No. _____

IN THE

Supreme Court of the United States

AENERGY, S.A., AND
COMBINED CYCLE POWER PLANT SOYO, S.A.
Petitioners,

v.

REPUBLIC OF ANGOLA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, sets forth exceptions to foreign sovereign immunity, pursuant to which litigants may bring civil claims against foreign states. Where an exception to immunity applies, the FSIA instructs that federal courts "shall" exercise jurisdiction and foreign states "shall be" liable to the same extent as private persons.

As Justice Scalia explained for the Court in *Republic of Argentina* v. *Weltover, Inc.*, "the FSIA permits a foreign plaintiff to sue a foreign sovereign in the courts of the United States." 504 U.S. 607, 619 (1992) (quotation marks omitted). Congress instructed courts to exercise jurisdiction over such cases even though evidence and witnesses will necessarily be located abroad. Yet some courts, like the Second Circuit below, invoke just such factors to dismiss FSIA suits on the ground of *forum non conveniens*. Such rulings improperly substitute a judge's case-by-case view of whether to abstain for the FSIA's careful scheme governing when federal courts "shall" exercise jurisdiction over suits against foreign sovereigns.

The question presented is:

Whether, in suits against foreign sovereign defendants under the FSIA, courts may dismiss on *forum non conveniens* grounds when a statutory exception to sovereign immunity applies and, if they may, whether the doctrine of *forum non conveniens* is governed by a different standard in such cases.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Aenergy, S.A., and Combined Cycle Power Plant Soyo, S.A. are companies organized under the laws of the Republic of Angola. Both Petitioners were plaintiffs in the district court and the appellants below. Petitioner Aenergy has no parent corporation, and no publicly held company owns 10% or more of its stock. Aenergy, S.A. wholly owns Petitioner Combined Cycle Power Plant Soyo, S.A.

Respondent the Republic of Angola is a foreign sovereign state. Respondents the Ministry of Energy and Water of the Republic of Angola ("MINEA") and the Ministry of Finance of the Republic of Angola ("MINFIN") are both political subdivisions of Angola. Respondents Empresa Pública de Produção de Electricidade, EP ("PRODEL") and Empresa Nacional de Distribuição de Electricidade ("ENDE") are both state-owned entities incorporated in the Republic of Angola and are wholly owned by Angola. Each of these Respondents was a defendant in the district court and an appellee below.

Respondent General Electric Company has no parent corporation, and no publicly held company owns 10% or more of its stock. Respondents General Electric International, Inc. and GE Capital EFS Financing, Inc. are wholly owned by Respondent General Electric Company. Each of these Respondents was a defendant in the district court and an appellee below.

RELATED PROCEEDINGS

In the U.S. Court of Appeals for the Second Circuit:

- *Aenergy, S.A.* v. *Republic of Angola*, Nos. 21-1510(L); 21-1752(Con) (2d Cir., judgment entered April 13, 2022) (reported at 31 F.4th 119).

In the U.S. District Court for the Southern District of New York:

- *Aenergy, S.A.* v. *Republic of Angola*, No. 1:20-cv-3569 (JPC) (S.D.N.Y.) (judgment entered May 19, 2021) (unreported, available at 2021 WL 1998725).

In the U.S. District Court for the District of Columbia:

- *Aenergy, S.A.* v. *Republic of Angola, et al.*, No. 1:22-cv-2514 (D.D.C.) (TNM).

In the U.S. District Court for the District of Connecticut:

- *Aenergy, S.A.* v. *GE Capital EFS Financing, Inc.*, No. 3:22-cv-1054 (JAM) (D. Conn.);
- *Aenergy, S.A.* v. *General Electric International, Inc.*, No. 3:22-cv-1055 (JAM) (D. Conn.).

In the Supreme Court of the State of New York, County of New York (Commercial Division):

- *Aenergy, S.A. et al.* v. *General Electric Co.*, Index No. 653025/2022 (N.Y. Sup. Ct.).

TABLE OF CONTENTS

TABLE OF APPENDICES

Page(s)

Appendix

TABLE OF AUTHORITIES

Page(s)

Cases

Cases—continued

Cases—continued

U.S. Statutes

Legislative Materials

Other Authorities

Other Authorities—continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Second Circuit is reported at 31 F.4th 119 and reproduced at Appendix ("App.") 1a-27a. The decision of the U.S. District Court for the Southern District of New York is available at 2021 WL 1998725 and reproduced at App. 28a-82a.

JURISDICTION

The Second Circuit filed its published decision on April 13, 2022. App. 1a. That court denied Petitioners' request for rehearing *en banc* on June 16, 2022. App. 83a-84a. On Petitioners' application, and by order of July 26, 2022, the Court extended the time within which to file a petition for a writ of certiorari to November 14, 2022. This petition is thus timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case implicates the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, *et seq*. The Appendix, at App. 85a-92a, reproduces relevant portions of the Act.

STATEMENT OF THE CASE

This case presents questions affecting the foreign relations of the United States and arising at the intersection of two doctrines. The first is the doctrine of foreign sovereign immunity, which is governed by the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602, *et seq*. The second is the doctrine of *forum non conveniens*, the judge-made rule under which a court may dismiss or stay a case if there is a substantially more appropriate or convenient foreign forum for a dispute. Given their importance to the foreign relations of the United States and the separation of powers, the Court should grant the petition for a writ of certiorari.

I. Legal Background

A. Enacted in 1976, the FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). As the Court has observed on multiple occasions, "[t]he key word there . . . is comprehensive." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 141 (2014).

Prior to the FSIA's enactment, questions of foreign sovereign immunity in U.S. courts were subject to an "old executive-driven, factor-intensive, loosely common-law-based immunity regime." *Ibid.* Congress replaced that old and uncertain regime with a set of uniform and predictable legal rules setting forth conditions under which foreign states would be subject

to the adjudication of civil actions brought against them in U.S. courts.

Under the FSIA, a "foreign state," as defined in § 1603(a), is presumptively entitled to immunity and cannot be subjected to the jurisdiction of federal or state courts in the United States. *See Fed. Republic of Germany* v. *Philipp*, 141 S. Ct. 703, 709 (2021); *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Intern. Drilling Co.*, 137 S. Ct. 1312, 1318 (2017).

Congress made the presumption of immunity subject to significant exceptions. *See* 28 U.S.C. §§ 1605(a), 1605A, 1605B. The FSIA provides that if one of the statutory exceptions to sovereign immunity is met, courts "shall" have both personal jurisdiction and subject-matter jurisdiction over that foreign state. 28 U.S.C. § 1330. As the Court recently observed, "[t]he result is to spell out, as a matter of federal law, the suits against foreign sovereigns that American courts do, and do not, have power to decide." *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022). In these circumstances, a foreign state "shall be liable" "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

B. "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when its jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507 (1947). First em-

braced by this Court in *Gilbert*, *forum non conveniens* ("FNC") proceeds from the premise that, "[i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 722 (1996). Although it was originally applied to purely domestic disputes, the doctrine has been applied more broadly over time and is now invoked in international cases. *E.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981); *see also Sinochem Intern. Co. Ltd.* v. *Malaysia Int'l Ship. Corp.*, 549 U.S. 422, 425 (2007).

Following the Court's decisions in *Gilbert* and *Piper*, lower courts—when not prevented from doing so due to an act of Congress—may exercise their discretion to dismiss civil actions on FNC grounds on the basis of three primary considerations. Those considerations are: (1) the deference owed to a plaintiff's choice of forum; (2) the existence of an "adequate alternative forum;" and (3) the balance of the public and private interest factors, articulated in *Gilbert*. *See generally* 14D Wright & Miller, Fed. Prac. & Proc. Juris. § 3828 (4th ed.); *e.g.*, *Wilson* v. *Island Seas Investments, Ltd.*, 590 F.3d 1264, 1269 (11th Cir. 2009); *Iragorri* v. *United Techs. Corp.*, 274 F.3d 65, 70-75 (2d Cir. 2001) (en banc).

II. Factual Background

Petitioners are Portuguese-owned energy companies that have their principal places of business in Portugal but are incorporated in the Republic of Angola. Today, Petitioners have no presence outside of

Portugal, but until late 2019 they had worked extensively with Respondents, New-York-based General Electric Co. ("GE") and the Republic of Angola, to sell, install, and maintain power plants using GE gas turbines. This case arose primarily from disputes regarding a set of contracts financed by a $1 billion credit facility provided to the Angolan government by Respondent GE Capital EFS Financing, Inc. ("GE Capital"), a U.S.-based GE subsidiary. Under the credit facility, payments were directed from the United States to various entities—including Petitioners and U.S.-based entities involved in the business arrangement.

In August 2019, the president of Angola issued a decree permitting the termination of Petitioners' contracts and declaring state ownership of turbines worth more than $100 million that were in fact owned by Petitioner Aenergy, S.A. To support its property seizure and breaches of contract, Angola invoked false claims made by GE—to wit, GE's false contentions that Aenergy had committed "irregularities" in connection with an approximately $650 million disbursement from GE Capital's U.S. accounts to GE accounts in the U.S. and elsewhere.

Following the termination of their contracts and Angola's expropriation of Petitioners' property without compensation, Petitioners sought to exhaust remedies in Angola's courts by (1) pursuing an ultimately fruitless administrative appeal—which might have led to reinstatement of Aenergy's contracts—and then (2) bringing a similarly fruitless adminis-

trative case in court. In May 2020, months after unexplained defaults by Angola on certain mandatory statutory deadlines (that went ignored by both Angola's executive branch and its courts)—and as a limitations period for Petitioners to seek damages from Angola drew near—Petitioners sued Respondents in the U.S. District Court for the Southern District of New York.

III. Procedural History

A. The District Court

In their May 2020 complaint, Petitioners sued Respondents for money damages for the first time. They contended that the GE Respondents tortiously procured Angola's wrongdoing by making up claims of "irregularity" to cover up GE's own flagrant misdeeds, and that the Angolan Respondents, *inter alia*, (a) improperly terminated Aenergy's contracts under false pretenses; (b) failed to pay more than $200 million for work performed by Petitioner Aenergy and (c) unlawfully expropriated Petitioners' property in violation of international law. Petitioners explained that, although Angola's witnesses are in that country, Petitioners' witnesses are in Portugal, and the substantial majority of the GE Respondents' witnesses are U.S.-based, with the balance scattered worldwide.

Respondents moved to dismiss Petitioners' complaint on multiple grounds, including on the basis of FNC. On May 19, 2021, the district court dismissed

Petitioners' claims on FNC grounds, while assuming that it possessed jurisdiction over all Respondents (*i.e.*, assuming that one of the FSIA exceptions to immunity applied). The district court held, *inter alia*, that Petitioners' Angolan suit—which was maintained solely because Angola argued Petitioners were required to exhaust remedies—reflected forum-shopping, that a jurisdictional bar on the contract-breach claims in Angola did not render Angolan courts unavailable, and that, although Petitioners' chosen forum of New York was convenient for the GE Respondents, it was inconvenient for unnamed, "presumably" important Angolans. App. 75a n.7.

The predominant point of the district court's analysis, however, was that an Angolan forum had a vastly superior interest in view of the sovereign interests that the district court believed were implicated in the case. App. 49a-58a. The district court proclaimed that "[w]hatever interest New York has in the conduct of GE in Angola is outweighed by the interest of Angola in adjudicating this dispute" because "[a]t the heart of this case are contracts . . . [involving] the Angolan government to provide power to the Angolan people." App. 80a. The court also stated that "[t]he issues here are not simply whether a United States company is liable for damages, but also include, for instance, whether a sovereign state violated international law by seizing Plaintiffs' assets." App. 56a. And the district court repeatedly emphasized that Petitioners "chose to do business in Angola with various Angolan government entities" as a pri-

mary motivation for dismissing Petitioners' suit. App. 51a.

B. The Decision Below

Petitioners appealed the decision of the district court, arguing, *inter alia*, that (1) FNC dismissals are impermissible in FSIA cases given the FSIA's text and purpose, and (2) if an FSIA case may be dismissed on FNC grounds, then the sovereign defendant should be entitled to less deference, because otherwise abstention from statutorily prescribed jurisdiction would be the rule rather than an exception.

On April 13, 2022, a panel of the Court of Appeals for the Second Circuit affirmed the district court's opinion and order by published opinion. App. 27a. Among other things, the court rejected Petitioners' argument that the FSIA does not permit application of FNC. App. 6a-11a. Noting that the Second Circuit "ha[s] not squarely decided" whether FSIA cases may be dismissed for FNC, App. 7a, the decision below held that Petitioners' argument was inconsistent with "the principle" passingly referenced in footnoted dictum in *Verlinden*, which suggested that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*" in FSIA cases. 461 U.S. at 490 n.15*; see* App. 7a & n.13. Not only that—the Circuit held that "*greater weight*" in "lawsuits against foreign states" might be owed to FNC considerations because "it may be inconvenient for a foreign state to retain competent counsel, submit to pre-trial discov-

ery, and produce its officials for trial in U.S. courts." App. 8a (emphasis added).

Applying this standard, the Circuit affirmed the district court's decision and its findings that greater deference should be afforded the sovereign defendants than if they were private persons. Among other things, the decision below, mechanically applying the public-interest factors identified in *Gilbert*, concluded that a "United States jury may have little or no relation to disputes involving a foreign state," App. 8a, even though jury trials are *prohibited* under the FSIA, 28 U.S.C. § 1330(a), and that "there may be a strong interest in resolving claims brought against a foreign state in that state's courts." App. 8a-9a.

Following the Second Circuit's decision, Petitioners filed a petition for rehearing *en banc*. The court of appeals denied that petition. App. 84a.[1]

Petitioners now seek certiorari.

