15-455-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DELAMA GEORGES, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DESILUS GEORGES AND ALL OTHERS SIMILARLY SITUATED, ALIUS JOSEPH, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MARIE-CLAUDE LEFEUVE AND ALL OTHERS SIMILARLY SITUATED, LISETTE PAUL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF FRITZNEL PAUL AND ALL OTHERS SIMILARLY SITUATED, FELICIA PAULE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, JEAN RONY SILFORT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

UNITED NATIONS, UNITED NATIONS STABILIZATION MISSION IN HAITI, EDMOND MULET, FORMER UNDER-SECRETARY-GENERAL OF THE UNITED NATIONS STABILIZATION MISSION IN HAITI, BAN KI-MOON, SECRETARY-GENERAL OF THE UNITED NATIONS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

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INTRODUCTION

Plaintiffs respectfully submit this Reply to the Brief for the United States of America ("the Government") as *Amicus Curiae* in Support of Affirmance (hereinafter "Am. Br.").[1] The Government asks the Court to affirm dismissal of this tort action on the ground of immunity, relying primarily on *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010).

This is a case of first impression where Defendants have breached Section 29 of the Convention on Privileges and Immunities of the United Nations ("CPIUN"), which provides that the United Nations ("UN") "shall make provisions for appropriate modes of settlement" of private law claims against it. Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16 (SA-14-37). This violation precludes Defendants from invoking immunity under Section 2 of the CPIUN in this case.

Neither *Brzak* nor any other decision has extended the UN's immunity to an instance where it was found in breach of Section 29. Granting the Government's request for immunity, despite Defendants' breach, would eviscerate the CPIUN's careful balance between immunity and victims' rights. The Government misinterprets the text and drafting history of the CPIUN, as well as principles of international law and the decisions of foreign courts, all of which confirm that

[1] Defendants have failed to appear in this case.

Defendants' immunity from suit under Section 2 is conditioned on the UN's obligation in Section 29 to provide access to alternative dispute settlement.

The Government's argument that Plaintiffs lack standing to invoke Defendants' breach because the CPIUN provides no private right of action ignores the fact that Plaintiffs are not pursuing an affirmative claim under the treaty. Rather, Plaintiffs raise the breach ***in response*** to the Government's assertion of treaty-based immunity against Plaintiffs' tort claims.

Finally, the Government's argument that the U.S. citizen Plaintiffs' constitutional right to court access should not be protected is unavailing. It too relies on *Brzak*, without accounting for the material differences from this case. Moreover, by contending that allowing Plaintiffs their day in court would herald the end of immunities everywhere, the Government ignores the very limited nature of Plaintiffs' challenge to UN immunity in this case. Reversal of the District Court's decision would neither expose Defendants to the threat of gratuitous litigation nor risk jeopardizing the UN's core functions. To the extent that future private law claims against the UN arise, the UN can keep them out of U.S. courts by simply complying with its duty under Section 29—which the District Court recognized as "obligatory." SA-6.

The Government has failed to show that Defendants are entitled to immunity in this case. This Court should, therefore, reverse the District Court's decision, and remand the case to proceed on its merits.

ARGUMENT

I. *BRZAK V. UNITED NATIONS* DOES NOT CONTROL THIS CASE.

A. This Case Presents a Question of First Impression.

The CPIUN imposes a mandatory, non-discretionary obligation on the UN, requiring that it "***shall*** make provisions for appropriate modes of settlement . . . of disputes of a private law character to which the [UN] is a party." CPIUN § 29 (emphasis added). The issue before this Court is whether Defendants are entitled to immunity under the CPIUN when they have breached this obligation, which is both a condition precedent to the operation of Section 2 immunity and a material term of the treaty as a whole. Brief for Appellants (hereinafter "Ap. Br.") 4. No U.S. court has previously addressed this question.

The Government does not contest that the UN breached its obligation under Section 29 when it declared Plaintiffs' claims "not receivable" and refused to provide any mode to settle them. Instead, the Government attempts to sidestep the consequences of that breach by focusing solely on Section 2. Am. Br. 10-13. In so doing, the Government cites to cases that define the scope of Section 2 immunity and waivers thereof. *Id.* (citing *Brzak*, 597 F.3d 107; *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011)). That precedent establishes that Section 2, when it is in

effect, confers absolute immunity except where the UN expressly consents to jurisdiction. *Brzak*, 597 F.3d at 112; *Bahel*, 662 F.3d at 623. But that precedent does not control this case, which concerns neither the scope of immunity nor waiver under Section 2. Rather, this case turns on whether Section 2 is operable as a matter of law where the UN has not met a condition precedent to Section 2 and is in material breach of the CPIUN.

