Contents

CHAPTER 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs civil actions against foreign states in U.S. courts. The FSIA's various statutory exceptions to a foreign state's immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, 1605B, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2020 in which the United States filed a statement of interest or participated as amicus curiae.

1. Scope of Application: Definition of Foreign State (*Indirect Purchaser Plaintiffs v. Irico Group Corp.*)

Section 1603(a) and (b) of the FSIA define "foreign state" as follows:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means any entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

On July 8, 2020, the United States filed an amicus brief in the U.S. Court of Appeals for the Ninth Circuit in *Indirect Purchaser Plaintiffs v. Irico Group Corp.*, No. 19-17428, a civil action alleging that foreign corporations had conspired to fix the prices of cathode ray tubes ("CRTs") used in televisions and computer monitors sold in the United States. The district court denied the defendant Irico Group's motion to dismiss, finding the commercial activity exception to the FSIA applied to the extent the defendants were agencies and instrumentalities of a foreign state. Excerpts below from the *amicus* brief of the United States address whether an ordinary profit-seeking company, not engaged in public activity, and owned only in minority part by the Chinese government, may be considered an agency or instrumentality under Section 1603(b) of the FSIA as an organ of the foreign government. The brief is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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I. The District Court Properly Determined That Irico Display Is Not An Organ Of China

A. Companies Are Not Organs of a Foreign State Unless They Serve a Public Function on Behalf of the Government

Section 1603(b)(2) defines an "agency or instrumentality" of a foreign state to include any entity "[1] which is an organ of a foreign state or political subdivision thereof, or [2] a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). In *Dole Food*, the Supreme Court held "that only direct ownership of a majority of shares by the foreign state [itself] satisfies" the majority-share prong. 538 U.S. at 474, 477. Because the two prongs are disjunctive—"*[e]ither* the entity can be an 'organ of a foreign state,' *or* the entity can have a majority of its shares or other ownership interest owned by a 'foreign state or a political subdivision thereof,'" *see Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996)—an entity can be an "organ of a foreign state" when the state does not directly own a majority of it. *Id.* The critical inquiry for determining whether an entity is an "organ" of a foreign state under this Court's precedents is whether it "engages in a public activity on behalf of the foreign government." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff'd on other grounds*,538 U.S. 468 (2003). Typically, organs of a foreign state are "quasi-public entities [such as] national banks, state universities, and public television networks." *Id.* at 808. While "commercial enterprises" can qualify as organs in certain circumstances, they do not constitute organs when they are "acting to maximize profits rather than pursue public objectives." *Id.*

In considering whether an entity is an organ of a foreign state, courts in this Circuit examine factors such as whether the entity was created by the foreign state's law; is controlled by government appointees; employs public servants; and has exclusive responsibility over an important public function. *Corporacion Mexicana*, 89 F.3d at 655; *see also Patrickson*, 251 F.3d at 807 (identifying level of government financial support and obligations and privileges under state law as additional considerations). Courts also consider the entity's "ownership structure." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003). These factors inform the

ultimate inquiry of whether the entity "engag[es] in a public activity on behalf of the foreign government." *Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1098 (9th Cir. 2008).

Ninth Circuit courts take a "holistic view" of the evidence, *id.* At 1102, and no single factor is dispositive. For instance, "a company may be an organ of a foreign state for purposes of the FSIA even if its employees are not civil servants" if the evidence otherwise demonstrates its public purpose. *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 641 (9th Cir. 2003). Likewise, a foreign state's ownership and control are typically relevant because an entity is unlikely to carry out a public function if those factors are absent. *See USX*, 345 F.3d at 209 ("different ownership structures might influence the degree to which an entity is performing a function 'on behalf of the foreign government'"). A foreign state's ownership and control of an entity, however, are not sufficient for organ status. As such, an ordinary commercial enterprise without a public purpose will not be considered an organ even when it is wholly owned and controlled by a government agency or instrumentality. *See Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461 (9th Cir. 1995) (holding that an "ordinary pork processing plant[] cannot be considered an 'organ' of the Province of Alberta'" even though it was wholly owned and controlled by a state agency).

A valid public purpose can take a wide variety of forms but must be something more than just making money for the state as a shareholder. *See Patrickson*, 251 F.3d at 808; *Alperin v. Vatican Bank*, 2007 WL 4570674, at *3 (N.D. Cal. Dec. 27, 2007) (distinguishing circumstances where "the entity serves a public purpose" from where "it acts as an independent commercial enterprise to maximize its own profits"), *aff'd* 365 Fed. App'x 74 (9th Cir. 2010).

B. The Percentage of a Company Owned Directly or Indirectly by a Foreign State Can Be Significant to Whether It Is an Organ

In analyzing whether a company is an organ, courts often examine the percentage owned directly or indirectly by the foreign state and other details showing the nature and extent of state involvement and control over the company. While there may be a variety of ways in which foreign governments organize functions carried out on their behalf, courts readily deem a company to be an organ of a foreign state when the state creates it as a wholly owned subsidiary of a state agency to advance a public objective, and the company engages in sovereign functions on the state's behalf.

For instance, in *Powerex*, the British Columbian government directed a state agency to establish a wholly owned subsidiary "to market the export of power." 533 F.3d at 1099. The exporting subsidiary was an organ of British Columbia because it "owes its very existence to the Province," which used it to further "public policies" concerning a natural resource of the foreign state; it "played a role in treaty formation and implementation"; and "[m]ost importantly," the Province had "sole beneficial ownership and control" of it through the state agency. *Id.* at 1099-1101 (citations omitted).

Where the state's direct and indirect ownership share of a company is 50% or less, however, courts have demanded more evidence that it serves a public function. When a foreign state owns 50% or less of a profit-seeking company, organ status has been routinely denied. For instance, in *Patrickson*, the Israeli government privatized its holdings so that it did not own a majority share of two chemical companies (Companies). 251 F.3d at 805. This Court held that the Companies were not organs of Israel although the government had "to approve the appointment of directors and officers, as well as any changes in the capital structure of the Companies," and the Companies had to present "an annual budget and financial statement to various government ministries." *Id.* at 808. Rather, the Companies were best viewed "as

independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives." *Id.*

Similarly, in *Board of Regents v. Nippon Telephone & Telegraph Corp.*, the Fifth Circuit held that a television broadcaster in which the government of Japan indirectly owned 46% was not an organ of Japan. 478 F.3d 274, 279 (5th Cir. 2007). The firm "operate[d] as one of several commercial interests in a competitive telecommunications market" with its ownership structure designed to encourage competition in this market. *Id.* While "Government authorization [was] required for numerous [firm] transactions," the government "merely provide[d] passive oversight" similar to "the requirements of other governments' regulatory bodies, such as the United States' Securities and Exchange Commission (SEC)." *Id.* at 279-80.

Organ status is reserved for entities serving public purposes, because otherwise courts "would open the door to situations in which a party only tangentially related to a foreign state could claim foreign state status and avail itself" of the FSIA's protections and "be unfair to plaintiffs." *USX*, 345 F.3d at 208.

C. The District Court's Non-Clearly-Erroneous Factual Findings Establish That Display Is Not an Organ of China

The district court considered the *Patrickson* factors and found numerous facts that weighed against organ status for Display:

- China only indirectly owned a minority share of Display;
- Display was "established as a form of privately held corporation";
- The government "did not exercise direct control over Display" instead "interacting with Display in a typical investor role";
- Display "functioned as an ordinary profit-making entity that happened to partially make profits for [China]"; (5th Cir. 2000). Unlike in *Patrickson*, however, that company was a "non-profit-making entity." 251 F.3d at 808 n.12.
- The government "did not appoint Display's executives, [or] pay their salaries, discrediting Display's contention that its corporate officers were civil servants"; and
- Display did not "exercise[] regulatory authority or other special sovereign privileges."

ER8-10. While Display received some financial support from China, that did not "outweigh the many factors counting against organ status." ER10-11.

Based on its factual findings, the district court properly concluded that Display is not an organ of China—rather it is just an ordinary profit-making company that benefits the state as a partial shareholder. Display's argument to the contrary is unavailing, as it does not show clear error in the court's factual findings or that the court misweighed the relevant factors. *See EIE Guam*, 322 F.3d at 639 (reviewing factual findings "for clear error" and legal issues, including "organ" status, "de novo").

Display is wrong that its showing surpasses that in *Powerex*. *See* Appellants' Opening Br., 9th Cir. Doc. 14, at 33 (Appellants' Br.). In *Powerex*, the exporter performed public functions, including treaty formulation and implementation, and was wholly-owned and controlled by a state agency. 533 F.3d at 1099-1101. Here, by contrast, the district court found that Display is an ordinary profit-making company indirectly owned only in minority-part by China serving no public function for the government.

While Display is correct that an organ can be profitable, Appellants' Br. 22, 36, Display is wrong to suggest that a company is an organ *because* the state profits as a partial shareholder, *id.* at 26-27. If that sufficed, China could make all Chinese companies organs by taking an

ownership share instead of taxing profits. That would expand the concept of organ of a foreign state beyond its proper bounds.

Display acknowledges that it might not be seen as having a public function in a "capitalist economic system," *see* Appellants' Br. 22, 27-28, but argues that its profit-making for the state should be viewed differently because of China's "distinctly socialist economy," *id.* at 36. The FSIA, however, does not give greater protection to ordinary profitmaking entities owned by socialist governments than by capitalist ones. *See Ocean Line Holdings Ltd. v. China Nat'l Chartering Corp.*, 578 F. Supp. 2d 621, 626 (S.D.N.Y. 2008) (rejecting argument that ordinary shipping enterprise is an organ of China); *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 831-32 (D.D.C. 1977) (rejecting argument that would characterize "every enterprise operated under a socialist system as an instrumentality of the state" because "there is no suggestion [in the FSIA's legislative history] that a foreign state's system of property ownership, without more, should be determinative on the question whether an entity" is an "agency or instrumentality under the Act").

* * * *

2. Commercial Activities Exception: *Indirect Purchaser Plaintiffs v. Irico Group Corp.*

The commercial activities exception in the FSIA provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
> ***
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. 1605(a)(2).

In the U.S. brief in *Irico Group*, discussed *supra*, the second issue is whether the district court erred in applying the FSIA's commercial-activity exception by finding a direct effect on the United States from a company's conspiratorial acts raising U.S. prices for televisions and computer monitors. The U.S. brief is excerpted below.

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II. The District Court Has Jurisdiction Over Group Under The Third Prong Of The Commercial Activity Exception

Under the commercial-activity exception, a foreign state is not immune from jurisdiction when "the action is based":[1] upon a commercial activity carried on in the United States by the

foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.28 U.S.C. § 1605(a)(2).

The "action" here is a Sherman Act suit alleging a conspiracy involving Group. In such a case, the relevant acts include joining the unlawful conspiracy and acts in furtherance of that conspiracy. Acts in furtherance of an antitrust conspiracy can include sales on agreed-upon terms, but they also can include other types of acts such as foregoing sales at particular prices, reducing production, or creating an enforcement mechanism to prevent cheating on the agreement. Each of these acts can contribute to the success of the conspiracy as a whole.

The district court held that the record supported "a finding that the Irico Defendants' commercial activities had a direct effect in the United States" by raising U.S. prices of CRTs and CRT-containing televisions and computer monitors. ER12. Group argues that this determination cannot be sustained because, as a matter of law "[u]nder this Court's FSIA precedents," its conspiratorial acts cannot cause a "direct effect" in the United States without "U.S. sales by Group," yet the district court made no finding of U.S. sales by Group. Appellants' Br. 4; id. at 15 ("Group's foreign sales of allegedly price-fixed CRTs cannot possibly cause a 'direct effect' in the United States."), 40 (same).

There is no such legal rule, however, as there are many situations in which a defendant's anticompetitive conspiratorial acts can cause a direct effect in the United States even though the defendant had no U.S. sales. Indeed, this case is one example. Even if Group sold no price-fixed CRTs in the United States, the record amply supports the district court's finding that Group's conspiratorial acts had a direct effect in the United States. We address Group's flawed legal and factual arguments in turn.

A. Group Is Incorrect That a Foreign State Must Make Direct U.S. Sales To Satisfy the Third Prong of the Commercial-Activity Exception

Group wrongly argues that, as a matter of law, a foreign state must make direct U.S. sales for its conspiratorial acts to have a direct effect in the United States under the FSIA. See Appellants' Br. 4, 15, 40. That argument finds no support in the text of the statute or applicable precedent, and could significantly harm antitrust enforcement. If a foreign state makes direct U.S. sales as part of an antitrust conspiracy, it is engaging in "commercial activity carried on in the United States" that falls within the first prong of the commercial-activity exception. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," 28 U.S.C. § 1603(d), and further defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States," *id.* § 1603(e). Direct U.S. sales are a type of commercial transaction carried on in the United States that satisfies the first prong of the commercial-activity exception. See, *e.g.*, *Altmann v. Republic of Austria*, 317 F.3d 954, 969 (9th Cir. 2002) (holding that Austrian gallery's "publication and sale of [marketing] materials" in the United States were "commercial activities" within the first prong of the commercial activity exception), amended, 327 F.3d 1246 (9th Cir. 2003), aff'd on other grounds, 541 U.S. 677 (2004); H.R. Rep. No. 94-1487 (1976), reprinted at 1976 U.S.C.C.A.N. 6604, 6615 ("commercial activity carried on in the United States by a foreign state" includes "import-export transactions involving sales to, or purchases from, concerns in the United States").

Group's proposed interpretation of the "direct effect" requirement thus violates the "cardinal principle of statutory construction" that statutes must be construed, if reasonably

possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); see also *Dole Food*, 538 U.S. at 476-77 (holding that it is improper to construe the FSIA "in a manner that is strained and, at the same time, would render a statutory term superfluous"). Reading "direct effects" to encompass only "direct sales" robs the third prong of any meaningful function.

Moreover, the Supreme Court has recognized that the third prong reaches beyond direct sales to other types of acts "in connection with" commercial activity abroad, so long as the acts cause a "direct effect" in the United States. *Weltover*, 504 U.S. at 618. The Court "reject[ed] the suggestion that [the FSIA commercial-activity exception] contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id*. Although jurisdiction cannot be predicated on "purely trivial effects in the United States," the Court explained that an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity." *Id*. Such a direct effect existed for Argentina's unilateral rescheduling of maturity dates on bonds, even though that commercial activity was "outside this country," because "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id*. at 611, 619.

Indeed, numerous examples show that actions of a foreign company to join and act in furtherance of an antitrust conspiracy can cause a direct effect in the United States even if that company made no direct sales in the United States. For instance, an agreement among foreign manufacturers to boycott U.S. businesses by refusing to supply them with inputs could cause significant harm in the United States despite the lack of any U.S. sales under the conspiracy. Likewise, a foreign firm could forego U.S. sales as part of a market allocation conspiracy, directly raising U.S. prices by carrying out its agreement not to sell in the United States. Or a foreign firm could directly harm a U.S. labor market by agreeing with a U.S. firm not to poach its employees.

An agreement among foreign manufacturers to fix the price of a component part sold abroad and incorporated into finished products sold in the United States is no different. A manufacturer participating in such a price-fixing conspiracy could directly harm the United States, even if it never sold the price-fixed component or the finished products in the United States, by raising the U.S. prices of finished products sold by its co-conspirators.

Group's proposed legal rule also is inconsistent with precedent. Although few antitrust cases have applied the FSIA's "direct effect" requirement, a district court in this Circuit recently found direct effects under the FSIA for conduct other than direct sales by the defendant in the United States. See *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, No. CV 16-2345-DMG, 2016 WL 8648638, at *3 (C.D. Cal. Aug. 18, 2016). There, a company 51% owned by the Mexican Government (Essa) breached its contract to sell solar sea salt to another Mexican firm, who was supposed "to sell the salt to Sea Breeze," who "in turn, was unable to meet its obligations to sell to various purchasers within the United States." Id. at *1. The court exercised jurisdiction over Essa under the third prong of the commercial-activity exception, even though another firm had distribution rights to sell Essa's salt in the United States. The court found a "direct effect" in the United States, because the U.S. was the largest importer of salt, Essa produced 17% of the world's salt, and the alleged price-fixing and granting of exclusive rights to another firm "leads to less variety in the U.S. salt market, as well as less competition and higher prices for United States consumers." Id. at 1, 3 & n.3. This Court affirmed, likewise finding the "direct effect" requirement satisfied. 899 F.3d 1064, 1068 n.2 (9th Cir. 2018).

* * * *

Group argues that a defendant must make U.S. sales to directly affect the United States because otherwise "a multitude of 'intervening object[s], cause[s], [and] agenc[ies]' " would be "necessary to bring about that effect," and the "domestic effects" of foreign price-fixed sales "are too 'remote and attenuated'" to be direct. Appellants' Br. 41-43, 45-47. These same arguments, however, were rejected in *Hsuing*. … Likewise, Sea Breeze involved a "direct effect" in the United States with "no break in the causal chain" even though the foreign state did not directly sell in the United States. 2016 WL 8648638, at *3 n.3 (discussed p. 26 , supra).

Group also argues that the direct-effect requirement incorporates "minimum contacts standards" from due process cases, which requires direct U.S. sales. Appellants' Br. 47 -48 (quoting *Sec. Pac. Nat'l Bank v. Derderian*, 872 F.2d 281, 286-87 (9th Cir. 1989)). Yet even assuming that the minimum-contacts standard applies to the direct-effect requirement, Group is wrong that direct sales in a forum are necessary for minimum contacts. While sales in a forum can establish minimum contacts, a plaintiff also can "show[] that a defendant purposefully directed his conduct [outside of the forum] toward the forum." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004). Group's proposed legal rule, thus, is incorrect.

B. The District Court Did Not Need To Resolve Whether Group Made U.S. Sales To Find That Its Anticompetitive Conspiratorial Acts Directly Affected the United States

Group also is incorrect that it had to make U.S. sales for jurisdiction here. Whether or not Group made price-fixed sales in the United States, the record amply supports the district court's finding that Group's anticompetitive conspiratorial acts had a direct effect in the United States. The district court found that Group participated in "over 70 conspiratorial meetings" at which the conspirators allegedly agreed to fix prices, allocate customers, and restrict output of CRT Products in the United States and elsewhere. ER1, ER12, ER1482 -83. Even if none of Group's price-fixed sales were in the United States, but see Appellees' Answering Br., 9th Cir. Doc. 25-1, at 14-17 (disputing this proposition), it would have been apparent to Group that its conspiratorial acts would directly affect the United States. Appellees presented evidence that Group priced its CRTs at the agreed price-fixed levels and reduced output to prop-up those fixed prices, see ER1459-6 8 (collecting evidence); and that during the conspiratorial meetings, Group and its co - conspirators specifically discussed U.S. dollar prices, ER1482-83, ER1504, ER1528-29, ER1544, and U.S. market conditions, id. ER1533 (Irico and Chunghwa employees were "bearish on Japanese, U.S., and European CRT TV demand"). Moreover, as the district court found, there was a direct causal connection between raising CRT prices and raising U.S. television and monitor prices, because "the U.S. was the second largest market for CRTs at 18% of the [worldwide] market" and "the CRT accounted for up to 50 percent of the cost of manufacturing a television or computer monitor." ER12.

