Nos. 18-581 & 18-575

In The Supreme Court of the United States

ARGENTINE REPUBLIC,

Petitioner,

v.

PETERSEN ENERGÍA INVERSORA S.A.U. AND PETERSEN ENERGÍA, S.A.U.,

Respondents.

YPF S.A.,

Petitioner,

v.

PETERSEN ENERGÍA INVERSORA S.A.U. AND PETERSEN ENERGÍA, S.A.U.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PROFESSORS AT LAW AND BUSINESS SCHOOLS AS *AMICI CURIAE* IN SUPPORT OF GRANTING CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* and their counsel state that this brief was not authored, in whole or in part, by counsel for either party, and no person other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief. None of the schools that employ *amici* are a signatory to this brief, and the views expressed here are not affiliated with those institutions. All parties received timely notice of *amici curiae*'s intention to file this brief and consented to its filing.

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Amici are scholars at law and business schools in the United States and the United Kingdom with expertise in a range of issues in international law, including investment law and investor-state disputes. *Amici* have strong civic and scholarly interests in the development of a sovereign immunity doctrine that is predictable and consistent with principles of law and policy. The purpose of this brief is not to take a position on the merits of the case, but rather to underscore the

implications of this case for sovereignty, international business, and foreign relations.

INTRODUCTION AND SUMMARY

This case presents a compelling opportunity to settle fundamental questions about the scope of the Foreign Sovereign Immunities Act (FSIA) and to clarify the extent to which United States courts should exercise jurisdiction over investor-state disputes abroad. The Second Circuit's decision concerns the most important exception to sovereign immunity in the FSIA, the "commercial activity" exception.[2] Despite some guidance from this Court, significant uncertainties persist about the treatment of sovereign acts that have commercial consequences within the FSIA.[3] This case deals directly with that crucial question, which has significant implications for sovereignty, international business, and foreign relations.

The Second Circuit's interpretation of the "commercial activity" exception of the FSIA represents a potential expansion of the jurisdiction of United States courts over investor-state disputes abroad. As a result, this case bears on the scope and meaning of sovereignty under United States law. Sovereign immunity—

[2] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (describing the "commercial" exception as "[t]he most significant of the FSIA's exceptions").

[3] *See* Gary B. Born & Peter B. Rutledge, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 279 (5th ed. 2011).

even in its "restrictive" form, which enables civil suits against sovereign defendants in certain situations—is rooted in notions of reciprocal respect and independence among sovereigns. This Court has long recognized the importance of sovereign immunity in the realm of foreign relations. Judicial actions against foreign sovereigns are inherently sensitive, posing risks to foreign relations and reciprocal immunities enjoyed by the United States abroad.

United States law recognizes that exercising jurisdiction over sovereign defendants is uniquely complex. Adjudicating disputes between foreign investors and sovereign states—commonly referred to as "investor-state" disputes—can involve incursions into the internal affairs of foreign sovereigns. The Second Circuit's decision will likely lead to a meaningful increase in the frequency and extent of such incursions.[4] An expansive reading of the commercial activity exception in the FSIA could also open United States courts to a broader spectrum of investor-state claims, which include many disputes over the regulatory actions of foreign sovereigns.[5]

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[4] The incidence of investor-state disputes has risen dramatically since 1990, when foreign investment flows began swelling to their current volumes. *See* The World Bank Grp., *Foreign Direct Investment, Net Outflows*, https://data.worldbank.org/indicator/BM.KLT.DINV.CD.WD (last visited Nov. 23, 2018) (illustrating foreign direct investment flows from 1970 to 2017).

[5] *See* Krzysztof J. Pelc, *What Explains the Low Success Rate of Investor-State Disputes?*, 71 INT'L ORG. 559, 560 (2017).

The challenges and complexities of adjudicating disputes between foreign investors and sovereigns are also acknowledged outside of United States law. For decades, the investor-state dispute settlement (ISDS) system has worked to address the unique challenges associated with transacting and resolving disputes with sovereigns.[6] Both the FSIA and the ISDS system share some common goals in seeking to curb the escalation of investor-state disputes into state-state conflicts.[7] Asserting the jurisdiction of United States courts, however, over such disputes overlooks—and may even create tension with—the ISDS system, which offers an effective and neutral forum for resolving investment disputes with sovereigns, without the same risks to foreign relations. Thus, foreign investors already have access to effective and adequate remedies through well-established channels in the ISDS system.