The Government erroneously relies on *Brzak* as controlling authority in this case. Am. Br. 10-13. The plaintiffs in *Brzak* challenged the UN's immunity on seven grounds, none of which is at issue here.[2] Brief of Appellants, *Brzak*, No. 08-2799, 24-26 (2d Cir. Sept. 3, 2008) (hereinafter "*Brzak* Ap. Br."). The *Brzak* parties did not brief, and the Court did not address, the legal consequences of a breach of Section 29. The *Brzak* plaintiffs raised Section 29 only in a tertiary contention that shortcomings in the UN's system for adjudicating employee disputes amounted to an express waiver of immunity under Section 2. *Id.* The Court rejected that argument, stating that "crediting [it] would read the word 'expressly' out of the CPIUN" waiver provision. *Brzak*, 597 F.3d at 112. Thus, in

[2] The Court's decision in *Brzak* primarily concerned whether the CPIUN is self-executing in U.S. courts. 597 F.3d at 111-12. Both the *Brzak* plaintiffs and Plaintiffs in this case raised constitutional challenges to the CPIUN; however, the former asserted a facial challenge to the treaty, whereas Plaintiffs here challenge it as applied to the facts of this *sui generis* case. *Compare Brzak* Ap. Br. 10-18 *with* Section IV, *infra*.

Brzak this Court recognized the "absolute immunity" generally conferred pursuant to Section 2 of the CPIUN, but it did not determine whether that immunity remains available after the UN has breached Section 29.

The other UN immunity cases cited by the Government are similarly inapposite because they simply restate the proposition that Section 2 generally affords the UN absolute immunity from suit. S*ee Van Aggelen v. United Nations*, 311 Fed. Appx. 407, 409 (2d Cir. 2009) (affirming dismissal of a lawsuit, which was filed subsequent to the plaintiff's successful pursuit of claims through the UN's employee justice system, because all defendants had immunity under the CPIUN); *Emmanuel v. United Nations*, 253 F.3d 755, 756 n.2 (1st Cir. 2001) (considering whether a Status of Forces Agreement between the UN and Government of Haiti applies to individual disputes with the UN, and discussing, by way of footnote, the immunity generally available to the UN under the CPIUN); *see also Bahel*, 662 F.3d at 623-36 (holding that immunity of individual officials can be impliedly waived, and finding that the UN had waived immunity in a criminal case involving a former employee.). These cases all simply support a proposition that is not in dispute in this case.

B. Jurisdiction Over This Case Turns on Breach of Section 29, and Not on Waiver of Immunity Under Section 2.

Plaintiffs do not assert that Defendants waived immunity in this case. Waiver is an established legal concept defined as the intentional relinquishment of a known and otherwise enforceable legal right. *See Sillman v. Twentieth Century-Fox Film Corp.*, 165 N.Y.2d 498, 450 (1957). Plaintiffs do not argue that Defendants relinquished an enforceable right, but rather that the UN's failure to comply with Section 29 renders Section 2 ***un***enforceable.

The Government cites to no case holding that Defendants are still entitled to immunity under Section 2 when they have breached Section 29. No such case exists. Plaintiffs in prior cases had access to remedies denied to Plaintiffs here. For example, in *Brzak*, the plaintiffs were employees of a UN agency and enjoyed access to the UN's adjudication system for employee claims. One plaintiff obtained a remedy through that system, and the other voluntarily withdrew her claim while it was still pending. *Brzak* Ap. Br. 25-26 n.14; *Ishak v. Sec'y-General of the United Nations*, Judgments U.N. Appeals Trib., No. 2011-UNAT-152, ¶ 7 (July 8, 2011). Similarly, in *Bisson v. United Nations* (cited in Am. Br. 11), the plaintiff was a UN employee who received compensation for personal injury pursuant to Section 29. No. 06-cv-6352, 2007 WL 2154181, at 10, n.23 (S.D.N.Y. July 27, 2007) (recommendation by magistrate judge, *adopted in* 2008 WL 375094, at *9-10 (S.D.N.Y. Feb. 11, 2008)). Bisson did "not claim[] that she

[wa]s without monetary compensation for her injuries but [wa]s instead contending that the remedies available [were] inadequate." *Id.* In these cases, the UN complied with its obligation to provide a forum for dispute resolution, and the plaintiffs did not (and could not) assert breach.

Here, however, the UN has breached Section 29 by refusing Plaintiffs any extrajudicial process or remedy for the extraordinary injury they have suffered. Ap. Br. 20-25. This distinction is not "meaningless," as the Government suggests. Am. Br. 12. Instead, it places the UN in material breach of the CPIUN, and in violation of a condition precedent, both of which render immunity unenforceable.[3]

Plaintiffs' argument is thus completely different from, and not simply a restyling of, a waiver argument, as the Government asserts. *Id.* 12. Indeed, in *Brzak* this Court treated the fundamental question of whether the CPIUN was applicable as a matter of law separately from the question of whether the UN had waived its immunity. 597 F.3d at 111-12. The Court should do likewise here, analyzing whether Section 2 is applicable despite the UN's violation of Section 29, without regard to waiver.