Contrary to Group's assertion (Br. 46), it was not a mere "fortuity" that its acts affected the United States. The conspiratorial agreement included the United States, and CRTs were a large cost of televisions and computer monitors sold in the United States. Thus, this is not a case where the conspiracy covered only foreign markets and the component was a minor part in the finished product sold in the United States, where the existence and directness of any U.S. effect from the conspiracy may be less clear.

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3. Expropriation Exception to Immunity: *Germany v. Philipp*

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

On September 11, 2020, the United States filed its *amicus* brief in the U.S. Supreme Court in *Germany v. Philipp*, No. 19-351. The case arises out of the taking of a collection of medieval relics known as the "Welfenschatz" by the German government after World War II, which the heirs of its original Jewish owners sought to recover. The district court denied Germany's motion to dismiss. The U.S. Court of Appeals for the D.C. Circuit held that the expropriation exception to jurisdiction applies in the case, because a state's confiscation of its own citizens' property, while not a violation of the international law of takings, does violate international law, when it amounts to the commission of genocide. The court of appeals also rejected the argument for abstention under the doctrine of international comity and denied rehearing en banc. The questions in the case before the Supreme Court are: (1) whether the expropriation exception applies to domestic takings by a state of the property of its own nationals in the context of a human-rights violation; and (2) whether a court may abstain from exercising jurisdiction under the FSIA on the basis of international comity. The U.S. brief is excerpted below.[*] See Chapter 5 for discussion of the section of the brief discussing the doctrine of international comity.

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I. THE EXPROPRIATION EXCEPTION IN THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PROVIDE JURISDICTION IN ANY CASE INVOLVING A DOMESTIC TAKING

A. Under The Domestic Takings Rule, The Expropriation Exception Does Not Apply When A Sovereign Has Taken The Property Of Its Own Nationals

The FSIA's expropriation exception abrogates sovereign immunity in cases in which "rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). Under the long-settled domestic takings rule, "[t]he property which is the subject- matter of expropriation must be *foreign* property." S. Friedman, *Expropriation in International Law* 163 (1953) (emphasis added). Accordingly, the expropriation exception does not apply to cases in which a sovereign has taken the property of its own nationals.

1. a. The domestic takings rule has been an established principle of international expropriations law since well before World War II. …

[*] Editor's note: The Court issued its unanimous decision on February 3, 2021, holding that the expropriation exception does not cover domestic takings even in the context of a human-rights violation and declining to consider the comity question.

For example, in a 1938 letter asserting that Mexico had violated international law through its uncompensated taking of American-owned property, Secretary of State Cordell Hull observed that he "could not question the right of a foreign government to treat its own nationals in this fashion" because that was "a matter of domestic concern." *Mexico-United States: Correspondence concerning expropriation by Mexico of agrarian properties owned by Aliens, Extradition, and Naturalization*, 32 Am. J. Int'l L. 181, 184 (Supp. 1938); cf. *United States* v. *Belmont*, 301 U.S. 324, 332 (1937) ("What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here."). …

b. The domestic takings rule continued to hold force after World War II, even as the international community began to recognize a series of human-rights norms that apply to a sovereign's treatment of its own nationals, …

This continued focus of international law on the treatment of the property of aliens paralleled the ongoing—and indeed, intensifying—debates regarding whether international law should govern takings *at all*. The rise of the Cold War focused attention on the basic differences in the way communist and capitalist governments treated property, leading this Court to observe in the 1964 *Sabbatino* case—which involved Cuba's allegedly unlawful taking of the property of American-owned companies—that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964). Given the international community's inability to reach consensus even with respect to the expropriation of foreign property, the prospect of a consensus with respect to domestic takings was remote.

There has been no departure from the domestic takings rule. For example, the Restatement (Third) of Foreign Relations Law of the United States (1987) recognizes that "[a] state is responsible under international law" for "a taking by the state of the property *of a national of another state.*" *Id.* at § 712(1), at 196 (emphasis added)…

2. In the more than forty years since the FSIA was enacted, courts have repeatedly invoked the domestic takings rule to reject the assertion that the expropriation exception creates jurisdiction over claims that a sovereign has expropriated the property of its own nationals. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring) (observing that the "consensus view" is that the expropriation exception does not apply when the property "belong[s] to a country's own nationals"); see, *e.g.*, *Mezerhane* v. *República Bolivariana de Venezuela*, 785 F.3d 545, 549 (11th Cir. 2015), cert. denied, 136 S. Ct. 800 (2016); *Altmann* v. *Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002), aff 'd on other grounds, 541 U.S. 677 (2004); *de Sanchez* v. *Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985). The same result should have obtained here. As it comes before the Court, this case presents allegations that the German government expropriated the property of German nationals through the forced sale of the Welfenschatz in 1935. The domestic takings rule dictates that such claims fall outside the bounds of the expropriation exception.

B. The Expropriation Exception Does Not Provide Jurisdiction Over Domestic Takings That Occur In The Context Of A Human-Rights Violation

In the decision below, the court of appeals did not dispute the existence or continued vitality of the domestic takings rule. To the contrary, it acknowledged that "an 'intrastate taking'—a foreign sovereign's taking of its own citizens' property—does not violate the international law of takings." Pet. App. 7 (citation omitted). And in its prior related decision in *Simon* v. *Republic of Hungary*, 812 F.3d 127, 142-143 (D.C. Cir. 2016), remanded, 277 F. Supp.

3d 42 (D.D.C. 2017), rev'd and remanded, 911 F.3d 1172 (D.C. Cir. 2018), cert. granted, No. 18-1447 (July 2, 2020), the court explicitly recognized that "[t]he domestic takings rule means that, as a general matter, a plaintiff bringing an expropriation claim involving an intrastate taking cannot establish jurisdiction under the FSIA's expropriation exception because the taking does not violate international law." *Id.* at 144-145.

The court of appeals held, however, that the "domestic takings rule has no application" where the takings in question "amount to genocide." *Hungary I*, 812 F.3d at 143-144. The court reasoned that "genocide itself is a violation of international law" that a sovereign may commit against its own people by—among other things—confiscating property "'to bring about [a protected group's] physical destruction.'" *Id.* at 142-143 (quoting Genocide Convention art. 2(c), 78 U.N.T.S. 280) (emphasis omitted). Thus, in the court's view, respondents' domestic takings claims fit within the expropriation exception so long as they involve a seizure that allegedly occurred as "part of " the Nazi genocide. Pet. App. 9.

The court of appeals erred, however, in assuming that the expropriation exception should be read broadly to encompass claims involving property seized as part of a genocide. The text, context, and history all demonstrate that the expropriation exception deprives a sovereign of immunity only in cases where the sovereign is alleged to have violated the international law governing expropriations. The FSIA's reference to "property taken in violation of international law" therefore excludes property taken by a sovereign from its own nationals, even when the taking occurs in the context of a genocide or other human-rights violation.

1. The text excludes property taken from a sovereign's own nationals

a. The expropriation exception applies in cases involving "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). Congress did not further define those terms, but this Court has previously looked to the "most recent restatement of foreign relations law at the time of the FSIA's enactment" to discern the contemporary meaning of one of the statute's provisions. *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 199-200 (2007); see *Baker Botts L. L. P.* v. *Asarco LLC*, 576 U.S. 121, 128 n.2 (2015) (terms must be understood in accordance with their "ordinary meaning * * * at th[e] time" they were enacted). When the FSIA was enacted in 1976, the then-current Restatement (Second) of Foreign Relations Law of the United States (1965) defined a "taking" as "[c]onduct attributable to a state that is intended to, and does, effectively deprive *an alien* of substantially all the benefit of his interest in property." *Id.* § 192, at 572 (emphasis added). It follows that property "tak[en]" in violation of international law must be the property of "an alien." *Ibid.*

Moreover, the Restatement (Second) contains a section entitled "When Taking is Wrongful under International Law." Restatement (Second) § 185, at 553. The section explains that property is taken in violation of international law when there is a "taking by a state of [the] *property of an alien*" for a non-"public purpose," or without "just compensation," or where the property is merely "in transit through the territory of the state, or has otherwise been temporarily subjected to its jurisdiction, and is not required by the state because of serious emergency." *Ibid.* (emphasis added); see also *id.* §§ 165-166, at 501-502, § 185 cmt. a, at 553 (explaining that a taking may also violate international law where it is "discriminatory" against an alien); *id.* §§ 186-187, at 562-563. The statutory phrase "rights in property taken in violation of international law" is therefore best read to encompass rights in property taken froman alien in the specified circumstances and to exclude property taken from a state's own nationals, no matter the context. 28 U.S.C. 1605(a)(3).

b. That conclusion is reinforced by "settled principles of statutory of construction" under which particular words or phrases should be given "a consistent meaning" across statutes that "pertain to the same subject." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). Twelve years before Congress enacted the FSIA, it enacted the Second Hickenlooper Amendment, which created an exception to the act of state doctrine—the doctrine that generally bars U.S. courts from sitting in judgment of the acts of a foreign state undertaken within its own jurisdiction, *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). The Second Hickenlooper Amendment was a response to this Court's decision in *Sabbatino*, 376 U.S. at 428, which held that the act of state doctrine bars U.S. courts from adjudicating claims involving the taking of property by a foreign sovereign within its own territory. In the wake of *Sabbatino*, Congress sought to ensure that the act of state doctrine would not prevent courts from adjudicating certain expropriation claims, such as those arising from the Castro government's expropriation of American-owned businesses. See *Banco Nacional de Cuba* v. *Farr*, 243 F. Supp. 957, 962-963 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968) (explaining history of the Amendment).

The text of the Second Hickenlooper Amendment specifies that the exception to the act of state doctrine applies in cases involving a "confiscation or other taking * * * by an act of state *in violation of the principles of international law*." 22 U.S.C. 2370(e)(2) (emphasis added). Nine years before the FSIA was enacted, a court interpreted the quoted language to prevent the application of the exception in cases involving "confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided." *F. Palicio y Compania, S. A.* v. *Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), aff 'd, 375 F.2d 1011 (2d Cir. 1967) (per curiam), cert. denied, 389 U.S. 830 (1967). The language has been interpreted in the same way ever since. *Perez* v. *Chase Man-hattan Bank, N.A.*, 463 N.E.2d 5, 10 (N.Y.), cert. denied, 469 U.S. 966, (1984); see *Comparelli* v. *Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1320 (11th Cir. 2018); *Bank Tejarat* v. *Varsho-Saz*, 723 F. Supp. 516, 520–521 (C.D. Cal. 1989); *Jafari* v. *Islamic Republic of Iran*, 539 F. Supp. 209, 215 (E.D. Ill. 1982).

The expropriation exception's reference to "rights in property taken in violation of international law" closely tracks the Second Hickenlooper Amendment's reference to "takings * * * in violation of principles of international law." Because the two statutes also "pertain to the same subject"—the facilitation of judicial review of claims involving takings by a foreign state—they should be interpreted in the same way. *Erlenbaugh*, 409 U.S. at 243; see also *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation omitted) (when statutory language is "obviously transplanted" from another source, it brings the "old soil with it"). Accordingly, like the Second Hickenlooper Amendment, the expropriation exception excludes any cases involving domestic takings, "no matter how flagrant." *Palicio*, 256 F. Supp. at 487.

c. Neither the court of appeals nor respondents have offered support for the contrary proposition that the ordinary, contemporary meaning of the text of the expropriation exception covers property excluded by the domestic takings rule if the property was confiscated as part of a genocide. Instead, both the court of appeals and respondents have relied primarily on the proposition that the United Nations' 1948 definition of genocide is capacious enough to establish that some confiscations amount to genocide. Pet. App. 7. But if the Genocide Convention informed the meaning of the phrase "rights in property taken in violation of international law," 28 U.S.C. 1605(a)(3), when the phrase was enacted, one would expect to find evidence suggesting as much. Instead, the then-current Restatement (Second) defined wrongful "takings"

to include only those involving the expropriation of foreign owned property, even though the Genocide Convention had been adopted 16 years before the Restatement was published… And no court of appeals espoused the view that the expropriation exception may be understood to cover takings that occur as part of a genocide until 2012—almost 40 years after the FSIA's enactment and more than 60 years after the 1948 Genocide Convention. See *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012).

This dearth of contemporary support for the court of appeals' position cannot be excused by analogy to the Alien Tort Statute (ATS), 28 U.S.C. 1350. The court of appeals briefly observed that under the ATS, courts may apply norms of human-rights law that "did not even exist" when the statute was enacted. *Hungary I*, 812 F.3d 145. But there is no reason to assume that Congress intended for the expropriation exception to be interpreted in accordance with the ATS, a statute that employs different statutory language, was drafted in a different context, was enacted almost two centuries earlier, and was not considered in the context of human-rights law until after the FSIA was enacted. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724-725 (2004). As noted, the text of the Second Hickenlooper Amendment provides the far more obvious statutory precursor for the expropriation exception. … In any event, even if Congress were somehow attempting to mirror the ATS in the expropriation exception, that would not help respondents. At the time of the FSIA's enactment, the ATS had been interpreted to bar a German national's claims predicated on the forced sale of his property under the Nazi regime. *Dreyfus* v. *Von Finck*, 534 F.2d 26, 31 (2d. Cir. 1976).

2. Statutory context confirms that the expropriation exception does not encompass property taken as part of a genocide or other human-rights violation

a. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (citation omitted). With respect to the FSIA in particular, the Court has emphasized that even where a proposed interpretation is "literally possible," it may be rejected based on an "analysis of the entire statutory text." *Samantar* v. *Yousuf*, 560 U.S. 305, 315 (2010); see *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1057-1070 (2019) (adopting the "most natural reading" of FSIA provision based on context).

Here, the FSIA as a whole demonstrates that the expropriation exception does not abrogate sovereign immunity in cases involving genocide. As Judge Katsas explained in his dissent from denial of en banc review, genocide is primarily understood as the intentional "extermination of a national, ethnic, racial, or religious group." Pet. App. 102. Yet it is undisputed that the FSIA provides no jurisdiction over genocide claims involving mass murder and other inflictions of physical suffering outside the United States. *Ibid.* It would be odd for Congress to provide jurisdiction over claims involving genocide only when, and to the extent, that property is confiscated, while extending no jurisdiction to other acts, including killing members of the group or otherwise inflicting conditions of life calculated to bring about that group's destruction. See *Hungary I*, 812 F.3d at 146 (acknowledging the "seeming anomaly" in the statute).

Nor is that the only anomaly that is likely to arise from the court of appeals' interpretation of the expropriation exception. The FSIA leaves a sovereign's immunity intact in the vast majority of cases in which a plaintiff claims that death or injury resulted from other human-rights violations such as torture, slavery, and extrajudicial killings. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993) (holding that U.S. courts lacked jurisdiction over a personal

injury suit alleging "wrongful arrest, imprisonment, and torture" because—while those forms of state action may be "monstrous"—they are nonetheless shielded by sovereign immunity). But under the court of appeals' reading of the statute, a foreign sovereign's immunity might be abrogated if it has seized property as part of one of these human-rights violations. The unlikely consequence would be a system of foreign sovereign immunity that offers more protection for an individual's property than for her person.

b. The FSIA's terrorism exception, 28 U.S.C. 1605A, supplies additional contextual support. The terrorism exception is the sole provision of the FSIA that expressly permits a sovereign to be sued for a human-rights violation that occurs outside the United States. Notably, the terrorism exception allows plaintiffs to seek damages not only with respect to their property losses, but also with respect to the personal injuries that are more typically associated with human-rights violations. 28 U.S.C. 1605A(a)(1) and (d).

Further, the terrorism exception is narrowly tailored to abrogate sovereign immunity only with respect to specific acts—namely, "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. 1605A(a)(1). It also restricts the plaintiffs who may bring a cause of action, see 28 U.S.C. 1605A(a)(2)(A)(ii) and (c), and it mandates that any claims must be brought against a designated state sponsor of terrorism, 28 U.S.C. 1605A(a)(2)(A)(i), rather than allowing plaintiffs to bring suit against any sovereign they choose.

The absence of similar tailoring in the expropriation exception counsels against reading the exception to cover losses of property that occur in the context of a human-rights violation. It is unlikely that Congress would narrowly abrogate a sovereign's immunity in U.S. courts for acts in the context of terrorism committed against U.S nationals and U.S government employees, while broadly depriving sovereigns of immunity any time they have allegedly seized property as part of a genocide or other human-rights violation. Indeed, such a reading might lead to evasion of the congressionally established limits in the terrorism exception itself because plaintiffs who do not come within those limits may nonetheless attempt to bring suit under the expropriation exception by alleging that a taking occurred as part of the terrorist act. 22

3. The FSIA's statutory history reinforces that the expropriation exception applies only in cases involving a foreign state's taking of the property of a foreign-national

The history of the FSIA counsels strongly against the broad reading of the expropriation exception that was endorsed by the court of appeals below. As this Court has previously observed, the FSIA was primarily intended to codify the "restrictive theory" of foreign sovereign immunity that the Executive Branch had adopted and applied for decades before the FSIA's enactment. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319-1321 (2017), aff'd and remanded, 743 Fed. Appx. 442 (D.C. Cir. 2018); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Under the restrictive theory, a foreign state is generally immune for its "public acts," *ibid.*, but not for those that are private or commercial. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) (House Report); see *Victory Transp. Inc.* v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). The bulk of the FSIA's immunity exceptions are therefore "narrow ones[,] covering waiver, commercial activity in the United States, * * * torts causing injury in the United States, and arbitration." Pet. App. 104 (Katsas, J., dissenting from the denial of rehearing en banc) (citing 28 U.S.C. 1605(a)(1)-(6)).

The expropriation exception deviates from the restrictive theory by allowing courts to exercise jurisdiction over sovereigns for public acts that qualify as unlawful expropriations. But

there is no evidence that Congress intended for that deviation to work a "radical departure from the[] basic principles" of the "restrictive theory." *Helmerich.*, 137 S. Ct. at 1320. To the contrary, the House Report stated that the exception was intended to encompass "[e]xpropriation claims" involving "the nationalization or expropriation of property without payment" of "compensation required by international law," as well as "takings which are arbitrary or discriminatory in nature," as when a state targets the property of foreign nationals. House Report 19-20 (emphasis omitted); see also Restatement (Second) § 185 cmt a at 553 (explaining that a taking is wrongful under international law when it discriminates against an alien), § 166 (defining unlawful discrimination against an alien); ….