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[1] Cognizant of certain statutes of limitations, Petitioners in August 2022 initiated four new U.S. lawsuits against each of the GE Respondents individually (and without the Angola Respondents), and a lawsuit against the Angola Respondents (but solely for unpaid work by AE). These are identified above as related proceedings. *Cf. Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140 (1988); *Vasquez* v. *Bridgestone/Firestone, Inc.*, 325 F.3d 665, 679 n.24 (5th Cir. 2003) ("Even where a court enters a final f.n.c. dismissal, it may reconsider the issue if there is a change in the material facts underlying the judgment.").

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW DISREGARDED THE FSIA'S MANDATORY JURISDICTIONAL SCHEME, WHICH DOES NOT PERMIT DISMISSALS FOR FNC

The "[Foreign Sovereign Immunities] Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar* v. *Yousuf*, 560 U.S. 305, 313 (2010); *see NML*, 573 U.S. at 141 (the FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States" (quoting *Verlinden*, 461 U.S. at 493)). Under the FSIA's comprehensive and mandatory jurisdictional scheme, courts may not decline to exercise jurisdiction—conferred where a statutory exception to immunity applies—on the grounds of FNC.

The question whether the FSIA, as a mandatory jurisdictional statute, bars dismissals for FNC where a statutory exception to immunity is satisfied has not been thoroughly analyzed by this Court. In passing dictum in a footnote in *Verlinden B.V.* v. *Central Bank of Nigeria*, this Court observed—while considering one specific, narrow FSIA provision—that the FSIA "does not *appear* to affect the traditional doctrine of *forum non conveniens*." 461 U.S. 480, 490 n.15 (1983) (emphasis added). Seizing upon this footnoted dictum, courts of appeals that have considered the issue—including the Second Circuit in the decision below, *see* App. 7a & n.13—hold that the ques-

tion has been resolved by the *Verlinden* footnote, even though the Court in *Verlinden* never purported to determinatively address the issue. *See, e.g., Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002) (citing *Verlinden* footnote); *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 454 (6th Cir. 1988) (same); *see also* Restatement (Fourth) of the Foreign Relations Law of the United States § 461 Reporters' Note 6 (Am. L. Inst. 2018) (collecting cases).

As the Circuits believe themselves (incorrectly) bound by this Court's dictum, the Court's intervention is urgently needed. This case provides an ideal opportunity for the Court to address a critical question affecting the foreign relations of the United States. Congress did not displace "the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA]'s 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state'" so that *courts* could engage in case-by-case balancing of foreign sovereigns' purported inconveniences where the legislative branch itself conferred jurisdiction. *NML*, 573 U.S. at 141 (quoting *Verlinden*, 461 U.S. at 488). To vindicate the political branches' constitutional primacy in the critical sphere of foreign relations, this Court should grant review to determine whether the FSIA permits application of FNC (and, if so, under what standard).

A. The courts of appeals have treated the matter of whether an FSIA case may be dismissed on FNC grounds as settled by this Court's decision in *Verlinden*. That case, however, did nothing of the sort, and the passing reference in a footnote is at best dictum applicable to a narrow circumstance. The issue of whether the FSIA bars application of FNC is thus fully ripe for this Court's consideration.

Verlinden concerned the question whether a foreign plaintiff could bring suit against a sovereign defendant under the FSIA. The Court held that Congress had identified the classes of cases that could be bought in U.S. courts. Specifically, Congress set forth the categories of conduct exempt from immunity and the territorial nexus to the United States justifying U.S.-court adjudication.

In a footnote specifically addressing the question "whether, by waiving its immunity [under § 1605(a)(1)], a foreign state could consent to suit based on activities *wholly unrelated to the United States*," the *Verlinden* Court noted that "[t]he Act does not appear to affect the traditional doctrine of *forum non conveniens*." 461 U.S. at 490 n.15 (emphasis added). This Court called § 1605(a)(1) "an exception to the normal pattern of the Act, which generally requires some form of contact with the United States." *Ibid.* Thus, at most, that dictum contemplates the deployment of FNC as a backstop to an FSIA case with no territorial connection to the United States in which jurisdiction is predicated on implicit waiver of immunity under § 1605(a)(1).

In short, the Court hypothesized that in a case predicated on entirely extraterritorial conduct *and* a theory of impliedly waived immunity, FNC *might* have a continuing role to play. That statement—a passing observation on a hypothetical scenario—cannot be properly read to mean that FNC can and should be applied across *all* classes of FSIA cases.

B. Properly considered, the text of the FSIA and this Court's more recent precedents confirm that the judge-made doctrine of FNC must inevitably yield to the statute's prescribed scheme for federal-court jurisdiction.

1. As noted above, although courts historically decided case-by-case whether to grant foreign sovereigns immunity from suit, "Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA]'s 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *NML*, 573 U.S. at 141 (quoting *Verlinden*, 461 U.S. at 488). Said otherwise, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 141-42. The FSIA's "comprehensive jurisdictional scheme" reflects a key congressional purpose—"uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." FSIA House Report, H.R. Rep. 94-1487, at 12-13 (1976).

Thus, the FSIA in no way authorizes courts to engage in case-by-case abstention based upon a judicial finding of inconvenience or relative burdens predicated on sovereign interests. The Act prescribes a set of rules that, if met, *require* personal and subject-matter jurisdiction. 28 U.S.C. § 1330. If jurisdiction is proper, the statute states, foreign states "shall be" liable to the same extent as a private person. 28 U.S.C. § 1606; *Cassirer*, 142 S. Ct. at 1508 (Section 1606 "ensures that a foreign state, if found ineligible for immunity, must answer for its conduct just as any other actor would.").

The FSIA allows no express, or even implied, license to abstain from proceeding to the merits if an immunity exception is met. The opposite is true. Indeed, as *NML* makes clear, the FSIA is a mandatory jurisdictional statute. As such, it bars courts from dismissing otherwise jurisdictionally valid cases for FNC. *See Daliberti* v. *Republic of Iraq*, 97 F. Supp. 2d 38, 54 n.7 (D.D.C. 2000) ("Congress has explicitly authorized this [FSIA] action, and in doing so has already balanced the interests of the United States in hearing such a suit in the federal courts of this country against the interests of Iraq in not being forced to defend here. It would be inappropriate for this Court to second-guess Congress and apply its own balancing test where none is called for by the statute or manifest principles of constitutional law.").

The court below assumed FNC was presumptively available as a common-law rule subject to legislative override (which it deemed absent in the FSIA), but in

fact the reverse is true. When this Court first recognized FNC in a case for damages in 1947, reading into the general venue statute a supervening rule permitting discretionary dismissals, it recognized that FNC had no application when damages cases are brought under a *specific* venue provision, because then there is no basis to imply a discretionary carve-out. *Gilbert*, 303 U.S. at 505. On the same day that *Gilbert* was decided, the Court reaffirmed that "administration of the federal courts in the discharge of their own judicial duties" is "subject of course to the control of Congress." *Koster* v. *(Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 520 n.1 (1947). The courts below thus should have looked for statutory authorization to abstain. There is none.

2. Permitting FNC dismissals in FSIA cases violates this Court's instruction in *NML* that Congress crafted a "comprehensive set of legal standards" governing immunities and jurisdiction, and that courts may not graft extra-statutory exceptions. In other words, Congress decided how best to balance the interests of plaintiffs and sovereigns, and when courts should exercise jurisdiction. *See Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003). Exercising their undoubted authority over foreign relations, Congress (and the President when he signed the FSIA) identified the categories of cases—expressly including cases involving foreign plaintiffs, foreign defendants, and foreign conduct—that they decided *are* subject to mandatory federal-court jurisdiction. That identification precludes judicial balancing; Congress "forced [courts'] retirement from the immunity-by-factor-

balancing business" because of the foreign-affairs interest in uniform rules. *NML*, 573 U.S. at 146. Permitting the Judiciary to exercise discretionary abstention based upon a court's view of the case's "foreignness," as the FNC analysis calls for, is irreconcilable with the FSIA's mandatory jurisdictional scheme.

Indeed, no better demonstration of that irreconcilability is that courts apply FNC in the name of "convenience," despite the FSIA occupying the *very same field*; Congress enacted the immunity rules precisely to give states what it deemed appropriate "protection from the inconvenience of suit." *Dole*, 538 U.S. at 479.

3. Permitting judicial abstention on a case-by-case basis further violates the federal interest in having a uniform set of legal rules govern the circumstances in which a foreign sovereign may be sued. The unique federal interest in that uniformity and predictability is paramount, so that the Executive can point to the comprehensive set of legal rules as a justification for why one suit against one sovereign proceeds while the next one does not. That interest is completely undermined by a common-law standard permitting individual judges to evaluate for themselves whether the interests of the sovereign defendant are paramount.

4. Permitting FNC dismissals also contravenes federal courts' virtually unflagging obligation to exercise jurisdiction. *See Quackenbush*, 517 U.S. 706 at

716 (with few exceptions, "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress").

Under standard FNC analysis, consider that *Piper* places an interpretive thumb on the scale by noting that "a foreign plaintiff's choice [of forum] deserves less deference," 454 U.S. at 256, and that the *Gilbert* factors will always (or nearly always) point toward dismissal in cases under the FSIA immunity exceptions cited here—those statutory exceptions apply only to foreign-squared or foreign-cubed cases, because they cover only cases against (a) a foreign defendant (the foreign state), based upon (b) foreign conduct (usually commercial or expropriatory conduct violating international law).

The *Gilbert* factors, as refined in *Piper*—which assess whether there are witnesses and evidence abroad, whether witnesses speak a foreign language, whether there may be translation issues, whether foreign law is implicated, and whether there are localized interests in having a dispute heard elsewhere—are in play in all FSIA cases. Consider further that, by some accounts, federal courts grant nearly *half* of FNC motions that are filed, despite the Court's instruction that it be used "rarely." *Gilbert*, 330 U.S. at 508. *See, e.g.*, Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 Va. J. Int'l L. 157, 169 (2012) (finding motions to dismiss for *forum non conveniens* were granted in 48% of reported federal cases between 2007 and 2012); Christopher A. Why-

tock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481, 510, 515-16 (2011) (estimating a 47% dismissal rate in published federal FNC decisions between 1990 and 2005).

It cannot be that when Congress crafted a set of immunity exceptions mandating jurisdiction for specific foreign-conduct-and-foreign-defendant cases as part of a "comprehensive" legislative scheme (per *NML*), Congress impliedly permitted district courts—in their own discretion—to decline jurisdiction in a substantial number of cases falling within the FSIA's sweep. *Cf. Smith* v. *United States*, 507 U.S. 197, 203 (1993) ("Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other." (internal quotation marks omitted)).

In other words, if Congress had sought to direct the courts to exercise broad discretion in any given FSIA case to determine the level of deference owed the plaintiff, assess the adequacy of an alternative forum, and balance the *Gilbert* factors, it assuredly would have said so. The federal courts, and their jurisdiction, are creatures of statute, and, as noted, courts have the obligation to exercise jurisdiction granted to them save in the rarest cases. *See Sprint Comm'cns, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013) ("Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" (quoting *Colo. Water River Conservation Dist.* v. *United States*, 424 U.S. 800,

817 (1976))). Courts have no valid basis to interpolate common-law abstention rules that violate specific and comprehensive statutory text—particularly when the application of those rules would, on their face, permit abstention in the mine-run of cases filed under the FSIA.

C. Although the courts of appeals have treated the applicability of FNC in FSIA cases as settled because of *Verlinden*'s footnoted dictum, the Circuits have divided on whether international comity abstention may be raised as an extratextual defense. *Compare Philipp* v. *Fed. Republic of Germany*, 894 F.3d 406, 415-16 (D.C. Cir. 2018) (rejecting comity abstention); *and Simon* v. *Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (same), *with Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir. 2015) (embracing comity abstention as a defense); *and Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 679-84 (7th Cir. 2012) (same). There is currently another petition for certiorari raising that split. *See Museum of Fine Arts* v. *De Csepel*, No. 22-243 (U.S. filed Sept. 7, 2022), 2022 WL 4287603.

Just as the Court should resolve whether the FSIA's text permits extratextual comity abstention, certiorari is warranted to determine whether the FSIA permits extratextual abstention based on FNC. It is no accident that both defenses were raised below in this action: they have both arisen as reliable tools for weakening a mandatory jurisdictional statute into a non-dispositive multi-factor balancing test whose

result is only reviewable for the district court's abuse of discretion.

II. IF THE FSIA PERMITS FNC DISMISSALS, THE COURT SHOULD RESOLVE A DIVISION AMONG THE CIRCUITS ON THE PROPER APPLICATION OF FNC IN FSIA CASES

As discussed, the Court should grant review to determine whether the FSIA permits FNC dismissals at all. If the Court determines the FSIA does permit dismissals for FNC, the Court's guidance is needed on the proper standard governing the application of FNC in FSIA cases. The Court's review is needed in particular because there is a split among the two most important courts of appeals in the FSIA context—the D.C. Circuit and the Second Circuit—as to what FNC standard applies to lawsuits against foreign sovereigns.

The D.C. Circuit—which is denominated by statute a proper venue for litigating disputes against all foreign states, 28 U.S.C. § 1391(f)—has held that foreign states not protected by immunity should be treated like private persons, and are therefore not entitled to any greater protection than a private-party defendant. By contrast, the Second Circuit's decision below allows for "*greater weight*" to be given to the inconveniences of suit here for a foreign sovereign requesting FNC dismissal.

The result is that suits against foreign sovereigns are subject to disparate standards in the two leading Circuits in which such suits are adjudicated. The Court should not abide a split in such a sensitive area of law implicating core foreign relations concerns.

