such a ruling would therefore "expres[s] lack of the respect due coordinate branches of government," and also create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217; see *Schneider*, 412 F.3d at 198 (finding the fourth factor present where the Court "could not determine Appellants' claims without passing judgment on [a] decision of the executive branch"); see also *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007)

(finding a political question present where "[a] court could not find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy toward Israel").

2. a. The plaintiffs' sole reason for arguing that the district court's political question ruling was wrong is that the court "erroneously concluded that the Justice Department had itself filed a 'Declaration of Interest' on behalf of the State Department." Br. 12. Their contention that "only the State Department has the right and authority to file formal Statements of Interest concerning lawsuits that may interfere with the executive's foreign policy agenda," *id.*, lacks any support in the law and is flatly wrong. Congress expressly assigned to the Department of Justice the responsibility to "attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517. When doing so, the Department of Justice regularly consults with federal agencies, including, as appropriate, the State Department. But the authority to make the filing rests with the Department of Justice. Here, the government's interests were asserted through a motion to dismiss filed after the United States substituted itself as a defendant for Mr. Abrams. No more is required. See, *e.g.*, *El-Shifa*, 607 F.3d at 855, 856-61 (holding that the political question doctrine barred claims in a case where the government filed a motion to dismiss).

* * * *

…[T]he plaintiffs argued that the district court had misunderstood the nature of their claims because they "never referred to the sovereignty of Jerusalem as a central concern in their pleadings" and in fact no plaintiff had "claimed that his or her stolen property was located in Jerusalem." Opp'n Summ. Affirmance 13. The fact that the plaintiffs never expressly referred to the sovereignty of Jerusalem is irrelevant; the entire premise of their lawsuit is that land in the "Occupied Palestinian Territories"—which plaintiffs define to include East Jerusalem, see Am. Compl. 11 n.2—is currently in the possession of Israeli citizens but rightly belongs to Palestinians, and they asked for damages based on that contention. See also *id.* at 26 (alleging that the defendants "are intentionally and literally cleansing East Jerusalem … of all non-Jews" (emphasis omitted)). As the district court recognized, it would be impossible to adjudicate these claims without resolving questions of sovereignty and the rights of foreign citizens in these territories. But even if there were any question on this point, the plaintiffs do not deny that their claims would require a determination that Israeli military officials and settlers committed various war crimes and crimes against humanity. As explained above, that alone suffices to render their claims non-justiciable.

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### 3. *Forum Non Conveniens*

See discussion of *Simon v. Hungary* and *Philipp v. Germany* in Chapter 10.

## D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

### 1. *Hernandez*

On June 15, 2018, the plaintiff in the district court, Jesus Hernandez, filed a new petition for certiorari in the U.S. Supreme Court. *Hernandez v. Mesa*, No. 17-1678. *Hernandez* is a damages action against a U.S. Border Protection officer (Mesa) for the death of a Mexican national in a shooting across the U.S. border with Mexico. See *Digest 2017* at 172-77 for discussion of the U.S. brief filed in the Supreme Court in 2017 and the Supreme Court's 2017 decision ("*Hernandez I*"), remanding to the U.S. Court of Appeals for the Fifth Circuit in light of another Supreme Court decision in a *Bivens* action (*Abbasi)*. See *Digest 2016* at 192 and *Digest 2015* at 163-66 for discussion of the initial decision by the Fifth Circuit, en banc, affirming the dismissal of all claims in *Hernandez v. Mesa et al.*, 785 F.3d 117 (5th Cir. 2015). On remand from the Supreme Court, the Fifth Circuit once again affirmed the district court's dismissal of all claims, focusing on the *Bivens* action. 885 F.3d 811 (5th Cir. 2018) (en banc). On October 1, 2018, the Supreme Court invited the Solicitor General to file a brief in the case expressing the views of the United States.

### 2. *Rodriguez*

*Rodriguez v. Swartz* involves issues similar to those in *Hernandez*. The U.S. Court of Appeals for the Ninth Circuit found, *inter alia*, that there was an implied remedy for damages under *Bivens* in the context of a cross-border shooting. 899 F.3d 719 (2018). See *Digest 2016* at 192, for discussion of the U.S. government's notification to the Ninth Circuit that it should use the Supreme Court's determination in *Hernandez* in deciding *Rodriguez*. See *Digest 2017* at 177-81 for discussion of the U.S. supplemental brief filed in 2017 in the Ninth Circuit supporting reversal. After the Ninth Circuit's decision in 2018, the defendant in the district court filed a petition for writ of certiorari in the U.S. Supreme Court. On October 29, 2018, the Supreme Court invited the U.S. government to file a brief expressing its views. *Swartz v. Rodriguez*, No. 18-309.

## E. AGREEMENT FOLLOWING REVIEW OF COMPACT OF FREE ASSOCIATION WITH PALAU

On September 19, 2018, the United States and Palau signed an agreement to amend the "Compact Review Agreement" (the Compact of Free Association Section 432 Review signed in 2010, or "CRA"). For background on the 2010 CRA, see *Digest 2010* at 196-97. The United States and Palau also exchanged diplomatic notes to bring the amended CRA into force on the same day. As described in a September 19, 2018 media note on the

subject, available at https://www.state.gov/united-states-and-palau-sign-agreement-to-amend-the-compact-review-agreement/:

> The signing marks the completion of the first review and amendment process as provided for under the Compact of Free Association (the "Compact"), U.S. Public Law 99-658.
>
> Since the implementation of the Compact in 1994, the United States has provided over $700 million in direct assistance and investment to Palau. The U.S. investment in Palau under the Compact, and numerous other federal programs, has provided funds for essential government operations, law enforcement, infrastructure development, weather pattern monitoring, immunizations and health screenings, scholarships for higher education, and postal services.
>
> The United States sees Palau and the Pacific Islands as an essential part of a free and open Indo-Pacific region and is committed to the Pacific Islands' security and prosperity. The United States is actively engaged in advancing a regional order based on respect for sovereignty, the rule of law, and the principles of free, fair, and reciprocal trade.

**Cross References**

*Universal jurisdiction*, **Ch. 3.A.5.**
*Scalin v. SNCF,* **Ch. 8.A**
*BAE Systems v. Korea,* **Ch. 10.A.1**
*Simon v. Hungary,* **Ch. 10.A.2**
*Philipp v. Germany,* **Ch. 10.A.2**
*Scalin v. SNCF,* **Ch. 10.A.2**