Accepting the court of appeals' interpretation would effect a "radical departure" from the restrictive theory. *Helmerich*, 137 S. Ct. at 1320. As the *Helmerich* Court observed, "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a '*jure imperi*') that the restrictive theory of sovereign immunity ordinarily leaves immune from suit." *Id.* at 1321. And while *Helmerich* also acknowledged that there were "fair arguments" that Congress intended for the expropriation exception to abrogate immunity with respect to certain takings of the property of a sovereign's "own nationals[]," that statement is most naturally read to refer to the "fair arguments" to that effect advanced in *Helmerich* itself. *Ibid.* Those arguments were dramatically different from the ones advanced in this case. *Ibid.*

The plaintiffs in *Helmerich* had asserted that U.S. courts could exercise jurisdiction over their claims under the expropriation exception because Venezuela violated international expropriation law by targeting the property of a Venezuelan corporation based on the foreign nationality of the corporation's shareholders. *Helmerich & Payne Int'l Drilling Co.* v. *Bolivarian Republic of Venezuela*, 784 F.3d 804, 812 (D.C. Cir. 2015). The parties agreed that the domestic takings rule would generally bar plaintiffs' claims because the expropriation involved the property of Venezuela's own national (a Venezuelan corporation), but the plaintiffs asserted that there is an exception to the domestic takings rule where a country targets a domestic corporation because it is owned by foreign nationals. *Ibid.* This Court observed that there were "fair arguments" for that proposition, but declined to decide the question, instead remanding on the basis that the court of appeals had applied too lenient a standard in assessing jurisdiction. *Helmerich*, 137 S. Ct. at 1321. But the Court's tentative appraisal of the arguments for a targeted exception to the domestic takings rule in *Helmerich* do not help respondents, who seek an entirely distinct—and far greater—departure from the rule to allow U.S. courts to exercise jurisdiction in cases in which the property was not even *indirectly* owned by a foreign national at the time of the taking.

4. More recent statutes are unavailing

In an attempt to bolster their arguments, respondents and the court of appeals have relied on a pair of statutes from 1998 and 2016 in which Congress has denounced seizures of property that occurred during the Holocaust. …Those statutes demonstrate Congress's concern with Nazi art seizures, but they do not expand the expropriation exception or otherwise provide courts with jurisdiction to resolve related takings claims against sovereigns. …

A 2016 amendment to the FSIA that references "Nazi-era claims" also fails to establish that the expropriation exception provides jurisdiction in this suit. 28 U.S.C. 1605(h)(2)(A). The recent FSIA amendment confers immunity with respect to "certain art exhibition activities" in the United States, making it possible for sovereigns to loan artworks for display without fear that the artworks' presence in the United States will subject the sovereign to litigation. *Ibid*. The

provision exempts certain "Nazi-era claims" from its general grant of immunity, but it does nothing to broaden the existing statutory basis for jurisdiction over those claims. *Ibid.* Rather, the exemption from the conferral of "exhibition activities" immunity applies only to Nazi-era claims "in which rights in property taken in violation of international law are in issue within the meaning of" the expropriation exception. *Ibid*. The 2016 amendment thereby expressly preserves the existing scope of the expropriation exception …

C. Any Ambiguity Should Be Resolved Against Jurisdiction

To the extent there is any remaining ambiguity in the expropriation exception, it should be resolved against jurisdiction. "When foreign relations are implicated," it is particularly important for courts to " 'to look for legislative guidance before exercising innovative authority over substantive law. ' " *Hernandez* v. *Mesa*, 140 S. Ct. 735, 747 (2020) (quoting *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (opinion of Kennedy, J.)). That principle is grounded in large part on the Constitution, under which the "conduct of the foreign relations of our Government is committed * * * to the Executive and Legislative—'the political' Departments." *Medellin* v. *Texas*, 552 U.S. 491, 511 (2008) (citation omitted). But the principle also stems from practical concerns regarding the serious "risks of adverse foreign policy consequences" that arise when U.S. courts attempt to set "limit[s] on the power of foreign governments over their own citizens," *Sosa* 542 U.S. at 727-728.

Those constitutional and practical considerations counsel strongly against adopting the court of appeals' interpretation of the expropriation exception, which requires courts to make declarations with respect to highly sensitive foreign-policy questions merely to determine jurisdiction. Moreover, adopting a broad understanding of a provision that abrogates the immunity of foreign sovereigns threatens to "'affront' other nations, producing friction in our relations" and the reciprocal revocation of immunity in foreign courts. …

…In the context of this case, that determination may be largely straight-forward because the international community has long recognized that the Holocaust constituted a genocide. But plaintiffs may raise allegations of genocide in other contexts. See, *e.g.*, *Bakalian* v. *Central Bank of the Re-public of Turkey*, 932 F.3d 1229 (9th Cir. 2019) (considering allegations that property was taken as part of a genocidal campaign by Turkey against ethnic Armenians); *Rukoro* v. *Federal Republic of Germany*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019) (considering claim that Germany committed genocide in colonial Africa), appeal pending, No. 19-609 (2d Cir. filed Mar. 11, 2019). And it could have dramatic effects on foreign policy if a federal court were to declare that another country has committed genocide as part of the court's jurisdictional analysis. Moreover, even with respect to settled instances of genocide like the Nazi Holocaust, questions may remain regarding the onset, scope, and nature of the genocide.…

The court of appeals' decision is also likely to give rise to other difficult questions in the sensitive human-rights arena, all of which a court would be required to address merely to determine whether it has jurisdiction.…

These foreign policy concerns are exacerbated because international law disputes regarding expropriations may be highly sensitive even when they do not involve alleged human-rights violations.… Congress has determined that courts may nonetheless exercise jurisdiction over such disputes when they fall within the bounds of the expropriation exception, but courts should not broaden the bounds of the exception so that they are forced to address questions that implicate sensitive issues with respect to both a sovereign's treatment of the property rights of its own citizens *and* human-rights norms.

2. Finally, rejecting the court of appeals' broad interpretation of the expropriation exception serves the "reciprocal self-interest" of the United States. *National City Bank* v. *Republic of China*, 348 U.S. 356, 362, (1955). As this Court has recognized, the United States is not infrequently sued in foreign courts. See *Helmerich*, 137 U.S. at 1322. Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), it is generally in the United States' interest to avoid adopting broad exceptions to foreign sovereign immunity that are inconsistent with the immunity protections that would be afforded under principles of international law generally accepted by other nations. *Helmerich*, 137 U.S. at 1322 (noting the Court's prior recognition that "our grant of immunity to foreign sovereigns dovetails with our own interest in receiving similar treatment).

The text of the expropriation exception already departs from typical international practice because it appears that no other country has adopted a comparable exception to sovereign immunity for expropriations. Restatement (Fourth) § 455, Reporter's Note 12. But the court of appeals interpretation goes further, suggesting that the already anomalous exception to immunity has broader application in the context of a human-rights violation. In 2012, the International Court of Justice rejected a similar proposition, holding that "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law." *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. ¶ 91, at 44 (Feb. 3). Several European nations have submitted diplomatic notes to the United States endorsing that view and emphasizing that depriving Germany of immunity in this case might have negative consequences for foreign relations. See Pet. Br. 9 n.3; Letter from Jonathan M. Freiman to the Clerk of the Court (Sept. 4, 2020) (No. 19-351). Because it is an inappropriately expansive judicial interpretation that has exacerbated the tension between international and domestic immunity law, the court of appeals' position should be rejected.

* * * *

4. Nonapplicability in Criminal Cases

On May 18, 2020, the United States filed a brief on appeal in the Ninth Circuit in *United States v. Pangang Group Co. Ltd.*, No. 19-10306, a criminal prosecution of a Chinese company for corporate espionage. The U.S. brief asserts that the FSIA does not apply to criminal prosecutions against agencies and instrumentalities (and, in the alternative, that if the FSIA applies, its exceptions apply as well). The U.S. brief is excerpted below and available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

III. THE FSIA DOES NOT CONFER ABSOLUTE IMMUNITY FROM CRIMINAL PROSECUTION ON THE PANGANG DEFENDANTS

* * * *

B. The district court had jurisdiction over this case alleging "offenses against the laws of the United States," and the text, structure, and history of the FSIA do not provide otherwise

The district court correctly determined that it had jurisdiction over this criminal case. Under 18 U.S.C. § 3231, the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." *Id.* The Pangang Defendants are charged with "offenses against the laws of the United States"—specifically, the EEA [Economic Espionage Act of 1996], 18 U.S.C. § 1831(a)(1)–(5). ER 46–59. "It is hard to imagine a clearer textual grant of subject-matter jurisdiction" than Section 3231 as to criminal cases. *In re Grand Jury Subpoena*, 912 F.3d at 628. "And nothing" in the text of the FSIA "expressly displaces section 3231's jurisdictional grant." *Id.* Accordingly, the district court's order that it had jurisdiction over this criminal case should be affirmed.

In arguing to the contrary, the Pangang Defendants contend that Congress stripped the district court of jurisdiction over this criminal case through enactment of the FSIA. But that statute (1) never mentions criminal jurisdiction or criminal cases at all in its text, (2) was designed to address uncertainty and entanglements caused by private litigants suing foreign countries, who then appealed to the State Department to recommend immunity, and (3) has never been construed by any court to bar a federal criminal prosecution through want of jurisdiction. Each of these issues cuts strongly against the Pangang Defendants' suggested statutory construction.

1. The text of the FSIA does not mention criminal cases, in contrast to the very clear statutory text of Section 3231 and implications of the EEA

The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA's text, read "as a whole," *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010), demonstrates that the FSIA is exclusively civil in its application.

The FSIA begins by conferring jurisdiction over "any nonjury civil action" in which a foreign state is not immune. 28 U.S.C. § 1330(a); *see Houston v. Murmansk Shipping Co.*, 667 F.2d 1151, 1154 (4th Cir. 1982) ("Congress apparently did not intend the phrase 'nonjury civil action' to define the district court's jurisdiction. Rather, it appears that the phrase was intended to serve as a shorthand way of ensuring that actions against foreign states would be tried without a jury"). The FSIA's procedures for asserting immunity or other jurisdictional limits likewise address civil actions. *See* 28 U.S.C. § 1441(d) (removal of "[a]ny civil action"); *id.* § 1608(d) (deadline for serving "an answer or other responsive pleading to the complaint"). The FSIA's other procedural provisions have a uniform focus on civil actions. *See, e.g., id.* § 139(f) (venue); *id.* § 1608(a), (b) (service rules). And the statutory findings and declaration of purpose refer to the "rights of both foreign states and litigants," without reference to governments or prosecutors that conduct criminal proceedings. *Id.* § 1602.

This civil focus and absence of reference to criminal proceedings is particularly instructive because the Supreme Court has advised that any "immunity defense made by a foreign sovereign in an American court must stand on the [FSIA's] text. Or it must fall." *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014). "The Act's careful calibration of remedies among the listed types of defendants suggests that Congress did not mean to cover other types of defendants never mentioned in the text." *Samantar*, 560 U.S. at 319. Indeed, the Court emphasized that it would not further Congress's purpose to confer immunity in circumstances where FSIA contains not "so much as a word spelling out how and when" such immunity applies. *Samantar*, 560 U.S. at 322. So, too, here: despite detailed provisions covering how immunity applies in scenarios from admiralty to mortgage foreclosure actions to art exhibits—including a detailed special provision for Nazi-era claims—FSIA has not one word about "how and when" immunity applies to those charged with federal criminal offenses. 28 U.S.C. § 1605(b), (d), (h)."Reading the FSIA as a whole,"then,"there is nothing to suggest" that this Court "should read" FSIA to cover criminal cases. *Samantar*, 560 U.S. at 319.Under such circumstances, FSIA does not confer immunity on the Pangang Defendants or deprive the district court of jurisdiction.

That conclusion follows even more forcefully when considering the particular charges in this case—violations of the Economic Espionage Act of 1996, 18 U.S.C. §§1831–39. Congress passed that statute many years after enactment of the FSIA, and it contains criminal espionage provisions expressly requiring the involvement of a foreign government, instrumentality, or agent, at least as a beneficiary.*See* 18 U.S.C. §1831(a)("Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent" knowingly engages in certain conduct related to economic espionage violates statute); ER 46 (Third Superseding Indictment charging violations of 18 U.S.C. § 1831(a)(1)–(5)). "The legislative history indicates that § 1831 is designed to apply only when there is evidence of foreign government sponsored or coordinated intelligence activity." *United States v. Hsu*, 155 F.3d 189, 195 (3d Cir. 1998) (internal quotation marks and citation omitted) (quoting legislative history). That same legislative history explains that the EEA was designed to target activity ranging from a "foreign government that uses its classic espionage apparatus to spy on a company, to the two American companies that are attempting to uncover each other's bid proposals, or to the disgruntled former employee who walks out of his former company with a computer diskette full of engineering schematics." *Id.* at 201 (internal quotation marks and citation omitted). The Pangang Defendants do nothing to explain how this legislative intent to target the actions of, among others, foreign governments under the EEA accords with their claimed immunity. Indeed, the Pangang Defendants' position—that they are entitled to absolute immunity simply because the government has alleged in the indictment that they are foreign instrumentalities under the EEA—underscores the dubious nature of their claim for dismissal under the FSIA. At a minimum, it seems particularly doubtful that Congress, while writing a statute that would often lead to the prosecution of
foreign state actors engaged in economic espionage, nevertheless silently intended to provide those same foreign instrumentalities absolute immunity from prosecution. In the absence of textual support clearly indicating otherwise in the FSIA, this Court should not provide the Pangang Defendants with such relief.

2. The history of the FSIA indicates application to civil, not criminal, cases

Historically, the grant or denial of foreign state immunity was "the case-by-case prerogative of the Executive Branch." *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009); *see Samantar*, 560 U.S. at 311–13, 320. That rule flowed from the Executive Branch's constitutional primacy in foreign affairs. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–36 (1945). Until 1952, if a foreign state sought immunity from a private civil action, the Executive generally requested a court to recognize immunity. *Samantar*, 560 U.S. at 311–312.

In 1952, this practice changed: the Executive Branch decided to grant immunity from suit to foreign states for "sovereign or public acts" but not "private acts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711–15 (1976) (reprinting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952)). This policy led to "diplomatic pressure on the State Department" from foreign governments to grant immunity in private suits, and "political considerations led to suggestions of immunity in cases where immunity would not have been available" under the new policy. *Verlinden*, 461 U.S. at 487.

To address the "considerable uncertainty" faced by "private litigant[s]" due to inconsistent immunity determinations resulting from the Executive Branch having requests for immunity thrust upon it, Congress passed the FSIA in 1976. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 9 (1976) ("1976 House Report"); *see also Verlinden*, 461 U.S. at 488. Passage of the FSIA was supported by the Departments of State and Justice. 1976 House Report 6. In passing the bill, the House of Representatives noted the need for "comprehensive provisions" to "inform parties when they can have recourse to the courts to assert a legal claim against a foreign state," 1976 House Report 7, and repeatedly referred to "plaintiffs," "suit[s]," "litigants," and "liability," *id.* at 6–8, 12—all terms consistent with civil actions. Moreover, the House introduced the need for the bill with the following observation and examples:

> American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. . . . Instances of such contact occur when U.S. businessmen sell good to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy. At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state.

Id. at 6–7. The problems identified, language used, and examples cited by Congress in passing the FSIA all indicate an interest in providing civil litigants with more certainty—not displacing federal criminal proceedings. As the Supreme Court has stated, "[t]he FSIA was adopted . . . to address a modern world where foreign state enterprises are every day participants in commercial activities, and to assure litigants that decisions regarding claims against states and their enterprises are made on purely legal grounds." *Samantar*, 560 U.S. at 323 (internal quotation marks omitted) (citing 1976 House Report).

This history and context do not suggest that the Executive Branch or Congress had any intention of passing a statute that provided foreign government-controlled entities free rein to violate criminal laws with impunity. The FSIA's purposes do not support such a construction.

The federal government, not a private party, controls whether to initiate a federal criminal matter against a foreign-government-owned commercial enterprise. *Pasquantino v. United States*, 544 U.S. 349, 369 (2005); *see also United States v. Sinovel Wind Grp. Co.*, 794 F.3d 787, 792 (7th Cir. 2015). Accordingly, immunity in criminal matters "simply was not the particular problem to which Congress was responding." *Samantar*, 560 U.S. at 323 (regarding officials' civil immunity).

3. No court has ever applied the FSIA to bar a federal criminal prosecution

In addition to inconsistency with the FSIA's history, purpose, and text, the Pangang Defendants' argument suffers from a lack of decisional support. The Supreme Court has repeatedly described FSIA as addressed to civil actions and has never suggested that it applies to the criminal context. *See Verlinden*, 461 U.S. at 488 (FSIA provides "a comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state or its political subdivisions, agencies, or instrumentalities") (emphasis added); *accord NML Capital, Ltd.*, 573 U.S. at 141; *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). The only courts to have addressed the question in criminal prosecutions or investigations have held that the FSIA does not apply. *See United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *In re Grand Jury Proceeding Related To M/V Deltuva*, 752 F. Supp. 2d 173, 176–180 (D.P.R. 2010); *United States v. Hendron*, 813 F. Supp. 973, 974–977 (E.D.N.Y. 1993).

The D.C. Circuit recently examined these issues at some length in a decision with instructive parsing of text, history, structure, and precedent. *See In re Grand Jury Subpoena*, 912 F.3d at 625–33. The court ultimately assumed without deciding that the FSIA did apply to criminal matters and nevertheless denied the defendants' claimed immunity under the commercial activity exception. In so doing, however, the court rejected the defendant's argument that the FSIA stripped district courts of jurisdiction over criminal cases. "[A] reading that embraces absolute immunity in criminal cases is much harder to reconcile with the Act's context and purpose." *Id.* at 629. The court observed that such a result would allow sweeping negative consequences: "[A] foreign-sovereign-owned, purely commercial enterprise operating within the United States could flagrantly violate criminal laws and the U.S. government would be powerless to respond save through diplomatic pressure. . . . We doubt very much that Congress so dramatically gutted the government's crime-fighting toolkit. . . ." *Id.* at 629–30 (internal citations and quotation marks omitted). In particular, the court found no justification for such significant ramifications for criminal cases in the FSIA's text or history. *Id.* at 630 (observing that "if Congress really intended [that result,] . . . one would expect that answer to show up clearly in the Act's text, or at least" in legislative history, yet "the Act and its legislative history do not say a single word about possible criminal proceedings" (internal quotation marks and citations omitted)). Instead, the court concluded, canvassing scholarship in support of its reading, that "the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states." *Id.* at 630 (citation omitted).

These principles apply with equal force in this case. The Pangang Defendants' position would confer absolute immunity on foreign government-controlled businesses that committed substantial economic espionage in the United States—espionage that domestic or foreign-owned but not government-controlled competitors could not commit without criminal sanction. The government would be powerless to stop this activity except through diplomatic pressure. Inferring such Congressional intent from the FSIA, where no mention of criminal cases is made, is simply implausible and should not be adopted. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S.

564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available."); *accord Tovar v. Sessions*, 882 F.3d 895, 904 (9th Cir. 2018).