[6] The ISDS system is composed of thousands of international investment treaties and an institutional framework for the resolution of investment disputes. *See* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427 (2010) (arguing that international treaty frameworks constitute a global regime for investment); *see also infra* Part II of this brief.

[7] U.S. TRADE REP., *ISDS: Important Questions and Answers*, https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers (last visited Nov. 23, 2018).

ARGUMENT

I. The Second Circuit's decision directly affects a critical area of law with far-reaching implications for sovereignty, international business, and foreign relations.

Questions of jurisdiction over foreign sovereigns in United States courts have exceptionally important implications. As this Court has acknowledged, "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."[8] Indeed, exercising jurisdiction over sovereign defendants has the potential to undermine foreign relations and upset reciprocal immunities enjoyed by the United States abroad. Moreover, adjudicating investor-state disputes often involves incursions into the internal affairs of foreign nations, tipping the balance between private rights and sovereign powers under United States law.

A. An expansion of the commercial activity exception has significant implications for the meaning of sovereignty under United States law and for foreign relations.

This case arises out of an act of expropriation that affected investments in Argentina's national oil company. Expropriation, the act of taking private property for public use, is a quintessential expression of sovereign

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[8] *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983).

power.[9] Private parties have no analogous legal powers. However, acts of expropriation frequently have private dimensions, altering or impairing contracts and other private property rights.

In an act of expropriation, commercial and sovereign elements are often deeply intertwined. Argentina's partial expropriation of YPF S.A. in 2012 embodies those connections. Formed in 1922, YPF was the first national oil company in Latin America. Even after its privatization in the 1990s, YPF remained a national symbol in Argentina, closely connected to energy independence and politics.[10] The YPF expropriation legislation refers directly to energy policy and national interests in energy self-sufficiency.[11] Likewise, then-President Cristina Fernández de Kirchner declared the expropriation a victory for "energy sovereignty" in Argentina.[12]

Expropriation played an important role in defining sovereignty and investor-state relations in the twentieth century. Some former colonies, newly independent, expropriated foreign assets in an effort to

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[9] *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) ("Expropriation is a decidedly sovereign—rather than commercial—activity.").

[10] *See*, *e.g.*, Taos Turner, *YPF CEO Mixes Oil, Argentine Politics*, WALL ST. J. (Jan. 6, 2014, 7:47 PM), https://www.wsj.com/articles/ypf-ceo-mixes-oil-argentine-politics-1389055305.

[11] Law 26,741, Art. 1, App. to Pet. Cert., 178a, No. 18-581.

[12] ECONOMIST, *Flogging a Dead Cow* (July 27, 2013), https://www.economist.com/the-americas/2013/07/27/flogging-a-dead-cow.

exert control over natural resources.[13] Mexico's landmark nationalization of the petroleum industry in 1938, for instance, was a prequel to a broader wave of recalibrations between international oil companies and newly independent sovereigns.[14] Many commodity-dependent states also asserted power over natural resources through state-owned enterprises (SOEs).[15] These trends reflect the strategic importance of natural resources—particularly energy—to sovereign interests and independence.[16] Even now, state influence in the oil sector is a global norm. National oil companies manage approximately 90 percent of the world's oil and comprise three quarters of the world's largest oil firms.[17]

Because independence and self-determination are fundamental sovereign prerogatives, sovereignty is often defined as the power of nations to regulate their internal affairs without foreign interference.[18] Accordingly, United States law provides limited grounds for

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[13] U.N. Conf. on Trade and Dev., *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* 5 (2012), https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.

[14] *See* Tim R Samples, *A New Era for Energy in Mexico? The 2013–14 Energy Reform*, 50 TEX. INT'L L.J. 603, 621–22 (2016).

[15] *See* Ernest E. Smith & John S. Dzienkowski, *A Fifty-Year Perspective on World Petroleum Arrangements*, 24 TEX. INT'L L.J. 13, 32 (1989).

[16] *See*, *e.g.*, Permanent Sovereignty over Nat. Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/RES/1803, para. 4 (Dec. 14, 1962).

[17] ECONOMIST, *Really Big Oil* (Aug. 10, 2006), https://www.economist.com/leaders/2006/08/10/really-big-oil.

