

We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today. Our textual analysis aligns with the Executive's interpretation so there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference."²³

After concluding that the New York Convention did not prohibit GE Energy from enforcing the arbitration clauses, the Supreme Court remanded the case for the lower court to address whether "GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination."²⁴

STATE JURISDICTION AND IMMUNITY

U.S. Supreme Court Rules that Victims of State-Sponsored Terrorism Can Sue Foreign States for Retroactive Punitive Damages Under the Foreign Sovereign Immunities Act

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In *Opati v. Republic of Sudan*, the Supreme Court upheld a \$4.3 billion award of punitive damages against Sudan for its support of the 1998 bombings of U.S. embassies in Kenya and Tanzania. The Supreme Court held that Congress's 2008 amendments to the Foreign Sovereign Immunities Act (FSIA) authorized the plaintiffs to recover punitive damages from state sponsors of terrorism for acts committed prior to the enactment of these amendments. This case is part of a broader trend of U.S. litigation brought against states who are designated sponsors of terrorism or alternatively are deemed responsible for acts of terrorism within the United States.

Following the 1998 bombings of U.S. embassies in Kenya and Tanzania, victims and family members sued Sudan for its alleged facilitation of these attacks.¹ At the time, Sudan had already been designated by the U.S. State Department as a state sponsor of terrorism.² Plaintiffs were therefore able to sue Sudan for money damages, as an exception added in 1996 to the FSIA withheld immunity from state sponsors of terrorism in cases alleging their responsibility for the death or personal injury of U.S. citizens through acts like

applying it as law in the United States. In doing so, they ordinarily give great weight to an interpretation by the executive branch.").

²³ *GE Energy Power*, *supra* note 1, at 1647 (citation omitted).

²⁴ *Id.* at 1648. Justice Sotomayor wrote a concurring opinion, noting: "I agree with the Court that the [New York Convention] does not categorically prohibit the application of domestic doctrines, such as equitable estoppel, that may permit nonsignatories to enforce arbitration agreements. I note, however, that the application of such domestic doctrines is subject to an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate." *Id.* (Sotomayor, J., concurring).

¹ *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1604 (2020).

² The U.S. State Department designated Sudan as a state sponsor of terrorism on August 12, 1993. 58 Fed. Reg. 52,397, 52,523 (1993). The State Department still maintains this designation. U.S. Dep't of State Press Release, State Sponsors of Terrorism, at <https://www.state.gov/state-sponsors-of-terrorism> [<https://perma.cc/3AMY-BB7V>]. Recently, Sudan has sought to have this designation removed. Hilary Mossberg & John Prendergast, *Sudan's Push for Removal from U.S. Terror List: Not a Panacea*, JUST SECURITY (Jan. 29, 2020), at <https://www.justsecurity.org/68275/sudans-push-for-removal-from-u-s-terror-list-not-a-panacea>.

extrajudicial killings.³ This exception to immunity came with the limitation that punitive damages could not be awarded against the state sponsor of terrorism.⁴

In 2008, Congress again amended the FSIA to, among other things, allow plaintiffs suing under the state sponsor of terrorism exception to recover punitive damages. The amendments also created a new federal cause of action for such cases; mandated that existing lawsuits filed under this exception be treated “as if” they had been filed under the 2008 amended FSIA; and enabled “plaintiffs to file *new* actions ‘arising out of the same act or incident’ as an earlier action and claim the benefits of [the amended terrorism exception].”⁵ Congress placed many of these changes in a new statutory provision—28 U.S.C. § 1605A.⁶

As a result of these changes, the plaintiffs in the suit against Sudan “amended their complaint to include the new federal cause of action, and hundreds of additional victims and family members filed new claims.”⁷ Sudan declined to participate in the consolidated bench trial, and the district court entered a default judgment for the plaintiffs.⁸ With the help of seven special masters in the determination of damages, the court awarded the plaintiffs around \$10.2 billion in damages, of which around \$4.3 billion were punitive damages.⁹ Sudan later made an appearance and appealed the decision to the D.C. Circuit.¹⁰ Although the D.C. Circuit upheld the district court’s determination of Sudan’s liability, it vacated the award of punitive damages on the ground that Congress had not been sufficiently clear in providing that punitive damages would be retroactively available for cases grounded in pre-2008 conduct.¹¹ The plaintiffs subsequently filed a petition for writ of certiorari, which the Supreme Court granted to address whether punitive damages were available retroactively in light of the 2008 amendments to the FSIA.¹²