A. The D.C. Circuit Holds That A Sovereign's Interest In Resolving Disputes Internally Has No Role In The FNC Analysis

In *Philipp* v. *Federal Republic of Germany*, heirs of German-Jewish art dealers brought an action against Germany and its state-owned instrumentality in the U.S. District Court for the District of Columbia, alleging common-law violations of their property rights to a collection of medieval relics subjected to forced sale by the Nazi regime in 1935. 248 F. Supp. 3d 59 (D.D.C. 2017), *aff'd*, 894 F.3d 406 (D.C. Cir. 2018), *vacated on other grounds and remanded*, 141 S. Ct. 703 (2021).

The sovereign defendants moved to dismiss the *Philipp* plaintiffs' complaint, claiming that Germany was immune from suit under the FSIA, that the claims brought against Germany were preempted, and—as relevant here—that the federal court should decline to exercise jurisdiction under the FSIA as a matter of "international comity" unless the plaintiffs first exhausted all of their remedies in Germany it-

self.[2] The district court rejected Germany's arguments.

On appeal, the D.C. Circuit affirmed and, in discussing the impropriety of an international comity abstention defense, clarified that district courts within that circuit charged with deciding motions to dismiss on FNC grounds cannot consider a sovereign defendant's interest in resolving disputes against it within that sovereign's own courts.

Relying on FSIA § 1606, which provides that a foreign state which is not entitled to immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances," the D.C. Circuit in *Philipp* held that the FSIA "forecloses th[e] possibility" that foreign states subject to suit in the United States can raise common-law defenses beyond those available to private-party defendants. 894 F.3d at 415-16.

Rejecting the notion that the sovereign interests of a foreign-state defendant permit sovereigns to invoke international comity abstention as a basis for dismissing FSIA cases, the D.C. Circuit held that foreign states sued under the FSIA may raise only those defenses "that are equally available" to private parties who are sued in U.S. courts. Relying on

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[2] *See generally* Maggie Gardner, *Abstention at the Border*, 105 Va. L. Rev. 63, 93-95 (2019). As discussed above, the question of international comity abstention is the subject of a separate petition for a writ of certiorari that is currently before the Court. *See Museum of Fine Arts* v. *de Csepel*, No. 22-243 (U.S. filed Sept. 7, 2022), 2022 WL 4287603.

§ 1606, the D.C. Circuit concluded that defenses such as FNC *can* be invoked by a foreign-sovereign defendant because that defense can be raised by a private person, but opined that "[o]bviously a 'private individual' cannot invoke a '*sovereign's* right to resolve disputes against it." 894 F.3d at 474 (emphasis in original).

Not long after *Philipp*, in *Simon* v. *Republic of Hungary* the D.C. Circuit rejected a sovereign's argument that it could assert, as a basis for the court to decline jurisdiction, the "foreign sovereign's interest in resolving disputes internally." 911 F.3d 1172, 1188 (D.C. Cir. 2018), *vacated and remanded on other grounds*, 141 S. Ct. 691 (2021). That argument, the Circuit held, had no place in the FNC analysis. *See ibid.* (noting that cases cited by Hungary "do not speak to whether a court should, on *forum non conveniens* grounds, refuse to exercise jurisdiction that does exist").

In short, the D.C. Circuit has made pellucid that § 1606 precludes applying anything but standard-issue FNC doctrine to lawsuits against foreign sovereigns—*i.e.*, the fact that a defendant is a sovereign country has no bearing on the FNC analysis (assuming the doctrine applies in FSIA cases).

B. The Second Circuit's "Greater Weight" Approach

In the decision below, the Second Circuit split with the D.C. Circuit's approach. *See* William

S. Dodge, *Second Circuit Holds that Forum Non Conveniens Applies Under the FSIA*, www.tlblog.org/second-circuit-holds-that-forum-non-conveniens-applies-under-the-fsia (April 25, 2022) (noting the tension between the decision below, on the one hand, and the D.C. Circuit's approach and § 1606, on the other).

Rather than adhering to § 1606's mandate that the Angolan Respondents be treated as private individuals for FNC purposes, the Second Circuit instructed that FNC may apply with "*greater weight*" to suits against foreign states, and affirmed the district court's view that the invocation of FNC was weightier in this sovereign-defendant case. App. 8a.

Specifically, the Second Circuit found that motions to dismiss on FNC grounds should be viewed more favorably when brought by foreign sovereigns because the sovereign might have "a strong interest in resolving claims brought against [them] in that state's courts, particularly when the allegations relate to the state's domestic conduct." App. 8a-9a. And, in the decision below, the Circuit found that the district court properly found that Angola's sovereign interests were paramount. App. 26a (deferring to Angola's "significantly stronger interest in addressing disputes related to its government contracts").

These holdings are in direct conflict with the approach taken by the D.C. Circuit. *See Philipp*, 894 F.3d at 416 ("By its terms, [FSIA § 1606] permits only defenses, such as forum non conveniens, that

are equally available to 'private individual[s] . . . . Obviously a private individual cannot invoke a *sovereign's* right to resolve disputes against it."). The Court's intervention is urgently needed to provide guidance to the lower courts and resolve the apparent disparity in the treatment of suits against foreign sovereigns in the D.C. and Second Circuits.

III. THE QUESTION PRESENTED IS IMPORTANT

Where cases that touch upon foreign relations are concerned, it is particularly critical for the judicial branch to speak with one voice—the voice of this Court—not only to promote uniformity of federal law, but also to parallel the finality of decision-making exercised by the political branches in this area. The FSIA undoubtedly implicates key issues regarding U.S. foreign relations. *Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."). This is a strong justification for granting certiorari. *E.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 681 (2004); *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) ("Because the Second Circuit's decision conflicts with those of other Circuits . . . and implicates serious issues of foreign relations, we granted certiorari."); *see also Monasky* v. *Taglieri*, 140 S. Ct. 719, 725 (2020) (granting certiorari to clarify "an important question of federal and international law").

Even slight diversions between Circuits are likely to have a magnified effect when those decisions touch on foreign relations. The concept of percolation among the Circuits as a beneficial prerequisite to certiorari, while undoubtedly useful in areas of domestic concern, only hinders the ability of the United States to maintain a uniform and predictable voice in the conduct of its relations with foreign sovereigns. The FSIA was intended to cut through the unpredictable, case-by-case executive discretion that plagued the field of foreign sovereign immunity prior to its passage. Whether courts have the institutional or legal competence to continue exercising that long-abandoned discretion in the guise of the FNC doctrine is an exceedingly important question that warrants this Court's review. What is more, only this Court can cut through the confusion that has governed the courts of appeals' approach to the issues raised in this petition, given how the lower courts have viewed this Court's dictum in *Verlinden*.

Separation-of-powers concerns also favor this Court granting review. As a matter of federal common law, the FNC doctrine "is 'subject to the paramount authority of Congress.'" *City of Milwaukee* v. *Illinois and Michigan*, 451 U.S. 304, 313 (1981) (citation omitted). Recent decisions of this Court demonstrate a clear commitment to reaffirming the supremacy of legislative text vis-à-vis judicially crafted exceptions to, or extensions of, the plain language of a statute. *See, e.g., Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (abrogating the judge-made "wholly groundless" exception to the

Federal Arbitration Act); *Ross* v. *Blake*, 578 U.S. 632 (2016) (abrogating judge-made "special circumstances" exception to the statutory exhaustion requirements of the Prison Litigation Reform Act).

Thus, this Court has not hesitated to review decisions touching on constitutional separation-of-powers, even when there is no clear conflict among the circuits. *See, e.g.*, *Bank Markazi* v. *Peterson*, 578 U.S. 212 (2016) (addressing an act of Congress that applied to a single pending district court action concerning Iranian state-sponsored terrorism); *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Cheney* v. *U.S. Dist. Court*, 542 U.S. 367 (2004). Indeed, as *Bank Markazi* demonstrates, given the primacy of the political branches in conducting foreign affairs, the Court's interest in settling separation-of-powers questions is at its zenith when foreign relations are at issue.

The question presented is also important because lower courts' current application of FNC in lawsuits against foreign sovereigns puts the United States at a disadvantage when it is sued in other countries' courts. When it is sued in foreign courts, the United States almost certainly cannot hope to obtain dismissal on FNC grounds, as the doctrine of *forum non conveniens* is generally not available in most countries. *See, e.g.*, Case No. C-281/02, *Owusu* v. *Jackson*, 2005 E.C.R. I-01383 (ECJ 2005) (holding that E.U. law forbids FNC dismissals in cases involving private parties, even if there are adequate alternative forums available outside the European Union). There-

fore, the Court should grant the petition to resolve questions that potentially put the United States at a disadvantage compared to other countries.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR ADDRESSING THE QUESTION PRESENTED

The question presented is squarely implicated here, and there are no jurisdictional or procedural issues that bar the Court's review.

First, the Second Circuit issued a published decision, directly addressing the question presented, and leaving no doubt that the decision below will control in all FSIA cases within that Circuit.

Second, the decision below is not bound by its facts. It unmistakably holds as a matter of law that FNC dismissals are proper in FSIA cases and, indeed, that in FSIA cases a foreign state may even be *more* entitled to FNC dismissal than a private person—and indeed was in the decision below.

Finally, there is no reason to wait for the circuit split between the Second Circuit and D.C. Circuit to develop further. Venue over foreign sovereigns is always proper in the U.S. District Court for the District of Columbia, 28 U.S.C. § 1391(f), making that forum the primary venue for FSIA disputes. Given New York's status as a global center for finance and culture, the Second Circuit carries almost the same importance as a legal forum for foreign sovereign disputes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 14, 2022

APPENDIX

APPENDIX A — OPINION, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, *AENERGY, S.A. V. REPUBLIC OF ANGOLA*, NOS. 21-1510(L); 21-1752(CON) (APRIL 13, 2022)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

AUGUST TERM 2021
No. 21-1510-cv (L)
21-1752 (Con)

AENERGY, S.A., COMBINED CYCLE POWER PLANT SOYO, S.A.,

Plaintiffs-Appellants,

v.

REPUBLIC OF ANGOLA, MINISTRY OF ENERGY AND WATER OF THE REPUBLIC OF ANGOLA, MINISTRY OF FINANCE OF THE REPUBLIC OF ANGOLA, EMPRESA PÚBLICA DE PRODUÇÃO DE ELECTRICIDADE, EP, EMPRESA NACIONAL DE DISTRIBUIÇÃO DE ELECTRICIDADE, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC INTERNATIONAL, INC., GE CAPITAL EFS FINANCING, INC.,

Defendants-Appellees.

Before: CABRANES, LYNCH, and NARDINI, *Circuit Judges.*

Appendix A

February 1, 2022, Argued
April 13, 2022, Decided

OPINION

José A. Cabranes, *Circuit Judge*:

Plaintiffs Aenergy, S.A., and Combined Cycle Power Plant Soyo, S.A. (together, "AE"), sue various Angolan Government entities (together, "Angola"), plus General Electric Co. and related entities (together, "GE"). AE alleges that Angola wrongfully cancelled AE's Angolan power plant contracts and seized its related property in violation of state and international law. It further alleges that GE interfered with its contracts and prospective business relations in violation of state law. This case presents two questions. The first is whether standard principles of *forum non conveniens* apply to AE's lawsuit brought pursuant to exceptions to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605.[1] We hold that they do. The second is whether the United States District Court for the Southern District of New York (John P. Cronan, *Judge*) abused its discretion in dismissing AE's Complaint on *forum non conveniens* grounds. We hold that it did not. Accordingly, we **AFFIRM** the orders of the District Court.

I. BACKGROUND

"The factual recitation here, while primarily taken from the complaint, is supplemented with information

1. *See infra* note 8.

from affidavits."[2] AE is an Angolan energy company owned by a Portuguese citizen, Ricardo Machado. Beginning in 2013, AE worked with GE to construct and service electricity-generating facilities in Angola. In August 2017, Angola[3] awarded AE thirteen contracts totaling $1.1 billion. To pay, Angola[4] secured a $1.1 billion credit facility from GE's affiliate,[5] of which $644 million was disbursed in December 2017. The contracts required AE to provide power plant services and to sell Angola eight GE-manufactured turbines. Around the same time, AE entered into various service contracts with GE[6] and bought 14 turbines from GE—six more than the eight turbines called for in the contracts with Angola.

GE mistakenly thought that 12 of these turbines would be promptly sold by AE to Angola. As a result, GE overestimated the extent to which the $1.1 billion credit facility issued by its affiliate would be used to pay GE itself—an error with serious accounting consequences. While Angola

2. *Aguas Lenders Recovery Grp. v. Suez, S.A.*, 585 F.3d 696, 697 n.1 (2d Cir. 2009).

3. Specifically its state-owned electricity companies Empresa Pública De Produção De Electricidade, EP ("PRODEL") and Empresa Nacional De Distribuição De Electricidade ("ENDE"), both defendants in this action.

4. Specifically its Ministry of Finance of the Republic of Angola ("MINFIN"), a defendant in this action.

5. Specifically GE Capital EFS Financing, Inc. ("GE Capital"), a defendant in this action.

6. Including with GE International, Inc. ("GE International"), a defendant in this action.

considered AE's proposal on behalf of GE to amend the contracts to include 12 rather than eight turbines, Wilson da Costa—CEO of GE's Angola business—fabricated letters indicating that Angola had already approved the change, which he and Leslie Nelson—the head of GE's sub-Saharan Africa business—distributed to other GE employees. Angola[7] subsequently rejected AE's proposed amendment to the contracts.