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[3] Because the immunity of UN officers is entirely derivative of immunity accorded to the UN, Defendants Ban Ki-Moon and Edmond Mulet are not entitled to immunity under the CPIUN where the UN is not. Ap. Br. 47-48. The Vienna Convention on Diplomatic Relations does not confer immunity to UN officers. *Id.* As a result of its erroneous conclusion that the UN and MINUSTAH are immune from suit under the CPIUN, the District Court improperly determined that Defendants Ban and Mulet are also immune. SA-7-8.

II. THE TEXT AND DRAFTING HISTORY OF THE CPIUN, AND GOVERNING RULES OF INTERNATIONAL LAW, CONFIRM THAT THE UN'S OBLIGATION TO SETTLE CLAIMS UNDER SECTION 29 IS A CONDITION PRECEDENT TO IMMUNITY UNDER SECTION 2.

The Government has failed to present any valid reason why Defendants are entitled to Section 2 immunity when they have failed to perform a condition precedent to that immunity.[4] The CPIUN must be read in light of its drafting history, governing rules of international law and the subsequent practice of

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[4] The Government asserts in a footnote that the UN is immune from suit under the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288 *et seq*. Am. Br. 9, n.2. That argument is unavailing because the CPIUN, and not the IOIA, is the exclusive and controlling source of immunity for Defendants in this case.

The IOIA confers immunity on numerous designated international organizations. S. Rep. No. 80-599, at 3 (1947). It was enacted in 1945, when it was "too soon to know" whether the statute would be consistent with the immunity requirements of the UN. *Id.* When the CPIUN was subsequently ratified in 1946, as the more specific law governing UN immunities, it superseded the IOIA to the extent the two conflicted. *Id.* (the CPIUN "will have the effect of amending any inconsistent provisions of existing law [namely, the IOIA]"); *see also Brzak*, 597 F.3d at 112 (applying immunity under the CPIUN without regard to "whatever immunities are possessed by other international organizations [under the IOIA]"); *Rodgers v. United States*, 185 U.S. 83, 89 (1902) (under the principle of *lex specialis derogat lex generalis*, where two laws apply to the same set of facts, the more specific will prevail over the more general in the event of a conflict). The Government concedes that the CPIUN and IOIA set out conflicting rules: whereas the CPIUN carefully balances broad UN immunity with an obligation to provide access to an alternative remedy to victims of UN wrongdoing, "the IOIA does not mention any requirement [to that effect]." Am. Br. 9 n.2.

Because the IOIA and the CPIUN are in conflict here, as the more specific law, the CPIUN must prevail. Moreover, as the CPIUN entered into force in the United States in 1970, it must also prevail as the later in time. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

signatory states. These sources all require interpreting Section 29 as a condition precedent to Section 2.

A. Conditions Precedent Exist When Parties So Intend, Even When Not Set Forth Expressly.

The Government contends that "[n]othing in Section 29(a) states, either explicitly or implicitly, that compliance with its terms is a precondition to the UN's immunity under Section 2," which "makes clear that it does not [constitute a condition precedent]." Am. Br. 10. Conditions precedent exist both when express language provides as much, and also when a condition is "gathered from the terms of the contract as a matter of interpretation." *Nat'l Fuel Gas Distrib. Corp. v. Hartford Fire Ins. Co.*, 2005 N.Y. Misc. Lexis 3094, at *15 (N.Y. Sup. Ct. Aug. 1, 2005) (quoting Calamari & Perillo, The Law of Contracts § 11.8, at 402 (4th ed. 1998)); *see also Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts . . . with a view to making effective the purposes of the high contracting parties."). It is well established that "no particular form of language is necessary to make an event a condition." *Nat'l Fuel*, 2005 N.Y. Misc. Lexis 3094, at *15 n.8 (quoting Restatement (Second) of Contracts § 226, cmt. a (Am. Law. Inst. 1981)). Rather, whether parties to a contract have "made an event a condition is determined by the process of interpretation," which involves not only an examination of the text of an agreement, but also other evidence probative of the parties' intent. *Edelman Arts,*

Inc. v. Art Int'l (UK) Ltd., 841 F. Supp. 2d 810, 824 (S.D.N.Y. 2012) (quoting Restatement (Second) of Contracts § 226, cmt. a).