The Supreme Court unanimously held that the 2008 amendments to the FSIA provided for the retroactive award of punitive damages.¹³ In an opinion by Justice Gorsuch, the Court

³ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 221, 110 Stat. 1214, 1241 (amending 28 U.S.C. § 1605 to withhold immunity from designated state sponsors of terrorism in cases brought for money damages by U.S. citizen plaintiffs or regarding U.S. citizen victims alleging personal injury or death that the state caused “by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act”). Unless the FSIA sets forth an exception to immunity, foreign states are “immune from the jurisdiction” of U.S. courts. 28 U.S.C. § 1604.

⁴ 28 U.S.C. § 1606 (providing that foreign states denied immunity under § 1605 or § 1607 are not liable for punitive damages).

⁵ *Opati*, *supra* note 1, at 1606; *see generally* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 1083, 122 Stat. 3, 338 (2008) (containing these changes, as well as specifying that such suits could be brought not only with respect to U.S. citizen plaintiffs, but also with respect to plaintiffs who, regardless of citizenship, were affected while working as U.S. governmental employees or contractors).

⁶ 28 U.S.C. § 1605A.

⁷ *Opati*, *supra* note 1, at 1606.

⁸ *See id.*

⁹ *See id.* at 1607.

¹⁰ *Id.*

¹¹ *Owens v. Republic of Sudan*, 864 F.3d 751, 816–18, 825 (D.C. Cir. 2017), *vacated sub nom.* *Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020).

¹² *Opati*, *supra* note 1, at 1606; Petition for Writ of Certiorari at i, *Opati*, 140 S. Ct. 1601 (2020) (No. 17–1268). The Department of Justice submitted an amicus brief in support of the petition for certiorari in which it asserted that the D.C. Circuit erred in vacating the award of punitive damages. Brief for the United States as Amicus Curiae at 10, *Opati*, 140 S. Ct. 1601 (2020) (No. 17–1268). The DOJ contended that the 2008 amended FSIA does hold foreign states liable for punitive damages for actions committed prior to the 2008 amendments. *Id.* at 16.

¹³ *Opati*, *supra* note 1, at 1608–09.

concluded that Congress made this clear because it both “(1) . . . authorized punitive damages under a new cause of action; and (2) . . . explicitly made that new cause of action available to remedy certain past acts of terrorism.”¹⁴ The Court rejected Sudan’s argument that Congress should be required to provide a “super-clear statement” for the authorization of retroactive punitive damages.¹⁵ While the Court stated that it did not “doubt that applying new punishments to completed conduct can raise serious constitutional questions,” it advised litigants to “challenge the law’s constitutionality, not ask a court to ignore the law’s manifest direction.”¹⁶ The Supreme Court therefore vacated the D.C. Circuit’s decision to the extent that it had stricken the award for punitive damages.¹⁷ Despite this favorable ruling, the plaintiffs could still face obstacles in enforcing the judgment against Sudan—a pervasive problem in such cases.¹⁸

In its opinion, the Supreme Court grounded the U.S. law of sovereign immunity in considerations of international comity:

The starting point for nearly any dispute touching on foreign sovereign immunity lies in *Schooner Exchange v. MacFaddon*, 7 Cranch 116, 3 S.Ct. 287 (1812). There, Chief Justice Marshall explained that foreign sovereigns do not enjoy an inherent right to be held immune from suit in American courts: “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”¹⁹

The Court also cited a more recent decision from 2004 for the proposition that “foreign sovereign immunity is a matter of ‘grace and comity.’”²⁰ This understanding of sovereign immunity is potentially at odds with the view that foreign sovereign immunity is, at least under certain conditions, required as a matter of customary international law.²¹

The *Opati* decision is one of many recent cases in the United States in which plaintiffs have been awarded punitive damages against state sponsors of terrorism.²² As in *Opati*, these decisions have often been rendered in the district courts as default judgments, owing to the failure of foreign state defendants to appear in court.²³ Overall, courts have awarded plaintiffs

¹⁴ *Id.*

¹⁵ *Id.* at 1609.