Several months later, da Costa presented the forged letters to Angolan officials, and GE subsequently maintained that the $644 million disbursement had in fact paid for 12 turbines, not eight as reflected in Angola's contracts with AE. As a result, on September 2, 2019, Angola—pointing to purported irregularities related to the four disputed turbines—terminated its contracts with AE in favor of contracting with GE directly. AE appealed this decision, and the record indicates that the Supreme Court of Angola has received briefing. On October 4, 2019, Angola initiated a civil suit in Luanda Provincial Court to restrain the four turbines. After holding an *ex parte* injunction hearing, the Luanda Provincial Court preliminarily restrained the turbines. AE alleges that Angola's state-owned electricity companies—not the court-designated custodian—now possess the turbines and have moved them to a power plant facility.

AE filed its Complaint in the District Court on May 7, 2020. AE alleges that Angola—which AE sues under

7. Specifically the Ministry of Energy and Water of the Republic of Angola ("MINEA"), a defendant in this action.

exceptions to the Foreign Sovereign Immunities Act ("FSIA")[8] —breached its contract and took AE's turbines in violation of New York state and international law. AE

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8. The FSIA provides in relevant part that:

> 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;
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .

28 U.S.C. § 1605(a). We assume without deciding that AE's jurisdictional claims are correct. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 432, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) ("A district court . . . may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter . . . jurisdiction . . . .").

further alleges that GE tortiously interfered with AE's contracts and prospective business relations in violation of New York state law. After briefing, oral argument, and post-argument letter briefing, the District Court on May 19, 2021, conditionally dismissed AE's Complaint on *forum non conveniens* grounds, finding that the courts of Angola would be a more "convenient" forum.[9] On June 24, 2021, the District Court removed the conditions, and dismissed the case. AE timely appealed both orders.

II. DISCUSSION

AE argues as to Angola that *forum non conveniens* dismissal is unavailable—or, at least, the standard for dismissal must be higher—where a claim is brought against a foreign state under an exception to the FSIA. AE argues as to GE, and alternatively as to Angola, that the District Court erred or "abused its discretion" in dismissing the Complaint on *forum non conveniens* grounds. We consider and reject each of AE's arguments.

A. Standard *Forum Non Conveniens* Principles Apply to AE's Claims Under the FSIA

AE argues that "[t]he FSIA does not permit application of standard [*forum non conveniens*] doctrine."[10] To

9. *See Aenergy, S.A. v. Republic of Angola*, No. 20-CV-3569, 2021 WL 1998725 (S.D.N.Y. May 19, 2021).

10. Pls.' Br. 20. It is arguable that AE waived this argument below by noting it only in a footnote and "solely for preservation purposes." *See* Pls.' Mem. of Law in Opp'n to Defs.' Mots. to

support its position, AE points out that the FSIA is designed to give foreign states "some protection from the inconvenience of suit as a gesture of comity."[11] Because Congress has already considered convenience to foreign states, and "the central focus of the *forum non conveniens* inquiry is convenience,"[12] AE argues that applying *forum non conveniens* principles here would upset the careful balance struck by Congress.

We reject AE's argument. Initially, it is inconsistent with the principle articulated by the Supreme Court that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*."[13] While we have not squarely decided the issue after briefing, our holdings have assumed that this principle is an accurate and valid statement of the law. We cited it explicitly in affirming a

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Dismiss at 51 n.50, *Aenergy, S.A. v. Republic of Angola*, No. 20-CV-3569, Dkt. No. 79 (S.D.N.Y. Nov. 2, 2020); *cf. United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) ("[W]e do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." (citation omitted)). We assume without deciding that AE waived this argument, but exercise our discretion to address its merits. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("[T]his court has discretion to consider arguments waived below because our waiver doctrine is entirely prudential.").

11. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003).

12. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

13. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 490 n.15, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983).

conditional dismissal on *forum non conveniens* grounds and noted that "[t]he traditional doctrine of *forum non conveniens* is still applicable in cases arising under the FSIA."[14] And we implicitly assumed its validity in at least two other cases, where we found proper the *forum non conveniens* dismissal of complaints brought under an exception to the FSIA.[15]

This approach is sensible, as the principles underlying the *forum non conveniens* doctrine apply with equal weight—indeed, in some cases perhaps with greater weight—to lawsuits against foreign states. For example, it may be inconvenient for a foreign state to retain competent counsel, submit to pre-trial discovery, and produce its officials for trial in U.S. courts.[16] While a United States jury may have little or no relation to disputes involving a foreign state,[17] there may be a strong interest in resolving

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14. *Blanco v. Banco Indus. de Venez., S.A.*, 997 F.2d 974, 977 (2d Cir. 1993) (italics added) (brackets omitted) (quoting *Proyecfin de Venez., S.A. v. Banco Indus. de Venez., S.A.*, 760 F.2d 390, 394 (2d Cir. 1985)).

15. *See Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 393 (2d Cir. 2011); *In re Arb. between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 501 (2d Cir. 2002).

16. *Cf. Behrens v. Pelletier*, 516 U.S. 299, 308, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996) (indicating in the qualified immunity context that standing trial and participating in pretrial discovery "can be peculiarly disruptive of effective government" (citation omitted)).

17. *See Iragorri v. United Techs. Corp.*, 274 F.3d 65, 74 (2d Cir. 2001) (en banc).

claims brought against a foreign state in that state's courts, particularly when the allegations relate to the state's domestic conduct.[18] And litigation involving foreign states may require applying foreign law.[19] These general principles, while not applicable to every lawsuit involving a foreign sovereign, suggest that the *forum non conveniens* doctrine remains useful in the FSIA context as a "tool that helps prevent this country's judicial system from becoming the courthouse to the world, or an international court of claims."[20]

None of AE's arguments to the contrary are persuasive. *Forum non conveniens* does not require a case-by-case consideration of comity, and therefore is consistent with the FSIA's purpose in establishing a "comprehensive set of legal standards."[21] The fact that the FSIA gave foreign states "some protection from the inconvenience of suit

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18. *Cf. Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993) (finding "a strong local interest in trying [a] case in Australia" because it involved "one of the largest [liquidations] in Australian history and the actions undertaken by the Banks in furtherance of the alleged fraud were carried out in Australia by Australian corporations").

19. *Scot. Air Int'l, Inc. v. Brit. Caledonian Grp., PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996) ("When deciding a *forum non conveniens* motion, a court may properly rely on the difficulties attending the resolution of questions of foreign law.").

20. *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 158 F. Supp. 2d 377, 382 (S.D.N.Y. 2001), *aff'd*, 311 F.3d 488 (2d Cir. 2002).

21. *Republic of Arg. v. NML Cap., Ltd.*, 573 U.S. 134, 141, 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014) (citation omitted).

as a gesture of comity"[22] does not suggest that Congress intended by statute to override the common law principles of *forum non conveniens*,[23] as the doctrine counsels a broader inquiry into a venue's convenience for all parties and the public.[24] Nor does applying traditional *forum non conveniens* principles necessarily allow foreign sovereigns to "avoid accountability even where Congress dictated otherwise,"[25] as the availability of an adequate alternative forum is required for *forum non conveniens* dismissal.[26] Finally, *Wiwa v. Royal Dutch Petroleum Co.* [27] does not control here. In *Wiwa*, we held only that "suits should not be facilely dismissed . . . unless the defendant has fully met the burden of showing that the [factors identified in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)] tilt strongly in favor of trial in the foreign

22. *Dole Food*, 538 U.S. at 469.

23. *See Cap. Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 607 (2d Cir. 1998) (noting that *forum non conveniens* is a "common law doctrine" that may be "supplanted" by statute).

24. *See Iragorri*, 274 F.3d at 73-74 (discussing factors that indicate the convenience to the litigants and the public interest in the dispute).

25. *Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse*, 999 F.3d 808, 819 (2d Cir. 2021).

26. *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 74-75 (2d Cir. 2003).

27. 226 F.3d 88 (2d Cir. 2000).

forum."[28] *Wiwa* thus does not suggest, much less support, AE's thesis that *forum non conveniens* has no place or a lesser place in FSIA cases.

B. The District Court Did Not Abuse Its Discretion in Dismissing AE's Complaint on *Forum Non Conveniens* Grounds

AE argues that the District Court erred in applying the familiar three-step *forum non conveniens* analysis set forth in the unanimous en banc decision in *Iragorri v. United Technologies Corp.* [29] The three steps are "(1) determine the degree of deference properly accorded the plaintiff's choice of forum; (2) consider whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute; and (3) balance the private and public interests implicated in the choice of forum."[30]

We "begin with the assumption that [AE's] choice of forum will stand unless the defendant[s] meet[] the burden of demonstrating" that the three-step analysis favors dismissal.[31] At the same time, *forum non conveniens*

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28. *Id.* at 106 (brackets, citation, and internal quotation marks omitted).

29. *See generally* 274 F.3d 65.

30. *Celestin v. Caribbean Air Mail, Inc.*, 30 F.4th 133, 145, (2d Cir. 2022) (brackets, citation, and internal quotation marks omitted).

31. *Iragorri*, 274 F.3d at 71.

dismissal "lies wholly within the broad discretion of the [D]istrict [C]ourt and may be overturned only when we believe that discretion has been clearly abused."[32] A district court has "abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions."[33]

1. Degree of Deference

In the circumstances presented here the District Court did not err in affording minimal deference to AE's forum choice.

First, the District Court reasonably afforded "less deference" to the United States forum choice of AE—an entity incorporated in Angola—because it is a "foreign plaintiff."[34]

Second, the District Court did not err in finding that AE and its lawsuit lacked a "bona fide connection to the United States and to the forum of choice."[35] Apart from a December 2017 receipt of funds disbursed by GE's

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32. *Id.* at 72 (citation and emphasis omitted).

33. *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (brackets, citations, and internal quotation marks omitted).

34. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005).

35. *Iragorri*, 274 F.3d at 72 (footnote omitted).

affiliate—a transfer not at issue in the Complaint that occurred more than a year before Angola terminated AE's contracts—AE has "offered no proof that [it has] connections to the United States and failed to demonstrate that New York is convenient for [it]."[36] The District Court thus properly concluded that it does not appear "that considerations of convenience favor the conduct of the lawsuit in the United States."[37]

We find unpersuasive in this context AE's lead argument on appeal: that the District Court erred by dismissing its complaint on *forum non conveniens* grounds after holding that New York "would be relatively convenient for [GE] since [it is] either at home here or in a nearby district."[38] We have declined to assign "a plaintiff's choice of forum . . . presumptive deference simply because the chosen forum is [a] defendant's home forum," especially where the selection "suggests the possibility that [the] plaintiff's choice was made for reasons of trial strategy."[39] Caution was particularly apt here, where many of the contracts at issue specify that disputes will be heard in an Angolan arbitral forum—a fact that "modifies" *forum non conveniens* doctrine so that the "usual tilt in favor of

36. *Pollux*, 329 F.3d at 74 (affording minimal deference based on "only a faint connection to the United States" where the plaintiffs' "interactions with [the defendant] were centered in [the alternate forum]").

37. *Iragorri*, 274 F.3d at 72.

38. *Aenergy*, 2021 WL 1998725, at *9.

39. *Pollux*, 329 F.3d at 74.

the plaintiff's choice of forum gives way to a presumption in favor of the contractually selected forum."[40]

Third, the District Court's finding that AE's decision to file suit here while pursuing similar claims abroad "smacks of forum shopping"[41] was not "a clearly erroneous finding of fact."[42] Plaintiffs are entitled to less deference "the more it appears that [their] choice of a U.S. forum was motivated by forum-shopping reasons."[43] We have stated that one indication of forum shopping is "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case."[44] Here, the District Court had ample basis to find that AE sought a tactical advantage in New York, as AE "first chose a different forum to litigate the termination of the AE-MINEA Contracts: Angola[,] . . . [and] thus far, AE has not found success in those Angolan proceedings."[45]

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40. *Fasano v. Yu Yu*, 921 F.3d 333, 335 (2d Cir. 2019) (brackets and citation omitted).

41. *Aenergy*, 2021 WL 1998725, at *10.

42. *Pollux*, 329 F.3d at 70.

43. *Iragorri*, 274 F.3d at 72.

44. *Id.*

45. *Aenergy*, 2021 WL 1998725, at *10. Two other Courts of Appeals have held that filing suit here while pursuing claims abroad may support a factual finding of forum shopping. *See Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 695 (9th Cir. 2009) (holding that "the district court did not abuse its discretion when it concluded that [the plaintiff] was engaging in forum shopping by filing suit in the United States" in light of "the actions [the plaintiff] ha[d] filed across Europe"); *Interface Partners Int'l Ltd. v. Hananel*, 575 F.3d 97, 102-03 (1st Cir. 2009) (same, where the

Nor was the District Court's decision "an error of law,"[46] as courts in this Circuit are not required to discount parallel litigation in assessing whether a plaintiff is forum shopping. AE cites several cases that decline to consider parallel litigation while balancing the private interest factors identified by the Supreme Court in *Gilbert*.[47] But the *Gilbert* factors relate to "the convenience of the litigants,"[48] not a plaintiff's "reasons" for selecting a particular forum, which is at the heart of the forum shopping inquiry.[49] AE's reliance on *Bigio v. Coca-Cola Co.* [50] is likewise misplaced because there, unlike here, the district court did not find that the plaintiffs were forum shopping.[51]

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plaintiff "engaged in nearly four years of discovery in an Israeli forum—a forum it initially chose—and . . . subsequently moved to dismiss its suit 'on the verge of being ready for trial'" (footnote omitted)).

46. *Pollux*, 329 F.3d at 70.

47. *See, e.g.*, *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 31 (2d Cir. 2002) (holding that "related litigation" involving a different class of plaintiffs was due "little weight" in applying the *Gilbert* convenience factors); *Peregrine Myan. Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996) (holding that a parallel suit brought by the same plaintiff against different defendants in Hong Kong did not suggest that a United States venue was inconvenient).

48. *Iragorri*, 274 F.3d at 73.

49. *Id.* at 72.