Such an interpretation would also conflict with the federal government's traditional role in deciding whether to prosecute or subpoena a foreign-government-owned business—decisions the government has exercised for decades. *See, e.g.*, *United States v. Ho*, 3:16-CR-46-TAV-HBG-1, 2016 WL 5875005 (E.D. Tenn. Oct. 7, 2016); *M/V Deltuva*, 752 F. Supp. 2d at 176–80; *United States v. Jasin*, No. CRIM. A. 91-00602-08, 1993 WL 259436 (E.D. Pa. July 7, 1993); *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir. 1987) (per curiam); *see also, e.g.*, *United States v. Statoil, ASA*, No. 06-CR-960 (S.D.N.Y. Oct. 13, 2006) (criminal information and deferred prosecution agreement against Norwegian state-owned oil company); *United States v. Aerlinte Eireann*, No. 89-CR-647, Dkt. No. 12 (S.D. Fla. Oct. 6, 1989) (guilty plea of airline then owned by Ireland). That is perhaps why "no reported court decision has dismissed an indictment or otherwise suppressed a criminal prosecution based on immunity conferred by the FSIA." Restatement (Fourth) of Foreign Relations Law of the United States, § 451 rep. n.4 (2018).
In arguing against the weight of this authority, the Pangang Defendants cite *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), and the district court opinion upon which that decision rested. AOB 28. Such reliance is misplaced. As the D.C. Circuit explained, *Keller* was a civil case and never considered how FSIA interacted with Section 3231. *In re Grand Jury Subpoena*, 912 F.3d at 631. Moreover, *Keller* is no longer good law on its conclusion that the FSIA provided civil immunity to individual officials of a foreign state. *See Samantar*, 560 U.S. at 310 n.4 (listing *Keller* on the side of a circuit split that the Supreme Court proceeded to reject). And the manner in which *Keller* was abrogated is telling: the Supreme Court rejected the idea that, although the general text of the FSIA could be read consistently with *Keller*'s interpretation, when read "as a whole," the FSIA's history, purpose, structure, and text convinced the Court that extending coverage to scenarios "never mentioned in the text" was incorrect. *Samantar*, 560 U.S. at 319. Relying on *Keller* for interpretive guidance on which unmentioned scenarios the FSIA was meant to cover would be similarly unwise here. That is particularly true given that at least one other circuit has flatly rejected, in a civil case, the idea "that Congress intended the FSIA to govern district court jurisdiction in criminal cases." *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1214 (10th Cir. 1999).

Equally inapt is the Pangang Defendants' reliance on *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). AOB 1, 5, 6, 13, 23, 25, 29. "[E]ven the briefest peek under the hood of *Amerada Hess* shows that the Supreme Court's reasons for finding section 1330(a) to be the exclusive basis for jurisdiction in the civil context have no place in criminal matters." *In re Grand Jury Subpoena*, 912 F.3d at 629. Nothing in *Amerada Hess* addresses, let alone forecloses, criminal jurisdiction. The general language cited by the Pangang Defendants does not support their claim. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004) ("[G]eneral language in judicial opinions" must be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering"). Furthermore, the Pangang Defendants' repeated citation to *Amerada Hess* for the proposition that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts," AOB 1, 5, 13, 25, 29, fails to grapple with the context of that statement: *Amerada Hess* explained only that the "comprehensiveness of the statutory scheme" meant that Congress did not need to amend "other grants of subject-matter jurisdiction in Title 28" such as "federal question jurisdiction," admiralty, interpleader, commerce and antitrust, and

patents, copyrights, and trademarks. *Amerada Hess*, 488 U.S. at 437–39. This list has one thing in common: it refers to different civil jurisdictional provisions in Title 28. Jurisdiction in this case has nothing to do with Title 28. *See* 18 U.S.C. § 3231. *Amerada Hess* has no bearing here. *See In re Grand Jury Subpoena*, 912 F.3d at 629. The Pangang Defendants' reliance upon it is meritless.

* * * *

5. Terrorism Exception to Immunity: *Opati v. Sudan*

The terrorism exception applies, *inter alia*, to cases in which money damages are sought for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act … engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605A(a)(1). The provision further specifies that "[t]he court shall hear a claim under this section if" certain additional requirements are met, *id*. § 1605A(a)(2), including that "the foreign state was designated as a state sponsor of terrorism at the time the act [at issue] occurred, or was so designated as a result of such act, and … either remains so designated when the claim is filed … or was so designated within the 6-month period before the claim is filed . . . ." *Id*. § 1605A(a)(2)(A)(i). The provision provides a private right of action for U.S. nationals, members of the armed forces, and employees and contractors of the U.S. government to seek damages for personal injury or death resulting from the acts described above. *Id.* § 1605A(c). While the FSIA generally precludes foreign states from liability for punitive damages, 28 U.S.C. § 1606, the terrorism exception specifically permits punitive damages for actions brought under 1605A(c).

As discussed in *Digest 2019* at 327-33, the United States filed briefs in the U.S. Supreme Court in *Opati v. Sudan*, No. 17-1268 and *Sudan v. Opati*, 17-1406, and a related petition in *Sudan v. Owens*, 17-1236. The Court denied certiorari in *Sudan v. Opati*, and *Sudan v. Owens*, on May 26, 2020.

On May 18, 2020, the Court held in an 8-0 decision in *Opati v. Sudan* that plaintiffs in a federal cause of action under the terrorism exception may seek punitive damages for preenactment conduct. 590 U.S. ___, 140 S. Ct. 1601 (2020). The opinion is excerpted below. See Chapter 8 for discussion of the U.S.-Sudan claims agreement relating to the 1998 embassy bombings in Tanzania and Kenya.

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Two years after Congress amended the FSIA, al Qaeda attacked the U.S. Embassies in Kenya and Tanzania. In response, a group of victims and affected family members led by James Owens sued Sudan in federal district court, invoking the newly adopted terrorism exception and alleging

that Sudan had provided shelter and other material support to al Qaeda. As the suit progressed, however, a question emerged. In its recent amendments, had Congress merely withdrawn immunity for state-sponsored terrorism, allowing plaintiffs to proceed using whatever preexisting causes of action might be available to them? Or had Congress gone further and created a new federal cause of action to address terrorism? Eventually, the D. C. Circuit held that Congress had only withdrawn immunity without creating a new cause of action. See *Cicippio-Puelo* v. *Islamic Republic of Iran*, 353 F. 3d 1024, 1033 (2004).

In response to that and similar decisions, Congress amended the FSIA again in the National Defense Authorization Act for Fiscal Year 2008 (NDAA), 122 Stat. 338. Four changes, all found in a single section, bear mention here. First, in §1083(a) of the NDAA, Congress moved the state-sponsored terrorism exception from its original home in §1605(a)(7) to a new section of the U. S. Code, 28 U. S. C.§1605A. This had the effect of freeing claims brought under the terrorism exception from the FSIA's usual bar on punitive damages. See §1606 (denying punitive damages in suits proceeding under a sovereign immunity exception found in §1605 but not §1605A). Second, also in §1083(a), Congress created an express federal cause of action for acts of terror. This new cause of action, codified at 28 U. S. C. §1605A(c), is open to plaintiffs who are U. S. nationals, members of the Armed Forces, U. S. government employees or contractors, and their legal representatives, and it expressly authorizes punitive damages. Third, in §1083(c)(2)of the NDAA, a provision titled "Prior Actions," Congress addressed existing lawsuits that had been "adversely affected on the groun[d] that" prior law "fail[ed] to create a cause of action against the state." Actions like these, Congress instructed, were to be given effect "as if " they had been originally filed under §1605A(c)'s new federal cause of action. Finally, in §1083(c)(3) of the NDAA, a provision titled "Related Actions," Congress provided a time-limited opportunity for plaintiffs to file *new* actions "arising out of the same act or incident" as an earlier action and claim the benefits of 28 U. S. C. §1605A.

Following these amendments, the *Owens* plaintiffs amended their complaint to include the new federal cause of action, and hundreds of additional victims and family members filed new claims against Sudan similar to those in *Owens*. Some of these new plaintiffs were U. S. nationals or federal government employees or contractors who sought relief under the new §1605A(c) federal cause of action. But others were the foreign-national family members of U. S. government employees or contractors killed or injured in the attacks. Ineligible to invoke §1605A(c)'s new federal cause of action, these plaintiffs relied on §1605A(a)'s state-sponsored terrorism exception to overcome Sudan's sovereign immunity and then advance claims sounding in state law.

After a consolidated bench trial in which Sudan declined to participate, the district court entered judgment in favor of the plaintiffs. District Judge John Bates offered detailed factual findings explaining that Sudan had knowingly served as a safe haven near the two United States Embassies and allowed al Qaeda to plan and train for the attacks. The court also found that Sudan had provided hundreds of Sudanese passports to al Qaeda, allowed al Qaeda operatives to travel over the Sudan-Kenya border without restriction, and permitted the passage of weapons and money to supply al Qaeda's cell in Kenya. See *Owens* v. *Republic of Sudan*, 826 F. Supp. 2d 128, 139–146 (DC 2011).

The question then turned to damages. Given the extensive and varied nature of the plaintiffs' injuries, the court appointed seven Special Masters to aid its fact finding. Over more than two years, the Special Masters conducted individual damages assessments and submitted written reports. Based on these reports, and after adding a substantial amount of prejudgment

interest to account for the many years of delay, the district court awarded a total of approximately $10.2 billion in damages, including roughly $4.3 billion in punitive damages to plaintiffs who had brought suit in the wake of the 2008 amendments.

At that point, Sudan decided to appear and appeal. Among other things, Sudan sought to undo the district court's punitive damages award. Generally, Sudan argued, Congress may create new forms of liability for past conduct only by clearly stating its intention to do so. And, Sudan continued, when Congress passed the NDAA in 2008, it nowhere clearly authorized punitive damages for anything countries like Sudan might have done in the 1990s.

The court of appeals agreed. It started by addressing the plaintiffs who had proceeded under the new federal cause of action in §1605A(c). The court noted that, in passing the NDAA, Congress clearly authorized individuals to use the Prior Actions and Related Actions provisions to bring new federal claims attacking past conduct. Likewise, the law clearly allowed these plaintiffs to collect compensatory damages for their claims. But, the court held, Congress included no statement clearly authorizing *punitive* damages for preenactment conduct. See *Owens* v. *Republic of Sudan*, 864 F. 3d 751, 814–817 (CADC 2017). Separately but for essentially the same reasons, the court held that the foreign-national family member plaintiffs who had proceeded under state-law causes of action were also barred from seeking and obtaining punitive damages. *Id.*, at 817.

The petitioners responded by asking this Court to review the first of these rulings and decide whether the 2008 NDAA amendments permit plaintiffs proceeding under the federal cause of action in §1605A(c) to seek and win punitive damages for past conduct. We agreed to resolve that question. 588 U. S. ___ (2019).

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The principle that legislation usually applies only prospectively "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994). This principle protects vital due process interests, ensuring that "individuals . . . have an opportunity to know what the law is" before they act, and may rest assured after they act that their lawful conduct cannot be second-guessed later. *Ibid.* The principle serves vital equal protection interests as well: If legislative majorities could too easily make new laws with retroactive application, disfavored groups could become easy targets for discrimination, with their past actions visible and unalterable. See *id.*, at 266–267. No doubt, reasons like these are exactly why the Constitution discourages retroactive lawmaking in so many ways, from its provisions prohibiting *ex post facto* laws, bills of attainder, and laws impairing the obligations of contracts, to its demand that any taking of property be accompanied by just compensation. See *id.*, at 266.

Still, Sudan doesn't challenge the constitutionality of the 2008 NDAA amendments on these or any other grounds—the arguments we confront today are limited to the field of statutory interpretation. But, as both sides acknowledge, the principle of legislative prospectivity plays an important role here too. In fact, the parties devote much of their briefing to debating exactly how that principle should inform our interpretation of the NDAA.

For its part, Sudan points to *Landgraf*. There, the Court observed that, "in decisions spanning two centuries," we have approached debates about statutory meaning with an assumption that Congress means its legislation to respect the principle of prospectivity and apply only to future conduct—and that, if and when Congress wishes to test its power to legislate retrospectively, it must say so "clear[ly]." *Id.*, at 272. All this is important, Sudan tells us,

because when we look to the NDAA we will find no *clear* statement allowing courts to award punitive damages for past conduct.

But if Sudan focuses on the rule, the petitioners highlight an exception suggested by *Altmann*. Because foreign sovereign immunity is a gesture of grace and comity, *Altmann* reasoned, it is also something that may be withdrawn retroactively without the same risk to due process and equal protection principles that other forms of backward-looking legislation can pose. Foreign sovereign immunity's "principal purpose," after all, "has never been to permit foreign states . . . to shape their conduct in reliance on the promise of future immunity from suit in United States courts." 541 U. S., at 696. Thus, *Altmann* held, "[i]n th[e] *sui generis* context [of foreign sovereign immunity], . . . it [is] more appropriate, absent contraindications, to defer to the most recent decision [of the political branches] than to presume that decision *inapplicable* merely because it postdates the conduct in question." *Ibid.* And, the petitioners stress, once the presumption of prospectivity is swept away, the NDAA is easily read to authorize punitive damages for completed conduct.

Really, this summary only begins to scratch the surface of the parties' debate. Sudan replies that it may be one thing to retract immunity retroactively consistent with *Altmann*, because all that does is open a forum to hear an otherwise available legal claim. But it is another thing entirely to create new rules regulating primary conduct and impose them retroactively. When Congress wishes to do *that*, Sudan says, it must speak just as clearly as *Landgraf* commanded. And, Sudan adds, the NDAA didn't simply open a new forum to hear a pre-existing claim; it also created a new cause of action governing completed conduct that the petitioners now seek to exploit. Cf. *Altmann*, 541 U. S., at 702– 704 (Scalia, J., concurring). In turn, the petitioners retort that *Altmann* itself might have concerned whether a new forum could hear an otherwise available and pre-existing claim, but its reasoning went further. According to the petitioners, the decision also strongly suggested that the presumption of prospectivity does not apply at all when it comes to suits against foreign sovereigns, full stop. These points and more the parties develop through much of their briefing before us.

As we see it, however, there is no need to resolve the parties' debate over interpretive presumptions. Even if we assume (without granting) that Sudan may claim the benefit of *Landgraf* 's presumption of prospectivity, Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using §1065A(c)'s new federal cause of action. After all, in §1083(a), Congress created a federal cause of action that expressly allows suits for damages that "may include economic damages, solatium, pain and suffering, and *punitive damages*." (Emphasis added.) This new cause of action was housed in a new provision of the U. S. Code, 28 U. S. C.§1605A, to which the FSIA's usual prohibition on punitive damages does not apply. See §1606. Then, in §§1083(c)(2) and (c)(3) of the very same statute, Congress allowed certain plaintiffs in "Prior Actions" and "Related Actions" to invoke the new federal cause of action in §1605A. Both provisions specifically authorized new claims for preenactment conduct. Put another way, Congress proceeded in two equally evident steps: (1) It expressly authorized punitive damages under a new cause of action; and (2) it explicitly made that new cause of action available to remedy certain past acts of terrorism. Neither step presents any ambiguity, nor is the NDAA fairly susceptible to any competing interpretation.

Sudan's primary rejoinder only serves to underscore the conclusion. Like the court of appeals before it, Sudan stresses that §1083(c) *itself* contains no express authorization of punitive damages. But it's hard to see what difference that makes. Sudan admits that §1083(c) authorizes plaintiffs to bring claims under §1605A(c) for acts committed before the 2008 amendments.

Sudan concedes, too, that §1605A(c) authorizes plaintiffs to seek and win "economic damages, solatium, [and] pain and suffering," for preenactment conduct. In fact, except for the two words "punitive damages," Sudan accepts that *every other* jot and tittle of §1605A(c) applies to actions properly brought under §1083(c) for past conduct. And we can see no plausible account on which §1083(c) could be clear enough to authorize the retroactive application of all other features of §1605A(c), just not these two words.

Sudan next contends that §1605A(c) fails to authorize retroactive punitive damages with sufficient clarity because it sounds equivocal—the provision says only that awards "may" include punitive damages. But this language simply vests district courts with discretion to determine whether punitive damages are appropriate in view of the facts of a particular case. As we have repeatedly observed when discussing remedial provisions using similar language, "the 'word "may" *clearly* connotes discretion.'" *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U. S. ___, ___ (2016) (slip op., at 8) (quoting *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 136 (2005), in turn quoting *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 533 (1994); emphasis added). What's more, all of the categories of special damages mentioned in §1605A(c) are provided on equal terms: "[D]amages *may* include economic damages, solatium, pain and suffering, and punitive damages." (Emphasis added.) Sudan admits that the statute vests the district court with discretion to award the first three kinds of damages for preenactment conduct—and the same can be no less true when it comes to the fourth.

That takes us to Sudan's final argument. Maybe Congress did act clearly when it authorized a new cause of action and other forms of damages for past conduct. But because retroactive damages of the *punitive* variety raise special constitutional concerns, Sudan says, we should create and apply a new rule requiring Congress to provide a super-clear statement when it wishes to authorize their use.

We decline this invitation. It's true that punitive damages aren't merely a form a compensation but a form of punishment, and we don't doubt that applying new punishments to completed conduct can raise serious constitutional questions. See *Landgraf*, 511 U. S., at 281. But if Congress *clearly* authorizes retroactive punitive damages in a manner a litigant thinks unconstitutional, the better course is for the litigant to challenge the law's constitutionality, not ask a court to ignore the law's manifest direction. Besides, when we fashion interpretive rules, we usually try to ensure that they are reasonably administrable, comport with linguistic usage and expectations, and supply a stable backdrop against which Congress, lower courts, and litigants may plan and act. See *id.*, at 272–273. And Sudan's proposal promises more nearly the opposite: How much clearer-than-clear should we require Congress to be when authorizing the retroactive use of punitive damages? Sudan doesn't even try to say, except to assure us it knows a super-clear statement when it sees it, and can't seem to find one here. That sounds much less like an administrable rule of law than an appeal to the eye of the beholder.

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With the question presented now resolved, both sides ask us to tackle other matters in this long-running litigation. Perhaps most significantly, the petitioners include a postscript asking us to decide whether Congress also clearly authorized retroactive punitive damages in claims brought by foreign-national family members under state law using §1605A(a)'s exception to sovereign immunity. Sudan insists that, if we take up that question, we must account for the fact that §1605A(a), unlike §1605A(c), does not expressly discuss punitive damages. And in fairness, Sudan contends, we should also resolve whether litigants may invoke state law at all, in light of the possibility that §1605A(c) now supplies the exclusive cause of action for claims involving

state-sponsored acts of terror. We decline to resolve these or other matters outside the question presented. The petitioners chose to limit their petition to the propriety of punitive damages under the federal cause of action in §1605A(c). See Pet. for Cert. i. The Solicitor General observed this limitation in the question presented at the petition stage. See Brief for United States as *Amicus Curiae* 19, n. 8. The parties' briefing and argument on matters outside the question presented has been limited, too, and we think it best not to stray into new terrain on the basis of such a meager invitation and with such little assistance.