¹⁶ *Id.* at 1609–10.

¹⁷ *Id.* at 1610.

¹⁸ E. Perot V. Bissell & Joseph R. Schottenfeld, *Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act*, 127 YALE L.J. 1890, 1899 (2018) (noting that punitive damages “regularly go unrecovered” in FSIA suits).

¹⁹ *Opati*, *supra* note 1, at 1605 (quoting *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

²⁰ *Id.* (citing *Republic of Austria v. Altmann*, 514 U.S. 677, 689 (2004)).

²¹ See Jasper Finke, *Sovereign Immunity: Rule, Comity, or Something Else?*, 21 EUR. J. INT’L L. 853, 854–56, 870–71 (2011) (discussing various courts’ understanding of sovereign immunity); see also *Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening)*, Judgment, 2012 ICJ Rep. 99, para. 78 (Feb. 3) (“[T]he Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict.”).

²² Bissell & Schottenfeld, *supra* note 18, at 1890–92 (discussing suits brought against Cuba and Iran under the terrorism exception of the FSIA).

²³ *Id.*

substantial punitive damages against foreign states, with the awards collectively reaching many billions of dollars.²⁴

Litigation in the United States against foreign states for their alleged involvement in acts that harm Americans is likely to continue increasing. In 2016, Congress overrode President Obama's veto to enact the Justice Against Sponsors of Terrorism Act (JASTA). Codified largely in 28 U.S.C. § 1605B, the JASTA creates a new statutory exception to state immunity related to terrorism.²⁵ Section 1605B removes immunity from states, including ones that have *not* been designated by the State Department as sponsors of terrorism, with respect to suits alleging:

[p]hysical injury to person or property or death occurring in the United States and caused by—(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state [or its officials] . . . regardless where the tortious act or acts of the foreign state occurred.²⁶

Congress provided that the JASTA applies to “any civil action—(1) pending on, or commenced on or after, the date of [its] enactment . . . ; and (2) arising out of an injury to a person, property, or business on or after September 11, 2001.”²⁷ While the JASTA does not itself provide a cause of action or specify the availability of punitive damages, it opens the door to lawsuits grounded in other federal or state laws, including ones that allow for punitive or treble damages. It might prove difficult in light of *Opati* for foreign states to raise retroactivity challenges in such cases with respect to the award of such damages.²⁸

The string of litigation against foreign states has continued even amid the coronavirus pandemic. Contending that China was responsible for the spread of the coronavirus, numerous actors have brought lawsuits against China for its alleged “malfeasance, misfeasance, and/or nonfeasance,” which, the plaintiffs contend, “caused the pandemic.”²⁹ The plaintiffs invoke

²⁴ *Id.* For critiques of these awards, see *id.* at 1899–909 (arguing that large punitive damages run counter to U.S. policy interests); Haim Abraham, *Awarding Punitive Damages Against Foreign States Is Dangerous and Counterproductive*, LAWFARE (Mar. 1, 2019), at <https://www.lawfareblog.com/awarding-punitive-damages-against-foreign-states-dangerous-and-counterproductive> (arguing that large punitive damages imposed against foreign states make it difficult for plaintiffs to enforce compensatory awards and threaten “the peaceful international order”).

²⁵ Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, 130 Stat. 852 (2016) [hereinafter JASTA]; Jennifer Steinhauer, Mark Mazzetti & Julie Hirschfeld Davis, *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. Times (Sept. 28, 2016), at <https://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html>.

²⁶ 28 U.S.C. § 1605B(b).

²⁷ JASTA, *supra* note 25, § 7, 130 Stat. at 855. In a case involving Saudi Arabia, plaintiffs sued the country for its involvement in the terrorist attacks on September 11, 2001 under the JASTA. *Ashton v. Al Qaeda Islamic Army (In re Terrorist Attacks on September 11, 2001)*, 298 F. Supp. 3d 631 (S.D.N.Y. 2018). The federal district court held that the JASTA “provides courts with new legal principles to apply, retroactively and prospectively, in determining claims for sovereign immunity.” *Id.* at 661 (emphasis added).