50. 448 F.3d 176 (2d Cir. 2006).

51. *See generally Bigio v. Coca-Cola Co.*, No. 97-CV-2858, 2005 WL 287397, at *2 (S.D.N.Y. Feb. 3, 2005).

In sum, the District Court did not err in affording minimal deference to AE's choice of a New York forum.

2. Adequate Alternative Forum

"An alternative forum is adequate [1] if the defendants are amenable to service of process there, and [2] if it permits litigation of the subject matter of the dispute."[52] AE argues that Angola does not "permit[] litigation"[53] because (1) AE's contract damages claim is time-barred in Angola, (2) AE could not have its claims against Angola and GE tried in the same Angolan court, and (3) Angola provides inadequate due process.[54]

AE first argues that it is jurisdictionally time-barred in Angola from seeking breach of contract damages from Angola. We assume without deciding that AE's expert has correctly interpreted Angolan law. "In rare circumstances, . . . where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative."[55] However, "the availability

52. *Pollux*, 329 F.3d at 75.

53. Pls.' Br. 38.

54. AE also argues that Angola is inadequate because AE's owner, Machado, cannot travel there to testify due to safety concerns. This argument is unrelated to whether Angola "permits litigation of the subject matter of the dispute." *Pollux*, 329 F.3d at 75. It suggests instead that Angola is an inconvenient forum, *see Iragorri*, 274 F.3d at 75, and AE argued as much below. We thus consider this argument as part of the *Gilbert* analysis.

55. *Piper*, 454 U.S. at 254 n.22.

of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum, nor on identical remedies."[56] Nor does "the prospect of a lesser recovery . . . justify refusing to dismiss on the ground of *forum non conveniens*,"[57] provided that "the essential subject matter of the dispute can be adequately addressed" by the foreign court.[58]

Notwithstanding the asserted unavailability of breach of contract damages against Angola, the District Court did not err in holding that these are not examples of "rare circumstances" where the remedies afforded by a foreign forum can be said to be inadequate. The District Court correctly noted that AE brings "eight [other] claims" against both Angola and GE.[59] And even if AE cannot recover damages on its breach of contract claim against Angola, it has sought equitable contract remedies in Angola,[60] allowing the Angolan court to address the essential subject matter of the dispute.

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56. *Norex*, 416 F.3d at 158 (brackets, citation, and internal quotation marks omitted).

57. *Alcoa S. S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980) (en banc) (italics added) (affirming dismissal where the plaintiff in Trinidad could "recover only $570,000 rather than $8,000,000").

58. *Cap. Currency Exch.*, 155 F.3d at 610-11.

59. *Aenergy*, 2021 WL 1998725, at *13.

60. *See* App'x 592 (quoting AE's prayer in the Supreme Court of Angola that the contracts "should be considered in force").

AE next argues that Angola and GE cannot be tried in the same Angolan court. While Angola and GE contest this position, we assume without deciding that AE's claims against Angola would proceed in the Supreme Court of Angola, while its claims against GE would proceed in Luanda Provincial Court.

This does not suggest that Angola is an inadequate alternative to New York. This conclusion finds support in *Olympic Corp. v. Societe Generale*.[61] There, a U.S. corporation filed a complaint against a French bank, which in turn filed a third-party complaint against a French company.[62] We reversed the district court's *forum non conveniens* dismissal as to the complaint, but affirmed as to the third-party complaint, holding in effect that courts in different countries were adequate to resolve related disputes.[63] Our statement that "a court must satisfy itself that the litigation may be conducted elsewhere against all defendants"[64] thus does not require a single foreign court.[65]

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61. 462 F.2d 376 (2d Cir. 1972).

62. *Id.* at 377-78.

63. *Id.* at 379-80.

64. *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998).

65. The ability to try related claims in one courtroom may relate to the convenience of a foreign venue. *See Piper*, 454 U.S. at 259 ("It would be far more convenient . . . to resolve all claims in one trial."). But AE does not raise, and has thus waived, any argument that the *Gilbert* factors favor joinder. *See Frank v. United States*,

Finally, AE argues that Angola's judiciary will not provide due process. It points specifically to the seizure of its turbines and equipment pursuant to an order issued after an *ex parte* hearing, and subsequent transport of two of its turbines to a state-owned power facility.[66] A finding of a "lack of due process in the foreign forum" may support a finding that that forum is not adequate.[67] "[W]hile the plaintiff bears the initial burden" of production in this regard, "the defendant bears the ultimate burden of persuasion as to the adequacy of the forum."[68] To make such an initial showing, plaintiffs must demonstrate "inadequate procedural safeguards."[69] "[S]uch a [showing] is rare,"[70] because "it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."[71]

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78 F.3d 815, 833 (2d Cir. 1996) ("Issues not sufficiently argued are in general deemed waived and will not be considered on appeal."), *judgment vacated on other grounds*, 521 U.S. 1114, 117 S. Ct. 2501, 138 L. Ed. 2d 1007 (1997).

66. While AE before the District Court referred to State Department and other reports describing corruption in Angola, it does not raise these reports on appeal. Accordingly, we do not consider them. *See Frank*, 78 F.3d at 833.

67. *See Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009).

68. *Id.*

69. *PT United*, 138 F.3d at 73.

70. *Id.*

71. *Blanco*, 997 F.2d at 982 (brackets and citation omitted).

The District Court properly held that AE had failed to meet its initial burden of production, concluding that seizure pursuant to an *ex parte* hearing did not "render[] a judicial system inadequate"; indeed "courts in this country hold *ex parte* hearings in appropriate circumstances."[72] This holding reasonably characterized both our judicial process[73] and that of Angola, where AE does not dispute that the court has ordered only preliminary relief, and where permanent relief requires an adversary process of the sort now underway.[74] AE likewise does not dispute that the Angolan judiciary is independent from the executive branch. AE's argument that the seized turbines "went . . . to state-owned power companies that have since deployed them,"[75] suggests at most that the Angolan court's trustee has failed to fulfill its obligations. AE has proffered no evidence that Angola's courts cannot in appropriate circumstances address this asserted failure. Nor has it proffered evidence that the Angolan court "secretly gave

72. *Aenergy*, 2021 WL 1998725, at *13.

73. *See, e.g.*, Fed. R. Civ. P. 65(b) (authorizing *ex parte* temporary restraining orders in limited circumstances).

74. *See* App'x 190 (Angola's expert declaration stating that the property was seized as a "temporary ex-parte provisional remed[y]," and that "title to the property remains with [AE] pending final adjudication of the [P]arties competing rights"), 588 (AE's expert declaration stating that Angola and AE have filed papers related to a "plenary process," which is required for Angola to obtain permanent relief).

75. *See* Pls.' Br. 44.

[the turbines] to [Angola],"[76] or committed any other impropriety.

Relatedly, the District Court did not err in finding "relevant" AE's "decision to do business in Angola."[77] We agree that it is "anomalous" for AE—an Angolan corporation—to enter into multiple contracts worth more than a billion dollars with the Angolan government, subject to Angolan law and adjudication in many cases in an Angolan forum, and "then [to] argue to an American court that the [Angolan] system of justice is so . . . corrupt as not to provide an adequate forum for the resolution of . . . contractual disputes."[78]

We conclude that the District Court did not err in finding that Angola is an adequate alternative forum.

3. Gilbert Factors

"[E]ven where the degree of deference [to a foreign plaintiff's choice of forum] is reduced [at step one], the action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable."[79] To assess this issue, we consider private and public interest factors. With respect

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76. *See* Pls.' Reply 27.

77. *Aenergy*, 2021 WL 1998725, at *15.

78. *Blanco*, 997 F.2d at 981.

79. *Bigio*, 448 F.3d at 179 (brackets, citation, and internal quotation marks omitted).

to the private interest factors, we assess "the relative ease of access to sources of proof; [the] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [the] possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."[80] With respect to public interest factors, we consider "administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law."[81]

The District Court did not err by holding that the *Gilbert* factors suggest that New York is genuinely inconvenient and Angola is significantly preferable.

Concerning the private interest factors, the District Court reasonably held that Angola offers greater "relative ease of access to sources of proof."[82] All of the key events occurred in Angola. This includes the fabrication of letters indicating Angola's agreement to buy more turbines, GE's insistence that the contracts had been amended, and the Angolan President's termination of the contracts. By

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80. *Iragorri*, 274 F.3d at 73-74 (quoting *Gilbert*, 330 U.S. at 508).

81. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002).

82. *Aenergy*, 2021 WL 1998725, at *17.

contrast, the disbursement of funds in New York by GE's affiliate is not in dispute. And GE's United States-based employees are unlikely to be crucial witnesses, as they are alleged only to have "rel[ied] on" and received "report[s]" and "update[s]" from GE's employees in Angola.[83]

The District Court did not err in holding that "[t]he Angolan government is at the heart of this case" and giving priority to the availability of "Angolan state officials."[84] In light of their official roles, it is "unlikely that many would be willing to travel to New York to testify; and the cost, in any event, would be prohibitively great."[85] We disagree with AE's argument that the testimony of Angolan government witnesses does not meaningfully bear on "the precise issues that are likely to be actually tried."[86] To the contrary, these witnesses may offer testimony on important topics, including GE's alleged efforts to convince Angola to allow it to take over AE's contracts and the basis and good faith of Angola's alleged claim of contractual irregularities. Moreover, AE's initial disclosures list 36 witnesses affiliated with the Angolan government, which is inconsistent with its claim that such witnesses are irrelevant.

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83. Compl. ¶¶ 109, 162, 164.

84. *Aenergy*, 2021 WL 1998725, at *17.

85. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451-52 (2d Cir. 1975).

86. *Iragorri*, 274 F.3d at 74.

The District Court likewise did not err in concluding that translating "testimony from non-English speaking witnesses (or those that . . . would prefer to testify in another language) . . . would be a costly, difficult endeavor."[87] Translation for Angolan state officials who prefer to testify in their country's official language (Portuguese) "would result in significant cost to the parties and delay to the court," which "militates strongly in favor of [Angola] as a more appropriate forum for this litigation."[88] The same is true of many "relevant documents"—including the contracts at issue and related written communications that would require translation from Portuguese to English."[89]

The District Court reasonably evaluated the potential testimony of specific witnesses. Regarding da Costa and Nelson—the former CEO of GE's Angola business and the former head of GE's sub-Saharan Africa business, respectively, and "two witnesses that all parties seem to agree would be essential at trial"—the District Court found it "far from certain"[90] that either would be subject to a subpoena as "a national or resident of the United States [who is in a foreign country]."[91] This was not a

87. *Aenergy*, 2021 WL 1998725, at *18.

88. *Blanco*, 997 F.2d at 982.

89. *Aenergy*, 2021 WL 1998725, at *18.

90. at *17 n.7.

91. *Id.* (quoting 28 U.S.C. § 1783(a)). Under some circumstances "[a] court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country." 28 U.S.C. § 1783(a).

clearly erroneous assessment of the evidence. Da Costa may not be a U.S. resident, as his green card appears to have expired in 2019. Indeed, the record suggests that he may be an Angolan citizen residing in Angola. In any case, it is unclear whether a U.S. subpoena could be served upon or enforced against either da Costa or Nelson. And even assuming that da Costa and Nelson could be made available in New York, the District Court did not abuse its discretion in giving priority to the testimony of "officials from the Angolan government,"[92] as discussed.

The same is true of AE's owner, Machado—"an important witness in this action" who claims he cannot testify in Angola due to "grave security concerns."[93] It is of course true that a witness's "fear for [his] safety" is "relevant to the balancing inquiry."[94] But the District Court reasonably discounted these concerns because Machado's company, AE, continues to seek reinstatement of its Angolan contracts.[95] Even "assum[ing] [that] Machado's fears are legitimate," the District Court did not abuse its discretion in holding that "because all other private interest factors weigh in favor of dismissal, . . . such fears [do not] tip the balance in a meaningful way."[96]

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92. *Aenergy*, 2021 WL 1998725, at *17 n.7.

93. at *19.

94. *Iragorri*, 274 F.3d at 75.

95. *Aenergy*, 2021 WL 1998725, at *19.

96. *Id.*

Regarding the public interest factors, the District Court correctly held that "[t]his case has little to do with New York and a lot to do with Angola."[97] As discussed, AE has not put at issue the alleged transfer of funds in New York, and GE's United States-based employees are alleged principally to have relied upon and received reports from GE's employees in Angola. While the United States has an interest in regulating its corporate citizens in this case, that interest is relatively limited, and Angola has a significantly stronger interest in addressing disputes related to its government contracts.[98]

Finally, the District Court reasonably concluded that this case would require it "to confront 'difficult problems in conflict of laws and the application of foreign law.'"[99] As discussed, the contracts at issue are subject to Angolan law. The District Court properly held that this suggests that Angola is a superior forum. [100]

In sum, the District Court reasonably found that AE's forum choice was entitled to minimal deference;

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97. *Id.*

98. *See Allstate*, 994 F.2d at 1002 (Australia had a stronger interest to resolve "one of the largest [liquidations] in Australian history," involving actions "carried out in Australia by Australian corporations," despite U.S. securities laws.).

99. *Aenergy*, 2021 WL 1998725, at *20 (citation omitted).

100. *See Scot. Air Int'l*, 81 F.3d at 1234 (indicating that a need for the application of foreign law supports *forum non conveniens* dismissal).

that Angola is an adequate alternative forum; and that the public and private *Gilbert* factors favor Angola. The District Court thus did not err in dismissing AE's complaint under the doctrine of *forum non conveniens*.

CONCLUSION

To summarize, we hold as follows:

(1) Standard principles of *forum non conveniens* apply to AE's lawsuit brought pursuant to an exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605; and

(2) the District Court did not err in dismissing AE's Complaint on *forum non conveniens* grounds.