Still, we acknowledge one implication that necessarily follows from our holding today. The court of appeals refused to allow punitive damages awards for foreign-national family members proceeding under state law for "the same reason" it refused punitive damages for the plaintiffs proceeding under §1605A(c)'s federal cause of action. 864 F. 3d, at 818. The court stressed that it would be "puzzling" if punitive damages were permissible for state claims but not federal ones. *Id.*, at 817. Having now decided that punitive damages *are* permissible for federal claims, and that the reasons the court of appeals offered for its contrary decision were mistaken, it follows that the court of appeals must also reconsider its decision concerning the availability of punitive damages for claims proceeding under state law.

The judgment of the court of appeals with respect to punitive damages is vacated. The case is remanded for further proceedings consistent with this opinion.

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B. HEAD OF STATE AND OTHER FOREIGN OFFICIAL IMMUNITY

Mutond v. Lewis

On May 26, 2020, the United States filed an amicus brief in *Mutond v. Lewis*, No. 19-185, in the U.S. Supreme Court, urging the Court to grant the petition for certiorari in the case. The district court dismissed Lewis's claims under the Torture Victims Protection Act ("TVPA") against officials of the Democratic Republic of the Congo ("DRC") (including Mutond) related to his detention and interrogation. The U.S. Court of Appeals for the D.C. Circuit reversed, concluding that the officials were not entitled to conduct-based foreign official immunity. On June 29, 2020, the Supreme Court denied the petition. The U.S. brief is excerpted below.

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A. This Court Should Grant Review To Clarify That No Categorical Exception To Conduct-Based Foreign-Official Immunity Exists For Personal-Capacity Suits

The court of appeals first erred by concluding that conduct-based immunity has no application to suits against foreign officials in their personal capacities. That holding contradicts the principles of foreign official immunity long advanced by the Executive Branch, and necessitates this Court's review.

The D.C. Circuit's principal holding is a broad one: "In cases like this one, in which the plaintiff pursues an individual-capacity claim seeking relief against an official in a personal capacity, exercising jurisdiction does not enforce a rule against the foreign state. [Petitioners] are thus not entitled to the conduct-based foreign official immunity." Pet. App. 8a. Respondent attempts to characterize that holding as a "fact-intensive analysis" of this case. Br. in Opp. 1; see Pet. App. 6a-8a. But the only "facts" on which the court of appeals focused are features of this case that can be, and often are, easily replicated in nearly any action seeking damages from a foreign official: Respondent's complaint does not "seek[] to draw on the [foreign state's] treasury or force the state to take specific action." Pet. App. 7a. Thus contrary to respondent's claim, the decision below appears to reflect a "categorical rule" of non-immunity in personal-capacity suits against foreign officials. Br. in Opp. 2.

1. The decision below is contrary to the long-stated views and practice of the Executive Branch

a. The Executive Branch has repeatedly suggested immunity in suits filed against foreign officials in their personal capacities. See, *e.g.*, 15-cv-813- *Doğan v. Barak*, D. Ct. Doc. 48 (C.D. Cal. June 10, 2016); 11-cv-1433 *Doe v. Zedillo Ponce de Leon*, D. Ct. Doc. 38 (D. Conn. Sept. 7, 2012); 05-cv-10270 *Matar v. Dichter*, D. Ct. Doc. 36 (S.D.N.Y. Nov. 17, 2006). None of those filings has hinted that conduct-based immunity might turn on a pleading distinction between personal- and official-capacity suits. Indeed, the question of official immunity logically arises when the defendant is not sued in his official capacity—*i.e.*, when the foreign government is *not* the real party in interest.

Instead, conduct-based foreign-official immunity generally turns on whether the challenged *action* was taken in an official capacity. That common-sense rule has a long pedigree in the Executive Branch. See *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794) ("[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant * * * , [that] will of itself be a sufficient answer to the plaintiff 's action."); *Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797) ("[A] person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States."). And the official-capacity standard has remained consistent in the Executive Branch's numerous filings in lawsuits against foreign officials. See, *e.g.*, 15-cv-1265 *Miango* v. *Democratic Republic of the Congo*, D. Ct. Doc. 151-1, at 2 (D.D.C. May 1, 2019) ("As a general matter, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate."); U.S. Suggestion of Immunity at 5-6, *Ben-Haim* v. *Edri*, No. L-3502-15 (N.J. Super. Ct. Law Div. Dec. 3, 2015) ("As a general matter, under principles of customary international law accepted by the Executive Branch, a foreign official enjoys immunity from suit based upon acts taken in an official capacity."); see also 11-cv-1433 *Doe* v. *Zedillo Ponce de Leon*, D. Ct. Doc. 38, at 5; Gov't Amicus Br. at 21, *Matar* v. *Dichter*, No. 07-cv-2579 (2d Cir. Dec. 19, 2007). The State Department's adherence to that principle is also reflected in its annual *Digest of United States Practice in International Law*. See, *e.g.*, Office of the Legal Advisor, U.S. Dep't of State, *Digest of United States Practice in International Law* (CarrieLyn D. Guymon, ed. 2015), Ch. 10, § B(3), at 426.

b. The contrast between the Executive Branch's long-stated position and that in the decision below reflects a fundamental methodological flaw in the D.C. Circuit's approach to foreign-official immunity in this case. Under this Court's decisions, the principles recognized by the Executive Branch governing foreign-official immunity are to be followed by the courts. That

is true not only in cases in which the Executive files a suggestion of immunity, but also in cases in which courts must decide for themselves whether a foreign official is immune from suit.

1. In *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA left undisturbed the Executive Branch's historical authority to determine the immunity of foreign officials. See *id.* at 321-325. Under that tradition more generally, the Executive's articulation of foreign immunity principles historically has been adhered to in judicial proceedings, including in cases in which the Executive Branch expresses no view about a particular defendant's immunity. See, *e.g.*, *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 765-766 (2019) ("If the Department submitted a recommendation on immunity, courts deferred to the recommendation. If the Department did not make a recommendation, courts decided for themselves whether to grant immunity, although they did so by reference to State Department policy."); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943); *Compania Espagnola de Navegacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68, 74 (1938). In *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945), for example, the Executive took no position on the immunity of a particular ship owned by the Mexican government, but it identified precedent under which a state-owned vessel is not immune if it is used by a private party for commercial purposes. *Id.* at 31-32. The Court recognized that the Executive had applied that principle in other immunity determinations, deemed that practice "controlling," and applied the same principle to the specific vessel at issue. *Id*. at 38. As the Court explained, affording immunity on principles not accepted by the Executive "may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations" as would be denying immunity in the face of the Executive's suggestion to the contrary. *Id*. at 36.

2. The courts' deference to the Executive Branch's position on foreign-official immunity under that frame-work rests on the separation of powers under the Constitution. Before Congress enacted the FSIA, this Court had long recognized that the Executive's authority to make foreign sovereign immunity determinations, and the requirement of judicial deference to such determinations, followed from the Executive's constitutional responsibility for conducting the Nation's foreign relations. See, *e.g.*, *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that "continued retention of the vessel interferes with the proper conduct of our foreign relations"); see also *Hoffman*, 324 U.S. at 34; *United States* v. *Lee*, 106 U.S. 196, 209 (1882); *National City Bank* v. *Republic of China*, 348 U.S. 356, 360-361 (1955); see generally *Ludecke* v. *Watkins*, 335 U.S. 160, 173 (1948) (under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs"); 22 U.S.C. 2656.

The Executive's authority to make foreign-*official* immunity determinations has the same constitutional foundation. As this Court has recognized, suits against foreign officials implicate many of the same foreign-affairs concerns as do suits against foreign states. Although foreign-state and foreign-official immunity are not invariably coextensive in scope, see *Samantar*, 560 U.S. at 321, the historical basis for recognizing the immunity of current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers," *Underhill* v. *Hernandez*, 65 F. 577, 579 (2d Cir. 1895), aff 'd, 168 U.S. 250 (1897); see *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). As a result, suits against foreign officials implicate much the same considerations of comity and respect for other nations' sovereignty as suits against foreign states. See *Underhill*, 65 F. at 579; cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (The "strong sense of the Judicial Branch" is "that its engagement in the task of passing on the validity of

foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."). In the absence of a governing statute such as the FSIA, it continues to be the Executive Branch's role to assess those considerations in determining whether foreign officials are entitled to immunity. *Samantar*, 560 U.S. at 321-325.

2. The decision below erred in relying on the Second Restatement

Instead of considering whether petitioners took the acts at issue in an official capacity and whether they would be immune from suit under the principles accepted by the Executive Branch, the court of appeals assumed without actually deciding that the Second Restatement identified the relevant standard. Pet. App. 6a. That was error.

a. Reliance on the Second Restatement's provisions on foreign-official immunity as a conclusive statement of current law is misplaced. Cf. *Samantar*, 560 U.S. at 321 n.15 (expressing "no view" on whether the Second Restatement "correctly" articulates common-law immunity principles). The Second Restatement was published in 1965. Its drafters acknowledged the "paucity of adjudicated decisions in the international field" at the time and admitted their reliance on less conventional sources to divine the principles of foreign-relations law. Second Restatement § 1 cmt. c. The Restatement has twice been revised since that time, with each revision noting that foreign-relations law had undergone "significant change since publication of the previous Restatement." Restatement (Third) of Foreign Relations Law of the United States Intro. (1987) (Third Restatement); see also Restatement (Fourth) of Foreign Relations Law of the United States Intro. & Part IV Intro. Note (2018) (Fourth Restatement) (similar). Neither the Third Restatement (which was a complete revision) nor the Fourth (which is thus far only a partial revision but includes a provision on sovereign immunity) repeats the Second Restatement's test for foreign-official immunity.

b. Even taken at face value, it is far from clear that the Second Restatement provision at issue here addresses the question presented by this case. Section 66 of the Second Restatement is entitled "applicability of immunity *of foreign state*." Second Restatement § 66 (emphasis added; capitalization omitted; font altered). The relevant Subsection, 66(f), purports to explain that the "immunity *of a foreign state* * * * extends to" any "public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." *Id.* § 66(f) (emphasis added; font altered). That section is written in terms that appear to consider only when a suit against a foreign official would effectively trigger the foreign nation's (pre-FSIA) *sovereign* immunity. Indeed, the test mirrors the standard articulated by this Court—just two years earlier—for determining when a suit against a federal official is, in reality, a suit against the United States without its consent. See *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) ("The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' ") (citations omitted).

As this Court explained in *Samantar*, the common law doctrine of foreign-official immunity is distinct from the now-statutory doctrine of foreign-sovereign immunity. See 560 U.S. at 321-322. Practice confirms that distinction, as the Executive has "sometimes suggested immunity under the common law for individual officials even when the foreign state did not qualify." *Id.* at 321-322; see, *e.g.*, *Greenspan* v. *Crosbie*, No. 74-cv-4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976) (suggestion that Canadian officials enjoyed immunity from securities fraud conspiracy claims, while the province of Newfoundland could be held liable). That

distinction makes sense, as personal damages actions against foreign officials could unduly chill the performance of their duties, trigger concerns about the treatment of United States officials abroad, and interfere with the Executive's conduct of foreign affairs—even when a foreign state itself could be sued.

Because the Second Restatement's Section 66(f) is not written in terms that address the circumstances in which foreign officials may enjoy common law conduct-based immunity independently of their sovereigns, it does not answer the immunity question here. But even if Section 66(f) were instructive, the court of appeals should have interpreted it in a manner consistent with the principles of foreign-official immunity recognized by the Executive Branch. See *Smith* v. *Ghana Commercial Bank, Ltd.*, No. 10-cv-4655, 2012 WL 2930462, at *10 (D. Minn. June 18, 2012), report and recommendation adopted, 2012 WL 2923543 (D. Minn. July 18, 2012), aff 'd (8th Cir. Dec. 7, 2012) (exercising jurisdiction over Ghanaian Attorney General "would be 'to enforce a rule of law against' the Republic of Ghana" when the plaintiff's claims challenged the Attorney General's "decisions about how to pursue those accused of wrongdoing within Ghana's territory").

The court of appeals thus fundamentally erred in assessing conduct-based immunity for foreign officials. Rather than determining whether petitioners' challenged actions were taken in an official capacity, for which it is the policy of the Executive to recognize immunity, the court relied on the Second Restatement to effectively establish a categorical exception to conduct-based immunity for personal-capacity suits. Such a rule has been endorsed by no other court of appeals, and this Court's review is warranted.

B. This Court Should Grant Review To Resolve The Circuit Conflict About Whether The TVPA Implicitly Abrogates All Conduct-Based Foreign-Official Immunity

The court of appeals also erred in holding that Congress *sub silentio* abrogated conduct-based foreign-official immunity for claims arising under the TVPA. That holding is incorrect and conflicts with the decisions of other courts of appeals, necessitating this Court's review.

1. The decision below is incorrect

The pedigree of foreign-official immunity stretches back centuries. See p. 13, *supra*; see, *e.g.*, *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 138-139 (1812); *Actions Against Foreigners*, 1 Op. Att'y Gen. at 81; *Suits Against Foreigners*, 1 Op. Att'y Gen. at 46. "Just as longstanding is the principle that '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long- established and familiar principles." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (brackets in original); see, *e.g.*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813). As a result, a "statute must 'speak directly' to the question addressed by the common law" if it is to "abrogate a common-law principle." *Texas*, 507 U.S. at 534 (citation omitted). That rule is particularly clear for common-law immunities, as this Court has explained: "[W]e 'proceed[] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so.' " *Filarsky* v. *Delia*, 566 U.S. 377, 389 (2012) (citation omitted; second set of brackets in original).

The TVPA created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," "subjects an individual" to "torture" or "extrajudicial killing." § 2(a), 106 Stat. 73. The statute creates a cause of action only; it says nothing about immunities. Because the TVPA does not "speak directly to the question addressed by the common law" concerning conduct-based immunity for foreign officials, the

statute does not abrogate that doctrine. *Texas*, 507 U.S. at 534 (citation and internal quotation marks omitted).

Nor does the TVPA's legislative history evince an intention to discard the common law on foreign-official immunity. That legislative history is somewhat muddled by Congress's erroneous assumption, at the time of passing the TVPA, that the FSIA would govern foreign-official immunity. But the legislative history nonetheless reflects Congress's understanding that some TVPA suits could be barred by pre-existing immunity doctrines that were unchanged by the TVPA. See H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 5 (1991) ("The TVPA is subject to restrictions in the [FSIA]" regarding immunities.); S. Rep. No. 249, 102d Cong., 1st Sess. 7 (1991) (Senate Report) (similar). Consistent with that understanding, the Senate Report explained that for an official to be immune from a TVPA suit, the official must have "an agency relationship to [the] state," which could require the state to " 'admit some knowledge or authorization of the relevant acts.' " Senate Report 8 (citation omitted). The Senate Report expressed the view that, in practice, foreign states would rarely do so for the heinous acts covered by the TVPA. *Ibid*. But that practical observation is only relevant if the TVPA did not abrogate conduct-based immunity for foreign officials as a legal matter.

Contrary to Judge Randolph's opinion, the fact that the TVPA creates a cause of action does not pose a "clear conflict" with the doctrine of conduct-based immunity for foreign officials. Pet. App. 14a. That statutory causes of action may coexist with common-law immunities is well-established in American law. The best example is Section 1983, which—much like the TVPA—creates a right of action against "[e]very person who, under color of [law]," deprives another of his or her legal rights. 42 U.S.C. 1983. Like the TVPA, Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). But because common-law immunity principles are "an entrenched feature" of American law, " 'well grounded in history and reason,' " this Court has repeatedly held that they "were not somehow eliminated 'by covert inclusion in the general language' of § 1983." *Rehberg* v. *Paulk*, 566 U.S. 356, 361 (2012) (citation omitted); see *id*. at 361-362 (collecting cases). Instead, the Court has construed the statute "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986) (citation omitted); see, *e.g.*, *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967) (even though the word "person" in Section 1983 includes legislators and judges, the statute does not abrogate the common law doctrine of absolute legislative and judicial immunity).

There is no reason to interpret the TVPA differently. If anything, the fact that TVPA litigation necessarily involves foreign officials and interests should counsel additional hesitation before concluding that Congress silently dispensed with a long-established immunity doctrine. Cf. *Schooner Exchange*, 11 U.S. (7 Cranch) at 146 (stating that the Court would understand the government to have rescinded a foreign sovereign's immunity only if it so indicates "in a manner not to be misunderstood").

2. The court of appeals' decision conflicts with the decisions of other courts of appeals

In holding that the TVPA abrogates the common law doctrine of conduct-based immunity for foreign officials, the court of appeals created a conflict with the Second and Ninth Circuits, which this Court should resolve.

In *Doğan v. Barak*, 932 F.3d 888 (2019), the Ninth Circuit rejected the argument that because "the TVPA's plain language unambiguously imposes liability on any foreign official who engages in extrajudicial killings," the statute abrogated common-law foreign-official immunity. *Id*. at 894. Because the TVPA does not expressly address immunity, the Ninth Circuit explained, principles of immunity " 'were incorporated' into the TVPA." *Id*. at 895 (quoting

Filarsky, 566 U.S. at 389). And in *Matar v. Dichter*, 563 F.3d 9 (2009), the Second Circuit similarly rejected the argument that "any immunity [the foreign official defendant] might enjoy is overridden by his alleged violations of the TVPA." *Id.* at 15. The decision below cannot be squared with those rulings.

Respondent attempts to distinguish *Doğan* and *Matar* on the ground that the Executive Branch filed a suggestion of immunity on behalf of the foreign officials in those cases. See Br. in Opp. 18-19. According to respondent, the D.C. Circuit's decision in this case holds only that the TVPA "displaces" the second step of the common-law foreign-official immunity procedure. *Id.* at 18. But Judge Randolph's brief opinion contains no such limitation. And, as explained above, the same legal principles should govern the foreign-official immunity inquiry at the first and second steps, as the federal courts make immunity determinations by applying "the established policy" of the State Department. *Samantar*, 560 U.S. at 312 (citation omitted). While the D.C. Circuit recognized that courts are "divested of * * * jurisdiction" when the Executive suggests a foreign official's immunity, Pet. App. 5a, the court did not explain how the Executive's suggestion of foreign-official immunity in a TVPA case would coexist with Judge Randolph's determination that the TVPA abrogates conduct-based immunity for foreign officials. The resulting confusion only heightens the need for this Court's intervention.

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C. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Protection of Diplomatic and Consular Missions

On November 10, 2020, Attorney-Adviser Elizabeth Grosso of the U.S. Mission to the UN delivered the U.S. statement at a Sixth Committee meeting on the protection, security and safety of diplomatic and consular missions. Ms. Grosso's statement follows.

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* * * *

It is essential for the normal conduct of relations among states that the rules protecting the sanctity of ambassadors, other diplomats, and the premises of consular and diplomatic missions, are respected. These rules are the foundation on which diplomacy functions.