²⁸ See *Opati*, *supra* note 1, at 1610 (advising the D.C. Circuit to reconsider its holding that punitive damages were not retroactively available following the 2008 FSIA amendments with respect to the plaintiffs’ separate state law claims); Haley S. Anderson, *The Significance of the Supreme Court’s Opati Decision for States and Companies Sued for Terrorism in U.S. Courts*, JUST SECURITY (May 19, 2020), at <https://www.justsecurity.org/70260/the-significance-of-the-supreme-courts-opati-decision-for-states-and-companies-sued-for-terrorism-in-u-s-courts>.

²⁹ *E.g.*, First Amended Class Action Complaint at 3, *Alters v. People’s Republic of China*, No. 120–2110 (S.D. Fla. May 4, 2020).

various exceptions to immunity set forth in the FSIA, including Section 1605B.³⁰ Aside from these efforts to hold China accountable under existing exceptions in the FSIA, some legislators have signaled their interest in amending the FSIA to strip China of sovereign immunity relating to its handling of the coronavirus pandemic.³¹ In fact, two legislators, Representative Dan Crenshaw and Senator Tom Cotton, have already introduced bills that would amend the FSIA to include a proposed Section 1605C, allowing foreign states to be sued for spreading COVID-19 and tortious acts relating to the concealment of the existence of COVID-19.³²

INTERNATIONAL ORGANIZATIONS

Trump Administration Submits Notice of U.S. Withdrawal from the World Health Organization Amid COVID-19 Pandemic

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President Trump decided in mid-April of 2020 to suspend U.S. funding for the World Health Organization (WHO) and to have his administration review its performance, contending that it was biased in favor of China and inept in its handling of the COVID-19 pandemic. In a letter to the WHO director-general a month later, Trump informed the director-general that his administration's review confirmed his accusations. He threatened that, unless the WHO implemented significant reforms, the United States would reconsider its membership in the organization. Less than two weeks later, on May 29, 2020, Trump announced his decision to terminate the U.S. relationship with the WHO. On July 6, the administration gave formal notice of U.S. withdrawal to the UN secretary-general, the depositary for the WHO Constitution. Assuming certain legal preconditions are satisfied and the notice of withdrawal is not revoked, the withdrawal will take effect on July 6, 2021.

³⁰ *Id.* at 11–14 (invoking 28 U.S.C. § 1605(a)(2) (commercial activity exception); § 1605(a)(5) (exception for personal injury or death or property damage occurring within the United States caused by certain tortious activity of the foreign state or its officials); § 1605B (the JASTA's exception)); *see also* First Amended Class Action Complaint at 22, *Bella Vista LLC v. People's Republic of China*, No. 220–0574 (D. Nev. Mar. 23, 2020) (invoking these same provisions); Class Action Complaint at 3, *Buzz Photos v. People's Republic of China*, No. 320–0656 (N.D. Tex. Mar. 17, 2020) (asserting the Court has subject matter jurisdiction under “the Justice Against Sponsors of Terrorism Act (“JASTA”) exception” and separately invoking 28 U.S.C. § 1605); Class Action Complaint at 10, *Benitez-White v. People's Republic of China*, No. 420–1562 (S.D. Tex. May 3, 2020) (maintaining that China is not entitled to sovereign immunity under the JASTA).

³¹ Sean Mirski, *Senate Judiciary Committee Examines the Foreign Sovereign Immunities Act and Coronavirus-Related Suits Against China*, *LAWFARE* (June 30, 2020), at <https://www.lawfareblog.com/senate-judiciary-committee-examines-foreign-sovereign-immunities-act-and-coronavirus-related-suits>; Comm. on the Judiciary, *The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability* (June 23, 2020), at <https://www.judiciary.senate.gov/meetings/the-foreign-sovereign-immunities-act-coronavirus-and-addressing-chinas-culpability>.

³² *Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020*, S. 3662, 116th Cong. § 4 (2020); *Holding the Chinese Community Party Accountable for Infecting Americans Act of 2020*, H.R. 6519, 116th Cong. § 4 (2020).