For the foregoing reasons, we **AFFIRM** the District Court's May 19, 2021, and June 24, 2021, orders.

APPENDIX B — OPINION AND ORDER, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, *AENERGY, S.A. V. REPUBLIC OF ANGOLA*, NO. 1:20-CV-3569 (JPC) (MAY 19, 2021)

2021 WL 1998725

IN THE UNITED STATES DISTRICT COURT,
S.D. NEW YORK

AENERGY, S.A. AND COMBINED CYCLE POWER PLANT SOYO, S.A.,

Plaintiffs,

v.

REPUBLIC OF ANGOLA; MINISTRY OF ENERGY AND WATER OF THE REPUBLIC OF ANGOLA; MINISTRY OF FINANCE OF THE REPUBLIC OF ANGOLA; EMPRESA PÚBLICA DE PRODUÇÃO DE ELECTRICIDADE, EP; EMPRESA NACIONAL DE DISTRIBUIÇÃO DE ELECTRICIDADE; GENERAL ELECTRIC COMPANY; GENERAL ELECTRIC INTERNATIONAL, INC.; AND GE CAPITAL EFS FINANCING, INC.,

Defendants.

20 Civ. 3569 (JPC)

Signed 05/19/2021

Appendix B

OPINION AND ORDER

JOHN P. CRONAN, United States District Judge:

***1** Plaintiffs Aenergy, S.A. ("AE") and Combined Cycle Power Plant Soyo, S.A. ("Combined Cycle") are Angolan energy companies. They bring this suit against two groups: the "Angolan Defendants," consisting of the Republic of Angola and several arms of the Angolan government, and the "GE Defendants," consisting of General Electric ("GE") Co. and two GE subsidiaries. Plaintiffs allege that the Angolan Defendants breached several contracts and illegally seized Plaintiffs' assets, and that the GE Defendants tortiously interfered with these contracts and Plaintiffs' future dealings with the Angolan government.

Before the Court are two motions to dismiss: one from the Angolan Defendants and one from the GE Defendants. The Angolan Defendants move to dismiss the Complaint on the grounds that (1) they are immune from suit under the Foreign Sovereign Immunities Act, (2) this suit is subject to mandatory arbitration, (3) the Court should exercise its discretionary power under the doctrine of *forum non conveniens* and dismiss this case in favor of a more convenient forum, (4) the Court should abstain from hearing this case due to ongoing court proceedings in Angola, and (5) Plaintiffs failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The GE Defendants move to dismiss on the grounds that (1) the doctrine of *forum non conveniens* favors dismissal, (2) this suit is subject to mandatory arbitration, (3) the Court

lacks personal jurisdiction over the two GE subsidiaries, (4) Plaintiffs failed to state a claim under Rule 12(b)(6), and (5) principles of international comity warrant dismissal. For the reasons that follow, both motions are granted, and this suit is conditionally dismissed pursuant to the doctrine of *forum non conveniens*.

I. Background

A. Factual Background

The following facts are taken from the Complaint, the documents attached to it, and the documents it incorporates by reference. *See Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir. 2013). Plaintiffs attached several documents to the Complaint that are in the Portuguese language and lack an accompanying certified English translation. *See, e.g.*, Dkt. 10 ("Compl."), Exh. 15, 17, 19, 20. The Court did not consider these non-English materials. For purposes of these motions, the Court accepts the Complaint's allegations as true and construes them in the light most favorable to Plaintiffs. *See Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009).

1. Underlying Contracts Among the Angolan Government, AE, and GE

AE is a company constituted under the laws of the Republic of Angola with its principal place of business in Angola. Compl. ¶ 25. Ricardo Leitão Machado, a Portuguese citizen, founded the company in 2012 and owns 99.9% of AE's stock. *Id.* ¶¶ 2, 25. AE's mission is

to provide "cost-effective, reliable, and environmentally-friendly energy solutions" to the people of Angola and neighboring African countries. *Id.* ¶ 48; *see also id.* ¶¶ 2, 47. To that end, AE's business largely focuses on constructing and maintaining Angolan power plants. *See id.* ¶¶ 49, 53. Combined Cycle is a wholly owned subsidiary of AE. *Id.* ¶ 26.

***2** AE built its first power plant in Angola in 2013. *Id.* ¶ 49. As part of this project, AE acquired from GE[1] several turbines, which are massive industrial machines used to generate large amounts of power. *Id.* This cemented a relationship between AE and GE, and for the next several years, the two companies worked together on energy projects for the Angolan government (or "Angola" for short). *Id.* ¶¶ 52-55. Sometime around June 2016, AE agreed to purchase from GE three TM2500 turbines, a specific model of turbine manufactured by GE. *Id.* ¶ 56. AE "did not yet have contracts with Angola to supply those turbines," but bought them so that it would be ready to supply Angola with more turbines if and when the time came. *Id.*

In August 2017, AE entered into thirteen contracts with Empresa Pública de Produção de Electricidade, EP ("PRODEL") and Empresa Nacional de Distribuição de Electricidade ("ENDE"), two Angolan-owned utility companies that are subsidiaries of the Ministry of Energy and Water of the Republic of Angola ("MINEA"). *Id.*

1. The Complaint often refers to "GE" generally rather than a specific GE entity. The Court follows this same approach unless the Complaint attributes an action to a GE subsidiary.

¶ 58. These contracts "were approved by a series of presidential decrees dated July and August 2017." *Id.* ¶ 59. Together, the thirteen agreements provided that AE would "construct, extend, refurbish, and maintain power plants in Angola." *Id.* ¶ 58. Specifically, Angola agreed to pay AE $1.1 billion for eight TM2500 turbines and a variety of other goods and services. *Id.* ¶¶ 61-62. The Court refers to these thirteen contracts collectively as the "AE-MINEA Contracts."

Around this time, AE entered into several supply contracts with GE for various goods and services (the "GE-AE Supply Contracts"), which AE used to fulfill portions of the AE-MINEA Contracts and other contracts with Angola. *See id.* ¶ 63. For example, AE and GE International, Inc. entered into a collaboration agreement through which GE International would provide technical and other support to AE. *Id.* ¶ 64. Between March and June of 2017, AE agreed to purchase from "two GE affiliates" eleven TM2500 turbines, *id.* ¶ 65, which brought the total number to fourteen since AE had already bought three in June of the previous year, *id.* ¶ 66; *see also id.* ¶ 56. Because the AE-MINEA Contracts called for Angola to purchase only eight turbines from AE, *id.* ¶ 61, this gave AE an extra six. *Id.* ¶ 66. According to AE, it bought these extra machines "for its own commercial reasons" and in anticipation of future energy projects with Angola that might come to fruition. *Id.* ¶ 67; *see also id.* ¶ 56.

To finance the AE-MINEA Contracts, the Ministry of Finance of the Republic of Angola ("MINFIN") secured from GE Capital EFS Financing, Inc. ("GE Capital") a $1.1

billion credit facility ("the GE Credit Facility"). *Id.* ¶ 69. Through this arrangement, GE Capital would loan funds to the Angolan government, which would then pay AE the amounts due on the AE-MINEA Contracts. *See id.* ¶ 71. However, GE Capital recognized that under the GE-AE Supply Contracts, the ultimate supplier of the turbines (and possibly some of the other goods and services) that AE would provide Angola was a GE subsidiary known as "GE Power." *Id.* ¶¶ 72-73; *see also id.* ¶ 65.[2] So the GE Credit Facility created a payment mechanism that allowed GE Capital to transmit funds directly to GE Power's bank accounts in New York. *Id.* ¶¶ 73, 225.c. In other words, when Angola wished to draw on the GE Credit Facility to pay invoices owed to AE, "GE Capital could send payment in U.S. dollars from the United States directly to ... GE (in its capacity as supplier to AE)." *Id.* ¶ 73.

***3** This payment structure eliminated some risk. Rather than loan cash to Angola, wait for Angola to pay AE, and then wait for AE to pay GE Power, GE Capital instead could cut out the middle men and directly pay its sister entity, GE Power. *See id.* ¶ 75. In one fell swoop, Angola's debt to AE and AE's debt to GE would be satisfied. This meant that these transactions would occur "outside of Angola," *id.* ¶ 74 (internal quotation marks omitted), thus eliminating the possibility of repatriation and avoiding fluctuations in currency exchange rates. *Id.* ¶¶ 74-75. Although the $1.1 billion GE Credit Facility was

2. Although the Complaint refers to this entity as "GE Power," Compl. ¶ 72, the GE Defendants say it was actually called "GE Packaged Power," Dkt. 71 at 7 n.2. For purposes of these motions, the Court uses the Complaint's term.

"sizeable and unsecured," and "proposed to extend credit to a sovereign with a low credit rating," GE Co., the parent company, provided a guarantee to GE Capital to permit this transaction to proceed. *Id.* ¶ 82.

But there was a problem. GE wrongly believed that under the AE-MINEA Contracts, in addition to other goods and services, Angola had agreed to purchase *twelve* TM2500 turbines from AE and would likely buy an additional two. *Id.* ¶ 77. Yet, the AE-MINEA Contracts only required Angola to purchase *eight* turbines. *Id.* ¶¶ 61, 77. As discussed, AE had purchased the other six in anticipation of future projects with the Angolan government. *See id.* ¶¶ 56, 67-68. This incorrect assumption that GE Power would receive payment for at least twelve of the turbines it sold AE "informed GE's credit-approval process" for the GE Credit Facility. *Id.* ¶ 78.

GE thus underestimated its total risk exposure on the $1.1 billion loan to Angola. *Id.* ¶ 79. While GE thought that GE Capital would pay GE Power $354 million of the $1.1 billion (*i.e.*, for fourteen turbines), in reality GE Power would only receive $212.7 million (*i.e.*, for eight turbines). *Id.* ¶ 90. Thus, GE's risk exposure was $141.3 million greater than it thought. *Id.* From an accounting perspective, this misunderstanding led GE to record at least $395 million in revenues and $203 million in profits in 2017 because it expected to "pay[ ] itself" these amounts before the end of that year. *Id.* ¶ 80.[3] These

3. The Complaint does not explain why the 2017 revenue figure is $41 million higher than the $354 million GE Power

figures were significant. For example, the profits from this arrangement accounted for approximately 10% of GE Power's profits for 2017. *Id.* ¶ 81.

2. Forged Letters

GE senior executives soon discovered the problem, albeit after GE already had extended the GE Credit Facility to Angola. *Id.* ¶¶ 83-86. Looking for a solution, GE asked AE to work with MINEA to amend the AE-MINEA Contracts to cover MINEA›s purchase of additional turbines from AE. *Id.* ¶ 91. The idea was to keep the overall value of the AE-MINEA Contracts at $1.1 billion, but reduce the amount of other goods and services AE was to provide Angola (*i.e.*, presumably goods and services from AE directly or from suppliers other than GE) under two of the thirteen underlying contracts (Contracts 7 and 11). *Id.* ¶¶ 93, 96. This would free up funds to purchase four additional turbines from GE, which in turn would reduce GE's risk exposure on the GE Credit Facility as a greater percentage of the $1.1 billion would go directly to GE entities. *See id.* ¶ 95. Although GE was not a party to the AE-MINEA Contracts, GE provided AE with specific language that it hoped would be included in the amended AE-MINEA Contracts. *Id.* ¶¶ 97-98.

On October 12, 2017, MINEA wrote two letters (the "October 2017 Letters") in which it stated that it wanted

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anticipated as payment for the fourteen turbines, but it presumably accounts for other goods and services besides the turbines under the GE-AE Supply Contracts.

to negotiate the purchase of four additional turbines from AE. *Id.* ¶ 102; *see also* Dkt. 10, Exhs. 2, 3. Critically, MINEA did not agree to GE's proposed amendments and instead seemed to suggest that Angola might want to enter into a new agreement on top of the $1.1 billion AE-MINEA Contracts. *See* Compl. ¶ 102; Dkt. 10, Exhs. 2, 3. This was not what GE wanted.

***4** Wilson da Costa, CEO of GE's Angola business, Compl. ¶ 64, and Leslie Nelson, head of GE Power's Sub-Saharan Africa business, realized this. *Id.* ¶ 103. So "GE employees used Adobe Photoshop to fabricate 'signed' versions of the amendment letters that replaced the text of the real letters MINEA had signed ... with the text GE had requested." *Id.* ¶ 105. In other words, these fake letters said that MINEA agreed to amend the AE-MINEA Contracts to purchase four additional turbines, just as GE had wished. That night, "from the safety and secrecy of his home" in Luanda, Angola, da Costa took photographs with his iPad of the fake letters. *Id.* ¶ 107. He then e-mailed the photographs to various GE employees, including a representative of GE Capital, and stated that AE and MINEA amended the AE-MINEA Contracts to include GE's requested language. *Id.* ¶¶ 107-108. Nelson forwarded da Costa's e-mail and the fake letters to two GE employees in the United States. *Id.* ¶ 109. Problem solved for the time being.

3. The Discrepancy

In December 2017, it was time for AE to get paid for some of the work it had performed under the AE-MINEA

Contracts. *See id.* ¶ 115. MINEA approved AE invoices totaling approximately $644 million. *Id.* On December 24, 2017, MINFIN drew this amount from the GE Credit Facility. *Id.* ¶ 124. Pursuant to the GE Credit Facility payment structure, AE agreed that GE Capital could pay approximately 60% of this amount, or $376 million, directly to GE Power as AE's supplier. *Id.* ¶¶ 124-125. These funds were transferred from accounts at Deutsche Bank in New York to other accounts in New York. *Id.* ¶ 225.c.