Thus, "[i]t is not necessarily conclusive . . . that the parties did not make [one provision of an agreement] an express condition precedent to [another]." *Mount Sinai Hosp. v. 1998 Alexander Karten Annuity Trust*, 970 N.Y.S.2d 533, 540-41 (N.Y. App. Div. 2013). This Court's analysis of the relationship between Sections 2 and 29 of the CPIUN, therefore, should not end with the text of Section 2, as the Government suggests. *See* Am. Br. 7-8, 10. Neither the lack of express conditional language, nor the inclusion of an express exception, is determinative. *See DeVito v. Hempstead China Shop*, 38 F.3d 651, 654 (2d Cir. 1994) (holding that summary judgment was "inappropriate" where the lower court examined only the text of an agreement in concluding that one provision was not a condition precedent to another, without any "exploration of extrinsic evidence concerning the parties' intent").

Further, "[i]t is well established that treaty interpretation involves a consideration of legislative history and the intent of the contracting parties." *Maugnie v. Compagnie Nat'l Air France*, 549 F.2d 1256, 1257-58 (9th Cir. 1977) (citing *Choctaw Nation of Indians v. United States*, 318 U. S. 423, 431 (1943)). Thus, in ascertaining the relationship between Sections 2 and 29, this Court should

look to the history and negotiations from which the CPIUN arose, subsequent practice of other signatories, and relevant rules of international law. Ap. Br. 14-15.

B. The Drafting History of the CPIUN Evidences the Drafters' Intent that Immunity Be Conditioned on Compliance with Section 29.

The Government mischaracterizes the drafting history of the CPIUN, arguing that the drafters did not intend for Section 29 to be a condition precedent to the UN's entitlement to immunity under Section 2. Am. Br. 14-15. In support of its argument, the Government cites only to the drafting history of a different agreement, which is not probative of the relationship between Sections 29 and 2 of the CPIUN.

The CPIUN's drafters intended for the UN's immunity to be conditioned on its provision of some alternative dispute settlement process. The drafters made that clear when they stated that the UN should "submit to arbitration… ***if it is not prepared to go before the Courts***." A-203 (Study on Privileges & Immunities *in* Prep. Comm. Doc. PC/EX/113/Rev.1, at 70, Nov. 12, 1945) (emphasis added). Based on this understanding, the drafters, using the word "shall," clearly imposed on the UN an obligation to settle claims in every draft of the treaty including the final now in force. CPIUN § 29; *see* Ap. Br. 30. The language the drafters chose is mandatory; it is in no way hortatory or discretionary, as the Government suggests, Am. Br. 17.

Other contemporaneous documents reinforce that the drafters intended to create an immunity regime that would not result in impunity. The requirement that the UN participate in alternative dispute resolution was first articulated in a draft resolution by the International Labor Organization ("ILO Draft"), and was reproduced nearly verbatim in the Preparatory Committee's first draft of the CPIUN.[5] Memorandum by the Legal Adviser of the International Labor Office, *reprinted in* International Labor Office, 27:2 Official Bull. 111, 216 (Dec. 10, 1945); *see also* Wilfred Jenks, International Immunities 14-15 (1963). In its explanatory commentary, the ILO provided the rationale for including a dispute resolution requirement, expressly linking it to immunity:

> The arrangements suggested in this paragraph are designed ***as a counterpart for the immunities of the Organisation and its agents.*** The nature and effect of these immunities are frequently misunderstood. The circumstances in which international immunity operates to except the person enjoying it from compliance with the law are altogether exceptional. In general such immunity confers only exemption from legal process and not exemption from the obligation to obey the law . . . .

ILO Draft, *reprinted in* International Labor Office, 27:2 Official Bull. at 216. Importantly, the ILO further explained that the submission to alternative dispute

[5] Section 29 differs from the equivalent provision in the ILO Draft in only two regards, neither of which is relevant here: it (1) broadened the scope of the clause to apply to all types of private law claims, and (2) replaced a specific obligation to provide for "determination by an appropriate international tribunal" with a general obligation to "provide for appropriate modes of settlement."

resolution and national jurisdiction should be understood as alternatives, such that private law claims would be heard either by a national court or by some international mechanism. *Id.* at 219 (for private law matters where an international organization preferred not to submit to the jurisdiction of one state, "[i]t would therefore seem necessary to organize an international jurisdictional control over [such disputes]"). The ILO Draft thus supports reading Section 29 as a condition precedent to immunity.

The only language offered by the Government in support of its alternative interpretation comes from a report commenting on the UN Charter. Am. Br. 14 (citing Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945) ("UN Charter Report")). As the report itself acknowledges, the UN Charter simply "suggests the general rule and general obligations" with respect to immunity rather than offer any accounting of when immunity may be invoked. *Id.* at 159-60 (acknowledging that "[t]he exact nature of the privileges and immunities to which international organizations and their officials are entitled is not yet sufficiently clear . . . ."). The report's statement that the UN "is clearly not subject to the jurisdiction or control of any one of [its member states]," UN Charter Report at 159, thus merely restates the general principle behind Article 105 of the UN Charter, which provides that the UN enjoys "such privileges and immunities ***as are***

necessary for the fulfilment of its purposes."[6] (Emphasis added.), The details of the UN's immunity framework would not emerge until the CPIUN was drafted the following year. *See* A-206-207 (introductory note to the CPIUN, explaining that the treaty granted broader immunity than that provided in the Charter, but counterbalanced it with an obligation to settle claims). Thus, the UN Charter Report offers no help in understanding the relationship between Section 2 and Section 29 of the CPIUN.