The host government's special duty to protect diplomatic missions includes protection against violence and attacks from non-state actors. Over recent years, U.S. missions overseas have endured significant attacks, in some notable instances without the benefit of robust state protection.

The most recent serious incident occurred in Iraq, on December 31, 2019, when several Iranian-backed militias attacked the U.S. Embassy in Baghdad. The mob entered unhindered into the International Zone past barricades manned by Iraqi security forces. The attack on the Embassy was joined by at least one cabinet member of the Government of Iraq, one former cabinet member, and several leaders of Iran-backed armed groups who have been designated terrorists by the United States. Once the mob assembled in front of our embassy, the Iraqi

government made little effort to prevent individuals from breaking into, damaging, and setting fire to our diplomatic facilities.

Over the months following, attacks against diplomatic facilities have continued to escalate in Iraq, including with rocket fire and improvised explosive devices. These attacks have killed and injured many, and included many nationalities among their victims, from European diplomats to innocent Iraqi civilians. The assaults on our embassies abroad are attacks on the inviolability of the premises of a U.S. diplomatic mission. Under the Vienna Convention on Diplomatic Relations, governments have a special duty to take all appropriate steps to protect the premises of foreign missions against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. We call on all governments to fulfill this duty under international law to take all appropriate steps to protect our diplomatic facilities.

Not everything is within a host state's control. What matters is that states respond promptly and robustly to incidents that occur. For example, in April of this year, municipal and federal authorities responded promptly to a shooting that occurred outside the Cuban embassy in Washington, DC, and took the suspect into custody. There were no injuries. The suspect in the attack has now been formally charged in U.S. federal court and faces trial. This is but one example of how the United States has faithfully executed its duty to protect diplomatic facilities from intrusion, damage or disturbances, and to bring any offenders to justice.

Mr. Chairman, we appreciate the opportunity that this discussion affords to reemphasize the importance of these issues. We stand with partner nations in underscoring the urgency of taking steps to enhance security for diplomatic missions. The international community has a vital stake in the protection of diplomats and diplomatic missions, because diplomacy is the foundation of international relations. We must stand together, united against those forces in this world that wish harm to our diplomats.

* * * *

2. Determinations under the Foreign Missions Act

a. Designation of Chinese media entities as foreign missions

On February 18, 2020, the State Department's Office of Foreign Missions designated the following Chinese media entities as foreign missions under the Foreign Missions Act: Xinhua News Agency, China Global Television Network, China Radio International, China Daily Distribution Corporation, and Hai Tian Development USA. 85 Fed. Reg. 10,506 (Feb. 24, 2020). Senior State Department officials provided a special briefing on February 18, 2020 regarding the designations. The briefing is available at https://2017-2021.state.gov/senior-state-department-officials-on-the-office-of-foreign-missions-designation-of-chinese-media-entities-as-foreign-missions/, and excerpted below.

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* * * *

…we're making this designation based on the very indisputable fact that all five of these are subject to the control of the Chinese Government. Obviously, the Chinese Communist Party has always had a pretty tight rein on media in general and state-run media in particular, but that has only further tightened since Xi Jinping took over. Since he became general secretary, China's Communist Party has reorganized China's state news agencies and asserted even more direct control over them, both in terms of content, editorial, et cetera, et cetera.

* * * *

For Xinhua, this is an institution directly reporting to China's State Council, which is the chief administrative authority of the PR Government. China Global Television Network is part of the China Media Group, which is a media company run by the PRC Government. The same goes for China Radio International; that's also part of the China Media Group. China Daily Distribution Corporation acts on behalf of the *China Daily*, which is an English-language daily newspaper owned by the Publicity Department of the CCP. And then fifth, Hai Tian Development USA acts on behalf of the *People's Daily*, which is the official newspaper of the Central Committee of the Chinese Communist Party.

* * * *

… What we are doing is imposing two requirements on these entities.

The first is that they … are required to notify the Office of Foreign Missions within the State Department of their current personnel in the United States, basic information about those individuals, and then … if there's any changes to those employment situations. So if anyone departs or new people come on, they would notify us, just like the standard requirement for an embassy or consulate.

The second is that they would need to notify us of their current real property holdings, whether they are owned or leased; and in connection with that, prior to acquiring, whether by purchase or lease any new real property, they would need to obtain prior approval from my office. Those are the only two requirements that are in place, and all of that was notified to each of these entities earlier today.

* * * *

On March 2, 2020, the State Department announced the institution of a personnel cap on the PRC-controlled state media entities which were designated under the Foreign Missions Act on February 18, 2020. The press statement, available at https://2017-2021.state.gov/institution-of-a-personnel-cap-on-designated-prc-state-media-entities/, is excerpted below.

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* * * *

The U.S. government is today instituting a personnel cap on certain PRC-controlled state media entities in the United States – specifically, the five entities that were designated by the U.S. State Department on February 18, 2020, as foreign missions of the People's Republic of China. This cap limits the number of Chinese citizens permitted to work for these organizations in the United States at any given time.

The cap applies to the five Chinese state media entities operating in the United States that have been designated as foreign missions, which recognizes that they are effectively controlled by the PRC government. Unlike foreign media organizations in China, these entities are not independent news organizations.

The decision to implement this personnel cap is not based on any content produced by these entities, nor does it place any restrictions on what the designated entities may publish in the United States.

Our goal is reciprocity. As we have done in other areas of the U.S.-China relationship, we seek to establish a long-overdue level playing field. It is our hope that this action will spur Beijing to adopt a more fair and reciprocal approach to U.S. and other foreign press in China.

* * * *

In a June 22, 2020 press statement, available at https://www.state.gov/designation-of-additional-chinese-media-entities-as-foreign-missions/, the State Department announced the designation of additional Chinese media entities as foreign missions under the Foreign Missions Act. As identified in the press statement, the June 22 determination designates "…the U.S. operations of China Central Television, China News Service, the People's Daily, and the Global Times as *foreign missions*." The designations were published in the Federal Register on July 6, 2020. 85 Fed. Reg. 40,379 (July 6, 2020). Referring to the total of nine media entities designated in February and June, the June 22 press statement further explains the basis for, and meaning of, the foreign mission designation, as follows:

> These nine entities all meet the definition of a *foreign mission* under the Foreign Missions Act, which is to say that they are "substantially owned or effectively controlled" by a foreign government. In this case, they are effectively controlled by the government of the People's Republic of China.
>
> The decision to designate these entities is not based on any content produced by these entities, nor does it place any restrictions on what the designated entities may publish in the United States. It simply recognizes them for what they are.
>
> Entities designated as foreign missions must adhere to certain administrative requirements that also apply to foreign embassies and consulates in the United States.
>
> This designation recognizes PRC propaganda outlets as foreign missions and increases transparency relating to the CCP and PRC government's media activities in the United States.

On October 21, 2020, the State Department announced the designation of the U.S. operations of Yicai Global, Jiefang Daily, Xinmin Evening News, Social Sciences in China Press, Beijing Review, and Economic Daily as foreign missions. The press statement announcing the designations, available at https://www.state.gov/designation-of-additional-prc-propaganda-outlets-as-foreign-missions/, notes that the additional six entities, like those previously designated, meet the definition of a foreign mission under the Foreign Missions Act in that they are "substantially owned or effectively controlled" by a foreign government, specifically, the government of the People's Republic of China. The designations were published in the Federal Register on October 30, 2020. 85 Fed. Reg. 68, 941; 68,942; 68,951 (Oct. 30, 2020).

b. Other Foreign Mission Act designations and determinations

On July 6, 2020, the Department of State published notice of the designation of engagements between Chinese members of PRC foreign missions and personnel of sub-national government, educational institutions, and research institutions, as well as any visits by Chinese members of PRC foreign missions to any of the three above entities, to be a benefit under the Foreign Missions Act. 85 Fed. Reg. 40,380 (July 6, 2020). The determination requires that PRC personnel on foreign mission submit advanced notification s of such engagements or visits to the Office of Foreign Missions.

On August 13, 2020, the State Department announced that the Office of Foreign Missions had designated the Confucius Institute United States Center ("CIUS"), and any successor entity, including their real property and personnel, as a foreign mission within the meaning of 22 U.S.C. 4302(a)(3). 85 Fed. Reg. 52,187 (Aug. 24, 2020).

On September 21, 2020, the Department of State published notice of the Office of Foreign Missions determination under the Foreign Missions Act that events outside of a foreign mission premises are a benefit under the Act. 85 Fed. Reg. 59,371 (Sept. 21, 2020). Also on September 21, 2020, the Department published notice of the determination under the Foreign Missions Act that PRC missions must obtain advance approval from the Department of State's Office of Foreign Missions to host a cultural event with more than 50 people in attendance in the United States and its territories held outside the physical boundaries of the PRC bilateral foreign mission. 85 Fed. Reg. 59,371 (Sept. 21, 2020). The State Department announced new requirements on PRC mission personnel in a September 2, 2020 press statement, available at https://2017-2021.state.gov/advancing-reciprocity-in-u-s-china-diplomatic-relations/.

On November 13, 2020, the Department published notice of the determination under the Foreign Missions Act that the representative offices and operations in the United States of the National Association for China's Peaceful Unification, including its real property and personnel, are a foreign mission within the meaning of 22 U.S.C. 4302(a)(3). 85 Fed. Reg. 72,747 (Nov. 13, 2020).

3. Closure of the Consulate of the PRC in Houston

After the United States withdrew consent for the operation of the consulate of the People's Republic of China in Houston, the State Department's Office of Foreign missions implemented that decision utilizing the Foreign Missions Act, determining that three PRC consular properties in Houston would be closed for PRC's use, effective July 24, 2020. 85 Fed. Reg. 47,463 (Aug. 5, 2020). Shortly after the announcement regarding the Houston consular properties, the PRC announced closure of the U.S. consulate at Chengdu.

4. Enhanced Consular Immunities

As discussed in *Digest 2016* at 463, Section 501 of the Department of State Authorities Act, Fiscal Year 2017, Pub. L. No. 114-323 (codified at 22 U.S.C. § 254(c)), amended the Diplomatic Relations Act to include permanent authority for the Secretary of State to extend enhanced privileges and immunities to consular posts and their personnel on the basis of reciprocity. See also *Digest 2015* at 436-37.

The Agreement between the Government of the United States of America and the Government of the Kingdom of Saudi Arabia regarding Consular Privileges and Immunities was signed on January 21, 2020. The agreement entered into force on September 11, 2020 and is available at https://www.state.gov/saudi_arabia-20-911.

The Agreement Regarding Consular Privileges and Immunities with Kazakhstan, signed in 2019, entered into force May 4, 2020 and is available at https://www.state.gov/kazakhstan-20-504.

On September 1, 2020, Secretary Pompeo and Foreign Minister Nasser Bourita, of Morocco, offered remarks at the signing of the agreement on enhanced immunities between the two countries. The remarks at the signing ceremony are available at https://2017-2021.state.gov/secretary-michael-r-pompeo-and-moroccan-foreign-minister-nasser-bourita-at-the-signing-of-enhanced-immunities-agreement-with-morocco/. The State Department also issued a statement regarding the meeting (by video teleconference) between Secretary Pompeo and Foreign Minister Bourita in connection with the signing ceremony, which is available at https://2017-2021.state.gov/secretary-pompeos-meeting-with-moroccan-foreign-minister-nasser-bourita-3/. The enhanced immunity agreement with Morocco is provisionally applied from the date of signature. In addition to extending enhanced protections to personnel at consular posts, their family members, and consular posts, this agreement includes an Article to protect Embassy administrative and technical staff members. The article was included because upon its accession to the VCDR in 1968, Morocco took reservation to paragraph (2) of Article 37, indicating that it considers the paragraph "not applicable." The United States formally objected to the reservation in 1974 and stated that "the Government of the United States … considers the Convention as continuing in force between it and Morocco except for the provision[] to which the reservation [is] addressed." While the United States considers the protections specified under VCDR

Article 37(2) part of customary international law, and thus applicable, it is uncertain whether the Moroccan government and Moroccan courts would have accorded administrative and technical ("A&T") staff accredited personnel privileges and immunities commensurate with their status. To address this issue, the agreement concluded on September 1, 2020 provides a separate legal basis for ensuring that the privileges and immunities specified under Article 37(2) apply.

On September 12, 2020, the United States and the United Arab Emirates signed an enhanced consular privileges and immunities agreement. See State Department press statement, available at https://2017-2021.state.gov/signing-of-an-enhanced-consular-privileges-and-immunities-agreement-with-the-united-arab-emirates/.

5. Embassy Baghdad

On January 6, 2020, the U.S. Mission to the UN issued a statement regarding the December 31, 2019 attack by Iran on the U.S. embassy in Baghdad. The statement expresses the U.S. view of the host country's obligations under the 1961 Vienna Convention to protect diplomatic and consular premises. The statement is available at https://usun.usmission.gov/media-note-attack-on-u-s-embassy-in-baghdad-iraq/, and excerpted below.

> We appreciate the 27 United Nations Member States that spoke out against the December 31 Iran-orchestrated attack on the U.S. embassy in Baghdad. They clearly recognize the importance of a host country's obligations under the 1961 Vienna Convention to protect diplomatic and consular premises.
>
> Their comments stand in stark contrast to the United Nations Security Council's silence due to two permanent members—Russia and China—not allowing a statement to proceed. Indeed, not allowing the United Nations Security Council to issue the most basic of statements underscoring the inviolability of diplomatic and consular premises once again calls the Council's credibility into question. Such expressions of support should not be controversial or warrant courage.

6. Vienna Convention on Diplomatic Relations ("VCDR")

Due to the COVID-19 pandemic, many governments around the world instituted quarantine and testing requirements for everyone arriving into their country's territory, asserting that there would be no exceptions to these measures even for diplomatic personnel, who enjoy personal inviolability. By contrast, the United States government asked official travelers to simply self-quarantine for 14 days upon arrival from overseas travel. The U.S. government requested that other governments forgo mandatory testing on arrival for U.S. diplomats and their families in light of their privileges and immunities under the Vienna Convention on Diplomatic Relations ("VCDR") and likewise forgo such testing of official U.S. government travelers on the basis of reciprocity. One example of a

diplomatic note from May 2020, asserting inviolability and reciprocity, is excerpted below, with identifying information redacted.

* * * *

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of [*redacted*] and has the honor to renew its collaboration … to address challenges posed by the COVID-19 crisis, as countries worldwide begin to prepare to reopen economies and other essential services in a phased approach.

The Embassy wishes to express its appreciation to the Ministry for its continued support in informing us about local developments in combatting the spread of COVID-19. As noted by the Ministry in March, arriving and returning U.S. diplomats and their families who otherwise enjoy personal inviolability, must nevertheless submit to invasive medical testing upon arrival at [*redacted*] International Airport. The U.S. Department of State has instructed the Embassy to register its concern with this measure and to seek assurances that it will not be applied to U.S. Government personnel under the supervision of the U.S. Ambassador at the U.S. Embassy ….

The U.S. Embassy assures the Ministry that it shares the same goals … in controlling the spread of COVID-19. At the same time, the Embassy believes it is essential for all countries to respect the privileges and immunities accorded to diplomats under the Vienna Convention on Diplomatic Relations (VCDR), to which the [*redacted*] and United States are parties, while also taking into consideration the treatment accorded to its official travelers on a reciprocal basis. The Embassy believes both goals can be accomplished at the same time.

In order for the U.S. Embassy to continue to fully staff its Mission and carry out the conduct of bilateral relations and other diplomatic and consular functions … during this critical period, the Embassy needs to be assured that the privileges and immunities to which the U.S. Embassy and its personnel are entitled are fully respected …. Furthermore, the Embassy needs to be assured that with respect to official U.S. Government travelers …, [*redacted*] consider the treatment accorded to its official travelers to the United States where [*redacted*] official travelers are currently not subjected to testing upon arrival, but rather, are asked to self-quarantine for 14 days upon arrival from overseas travel.

The U.S. Embassy respectfully requests that [*redacted*] forgo mandatory testing on arrival for U.S. Diplomats and their families in light of their privileges and immunities under the VCDR, and likewise forgo such testing for other U.S. Government official travelers on the basis of reciprocity. In light of the extraordinary circumstances created by the COVID-19 challenge, the U.S. Embassy will voluntarily comply with the host government request for all arriving diplomatic staff and their families to strictly self-quarantine in their residences for 14 days after arrival. During that period, the U.S. Embassy Health Unit, staffed by a U.S. diplomat medical professional, will monitor the health of the newly arrived person via daily telephonic check-in and the individuals will be required to take their temperature daily. The U.S. Embassy is prepared to continue to provide advance notice to the Protocol Office of the Foreign Ministry of the return or arrival into [*redacted*] of U.S. mission personnel to facilitate their transportation directly from the airport to residence while minimizing contacts.

* * * *

Some governments declined the U.S. request for reciprocal self-quarantine instead of generally-applicable measures such as testing upon arrival; insisting that diplomats be subjected to the same testing and quarantine regime as any other arriving passengers. In order to allow U.S. diplomatic personnel to return to posts around the world, the U.S. government sent diplomatic notes to dozens of foreign governments, waiving personal inviolability for designated individuals for the limited purpose of having nasal swab testing performed upon arrival after receiving certain assurances regarding the nature of the tests and being guaranteed that those diplomats who test positive would not be required to institutionalize. One example of such a diplomatic note, identifying arriving diplomatic personnel and waiving personal inviolability for the limited purpose of testing upon arrival, is excerpted below (with identifying information redacted). Several governments urged ancillary measures, such as allowing local government health officials into diplomatic residences to perform temperature checks, or permitting inspections of diplomatic properties for implementation of COVID-19 protocols, or incentivizing diplomatic personnel to use tracking applications on their mobile devices. The U.S. government did not extend waivers to cover any of these ancillary requests.

* * * *

It is the position of the United States that pre-departure testing of such individuals in the United States combined with residential quarantine would be sufficient to meet the public health goals of the Government of [*redacted*].

Under Article 29 and/or Article 37 of the Vienna Convention on Diplomatic Relations, diplomatic agents, members of the administrative and technical staff of the Embassy and their family members enjoy full personal inviolability. Such individuals enjoy personal inviolability from the moment of their arrival in [*redacted*]. Accordingly, Article 29 and/or 37 preclude any COVID-19 testing of the above-named individuals.

Given the extraordinary circumstances brought on by the COVID-19 pandemic, and in a spirit of cooperation, the United States government waives the personal inviolability which is enjoyed by the individuals listed above for the sole and limited purpose of allowing these individuals to have a nasal swab done for COVID-19 testing upon arrival. The United States understands that tests will not be anonymized, but the negative samples collected for the purpose of COVID-19 testing will be destroyed after the conclusion of the test. The United States understands that test will be administered by Ministry of Health personnel and analyzed by the designated institution.