What did the $376 million payment cover? According to AE, it paid for various goods and services under the GE-AE Supply Contracts, including eight turbines. *Id.* ¶ 126. But according to GE, this amount reflected payment for the following: (1) some goods and services (but fewer than AE thought), including the eight turbines, provided under the GE-AE Supply Contracts; (2) four additional TM2500 turbines; and (3) a portion of the cost of two other TM2500 turbines. *Id.* So after this $376 million payment, "GE considered itself fully paid by AE for twelve of the fourteen turbines subject to the GE-AE [S]upply [C]ontracts." *Id.* Neither AE nor GE initially realized these divergent understandings.

About eight months later, everything began to unravel. *See id.* ¶ 128. Recall that the October 2017 Letters did not definitively reject the proposed amendments to the AE-MINEA Contracts. *See id.* ¶ 102. But on August 9, 2018, Angola issued the *coup de grâce* and told AE and da Costa that it would not amend the AE-MINEA Contracts in the manner in which GE had requested. *Id.* ¶ 128. In other

words, it would not reduce the scope of Contracts 7 and 11 in order to purchase four additional turbines. *See id.*

Upon hearing this, AE and MINEA discussed alternative ways in which AE could sell MINEA the additional turbines because, to AE's mind, it still had six extra turbines that it hoped to offload. *Id.* ¶ 134. They agreed to reduce the scope of services under Contact 6, a separate contract from those that GE originally had proposed amending, so that MINEA could purchase four additional turbines for $154 million. *Id.* ¶ 136. This arrangement would still allow MINEA to use the GE Credit Facility, and it would not require additional financing, since at that point Angola had drawn only $644 million of the $1.1 billion line. *Id.* ¶¶ 134-135. João Lourenço, the President of Angola, approved this change to Contract 6. *Id.* ¶ 137.

Of course, this was bad news for GE because GE was under the impression that Angola had already purchased the four additional turbines after amending Contracts 7 and 11. During subsequent meetings in Angola among AE, MINEA, and GE, da Costa took this position and argued that Angola had already paid AE—and therefore GE—for the four additional turbines. *Id.* ¶ 140. At one of these meetings on December 7, 2018, da Costa showed Angola representatives photographs of the fake letters. *Id.* ¶ 141. AE and MINEA immediately "denounced these digital documents as forgeries." *Id.* ¶142; *see also id.* ¶ 149.d.

***5** MINEA set out to clear things up. A few days later, it sent "Mr. Sezan of GE" a letter stating that MINEA had

"agreed to acquire a total of 8" turbines in the original AE-MINEA Contracts but it appeared that four additional turbines were purchased through the GE Credit Facility. *Id.* ¶ 149.e (internal quotation marks and emphasis omitted). MINEA stated that this "constitute[d] a serious irregularity" since "no addendum or valid document ha[d] been issued which would justify changing the scope of the contracts and the prices." *Id.* (internal quotation marks and emphasis omitted). Sezan forwarded this to several GE employees, including someone at GE Capital. *Id.* On December 17, 2018, Machado (AE's CEO) sent an e-mail to MINEA, da Costa, and Sezan in which he stressed that the October 2017 Letters were conditional in nature and did not authorize the purchase of four additional turbines. *Id.* ¶ 149.f.

On December 18, 2018, Sezan and da Costa met with MINEA in Angola. *Id.* ¶ 149.g. During this meeting, the two GE representatives doubled down on GE's position that MINEA had already paid for twelve turbines and claimed that now "AE was seeking double payment for four turbines." *Id.* ¶ 169.

4. Termination of the AE-MINEA Contracts

Eventually, the Angolan government "chose to simply accept Mr. da Costa's versions of the facts" and agreed that MINEA had paid for twelve turbines, not eight. *Id.* ¶ 147. MINEA then decided to terminate the AE-MINEA Contracts and looked to GE as a replacement energy partner. *See id.* ¶ 166. In January 2019, Sezan told Scott Strazik, the CEO of GE's "Gas Power business," *id.* ¶ 85,

that Angola "made a decision to transfer AE contracts to GE." *Id.* ¶ 164 (internal quotation marks omitted). It seems that at that time, the decision was not final because on February 26, 2019, Sezan told Strazik and another GE representative, both of whom were in the United States, that GE was reviewing the AE-MINEA Contracts to identify those that GE wished to absorb. *Id.* ¶ 170. On March 6, 2019, da Costa e-mailed MINEA stating that GE would continue to make the GE Credit Facility available only if MINEA terminated the AE-MINEA Contracts and entered into new contracts with GE. *Id.* ¶ 172. About one week later, MINEA asked GE to confirm that it would take over the work in the AE-MINEA Contracts, and GE stated that it would. *Id.* ¶¶ 174-175. GE also confirmed that it did not have "any kind of legal partnership, consortium or joint venture of any sorts" with AE. *Id.* ¶ 175 (internal quotation marks omitted).

In August 2019, President Lourenço adopted a resolution in which he permitted MINEA to terminate the AE-MINEA Contracts and transfer the remaining work to GE. *Id.* ¶ 177. MINEA once again asked GE to confirm that it was ready to take over the AE-MINEA Contracts. *Id.* ¶ 178. A summary of this confirmation request was sent to GE executives, including Frederic Ribieras in the United States who "by then was directing GE's activities related to GE's take-over of the AE-MINEA Contracts." *Id.* ¶ 179. Ribieras expressed a desire to provide "clarity" on the turbine discrepancy before finalizing the new contracts, *id.* (internal quotation marks omitted), but nothing came of this, *id.* ¶ 180.

On September 2, 2019, Angola sent AE a letter formally terminating the AE-MINEA Contracts. *Id.* ¶ 181. The letter justified the termination by citing "irregularities" regarding AE's acquisition of extra turbines beyond the initial eight Angola had agreed to purchase. *Id.* ¶ 183. This letter also informed AE that MINEA would award the remaining work under the AE-MINEA Contracts to GE. *Id.* ¶ 182.

5. Seizure of AE's Turbines

The termination letter further noted that four of the six additional turbines that AE had purchased from GE belonged to Angola because they were "purchased on behalf of MINEA." *Id.* ¶ 206 (internal quotation marks omitted). On November 29, 2019, Angola initiated an *ex parte* proceeding before the Luanda Provincial Court in Angola, and the court issued an injunction that allowed Angola to seize some of AE's property. *See id.* ¶¶ 212-216.

***6** Angolan police officers and other Angolan authorities came to AE's warehouses in Angola and "took all the property that was there, including not just the turbines, but also spare small engines, oil, equipment, parts, etc." *Id.* ¶ 216. AE claims that the value of this seized property totaled $112.8 million, and Angola did not provide any compensation to AE. *Id.* ¶¶ 216-217. AE alleges that its property was "targeted and expropriated at least in part" because AE is primarily owned by a Portuguese man and "because of the stance AE had taken against corruption" in Angola. *Id.* ¶ 220.

6. Termination of the Soyo II Power Plant Contract

Besides the AE-MINEA Contracts, AE also had contracted with Angola to build and operate a power plant called Soyo II, located in the Zaire province of Angola. *Id.* ¶ 201. In August 2018, Angola awarded a 25-year concession and various related contracts to Combined Cycle, the wholly owned AE subsidiary, to "build and do various work related to [this] new power plant." *Id.* The Court refers to this arrangement as the "Soyo II Concession." As part of this project, AE had agreed to purchase from GE equipment manufactured in the United States. *Id.* However, on October 23, 2019, President Lourenço terminated the Soyo II Concession as well, and MINEA sent a termination letter citing the "same purported irregularities invoked in support of Angola's decision to terminate the AE-MINEA Contracts." *Id.* ¶ 202.

7. AE's Legal Proceedings in Angola

Following MINEA's termination of the AE-MINEA Contracts, AE sought relief in Angola. First, AE filed an administrative appeal with MINEA, asking MINEA to reconsider its decision to terminate the AE-MINEA Contracts. *Id.* ¶ 195. MINEA denied this on September 30, 2019 and concluded that "Angola had purchased twelve turbines; that AE was responsible for creating the [f]orged [l]etters; and that there was no relationship whatsoever between AE and GE beyond a customer-supplier relationship." *Id.* AE appealed this decision to

President Lourenço, who denied the appeal in a one-sentence decision on November 13, 2019. *Id.* ¶ 196.

Before seeking judicial review in the Angolan Supreme Court, AE filed an action in this District seeking evidence from GE pursuant to 28 U.S.C. § 1782. *In re Aenergy, S.A.*, No. 19 Misc. 542 (VEC) (S.D.N.Y.). Section 1782 provides a mechanism through which a district court may order discovery "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782. The Honorable Valerie E. Caproni granted this request, and GE produced discovery, some of which AE submitted to the Angolan Supreme Court. *See* Compl. ¶¶ 21, 197; Dkt. 71 ("GE Defendants' Motion") at 2-3; *see also* Compl. ¶ 22 n.1.

AE filed its appeal of President Lourenço's decision in the Angolan Supreme Court on January 10, 2020. Compl. ¶ 197; *see* Dkt. 59, Exh. 26 at 140. At the time of the filing of the Complaint, Plaintiffs contended that the Angolan government, the respondent in that proceeding, had not responded to AE's filings, and the Angolan Supreme Court had "done nothing." Compl. ¶ 198. However, in a submission recently filed on May 3, 2021, Plaintiffs acknowledge that Angola submitted its opposition brief on September 9, 2020, but maintain that the Angolan Supreme Court was slow in serving that filing on Plaintiffs. Dkt. 119 at 4, Exh. 2 ¶ 18. The Angolan Defendants further have advised the Court that, on March 25, 2021, AE "filed a 'réplica,' or reply submission," in the Angolan Supreme Court proceeding, which seems to be analogous to a reply brief responding to Angola's opposition. *See* Dkt. 112 ¶ 2, Exh. A.

B. Procedural History

***7** On May 7, 2020, Plaintiffs AE and Combined Cycle initiated this action with the filing of the Complaint against the Angolan Defendants and the GE Defendants. Dkt. 1.[4] Specifically, the Angolan Defendants include the Republic of Angola, MINEA, MINFIN, PRODEL, and ENDE, and the GE Defendants include GE Co., GE International, and GE Capital. *See* Compl. ¶¶ 27-34. The Complaint alleges ten causes of action against these various entities. *Id.* ¶¶ 227-298.

Against the Angolan Defendants alone, Plaintiffs assert six claims: (1) breach of contract with regard to the AE-MINEA Contracts; (2) breach of contract with regard to the Soyo II Concession; (3) unjust enrichment; (4) taking of physical assets in violation of international law; (5) taking of intangible assets in violation of international law; and (6) conversion. *Id.* ¶¶ 227-277. As for the GE Defendants, Plaintiffs assert two claims against only them: (1) tortious interference with contract and (2) tortious interference with prospective business relations. *Id.* ¶¶ 278-289. Finally, the Complaint asserts an accounting claim and an aiding and abetting claim against all Defendants. *Id.* ¶¶ 290-298.

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4. On May 7, 2020, the Honorable Valerie E. Caproni granted Plaintiffs' application to file the Complaint and accompanying exhibits provisionally under seal and with redactions, and ordered the GE Defendants to state their position on whether such treatment was warranted. Dkt. 6. The GE Defendants confirmed that they did not seek such treatment. Dkt. 8. Plaintiffs then filed the unredacted Complaint and unsealed exhibits on May 21, 2020. *See* Compl., Exhs. 1-20.

Appendix B

On September 18, 2020, the GE Defendants moved to dismiss the claims against them. Dkt. 50. They argue that the Court should dismiss this case on the grounds of *forum non conveniens* and international comity, as well as because Plaintiffs' claims are subject to mandatory arbitration. GE Defendants' Motion at 14-41, 49-50. In the alternative, the GE Defendants also argue that the Court lacks personal jurisdiction over GE International and GE Capital, and that in all events Plaintiffs have failed to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* at 41-49.

On September 29, 2020, the Angolan Defendants also moved to dismiss. Dkt. 58. They too focus primarily on threshold issues, arguing that the Court lacks jurisdiction under the Foreign Sovereign Immunities Act, Plaintiffs' claims are subject to mandatory arbitration, *forum non conveniens* warrants dismissal, and the Court should abstain from hearing this case while proceedings in Angola remain ongoing. Dkt. 61 ("Angolan Defendants' Motion") at 12-45. The Angolan Defendants also argue that Plaintiffs failed to state a claim under Rule 12(b)(6). *Id.* at 45-47. This case was reassigned to the undersigned on September 29, 2020.

On November 2, 2020, Plaintiffs filed a memorandum of law in opposition to both motions to dismiss. Dkt. 79 ("Opposition"). On November 30, 2020, Plaintiffs submitted a letter informing the Court of "newly discovered facts" relevant to Plaintiffs' claim that the Angolan Defendants took their physical assets in Angola in violation of international law. Dkt. 91 at 3. Each group of

Defendants filed a reply memorandum of law on December 2, 2020. Dkts. 92, 96. The Court granted Plaintiffs' request to file a sur-reply brief, Dkts. 98, 101, which Plaintiffs subsequently filed, Dkt. 102 ("Sur-Reply"). The Court held oral argument on April 19, 2021. Following oral argument, the Court allowed all parties to submit supplemental letter briefs, which the parties filed on April 26, 2021 and May 3, 2021. *See* Dkts. 113-123.

II. Discussion

*****8 "[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.' " *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)); *see also Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 389 (2d Cir. 2011). Therefore, "[a] district court may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." *Sinochem Int'l Co.*, 549 U.S. at 432.