As set forth above and in Plaintiffs' principal brief, the drafting history of the CPIUN consistently demonstrates that the drafters intended for the UN to be entitled to immunity only so long as it provides alternative dispute resolution. The Government has presented no compelling evidence to the contrary.

C. Conditioning Immunity on the Provision of Appropriate Modes of Settlement Is Consistent with International Law and the Decisions of Courts Abroad.

Reading Section 29 as a condition precedent to Section 2 is the only way to interpret the application of UN immunity in a manner consistent with international law and the practice of other CPIUN signatories. The Government's proposed

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[6] Thus, the UN Charter Report does not show, as the Government claims, that the Charter "was undertaken with the understanding—at least as far as the United States was concerned—that the UN would be absolutely immune from the jurisdiction of its members." Am. Br. 15. To the contrary, the Report itself makes clear that the drafters of the UN Charter specifically chose a less expansive, functional immunity. UN Charter Report at 158-59.

reading, in contrast, controverts at least three general canons of construction relevant to international treaties such as the CPIUN.

First, every treaty must be interpreted so as to give effect to the legal obligations established by its plain language. *Factor v. Laubenheimer*, 290 U.S. 276, 303-04 (1933); *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992). The Government's reading would deny Section 29 effect because there is no alternative forum through which the provision may be enforced. Extensive efforts outside the courts—by Plaintiffs, Governmental actors, and UN officials—have not resulted in the UN honoring its Section 29 obligation. *See* A-182-183.

Contrary to the Government's suggestion, the International Court of Justice ("ICJ") does not provide a viable forum in which to hold the UN to its obligation. Am. Br. 24. The ICJ may issue advisory opinions regarding the interpretation or application of the CPIUN ***only upon a referral from a UN entity***. CPIUN § 30; UN Charter, art. 96. Neither Plaintiffs nor a member state could directly refer a dispute with the UN to the ICJ. And neither the UN General Assembly nor any other UN entity has referred, or indicated that it may refer, a question relevant to this case to the ICJ.

Second, when there are two competing interpretations of a treaty clause—one which restricts rights under the treaty and another that enlarges them—courts should give preference to the latter. *Asakura v. City of Seattle*, 265 U.S. 332, 342

(1924); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929). To read the CPIUN to accord the UN unconditional immunity even where it violates Section 29 does not just restrict the right of aggrieved parties to have their private law claims heard—it completely vitiates it.

Third, the fundamental principle of *pacta sunt servanda* ("agreements must be kept") requires that treaty promises, such as the UN's promise to provide alternative mechanisms of dispute resolution, must be kept. *See* Restatement (Third) For. Rel. Law of the United States, § 321 cmt. a (Am. Law. Inst. 1987) (*pacta sunt servanda* "lies at the core of the law of international agreements and is perhaps the most important principle of international law"). According the Defendants immunity, while ignoring their breach, would disregard this principle. *See* A-341-343 (decision of French court applying the principle of *pacta sunt servanda* to withhold immunity from a UN agency that failed to comply with an arbitration agreement).

The Government's reading of the CPIUN is also inconsistent with the growing consensus among foreign and international courts that the availability of immunity for international organizations depends on the provision of an alternative settlement mechanism. Ap. Br. 31-33; *see also* Riccardo Pavoni, *Choleric Notes on the Haiti Cholera Case*, Questions of Int'l L., at 31 (Jul. 27, 2015) ("The main criticism concerning the US District Court's Georges decision is simply that it

cannot be considered as representative of the current state of the law at the global level.").

The Government concedes that the opinions of sister signatories "are entitled to considerable weight." Am. Br. 18; *accord Abbott v. Abbott*, 560 U.S. 1, 16 (2010). Yet it argues that the foreign and international case law cited by Plaintiffs and *amici* is not directly applicable to this case. *See* Am. Br. 18-22. For example, the Government objects that these cases involve UN agencies and subsidiaries rather than the UN itself, Am. Br. 18; but that is so because the UN is headquartered in the United States, and suits against the UN Secretariat are, therefore, primarily decided here. *See* Brief by European Law Scholars and Practitioners As *Amici Curiae* (Dkt. No. 86-1), 5 (June 3, 2015) (hereinafter "Eur. L. Scholars Am. Br."). The Government misses the forest for the trees: The decisions cited by Plaintiffs plainly demonstrate the increasing practice worldwide of conditioning international organization immunity on access to alternative dispute settlement. *See* Ap. Br. 31-33.