[18] Sovereignty, *Black's Law Dictionary* (10th ed. 2014).

haling sovereign defendants into United States courts. The FSIA constitutes the sole basis for civil suits against sovereign defendants in courts of the United States.[19]

The law of foreign sovereign immunity transformed in significant ways during the twentieth century.[20] In the United States, the doctrine of absolute immunity gradually gave way to a "restrictive" theory of immunity, which permits civil suits against sovereign defendants in certain situations. In 1952, the "Tate Letter" marked the State Department's official adoption of a more restrictive approach to sovereign immunity, at a time when courts looked to the executive branch for direction in applying immunity to sovereign defendants.[21] Ultimately, the restrictive theory was codified into law in 1976 with the FSIA, which also shifted immunity determinations to the judiciary.[22]

Consistent with international law, a primary objective of the FSIA in shielding sovereigns from suit is to recognize the "absolute independence of every sovereign authority" as a matter of international comity,

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[19] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

[20] Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67 (2014).

[21] Letter from Jack B. Tate, Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952).

[22] George K. Foster, *When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 HOUS. L. REV. 361, 372 (2014).

which reflects reciprocal notions of deference and respect among nations.[23] However, as sovereign immunity is no longer absolute, the FSIA specifies exceptions to immunity in United States courts. Among the FSIA's exceptions to immunity, the "commercial activity" exception at issue in this case is the most important.[24]

As a result, distinguishing between a state's public acts and strictly commercial acts is vital. Whether or not a sovereign act of expropriation remains immune under the FSIA, despite having commercial implications or infringing on private rights, has compelling implications for the meaning and scope of the commercial activity exception of the FSIA. Accordingly, the Second Circuit's decision raises meaningful questions about the relationship between private rights and sovereign powers under United States law. In addition to foreign relations risks typically posed by sovereign immunity determinations, reciprocal immunities enjoyed by the United States in foreign jurisdictions are also at stake.

B. Exercising jurisdiction over investor-state disputes will likely involve more frequent and significant incursions into the internal affairs of foreign sovereigns.

Because many acts of expropriation have commercial elements or consequences, the Second Circuit's

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[23] *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017).

[24] *See* Foster, *supra* note 22, at 373.

expansive interpretation of the "commercial activity" could also lead to more investor-state litigation in United States courts. Expanding jurisdiction over expropriation disputes is likely to involve more frequent—and deeper—incursions into the internal affairs of foreign sovereigns. Adjudicating investor-state disputes often involves issuing judgments about the internal regulatory affairs of foreign nations. This is increasingly common as claims of indirect expropriation – also referred to as "creeping expropriation" or "regulatory taking"—continue to represent a majority of ISDS activity.[25]

In addition to cases arising out of direct expropriation, the Second Circuit's reasoning could also apply to indirect expropriation. Claims of indirect expropriation are even more common than direct expropriation claims in ISDS.[26] Because many claims arising out of expropriations have commercial elements or implications, the Second Circuit's decision could lead to higher volumes and a broader range of investor-state disputes in United States courts, raising the kinds of foreign relations risks that the FSIA intended to avoid.[27]

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[25] *See* Pelc, *supra* note 5, at 560.

[26] In claims of indirect expropriation, investors often seek compensation for adverse regulatory measures. A study of 1,812 claims in 742 ISDS cases since 1993 observed that over 70 percent of those cases featured an indirect expropriation claim. *See* Pelc, *supra* note 5, at 560.

[27] *See* Foster, *supra* note 22, at 414 ("In crafting the commercial activity exception, the political branches deliberately sought to exclude claims challenging sovereign acts because, in their view, they are generally too fraught with foreign relations risks.").

The Second Circuit's decision also has important implications for international business. The questions raised in this case are likely to be recurring and increasingly important in the modern global economy, as global flows of foreign direct investment now number in the trillions of dollars. The role of the United States as a major hub for financial markets further amplifies the implications of rulings in this area of the law. YPF is one of many foreign companies listed in the United States with exposure to the internal regulatory affairs and sovereign powers of a foreign country. On the New York Stock Exchange alone, there are over 500 issuing companies from 46 countries outside of the United States.[28]

This case not only concerns the scope of sovereign power under United States law, but also the relationships between foreign investors, SOEs, and their sovereign home states. SOEs are increasingly relevant in global commerce. A study of 40 countries by the Organization for Economic Cooperation and Development estimated that SOEs worth $2.4 trillion employ over 9.2 million people worldwide.[29] In addition to those figures, China's SOEs alone are valued at $29.2 trillion and employ 20.2 million people.[30] Disputes arising from the

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[28] N.Y. Stock Exch., *Current List of All Non-U.S. Issuers* (Oct. 31, 2018), https://www.nyse.com/publicdocs/nyse/data/CurListofallStocks.pdf.