The United States further understands that U.S. direct hires and their family members will arrive at [*redacted*] airport and be immediately tested upon arrival. U.S. government personnel and their family members will go immediately into residential quarantine for 14 days.

Anyone who tests negative upon arrival will be allowed to leave residential quarantine after 14 days. Anyone who tests positive and is asymptomatic will be closely monitored by the U.S. medical staff and continue to be tested until they have two negative test results.

Individuals who test positive and are symptomatic will be medically evacuated as soon as possible. The Mission medical staff will coordinate closely with the [*redacted*] Ministry of Health.

Finally, the United States notes that it does not waive the personal inviolability, or any other privilege or immunity enjoyed by the above individuals.

* * * *

Beginning in the summer of 2020, the United States sent diplomatic notes to multiple governments asserting the right of diplomatic personnel under the VCDR to depart their foreign posts without any impediment, to include the imposition of COVID-19 testing requirements. One example of such a diplomatic note is excerpted below. In some instances, the United States requested an exemption for accredited U.S. Embassy personnel and their family members from foreign government requirements for them to submit to a COVID-19 test as a condition of their departure. Personnel who submitted to testing did so voluntarily.

* * * *

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of [*redacted*] and has the honor to inform the Ministry of the impending departure of the Embassy's Deputy Chief of Mission, [*redacted*] and her spouse ….

The Embassy wishes to note that in order to comply with the [*redacted*] conditions of boarding, [*redacted*] and her spouse intend to take a COVID-19 test at [*redacted*] prior to their departure. [*redacted*] and her spouse are taking the test voluntarily and without any prejudice to any privileges and immunities which they enjoy. Should either [*redacted*] or her spouse test positive, they will not board the … flight on July 10, 2020, but will isolate at home until both are deemed healthy enough to fly by Embassy medical personnel or until medically evacuated by the United States government. The Embassy wishes to reiterate that the United States does not waive the privileges and immunities enjoyed by [*redacted*] or her spouse for the purpose of hospitalization or institutionalization should either of them test positive for COVID-19. Specifically, the United States does not waive the personal inviolability enjoyed by [*redacted*] and her spouse under Articles 29 and 37 of the Vienna Convention on Diplomatic Relations (VCDR) to which [*redacted*] is a party.

The Embassy of the United States would also like to take this opportunity to remind the Ministry of [*redacted*] obligations not to impede the departure of U.S. diplomats from [*redacted*] in any fashion. Article 44 of the VCDR, states that even at times of "armed conflict," the receiving state must "grant facilities in order to enable persons enjoying privileges and immunities" and "members of their families . . ." to leave at the earliest possible moment. Any requirement imposed by the Government of [*redacted*] on departing diplomats, which is inconsistent with the privileges and immunities they enjoy, would thus also run afoul of Article 44 of the VCDR.

* * * *

D. INTERNATIONAL ORGANIZATIONS

1. Drepina v. Tikhomirov

The United States filed a statement of interest in New Jersey state court on December 21, 2020 in *Drepina v. Tikhomirov*, No. L-000310-20. The statement of interest explains that the United Nations is absolutely immune from legal process and suit, absent an express waiver, and, accordingly, the court lacks jurisdiction and should dismiss all claims against the UN. The case involves plaintiff Drepina's allegations of sexual harassment and assault by former UN staff member Tikhomirov. The statement of interest is excerpted below and available at https://www.state.gov/digest-of-united-states-practice-in-international-law/. Also included in the statement of interest is the September 2, 2020 letter from UN Under-Secretary-General for Legal Affairs and United Nations Legal Counsel Miguel de Serpa Soares, asserting immunity for the UN and pointing out that the alleged incidents occurred in 2017 and that Mr. Tikhomirov retired from the UN in 2015.

* * * *

Absent an express waiver, the UN is absolutely immune from suit and all legal process. The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, art. 105.1. The General Convention, adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, defines the UN's privileges and immunities by providing that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, sec. 2. The United States is a party to both the UN Charter and the General Convention. Absent an express waiver, the UN is absolutely immune from suit and all legal process.

The United States understands the General Convention to mean what it unambiguously says: the UN enjoys absolute immunity from "every form of legal process," including suit and service of process, unless the UN expressly waives this immunity in a "particular case." Furthermore, under the Headquarters Agreement between the United Nations and the United States, the "headquarters district shall be inviolable . . . ," and "service of legal process . . . may take place within the headquarters district only with the consent of and under conditions approved by the [UN] Secretary-General." Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Oct. 21, 1947), art. III, § 9(a). Here, the United Nations has not waived its immunity, but on the contrary, has expressly requested that the United States take steps to protect its immunity in this proceeding. See Exhibit A; see also Letter dated October 20,

2020, from Miguel de Serpa Soares, Under Secretary General for Legal Affairs and United Nations Legal Counsel, to Kelly Craft, Permanent Representative of the United States to the United Nations (attached hereto as Exhibit B).

Courts routinely recognize the UN's absolute immunity from suit absent an express waiver on the part of the UN. "Under the [General] Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases." *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987). "[W]here, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction." *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008), aff'd, 597 F.3d 107, 112 (2d Cir. 2010); see also *LaVenture v. United Nations*, 746 F. App'x 80, 81 (2d Cir. 2018) (mem.) ("It is well established that the UN [has] absolute immunity from suit in domestic courts pursuant to the Convention on Privileges and Immunities of the United Nations."); *Georges*, 834 F.3d at 91 ("To reiterate, Section 2 provides that the UN 'shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.'"); *United States v. Bahel*, 662 F.3d 610, 623 (2d Cir. 2011) ("[T]he plain language of Article II leaves no doubt that the U.N. can only waive immunity for itself, as an organization, expressly."); *Emmanuel v. United States*, 253 F.3d 755, 757 (1st Cir. 2001) ("[T]he absolute immunity enjoyed by the United Nations . . . covers all suits brought by any party, including private individuals . . . .").

Here, Plaintiff has not alleged *any* waiver of immunity by the UN, much less an express one. The UN itself affirms that it is has not and does not intend to waive its immunity, but rather "expressly assert[s]" its immunity in this matter. *See* Exhibit A at 2. Because the UN has not waived its immunity in this case, it is entitled to immunity from legal process and suit, and the claims against it must be dismissed for want of jurisdiction. *See LaVenture*, 746 F. App'x at 82 ("[T]he United Nations enjoys absolute immunity from the instant suit and . . . [a]ccordingly, the District Court did not err in dismissing all claims against all defendants for lack of subject matter jurisdiction based on immunity."); *Georges*, 834 F.3d at 98 (affirming lower court dismissal for lack of subject matter jurisdiction on the basis of immunity).

* * * *

2. *Jam v. IFC*

As discussed in *Digest 2019* at 379-383, the Supreme Court held in *Jam v. Int'l Finance Corp.*, that international organizations enjoy the same immunity from suit as foreign governments under the FSIA. 586 U.S. ___, 139 S. Ct. 759 (2019). The United States filed a Statement of Interest on remand of the case in the district court for the District of Columbia in 2019, conveying its view that the lawsuit did not fall within the FSIA's commercial activity exception as plaintiffs claimed. No. 15-cv-00612. The district court dismissed the case on February 14, 2020. 442 F. Supp. 3d 162 (D.D.C.). After the plaintiffs sought leave to file an amended complaint, and following a request from the court for its views on the matter, the United States filed a second statement of interest in the district court on June 30, 2020, which is excerpted below and available at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

* * * *

I. If Leave To Amend Were Granted, The "Gravamen" Of This Action Would Still Be CGPL's Construction And Operation Of The Power Plant In India.

The Government continues to believe that the "gravamen" of this action is CGPL's construction and operation of the power plant in India. That conclusion follows from the Supreme Court's guidance in *Sachs* and *Nelson*, which instructed that the "gravamen" inquiry should focus on what "actually injured" the plaintiff—here, CGPL's alleged deficient construction and operation of the power plant. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

The plaintiffs' additional allegations do not lead to a different result. Those allegations primarily relate to IFC's organizational structure, internal processes, and knowledge about potential harms from the project. *See* Proposed Am. Compl. ¶¶ 197–269. They do not change the critical facts of this case: that an Indian company built and operated a power plant in India that allegedly caused Indian plaintiffs environmental and social harms in India. Thus, even if the Court were to grant plaintiffs leave to amend, the lawsuit still would be based upon CGPL's actions in India. The FSIA's commercial activity exception still would not apply.

II. Even Accepting The Court's Analysis, Plaintiffs' Additional Allegations Do Not Satisfy The Commercial Activity Exception.

The Court previously held that this action is based upon IFC's "alleged failure to ensure that the design, construction, and operation of the plant complied with all environmental and social sustainability standards laid out in the loan agreement," as well as its "alleged failure to take sufficient steps to prevent and mitigate harms to the property, health, and way of life of people who live near the Tata Mundra plant." *Jam*, 2020 WL 759199, at *8. Accepting this articulation of the gravamen, the proposed amended complaint does not satisfy the commercial activity exception for two independent reasons: (1) the additional allegations do not shift the gravamen from India to the United States; and (2) IFC's failure to prevent or mitigate environmental and social harms and ensure compliance with sustainability standards is not "commercial activity" under the FSIA.

a. The Plaintiffs' Additional Allegations Do Not Shift The Location Of The "Gravamen" From India To The United States.

The allegations added to the amended complaint principally fall into two categories. First, the plaintiffs submit additional allegations that IFC knew or should have known at the time it approved funding for the project that its sustainability measures were insufficient to address the project's risks. *See* Proposed Am. Compl. ¶¶ 163, 216–25, ECF No. 63-1. Second, the plaintiffs provide additional claims that IFC management in charge of monitoring the project's environmental and social performance and approving loan disbursements were located in Washington, D.C. *Id.* ¶¶ 198–215, 226–69. Neither of these categories is sufficient to shift the gravamen of the action from India to the United States.

At the outset, the first category of allegations does not relate to the gravamen at all. The Court has already ruled that this lawsuit is not "based upon" IFC's approval of the loan, "but rather the subsequent failure 'to take sufficient steps or exercise due care to prevent and mitigate

harms to the property, health, [and] livelihoods' of those who live near the plant." *Jam*, 2020 WL 759199 at *9 (alteration in original) (quoting Compl. ¶ 3, ECF No. 1). Accordingly, the added allegations about what IFC knew or should have known when it approved the loan are irrelevant to the location of the gravamen. The fact that in advance of the loan IFC might have lacked a "meaningful" Environmental and Social Action Plan, Proposed Am. Comp. ¶ 219, or have performed only "poor" due diligence, *id.* ¶ 220, simply does not concern whether the identified gravamen—IFC's failure to prevent or mitigate harm "*after approving the loan*," *Jam*, 2020 WL 759199 at *9 (emphasis added)—had "substantial contact" with the United States, 28 U.S.C. § 1603(e).

This Court previously reached the same conclusion as to similar allegations. Addressing claims that "critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions, were made in Washington, D.C.," and that IFC's disbursement of funds "was made in U.S. dollars and came from funds held within the United States," the Court concluded that the allegations "d[id] not pertain to the gravamen of plaintiffs' suit, as identified by this Court." *Jam*, 2020 WL 759199 at *10. Instead, "they relate[d] only to the loan transaction." *Id.* Moreover, this Court has recognized that such allegations are "in direct tension with the thrust of plaintiffs' complaint." *Id.* at *9. The original complaint was based on the claim that "IFC had the power to protect plaintiffs by enforcing provisions in the loan agreement but failed to do so." *Id.* Yet parts of the amended complaint now contend that IFC *lacked* such power and should not have entered the loan in the first place. *See* Proposed Am. Compl. ¶¶ 163, 216–25. The Court has already ruled that the action is "based upon" IFC's failure to prevent or mitigate harm *after* the loan was approved, and the plaintiffs' handful of additional allegations concerning the initial lending decision cannot change that conclusion.

The second category of added allegations similarly does not shift the location of the gravamen from India to the United States. These allegations consist of claims that ultimate authority for IFC's social and environmental oversight of the project rested with officials in the United States. The plaintiffs allege, for example, that managers "responsible for approving key project decisions about environmental and social (E&S) performance throughout the project" were "located at the IFC's headquarters in Washington, D.C." Proposed Am. Compl. ¶¶ 200–01. They allege that "[d]eterminations about whether any of the environmental and social (or other) conditions of the Loan Agreement have been breached, and whether the IFC should enforce the E&S commitments in the Loan Agreement, were made by the IFC's legal department, which is based in Washington, D.C." *Id.* ¶ 236. They claim that "the decision whether to disburse each tranche of the loan was made by the IFC in Washington, D.C." *Id.* ¶ 235. And they allege that all communications regarding the project were required to be sent to IFC's Washington, D.C. headquarters (in addition to being sent to IFC's New Delhi office). *Id.* ¶ 229.

But even taking these additional allegations into account, the lawsuit is still centered in India. As the Court explained, this action is "based upon" IFC's "failure to ensure the plant project was designed, constructed, and operated with due care." *Jam*, 2020 WL 759199 at *8. That gravamen "focuses on IFC's failure to act *at the Tata Mundra Power Plant* and in the surrounding community in India—which is the point of contact, or 'place of injury,' for the torts alleged in plaintiffs' complaint." *Id.* (emphasis added). In other words, this lawsuit is not "based upon" which IFC officials oversaw the project or where they were located, disbursed IFC funds, or received communications. Under the Court's "holistic approach," *id.*, where IFC made internal decisions and administered the loan is not determinative; instead, the inquiry focuses on the particular basis for the lawsuit—its gravamen. The Court has already explained that the

"plaintiffs' complaint against IFC is—at least in large part—based upon [] conduct (whether acts or omissions) *in India*." *Id.* at *7 (emphasis added). The added allegations do not change that conclusion.

The Plaintiffs are alleging a failure to act and asserting that such failure should be attributed to decisions at IFC's headquarters. But even if IFC management in the United States possessed the necessary authority to require changes to the plant's design, construction, or operation, any new design or method of operation proposed by IFC still would have had to be accepted and executed by CGPL in India. Similarly, even if IFC management could have withheld loan disbursements in the United States in response to a failure to meet conditions in the loan agreement, the intended effect of that action would be merely to incentivize behavior in India. What the plaintiffs still have not alleged is anything that IFC did (or did not do) in the United States that directly led to injuries in India. *Contra id.* at *6 n.3 (suggesting that "if CGPL contracted with IFC to actively monitor and adjust the power plant's cooling levels from a computer system in the United States, but IFC's technicians negligently misadjusted the cooling levels, causing a fire at the plant," an action by injured plant workers might be "based upon" IFC's U.S. conduct). Instead, the plaintiffs' additional allegations against IFC merely elaborate on the organizational structure and internal processes behind failures occurring in India. They do not demonstrate that the amended complaint would result in this lawsuit being based on conduct in the United States.

The conclusion that the gravamen identified by the Court is still situated in India is reinforced by the fact that, even with the plaintiffs' new allegations, their tort claims still focus primarily in India. A tort claim typically is not complete until the plaintiff suffers an injury. *Nnaka v. Fed. Rep. of Nigeria*, 238 F. Supp. 3d 17, 29 (D.D.C. 2017). Thus, the "locus" of a tort—the place where the last event necessary to make an actor liable takes place—usually will be "the place where the injury occurred." *Id.* (citations omitted). Here, even taking into account the plaintiffs' additional allegations, the locus of their tort claims is Gujarat, India—where they were injured by the power plant. Moreover, to the extent IFC owed any duty not to allow the plant to harm the plaintiffs, that duty also existed in India—the location where reasonably foreseeable harms might occur. *See Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 998 (D.C. Cir. 1980) (explaining that tort duties traditionally are owed to those "who might foreseeably be injured by defendant's conduct"). If the plaintiffs are correct that IFC breached their duty to the plaintiffs, IFC did so only by "fail[ing] to take steps to mitigate the foreseeable risks in India." *Jam*, 2020 WL 759199 at *9. And, to the extent IFC proximately "caused" the plaintiffs injuries, they undisputedly did so in India. Thus, notwithstanding assertions concerning IFC's organizational structure, internal processes, and knowledge, the plaintiffs' claims against IFC are still chiefly focused in India, not the United States. Similar to the Supreme Court's assessment in *Sachs*, however the plaintiffs frame their suit, "the incident [abroad] remains at its foundation." 136 S. Ct. at 396.

In short, per the Court's analysis, this action is based upon a failure to prevent harm in India, and the amended complaint does not shift the location of the gravamen to the United States.

b. IFC's Alleged Failure To Ensure Compliance With Its Standards And Prevent Or Mitigate Harms In India Is Not "Commercial Activity" Under The FSIA.

As set forth below, the commercial activity exception has not been satisfied for a second, independent reason: any failure by IFC to ensure adherence to its own sustainability standards and prevent social and environmental harms is not a "commercial activity" under the FSIA.

The FSIA codified the "restrictive theory" of foreign sovereign immunity, under which a foreign state is immune for its sovereign or public acts (*jure imperii*), but not its private or commercial acts (*jure gestionis*). *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612–23 (1992). In drawing this distinction, the FSIA explains that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Accordingly, the question whether particular activity is "commercial" turns not on "whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but on "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Weltover*, 504 U.S. at 614 (citations omitted). "Put differently, a foreign state engages in commercial activity . . . only where it acts 'in the manner of a private player within' the market." *Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614).

Courts have not yet had occasion to address this distinction with respect to international organizations like IFC. However, should the Court reach the issue here, it need not resolve broader questions such as whether IFC's lending activities writ large are "commercial," or even whether the particular loan to CGPL in this case was a "commercial activity." Instead, the Court need only determine whether the particular gravamen it already has identified—IFC's alleged failure to prevent environmental and social harm and ensure compliance with its own sustainability standards—is a "commercial activity" under the FSIA.

In the Government's view, it is not. In making any internal decisions about how to monitor the environmental and social aspects of an ongoing project, IFC would not be acting in the manner of a private player in the market, but rather would be acting in a public, quasi-regulatory capacity.

Although IFC does not hold the same regulatory responsibilities as a sovereign state, its discretionary implementation (or non-implementation) of its environmental and social policies is an act more akin to that of a sovereign in which private market participants do not ordinarily engage. After all, IFC's environmental and social standards were created with active and direct input from member governments and by decision of the IFC's member states, acting through the IFC Board of Directors. Consequently, governments view these standards as extensions of the regulatory policies of those member states. Here, IFC's enforcement or non-enforcement of its sustainability standards with respect to the Tata Mundra project is qualitatively different than the types of activities that commonly have been understood to be "commercial" under the FSIA, such as issuing common debt instruments, *see Weltover*, 504 U.S. at 617, or contracting for services,*see Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 580 (7th Cir. 1989). Instead, IFC's discretionary administration of its own environmental and social policies is more akin to the regulatory acts of foreign sovereigns that commonly are held to be non-commercial. *See, e.g.*, *Junguist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1030 (D.C. Cir. 1997) (finding that administration of a government program to provide health and welfare benefits was not "commercial activity" under the FSIA).