When UN agencies and peacekeeping forces have failed to provide access to any alternative remedy, foreign courts have declined to apply immunity. *See, e.g.*, A-341-343 (French court decision withholding immunity, pursuant to headquarters agreement using language virtually identical to CPIUN Section 2, because of UN agency's failure to adhere to the arbitration clause in its contract with the plaintiff);

A-358-363 (Italian court decision declining to enforce the immunity of a UN agency under its agreement with Italy because the agency's regulations did not ensure access to adequate dispute settlement). Where foreign courts have upheld international organization immunity, it is precisely because an alternative remedy was available. *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 31/8/1999, "Duhalde, Mario Alfredo c. Organización Panamerica de la Salud / accidente ley," Fallos (322-1905) (Arg.) *Duhalde v. Organizacion Mundial de la Salud*, *available at* http://servicios.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=472867 (Argentine court decision upholding the immunity of a UN agency under a companion treaty to the CPIUN with provisions identical to Sections 2 and 29, because appropriate alternative remedies were available, and noting that treaty-based immunity would be struck down without such remedies); A-346 (discussing Cypriot Supreme Court decision that accorded CPIUN immunity to UN peacekeeping force and noted that doing so did not leave plaintiff without a remedy because of the existence of a dispute settlement mechanism). Collectively, these cases demonstrate a recognition by our sister nations that international organizations, including the UN, are entitled to immunity only when they comply with their obligations to provide access to an alternative remedy.

The UN sanctions cases cited by Plaintiffs similarly demonstrate that where the UN does not provide an effective alternate remedy, the right to a remedy must be safeguarded at the national level. *See* Eur. L. Scholars Am. Br. 19-21. Contrary to the Government's suggestion, the courts' determination that UN resolutions could not properly be implemented domestically when the UN failed to provide any recourse for injured individuals is instructive, notwithstanding that the decisions do not reach the lawfulness of the underlying UN resolutions. Am. Br. 21-22.

Accordingly, the practice of signatories to the CPIUN, like the treaty's plain text and drafting history, support interpreting Section 29 as a condition precedent to Section 2. The Government's alternative reading of the CPIUN would controvert the drafters' intent and render Section 29 meaningless. It is not a reasonable reading and is, therefore, not entitled to deference. *See* Ap. Br. 46-47.

III. PLAINTIFFS HAVE STANDING TO ASSERT THAT DEFENDANTS HAVE BREACHED THE CPIUN.

The Government has previously conceded that "the drafting history [of the CPIUN] reflects a bargain between the UN and its member states in which, in exchange for Section 2, which establishes the UN's absolute immunity, the UN, in Section 29, agreed to provide for dispute resolution mechanisms for third-party claims." Letter from Ellen Blain to J. Oetken (Dkt. No. 42), 9 (July 7, 2014). It is well-established under both U.S. and international law that a party that fails to

satisfy its own duties under a treaty is no longer able to claim the reciprocal benefits of its bargain. *See* Ap. Br. 35-38.

The Government does not contest the UN's breach of Section 29 or the principle that a breaching party cannot invoke the benefits of a treaty, but argues solely that Plaintiffs have no standing to invoke the UN's breach. The Government's support for that contention, however, confuses two wholly distinct issues: whether individuals can sue to obtain remedies for breach of treaty, and whether individuals may raise breach to counter another litigant's invocation of a treaty provision.

The Government's argument that Plaintiffs cannot assert the UN's breach of the CPIUN relies entirely on inapposite case law concerning individuals who asserted a private right of action under a treaty. *See* Am. Br. 22-24. Although treaties are "primarily [] compact[s] between independent nations," they may nevertheless "contain provisions which confer certain rights upon the citizens or subjects of one of the [signatory] nations . . . which are capable of enforcement as between private parties in the courts of the country." *Edye v. Robertson*, 112 U.S. 580, 598 (1884). Not every treaty provision, however, establishes such a right. Thus, in *Mora v. New York*, the Court rejected the plaintiffs' contention that the Vienna Convention on Consular Relations ("VCCR") created a domestically-enforceable individual right to consular notification. 524 F.3d 183, 187, 209 (2d

Cir. 2008). The Court in *United States ex rel. Lujan v. Gengler* applied analogous reasoning to reject the individual litigant's argument that the national sovereignty clauses of the Charters of the UN and Organization of American States ("OAS") were privately enforceable. 510 F.2d 62, 67 (1975).

Plaintiffs, however, have not sued for breach of the CPIUN and do not base their substantive claims on the treaty. *See* A-66-78. The CPIUN is only at issue in this case because ***the Government*** —not Plaintiffs—have sought to invoke it. As such, the question of whether the CPIUN creates a private right of action that Plaintiffs have standing to enforce is irrelevant. *Cf. Swarna v. Al-Awadi*, 622 F.3d 123, 133 (2d Cir. 2010) (where plaintiff "d[id] not seek a remedy under the [treaty], but instead . . . under state and federal law, we [] need not determine . . . . whether the treaty provides 'rights conferred directly upon individuals that are assertable[] in a private action . . . .'") (quoting *Mora*, 524 F.3d at 193) (bracketed text in original)).