[29] Org. for Econ. Cooperation and Dev., *The Size and Sectoral Distribution of State-Owned Enterprises* 8 (2017), https://dx.doi.org/10.1787/9789264280663-en.

[30] *Id*.

interactions between investors, SOEs, and sovereigns are thus likely to be recurring and increasingly important in the future.

II. The Second Circuit's decision overlooks a well-established and highly active international system for investor-state dispute settlement (ISDS).

The modern ISDS system is a highly active area of international economic law with a well-established treaty system and institutional framework. Founded after the Second World War, the ISDS system responded to an increasingly complex landscape for international investment. A primary aim of the ISDS system is to provide a neutral, depoliticized forum for the resolution of investment. Both the FSIA (through immunity) and the ISDS system share a similar objective in seeking to avoid potentially disruptive claims against sovereigns from escalating through national court systems into broader conflicts between sovereigns.[31] Consistent with those policy goals, the United States Trade Representative identifies the aim of "resolv[ing] investment conflicts without creating state-to-state conflicts" as a primary goal of ISDS.[32]

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[31] *See* Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 470–72 (2015).

[32] U.S. TRADE REP., *supra* note 7.

A. The ISDS system is intended to address the unique challenges involved in transactions and disputes with sovereigns in the modern international system.

Large scale geopolitical shifts in the twentieth century—particularly the decolonization of Africa and Asia—altered the international landscape as the number of sovereign states in the world increased dramatically.[33] Since the creation of the United Nations in 1945, over eighty former colonies have gained independence.[34] This trend added considerable complexity to the international investment environment and to international governance more broadly.

Responding to these shifts in the global landscape, the ISDS system took shape. A bilateral agreement between Germany and Pakistan in 1959 signaled the beginning of the modern era of investment treaties.[35] Over two decades later, the United States launched a bilateral investment treaty program in 1981.[36] Capital exporting countries were the first in promoting bilateral investment treaties to enhance legal protections for their domestic investors abroad and consolidate

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[33] Dozens of new sovereigns emerged in Africa and Asia between 1945 and 1960. *See* U.S. DEP'T OF STATE, *Decolonization of Asia & Africa, 1945-1960*, https://history.state.gov/milestones/1945-1952/asia-and-africa (last visited Nov. 23, 2018).

[34] U.N., *The United Nations and Decolonization*, http://www.un.org/en/decolonization/history.shtml (last visited Nov. 23, 2018).

[35] Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 17 (2d ed. 2008).

[36] Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373 (1985).

foreign economic relations.[37] However, emerging market countries are increasingly forming treaties with other emerging market sovereigns.

An active promoter of investment protections and participant in the ISDS system, the United States has 45 bilateral investment treaties and 68 treaties with investment provisions worldwide.[38] Although content varies, the essential scope of investment treaties is fairly consistent: reciprocal obligations among sovereigns on the treatment of foreign investments. In addition to substantive investment protections, such as "fair and equitable treatment" for foreign investments, almost all investment treaties provide investors with procedural rights to pursue claims in arbitration.[39]

By channeling disputes towards arbitration and limiting claims to the involved parties, the ISDS system aims to prevent the escalation of investment disputes into diplomatic conflicts, economic sanctions, or military interventions by home states against host

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[37] *See* Salacuse, *supra* note 6, at 433, n. 32.

[38] U.S. DEP'T OF STATE, *Bilateral Investment Treaties and Related Agreements*, https://www.state.gov/e/eb/ifd/bit/ (last visited Nov. 23, 2018) (explaining the benefits of the U.S. bilateral investment treaty program).

[39] Joachim Pohl, et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 10 (OECD Working Papers on International Investment, 2012/02, 2012), https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf (finding that 96 percent of treaties in a sample of 1,660 IIAs contained ISDS provisions).

states.[40] Though admittedly imperfect,[41] the ISDS system responds to political and diplomatic risks associated with litigating investment claims against one sovereign in the courts of another sovereign.[42]

B. The ISDS system offers a highly active and comprehensive framework for resolving investment disputes related to expropriation and other sovereign acts.