This is especially the case because the policies at issue here relate to the regulation of the environment and natural resources. Courts routinely recognize that actions in this area are distinctly sovereign in nature. *See, e.g., Turan Petroleum, Inc. v. Ministry of Oil & Gas of*

Kazakhstan, 406 F. Supp. 3d 1, 15 (D.D.C. 2019) (holding that breaches of agreements "pertain[ing] to the exploration and development of Kazakhstan's oil and gas resources" are sovereign, not commercial, acts); *Rush-Presbyterian*, 877 F.2d at 578 (finding that "a contract whereby a foreign state grants a private party a license to exploit the state's natural resources is *not* a commercial activity, since natural resources, to the extent they are 'affected with the public interest,' are goods in which only the sovereign may deal").

The fact that the plaintiffs frame IFC's alleged conduct as a failure to ensure compliance with provisions in a loan agreement, *e.g.* Compl. ¶ 140, does not transform IFC's conduct into commercial activity. When evaluating whether activity is commercial, courts look to the nature of the conduct that is directly at issue, not to whether that conduct is connected in some way to a contract or other commercial act. *See, e.g.*, *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 216 (5th Cir. 2009) (dispute over contract to provide training and support services to Royal Saudi Air Force not "commercial"); *cf. In re Aluminum Warehousing Antitrust Litig.*, 2014 WL 4211353, at *15 (S.D.N.Y. Aug. 25, 2014) ("[N]ot all contractual arrangements are commercial in nature. There are numerous instances in which a public organ might use a contractual arrangement to fulfill its public function."). Here, the plaintiffs challenge IFC's internal decisions concerning how to promote environmental and social sustainability and conduct oversight in the countries in which it invests. Such conduct is not of the type associated with private players in a market, even if it has a connection to a loan agreement.

Finally, it makes no difference that private parties "can" address environmental and social harms in their own transactions. *See* Pls.' Notice of Supp. Evidence, ECF No. 57. Even uniquely sovereign activities can sometimes be emulated by private market participants. For example, while a private company "can" hire security for its CEO, "[p]roviding security for the [Saudi] royal family . . . is not a commercial act in which the state is acting in the manner of a private player within the market." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (citations omitted). Here, the manner in which the IFC engages in the monitoring and discretionary enforcement of its environmental and social standards is fundamentally different than the manner in which private players might attempt to pursue environmental or social goals. IFC develops sustainability standards that are formulated based on active and direct input from sovereign member states in light of member states' own policies on environmental and social matters. IFC's discretionary implementation and enforcement of such policies is not a commercial activity, but rather a public, quasi-regulatory function immune from suit under the FSIA.

* * *

In considering the above issues, the Court should keep sight of the novel context in which this case arises. Unlike foreign sovereigns, which have capitals within their own territory, IFC is an international organization headquartered in the United States. As a result, ultimate decision-making authority for functions of the organization frequently will reside in the United States, rather than in foreign jurisdictions. Nonetheless, it is critical not to afford less protection to organizations headquartered in the United States than foreign sovereigns with capitals elsewhere. The thrust of the International Organizations Immunities Act and the Supreme Court's ruling interpreting it in this case is that the immunity of international organizations and foreign sovereigns should be "equivalent." *Jam v. IFC*, 139 S. Ct. 759, 768 (2019). Courts therefore should be skeptical of claims of commercial activity based on internal oversight decisions where the only U.S. nexus is an attribution of responsibility to officials working at an international

organization's U.S. headquarters. Here, such allegations fail to satisfy the FSIA's commercial activity exception.

* * * *

On August 24, 2020, the district court issued its decision, denying as futile the plaintiffs' motion for leave to amend the complaint. Excerpts follow from the district court's opinion.

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* * * *

As the Court explained in its prior opinion, the commercial activity exception, "as applied to international organizations, withholds immunity when an action is based upon (1) 'a commercial activity carried on in the United States' by an international organization or (2) 'an act performed in the United States in connection with a commercial activity' of the international organization 'elsewhere.'" *Jam*, 442 F. Supp. 3d at 170–71 (quoting 28 U.S.C. § 1605(a)(2)). The first step in determining whether the exception applies, therefore, is to "consider whether the action is 'based upon' activity 'carried on' or 'performed' in the United States." *Id*. To make that determination, courts must look to "the basis or foundation of a claim, those elements that, if proven, would entitle a plaintiff to relief, and the gravamen of the complaint." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015) (internal quotation marks, citations, and alterations omitted).

At the motion-to-dismiss stage, the parties had each proposed competing bright-line rules for how to identify the gravamen of the complaint. Plaintiffs argued for a narrow approach focused only on IFC's affirmative lending activity. See Jam, 442 F. Supp. 3d at 173–74. IFC, in contrast, advocated for an equally narrow approach focused exclusively on the last act that "actually injured" plaintiffs. See *id*. at 172–73. The Court rejected both of these approaches. As to plaintiffs' approach, the Court emphasized that it is not only "IFC's direct, affirmative conduct" that is relevant to the gravamen analysis—instead, the "design, construction, and operation of the power plant in India" must also be considered when identifying the gravamen, since that conduct is equally critical to the success of plaintiffs' claims. *Id*. at 173–74. The Court continues to reject plaintiffs' approach.

The Court does, however, wish to clarify its view of IFC's approach. IFC's bright-line rule that the conduct that "actually injured" plaintiffs is always the gravamen remains incorrect. But the Court's February 14 opinion perhaps understated the importance of that conduct to the gravamen analysis as a whole. It is worth emphasizing that the Supreme Court's two main decisions expounding on the gravamen analysis, and subsequent caselaw interpreting those decisions, make clear that in the typical case—though not in every case—the conduct that "actually injured" a plaintiff will constitute the gravamen of a complaint.

The Supreme Court's first foray into the gravamen analysis was in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). …

The Supreme Court … concluded that the suit was instead based on "the tortious conduct itself": the detention, torture, and beating in Saudi Arabia. *Id*. Because such tortious conduct is not itself commercial activity, the Court determined that the suit did not fall within the commercial activity exception. *Id*. at 361. …

The Supreme Court's analysis in the more recent *Sachs* decision closely tracks that in *Nelson*. In *Sachs*, "a U.S. citizen [Sachs] sued an Austrian state-owned railway operator after she fell in Austria from a train station platform onto the tracks where a moving train crushed her legs." Jam, 442 F. Supp. 3d at 172. …

The Supreme Court [stated,] "there [was] nothing wrongful about the sale of the Eurail pass standing alone." Id. at 396. After all, "without the existence of the unsafe boarding conditions [in Austria], there would have been nothing to warn [plaintiff] about when she bought the Eurail pass." *Id*. Whichever way the Court sliced it, "all of [plaintiff's] claims turn[ed] on the same tragic episode in Austria," so the "conduct constituting the gravamen of [her] suit plainly occurred abroad." *Id*. …

In short, Sachs and Nelson both focused on "'the core of [the plaintiffs'] suit[s],' i.e., 'the . . . acts that actually injured them.'" *Petersen Energía Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 206 (2d Cir. 2018) (quoting *Sachs*, 136 S. Ct. at 396). Importantly, this was not a single-element test focused on the injury element of the plaintiffs' tort claims. In rejecting a one-element approach, the *Sachs* Court noted that application of such a test would "necessarily require[] a court to identify all the elements of each claim in a complaint before that court may reject those claims for falling outside" the commercial activity exception. *Sachs*, 136 S. Ct. at 396; but see *Jam*, 442 F. Supp. 3d at 173 (characterizing an "actual injury" test as "effectively a one-element approach to identifying the gravamen of a suit" (internal quotation marks omitted)). Neither *Sachs* nor *Nelson* did any such thing, declining to undertake a "claim-by-claim, element-by-element analysis" of the asserted causes of action. *Sachs*, 136 S. Ct. at 396. Instead, "[r]ather than individually analyzing each of the [plaintiffs'] causes of action," the Court "zeroed in on the core of their suit"—the "acts that actually injured them." *Id*.

To be sure, *Sachs* emphasized that it was not imposing a strict rule that the gravamen is always the conduct that "actually injured" a plaintiff, adding in a brief footnote that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits." *Id*. at 397 n.2. But the clear thrust of both *Sachs* and *Nelson* is that in the usual case, the conduct that "actually injured" the plaintiff—that pinched the boy's fingers—will be the gravamen, and in any event will always be an important factor to consider when identifying the gravamen. Federal courts around the country have interpreted *Sachs* accordingly. …

b. The Gravamen of the Proposed Amended Complaint

With that refined understanding of how to identify the gravamen in mind, the Court is nearly ready to undertake an assessment of the gravamen of the proposed amended complaint here. That analysis, however, is intertwined with what is essentially a question of first impression that the Court touched on only briefly in its February 14 opinion: what is a court to do under the FSIA where the conduct that "actually injured" the plaintiffs was not primarily that of a named defendant, but rather that of a third party?

IFC and the United States have argued that this is such a case, and that *Sachs* and *Nelson* compel the conclusion that a suit can be "based upon" the conduct of a third party, if that conduct is what "actually injured" the plaintiffs within their theory of the case. See, *e.g.*, Statement of Interest of the United States ("First U.S. Statement") [ECF No. 47] at 6, 8–9. As support, they point to the language in *Nelson* that the suit there was not based upon Saudi Arabia's recruitment activity within the United States, which "alone entitle[d] [plaintiffs] to nothing under their theory of the case," *Nelson*, 507 U.S. at 358, and the language in *Sachs* that there was "nothing wrongful about the sale of the Eurail pass standing alone," *Sachs*, 136 S. Ct. at 396. Using that same logic, IFC and the United States contend that there was nothing wrongful

about either IFC's funding of the Tata Mundra Plant or IFC's alleged failure to enforce certain provisions of the loan agreement standing alone—recovery on any claims for that conduct is derivative of, and depends on, subsequent tortious activity in India by Coastal Gujarat Power Limited ("CGPL"), the Indian power company that constructed and operated the plant. See First U.S. Statement at 6–7. The United States points out that while IFC's conduct may have "led to the conduct that eventually injured" plaintiffs, merely being a distant link in the causal chain is insufficient to invoke the commercial activity exception. See First U.S. Statement at 7; *Nelson*, 507 U.S. at 358. According to IFC and the United States, the conduct that actually injured plaintiffs here was the construction and operation of the plant in India, done mainly by CGPL. See First U.S. Statement at 7–9; Def. IFC's Reply Mem. of Law in Further Supp. of its Renewed Mot. to Dismiss [ECF No. 48] at 2–6.

The Court agrees with IFC and the United States that, for purposes of the FSIA, a suit can be based primarily upon the conduct of a third party, although that determination will depend heavily on the facts and circumstances of each case. This does not mean that courts should employ a freeform approach to identifying the gravamen where they look outside the four corners of the pleadings and independently determine who the "real" defendant is in some theoretical or metaphysical sense. Plaintiffs are, of course, the "master[s] of the[ir] complaint," and can choose to assert whatever claims against whichever defendants they wish. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987). But the Supreme Court's guidance in both *Sachs* and *Nelson* is that courts should, in the usual FSIA case, look to the conduct that "actually injured" plaintiffs. And this Court can find nothing in either of those cases suggesting that courts should restrict the gravamen analysis to just the named defendants' conduct where it is clear from the face of a plaintiff's complaint that the conduct that actually injured her was in large part that of a third party.

Indeed, while neither case addressed the issue explicitly, both the reasoning of the Supreme Court's opinions and the warnings against giving jurisdictional significance to feints of language support considering the conduct of a third party, at least in a case like the present one. Nothing in *Sachs*, for example, suggests that the result would have been any different if all relevant facts were the same, except that the Austrian railway and the ticket-seller had been two different state-owned entities, and Sachs had sued the ticket-seller instead of the railway for failure to warn. Under that hypothetical, the Court's reasoning in its gravamen analysis would continue to hold true. It would remain the case that"[w]ithout the existence of the unsafe boarding conditions in [Austria], there would have been nothing to warn Sachs about when she bought the[railway]pass." *Sachs*, 136 S. Ct. at 396. The core of the suit would likewise remain the "wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria." *Id.*

This Court is mindful of the Supreme Court's repeated admonitions that courts should not give "jurisdictional significance" to "feint[s] of language," nor should they "allow plaintiffs to evade the [FSIA's] restrictions through artful pleading."*Id.*at 396–97. The point of the gravamen analysis is to look past the technicalities of plaintiffs' claims and the precise details of how they framed their pleading and "zero[] in on the core of their suit." *Id*. at 396; see *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering System Co.*, 807 F.3d 806, 814 (6th Cir. 2015) ("Courts must look past artful pleading to determine the underlying reality of the core activities being challenged, to determine if the gravamen of the complaint truly falls within one of the exceptions Congress wrote into the FSIA."). In general, permitting a plaintiff in an FSIA action to switch

jurisdiction off and on, merely by adding or removing named defendants, would give rise to exactly the sort of evasion of the FSIA's restrictions about which *Sachs* and *Nelson* warned.

Here, the Court has no real doubt that, had plaintiffs named CGPL as a second defendant and asserted claims against CGPL, the gravamen of that action would have been in India. All of CGPL's conduct—as alleged in plaintiffs' complaint and proposed amended complaint—was in India, and it clearly had a much larger and more direct role in the plant's construction and operation, and hence in the alleged harms to plaintiffs, than did IFC, which played only a small part in the whole affair. The claims against IFC are, by necessity, more attenuated than any claims against CGPL would be, just as the failure-to-warn claims in *Sachs* and *Nelson* were quite attenuated relative to the other claims plaintiffs asserted. Indeed, the Seventh Circuit has noted that *Sachs* relied—if only implicitly—on the rationale that claims for conduct extending far back on the "chain of causation" leading to an ultimate injury cannot be the basis for jurisdiction—particularly where those claims are asserted against an entity that did not actually injure the plaintiff. See *Noboa v. Barceló Corporación Empresarial, SA*, 812 F.3d 571, 572–73 (7th Cir. 2016); see also *Nelson*, 507 U.S. at 358 (deeming it insufficient for gravamen purposes that activities "led to the conduct that eventually injured the Nelsons"). Accordingly, whether the concern is framed as one of feints of language or too much attenuation, this Court is extremely wary of permitting plaintiffs to manufacture jurisdiction under the FSIA by choosing not to name a defendant. And the Court does not think that this is one of those unusual cases where something other than the conduct that actually injured the plaintiffs constitutes the gravamen of the complaint, as may have been contemplated by *Sachs*'s enigmatic statement that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits." *Sachs*, 136 S. Ct. at 397 n.2. This Court can perhaps envision circumstances where that statement would come into play—where a sovereign's or international organization's conduct, while not actually injuring the plaintiff, was nonetheless so significant and closely tied to the eventual injury that it constitutes the gravamen of the complaint. Although the Court is loath to speculate on scenarios not presented in this case, the Sachs footnote could potentially apply in, for instance, an action asserting products-liability claims, where a sovereign entity (or international organization) manufactures a fatally defective drug inside the United States and sells it to another sovereign entity, who then sells it to a consumer abroad. In that scenario, it would be difficult to discern which conduct "actually injured" the consumer and was the basis for the suit under the standard *Sachs* and *Nelson* test, given that both domestic conduct (the manufacturing of the deadly drug) and foreign conduct (the sale of the drug) might bear similar levels of responsibility for the injury. To determine what the gravamen would be in a case where it is not clear which conduct actually injured the plaintiff, a court may well have to forego the actual injury analysis and instead conduct a fact-specific analysis of the relative importance of the domestic and foreign conduct to the eventual injury, as the *Sachs* footnote might suggest.

But this Court has no need to analyze any further how that hypothetical would playout, because the present case just isn't one where the *Sachs* footnote is applicable. Here, it is clear what conduct actually injured plaintiffs: construction and operation of the Tata Mundra Power Plant in India. Many of plaintiffs' claims, on their face, allege that IFC failed to do certain things inside the United States. See, *e.g.*, Compl. ¶ 299 (alleging that IFC "fail[ed] to take reasonable steps to prevent harms to Plaintiffs"); ¶ 306 (alleging that IFC "has failed and continues to fail to exercise due care and monitor, supervise[,]and control CGPL"). But as the Supreme Court concluded with respect to the failure-to-warn claims in *Sachs* and *Nelson*, and as the Court has emphasized in a related context, claims for failures or omissions in the United States resulting in

an injury abroad are particularly suspect when used as the basis for jurisdiction and should "flash[]the yellow caution light," because "it will virtually always be possible to assert that the … activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United States." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702 (2004) (quoting *Beattie v. United States*, 756 F.2d 91, 119 (D.C. Cir. 1984) (Scalia, J., dissenting)).Indeed, this case is factually analogous to *Sachs*: even though plaintiffs have asserted claims alleging omissions in the United States, ultimately, "[a]ll of [their] claims turn on the same tragic episode in [India], allegedly caused by wrongful conduct and dangerous conditions in [India], which led to injuries suffered in [India]." *Sachs*, 136 S. Ct. at 396. For these reasons, the Court refines its definition of the gravamen of plaintiffs' original complaint. The February 14 opinion defined the gravamen as "IFC's failure to ensure the Tata Mundra Power Plant was designed, constructed, and operated with due care so as not to harm plaintiffs' property, health, and way of life." Jam, 442 F. Supp. 3d at 177. The Court now revises that gravamen to focus on what actually injured plaintiffs: the construction and operation of the Tata Mundra Power Plant in India.

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3. Nkrumah v. Pompeo

As discussed in Chapter 1, on October 26, 2020, a federal district court for the District of Columbia found that a State Department determination, pursuant to IOIA Sec. 288e(b), that an international organization employee's presence in the United States was "not desirable" was not subject to judicial scrutiny. *Nkrumah v. Pompeo*, No. 20-cv-01892 (D.D.C. Oct. 26, 2020). As such, the court denied plaintiff Nkrumah's motion for a temporary restraining order and preliminary injunction. Ms. Nkrumah is a citizen of Ghana who had been entitled to the benefits of the IOIA as a World Bank employee. The State Department made the "undesirability" determination after an investigation revealed that Ms. Nkrumah had engaged in fraud related to the G-5 visa application for a domestic worker and participated in a scheme to underpay and overwork the G-5 visa holder. As a result of the "undesirability" finding, following a certain date, Ms. Nkrumah was no longer entitled to the benefits accorded employees of designated international organizations under U.S. law, including the immigration benefit of "G" nonimmigrant visa status. See Chapter 1.B.1.b for excerpts from the opinion.

Cross References

Hungary v. Simon, **Ch. 5.C.1**
Germany v. Philipp, **Ch. 5.C.2**
Nkrumah v. Pompeo, **Ch. 1.B.1.b**
Responsibility of International Organizations, **Ch. 7.A.4**
Holocaust claims, **Ch. 8.B**
Sudan claims, **Ch. 8.D**
Sudan, **Ch. 9.A.2**
Investor-State dispute resolution (including expropriation), **Ch. 11.B**
Israel-Lebanon maritime boundary, **Ch. 12.A.3**