Regardless of whether a treaty provides an enforceable private right of action, individuals may invoke breach in a responsive posture. *See Cook v. United States*, 288 U.S. 102 (1933) (allowing plaintiff to invoke a treaty to challenge the court's jurisdiction without requiring that the treaty provide a right of action); *Ackermann v. Levine*, 788 F.2d 830, 838-40 (2d Cir. 1986) (reaching merits of an alleged defense that plaintiff violated a treaty, without requiring that the treaty

provide private right of action); Oona Hathway *et al.*, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 Yale J. Int'l L. 51, 84 (2012) ("[C]ase law is consistent with this understanding that a treaty may be enforced defensively even when there is no private right of action."). By raising breach of the CPIUN to respond to the Government's attempt to limit the Court's jurisdiction over this common law tort action, Plaintiffs are not "insist[ing] upon their own preferred remedy" under the CPIUN as the Government contends. Am. Br. 22. They are challenging ***the Government's*** attempt to invoke the treaty to bar Plaintiffs from pursuing their tort suit.

The fact that the CPIUN and UN-Haiti Status of Forces Agreement ("SOFA") contain provisions governing dispute settlement between states and the UN is not relevant here. CPIUN ¶30; Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations In Haiti, U.N.-Haiti, ¶ 57, July 9, 2004. Such clauses have no bearing on an individual's right to assert breach of a treaty, even in cases (unlike this one) where breach forms the basis for the action. *See, e.g.*, *Standt v. City of New York*, 153 F. Supp. 2d 417, 424-27 (S.D.N.Y. 2001) (holding that article 36(1)(b) of the VCCR confers privately enforceable rights without considering the existence of a mandatory dispute resolution clause for state parties in the treaty's optional protocol). Indeed, the text of the SOFA confirms that state disputes are to be

treated separately from private disputes with the UN. *See* SOFA ¶55 ("***Except as provided in paragraph 57*** [*i.e*. the Haiti-UN dispute settlement clause], any dispute or claim of a private-law-character . . . shall be settled by a standing claims commission.") (emphasis added); *see also Emmanuel*, 253 F.3d at 756-57 (evaluating a clause in the predecessor to the current SOFA with identical terms, and emphasizing that "[t]he agreement, in referencing 'any dispute or claim of a private law character' without mentioning the Government of Haiti, dispels any argument that the U.N.-Haiti SOFA applies only to Haiti and the UNMIH and not to individuals in Haiti"). Plaintiffs have standing to assert, in response to the Government's CPIUN-based argument for immunity, that the UN's material breach of the treaty renders Defendants subject to suit. The Government has failed to provide any valid reason why Defendants are entitled to immunity under the CPIUN when the UN has materially breached that treaty.

IV. THE GOVERNMENT MISCONSTRUES PLAINTIFFS' LIMITED CONSTITUTIONAL CHALLENGE.

The Government offers no affirmative explanation for how depriving U.S. citizens of any forum in which to hear their private law claims against the UN comports with the right of access to court. Instead, it advances a *reductio ad absurdum* argument based on a faulty premise—that a ruling for Plaintiffs here would lead to the invalidation of *all* recognized immunities. *See* Am. Br. 29. But Plaintiffs' constitutional claim is limited to cases such as this where an aggrieved

party has been denied access to any mechanism at all to resolve a claim of injury the UN has inflicted.

The Government suggests this constitutional question is controlled by *Brzak*, but that is not so. The plaintiffs in *Brzak* challenged immunity under the CPIUN on its face, *see* 597 F.3d at 114, whereas Plaintiffs here challenge immunity under the CPIUN only as applied to their case, in a circumstance where enforcing such immunity would deprive them of any redress mechanism whatsoever.

Neither Plaintiffs, nor *amici* Constitutional Law Scholars and Practitioners, ask this Court to "revisit its holding in *Brzak*." Am. Br. 30. This Court in *Brzak* held that the general framework established by the CPIUN—which requires the provision of an extrajudicial redress process—did not violate the Constitution. *See* 597 F.3d at 114. The existence of a Section 29 redress process was not "irrelevant" to the Court's decision, as the Government claims. Am. Br. 29. Rather, the issue was simply not before the Court because the plaintiffs in that case presented only a facial challenge to the CPIUN, and had in fact been provided with an alternative forum in which to raise their claims. The Court in *Brzak* did ***not*** undertake to decide whether deviations from the general CPIUN framework, such as where the UN entirely fails to comply with Section 29, also comport with the Constitution. That is the separate question currently before the Court.