Investment treaties represent one of the most active areas of international law in the last fifty years, but most of that growth has occurred since 1990. As foreign direct investment flows surged worldwide—essentially quadrupling between 1990 and 2000—international investment law has also boomed.[43] Only 500 international investment treaties had been signed as of 1990.[44] Currently, over 3,300 investment treaties

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[40] *See* Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 53 (2009) (referencing statements by the World Bank's general counsel).

[41] Indeed, criticisms aimed at the ISDS system by various sovereigns have prompted reform initiatives. *See*, *e.g.*, U.N. Comm'n on Int'l Trade Law, Rep. of the Working Grp. on Investor-State Disp. Settlement Reform on the Work of its Thirty-Fifth Session, U.N. Doc. A/CN.9/935 (2018).

[42] Other forums for expropriation claims also exist beyond ISDS. Many countries' expropriation laws provide avenues for redress in domestic courts, including for claims of indirect expropriation.

[43] *See* Dolzer & Schreuer, *supra* note 35, at 1.

[44] UNCTAD, *International Investment Agreements Navigator*, http://investmentpolicyhub.unctad.org/IIA (last visited Nov. 23, 2018).

have been signed; almost 2,700 of those are already in force.[45] Treaties are now the leading source of international law on foreign investment.[46]

Investor-state disputes have followed a similar growth trajectory.[47] Prior to 1990, ISDS activity was virtually nonexistent. As of 2018, there are over nine hundred ISDS cases.[48] Annual ISDS case volumes steadily increased as well. Between 2006 and 2015, there were approximately 49 cases per year in the ISDS system.[49] Volumes in recent years have edged even higher: 82 in 2015, 75 in 2016, and 72 in 2017.[50] Global flows of foreign direct investment slipped by 16 percent from 2016, but still added up to approximately

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[45] *Id*.

[46] *See* Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 LAW & BUS. REV. AM. 155 (2007).

[47] *See* Rachel L. Wellhausen, *Recent Trends in Investor–State Dispute Settlement*, 7 J. INT'L DISP. SETTLEMENT 117 (2016); *see also* Frédéric G. Sourgens, *Supernational Law*, 50 VAND. J. TRANSNAT'L L. 155, 157 (2017) (observing that the aggregate claims, at $595.5 billion, in pending ISDS claims exceeds half a trillion dollars).

[48] Tim R Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. __ (forthcoming 2019).

[49] UNCTAD, *World Investment Report: Key Messages and Overview* 23 (2017), https://unctad.org/en/PublicationsLibrary/wir2017_overview_en.pdf.

[50] *See* UNCTAD, *Investment Dispute Settlement Navigator*, https://investmentpolicyhub.unctad.org/ISDS (last visited Nov. 28, 2018).

$1.52 trillion in 2017.[51] Accordingly, it is likely that investor-state disputes arising out of sovereign acts like expropriations and regulatory measures will persist.

Forums are also abundant. In concert with the emergence of investment treaties, the International Center for the Settlement of Investment Disputes was established in 1966 as a forum specifically for the arbitration of investment disputes with sovereigns.[52] Arbitrations are also routinely held in *ad hoc* tribunals organized under United Nations Commission on International Trade Law Arbitration Rules and, to a lesser extent, at the Stockholm Chamber of Commerce, the London Court of International Arbitration, and the Permanent Court of Arbitration.[53]

Investors have recovered tens of billions of dollars in damages through ISDS. A study of 20 highly active countries in ISDS found that investor claimants won over $80 billion in awards through 447 cases against countries in the sample.[54] The ISDS system and its arbitral forums provide adequate and effective channels for investors to pursue claims against sovereigns. Furthermore, the ISDS system offers neutral forums for

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[51] UNCTAD, *Investment Trends Monitor: Global FDI Flows Slipped Further in 2017* 1 (Jan. 2018), http://unctad.org/en/PublicationsLibrary/diaeia2018d1_en.pdf.

[52] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[53] *See* Wellhausen, *supra* note 47, at 4–5.

[54] Those figures are acknowledged as significant underestimates. *See* Samples, *supra* note 48.

investment disputes without opening the flood gates to United States courts that would be forced to intrude into the decisions of sovereigns and walk a tightrope of foreign affairs issues and international comity.

CONCLUSION

For these reasons, *amici curiae* scholars support granting certiorari.

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