UN immunity in this case is different from other types of immunity previously upheld by the courts. It is not "analogous to the immunity historically enjoyed by sovereign nations," as the Government argues. Am. Br. 30; *see* Patrick J. Lewis, *Who Pays for the United Nations' Torts?: Immunity, Attribution, and "Appropriate Modes of Settlement,"* 39 N.C.J. Int'l L. & Com. Reg. 259, 316-20 (2014) (noting the differences between immunity for foreign states and immunity for the UN). As a general matter, foreign sovereign immunity is grounded in the common law and pre-dates the Constitution. *See* Brief of Constitutional Law Scholars and Practitioners As *Amici* (Dkt. No. 63-2), 14-16 (June 3, 2015) (hereinafter "Con. L. Scholars Am. Br."); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."). The same is true for judicial, prosecutorial, and legislative immunities. *See Imbler v. Pachtman*, 424 U.S. 409, 423, n.20 (1976); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). Because the Constitution should be read in the context of the law at the time of the framers, immunities that were well recognized then may be presumed consistent with the Constitution. *See* Con. L. Scholars Am. Br. 14-16; *District of Columbia v. Heller*, 554 U.S. 570 (2008). In contrast, UN immunity is treaty-based, and became a part of U.S. law only in 1970. *See Brzak*, 597 F.3d at 111. It is thus subject to full constitutional scrutiny. *See*

Reid v. Covert, 354 U.S. 1, 16 (1957) ("No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the constitution.").

Even if traditional immunities were subject to the same scrutiny, a successful challenge to UN immunity as applied here would not "attack the concept of immunities generally." Am. Br. 30. Traditional immunities serve particularly compelling interests, as they are fundamental to the structure of government and to ensuring the independence of governmental offices. *See Imbler*, 424 U.S. at 422-23; *Tenney*, 341 U.S. at 377. They are also narrowly tailored to protect actors carrying out their official functions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982) ("[I]n general our cases have followed a 'functional' approach to immunity law. . . . In *Gravel [v. United States]*, for example, we emphasized that Senators and their aides were absolutely immune only when performing 'acts legislative in nature,' and not when taking other acts even 'in their official capacity.' Our cases involving judges and prosecutors have followed a similar line.") (citations and footnotes omitted).

Similarly, foreign sovereign immunity is a restrictive, not absolute immunity, as evidenced by the numerous exceptions set forth in the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1605(a); *see also Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) (describing the restrictive

theory of sovereign immunity recognized under the FSIA). In addition, foreign states are subject to the jurisdiction of their domestic courts, which may provide an alternative forum for aggrieved parties to have their claims heard. *See* August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy*, 1 Int'l Org. L. Rev. 59, 88-89 (2004).

The immunity of international organizations other than the UN is also often restrictive. *See OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762-63 (3d Cir. 2010). Moreover, international organizations, including the UN, generally provide for alternative dispute settlement mechanisms that make their immunity schemes narrowly tailored. The Supreme Court has recognized that the existence of a redress process is a "potent factor" when evaluating infringements on plaintiffs' ability to access the courts. *See United States v. Kras*, 409 U.S. 434, 445 (1973). It is only because of Defendants' extraordinary departure from that well-established practice that UN immunity ***as applied in this case*** violates the U.S. citizen Plaintiffs' constitutional rights.

The immunity granted to Defendants by the District Court in this case is far more expansive than previously recognized, effectively foreclosing Plaintiffs from any forum in which to bring their claims. Where the CPIUN is applied to bar a plaintiff from pursuing a well-pleaded civil lawsuit, that bar must pass strict scrutiny. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741-43

(1983) ("The right of access to a court is too important," and so prohibits enjoining "[t]he filing and prosecution of a well-founded" tort lawsuit); *Guttman v. Khalsa*, 669 F.3d 1101, 1121-22 (10th Cir. 2012) (applying strict scrutiny to a right of access limitation). The application of the CPIUN fails strict scrutiny in this case because Plaintiffs have been denied access to the alternative dispute settlement process provided for under the CPIUN that would have made the treaty narrowly tailored.

As the party asserting immunity, the Government bears the burden of proving that granting immunity in this case would comport with the Constitution. *See Johnson v. California*, 543 U.S. 499, 505 (2005). The Government's sole response to the U.S. Plaintiffs' arguments regarding violation of their right of access is that *Brzak* is dispositive. Am. Br. 29-31. But the Government does not—and cannot—explain why a decision upholding the CPIUN on its face governs a decision in a case where that treaty has been breached. The Government has thus failed to present any valid argument that immunity, as applied to the facts in this case, would pass constitutional scrutiny. Simply citing to *Brzak* does not satisfy its burden.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed, and the case remanded to proceed on its merits and for a decision on the motion for affirmation of service.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

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September 25, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2015, a true and correct copy of the foregoing document was served via mail, on the following:

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