Forum non conveniens is a device that permits a court to dismiss a case "when an alternative forum has jurisdiction to hear [the] case, and ... trial in the chosen forum would establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience, or ... the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." *Id.* at 429 (alterations in original)

(quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994)). "A district court's decision to dismiss by reason of *forum non conveniens* is confided to the sound discretion of the district court, to which substantial deference is given." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)); *accord Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (en banc) ("The decision to dismiss a case on *forum non conveniens* grounds lies wholly within the broad discretion of the district court and may be overturned only when ... that discretion has been *clearly abused*." (emphasis in original) (internal quotation marks omitted)).

In *Iragorri*, the Second Circuit set forth a three-step process for resolving a motion dismiss on the basis of *forum non conveniens*. *Iragorri*, 274 F.3d at 71-75; *accord Pollux Holding Ltd.*, 329 F.3d at 70. First, the court must determine the degree of deference afforded to the plaintiff's choice of forum. *Iragorri*, 274 F.3d at 73. Second, the court must consider "whether an adequate alternative forum exists." *Id.* Third, if such a forum exists, the court must "balance factors of private and public interest to decide, based on weighing the relative hardships involved, whether the case should be adjudicated in the plaintiff's chosen forum or in the alternative forum suggested by the defendant." *Pollux Holding Ltd.*, 329 F.3d at 70. A court may dismiss a case under this doctrine "only if the chosen forum is shown to be genuinely inconvenient and the selected [alternative] forum significantly preferable." *Iragorri*, 274 F.3d at 74-75.

Appendix B

A. Plaintiffs' Choice of Forum

Under the first step, "[a]ny review of a *forum non conveniens* motion starts with 'a strong presumption in favor of the plaintiff's choice of forum.' " *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 157 (2d Cir. 2005) (quoting *Piper Aircraft Co.*, 454 U.S. at 255). Nonetheless, the "degree of deference" afforded a plaintiff's choice of forum "varies with the circumstances" and "moves on a sliding scale depending on several relevant considerations." *Iragorri*, 274 F.3d at 71. A district court should afford greater deference when it appears that the plaintiff or the lawsuit has a "bona fide connection to the United States and to the forum of choice" and "considerations of convenience favor the conduct of the lawsuit in the United States." *Id.* at 72. The Second Circuit has recognized that relevant factors for this determination include "the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense." *Id.* On the other hand, a plaintiff's choice of forum deserves less deference if "the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum." *Id.*

***9** "A domestic [plaintiff's] choice of its home forum receives great deference, while a foreign [plaintiff's] choice of a United States forum receives less deference." *Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 498 (2d Cir. 2002); *accord Piper Aircraft Co.*, 454 U.S. at 256 ("Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."); *Norex Petroleum Ltd.*, 416 F.3d at 154 ("[L]ess deference is afforded a foreign plaintiff's choice of a United States forum." (internal quotation marks omitted)); *Palacios v. Coca-Cola Co.*, 757 F. Supp. 2d 347, 352 (S.D.N.Y. 2010) ("[T]he greatest deference is afforded a plaintiff's choice of its home forum, while 'less deference' is afforded a foreign plaintiff's choice of a United States forum." (internal citations omitted)), *aff'd*, 499 F. App'x 54 (2d Cir. 2012). Still, a plaintiff's foreign status is not dispositive, *Norex Petroleum Ltd.*, 416 F.3d at 157, and "the fact that [a] plaintiff is foreign does not ... render the forum choice completely undeserving of respect," *Metito (Overseas) Ltd. v. Gen. Elec. Co.*, No. 05 Civ. 9478 (GEL), 2006 WL 3230301, at *3 (S.D.N.Y. Nov. 7, 2006). But the Second Circuit has cautioned that "when a foreign plaintiff chooses a U.S. forum, it 'is much less reasonable' to presume that the choice was made for convenience," rather than "forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries." *Iragorri*, 274 F.3d at 71.

Here, Plaintiffs' choice of forum is afforded only minimal deference. To begin, this District is neither

Plaintiff's home forum. Plaintiffs are Angolan companies whose principal places of business are in Angola. Compl. ¶¶ 25-26. Because Plaintiffs are foreign entities, their choice of a United States forum is afforded "less deference." *Monegasque De Reassurances S.A.M.*, 311 F.3d at 498; *see also Iragorri*, 274 F.3d at 71 ("Even if the U.S. district was not chosen for ... forum shopping reasons, there is nonetheless little reason to assume that it is convenient for a foreign plaintiff.").

Further, only one of eight Defendants is at home in this District. The Republic of Angola and the instrumentalities of the Angolan government (MINEA, MINFIN, PRODEL, and ENDE) are citizens of Angola. Compl. ¶¶ 27-31. Of the three GE Defendants, only one is a citizen of New York. GE Co. is incorporated in New York and has its principal place of business in Massachusetts. *Id.* ¶ 32. This affords Plaintiffs' choice of forum some minor deference. The other two GE Defendants, GE International and GE Capital, are citizens of both Delaware and Connecticut. *Id.* ¶¶ 33-34. Thus seven of eight Defendants are not at home in this forum, and five are not even at home in this country. Still, it is safe to say that this District would be relatively convenient for all GE Defendants since they are either at home here or in a nearby district. *See Iragorri*, 274 F.3d at 72-73. But since "litigants rarely are concerned with promoting their adversary's convenience at their own expense, a plaintiff's choice of the defendant's home forum over other fora where [the] defendant is amenable to suit and to which the plaintiff and the circumstances of the case are much more closely connected suggests the possibility that [the] plaintiff's choice was made for reasons of trial strategy." *Pollux Holding Ltd.*, 329 F.3d at 74.

The Court also affords Plaintiffs' choice of forum less deference because Plaintiffs chose to do business in Angola with various Angolan government entities. Courts routinely have little sympathy for plaintiffs—even American plaintiffs—who conduct business in foreign lands and later try to cry foul here. *See, e.g.*, *BFI Grp. Divino Corp. v. JSC Russian Aluminum*, 298 F. App'x 87, 91 (2d Cir. 2008) (concluding that the district court did not abuse its discretion in determining that the plaintiff's choice of forum was not entitled to significant deference in part because the plaintiff "had chosen to invest in Nigeria"); *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 696 (S.D.N.Y. 2003) ("[W]here an American plaintiff chooses to invest in a foreign country and then complains of fraudulent acts occurring primarily in that country, the plaintiff's ability to rely upon [United States] citizenship as a talisman against *forum non conveniens* dismissal is diminished." (alteration in original) (quoting *Sussman v. Bank of Isr.*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992))), *aff'd*, 98 F. App'x 47 (2d Cir. 2004); *see also Monegasque De Reassurances S.A.M.*, 311 F.3d at 499 (affirming the district court's *forum non conveniens* dismissal in part because the plaintiff "voluntarily conducted business with ... a Ukrainian company, and must have anticipated the possibility of litigation in Ukraine"); *Blanco v. Banco Indus. de Venez., S.A.*, 997 F.2d 974, 981 (2d Cir. 1993).

***10** Perhaps even more telling is the fact that before coming to this Court, AE first chose a different forum to litigate the termination of the AE-MINEA Contracts: Angola. As discussed above, thus far, AE has not found

success in those Angolan proceedings. Plaintiffs' decision to file suit in this District thus smacks of forum shopping rather than a genuine pursuit of convenience. "Such a tactical maneuver is not protected by the deference generally owed to the plaintiffs' choice of forum." *Base Metal Trading SA*, 253 F. Supp. 2d at 698 (affording little deference to the plaintiffs' choice of forum because they only came to the United States after "pursu[ing] various remedies in the Russian court system with unsatisfactory results"); *see also Banco de Serguros del Estado v. J.P. Morgan Chase & Co.*, 500 F. Supp. 2d 251, 261 (S.D.N.Y. 2007) (concluding the plaintiff's choice of forum merited "little, if any, deference" in part because "other civil and criminal matters pertaining to the same alleged events and losses as this case have been proceeding in Uruguayan venues").

Moreover, because seven of ten parties to this action are Angolan, and the main events underlying this suit took place in Angola, a substantial number of witnesses and a significant portion of relevant evidence are located in Angola or other places abroad. *See* Opposition at 38-39 (noting that nine of the witnesses GE identified in its initial disclosures reside in the United States, but recognizing that potential witnesses also include twenty Angolan state officials, seventeen European individuals, and nine individuals who reside in Africa or Asia). And to the extent there was relevant evidence found only in the United States, AE took action under 28 U.S.C. § 1782 to ensure that it already arrived in Angola. *See In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 321 (S.D.N.Y. 2020) ("[AE] has sought non-party discovery pursuant to 28 U.S.C. § 1782 from

[GE] in aid of foreign litigation in Angola."). Plaintiffs' conclusory assertion that "there must be more [evidence] here" beyond what GE produced pursuant to the section 1782 order, Opposition at 38, is far from persuasive. Thus, the limited number of witnesses in this forum and the fact that much of the relevant evidence will be found in Angola further weighs against Plaintiffs' choice of forum. *See, e.g.*, *Owens v. Turkiye Halk Bankasi A.S.*, No. 20 Civ. 2648 (DLC), 2021 WL 638975, at *4 (S.D.N.Y. Feb. 16, 2021) (granting a motion to dismiss on the ground of *forum non conveniens* in part because "almost all of the relevant evidence [was] located in Turkey").

In an attempt to justify their choice of forum, Plaintiffs point to the transfer of funds under the GE Credit Facility "into bank accounts located in New York." Opposition at 35 (internal quotation marks omitted). This is the only New York-based event mentioned in the Complaint. *See* Compl. ¶ 225.c. In support of their position, Plaintiffs primarily rely on *Skanga Energy & Marine Ltd. v. Arevenca S.A.*, 875 F. Supp. 2d 264 (S.D.N.Y. 2012). *See* Opposition at 36. In *Skanga*, a Nigerian company agreed to transfer several million dollars into one of the defendant's New York bank accounts in exchange for petroleum products. *Skanga Energy & Marine Ltd.*, 875 F. Supp. 2d at 266-67. After the transfer of funds, the defendants never delivered the products, and the plaintiffs sued. *Id.* at 266. The court held that the plaintiff's choice of forum was entitled "considerable deference" because there was a "bona fide connection between the subject matter of [the plaintiff's] lawsuit and the chosen forum." *Id.* at 273. Central to the court's conclusion was that the plaintiff alleged its "money

disappeared down the rabbit hole in New York, and [the plaintiff] wishe[d] to follow it." *Id.*

Unlike in *Skanga*, the transaction on which Plaintiffs rely does not form the basis for any of Plaintiffs' substantive claims. Plaintiffs do not allege, for example, that the GE Credit Facility payment structure was improper or that this transfer of funds was wrongful. In fact, "AE agreed that GE Capital could send the money that AE agreed to pay GE for GE goods and services straight to GE Power rather than routing it first to AE." Compl. ¶ 123. Moreover, the New York bank transfer occurred in late December 2017, *id.* ¶ 225.c, long before the events that gave rise to this suit, such as the December 2018 meetings at which da Costa allegedly showed fabricated documents to Angolan officials, *id.* ¶¶ 140-141, the September 2019 termination of the AE-MINEA Contracts, *id.* ¶ 181, or the late 2019 seizure of AE's assets, *id.* ¶¶ 212-216. Accordingly, the mere fact that the underlying financing agreement here was routed through New York banks does not afford Plaintiffs' choice of forum much deference. *See Pollux Holding Ltd.*, 329 F.3d at 71-72, 74 (concluding that wire transfers, among other activity, afforded the plaintiffs "only a faint connection to the United States"); *Owens*, 2021 WL 638975, at *4 (granting a motion to dismiss on the basis of *forum non conveniens* because the underlying facts involved "an alleged fraudulent scheme orchestrated primarily in Turkey" despite the fact that the "scheme permitted the funds to move through New York financial institutions"). Instead, the Court agrees that an "allegation that Defendants utilized money wires and bank accounts in New York," without more, gives "no indication

that New York is a convenient, or even relevant, forum." *Banco de Serguros del Estado*, 500 F. Supp. 2d at 261. This is particularly so when the facts underlying Plaintiffs' core claims—*i.e.*, breach of contract, taking, and tortious interference—all occurred in Angola. *See, e.g.*, Compl. ¶¶ 59 (discussing a series of Angolan presidential decrees that approved the AE-MINEA Contracts), 107 (explaining da Costa photographed the fake letters in Angola), 139-142 (discussing meetings between MINEA, AE, and GE in Angola at which GE's alleged forgery came to light), 177 (noting that the President of Angola adopted a resolution to permit MINEA to terminate the AE-MINEA Contracts), 181 (explaining that the Angolan government sent AE in Angola a formal termination letter), 202 (discussing the President of Angola's termination of the Soyo II Concession), 216 (explaining that Angolan authorities seized AE's assets at AE's warehouses in Angola).

***11** Shifting focus away from New York banks, Plaintiffs also argue that *forum non conveniens* dismissal here is improper because Plaintiffs are treated as a "foreign group" in Angola and thus the Court should afford deference to their chosen forum. Opposition at 35 (internal quotation marks omitted). Plaintiffs cite no authority for why they should be considered a "foreign group" when both AE and Combined Cycle are incorporated in Angola and have their principal places of business there, Compl. ¶¶ 25-26, but seem to base this theory on the fact that AE's majority owner is Portuguese, *see id.* ¶¶ 257, 263; Opposition at 35. In any case, Plaintiffs say *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006) is "on point." Opposition at 35. Plaintiffs are wrong. In

Bigio, the Egyptian government seized the plaintiffs' property because they were Jewish, and the plaintiffs then fled Egypt for Canada. 448 F.3d at 178. Years later, the Egyptian government ordered that the property be returned to the plaintiffs, but an Egyptian state-owned entity instead sold or leased the property to Coca-Cola Co. *Id.* "Unable to obtain relief in the Egyptian courts," the plaintiffs sued Coca-Cola in the United States. *Id.* The Second Circuit held that the district court erred in dismissing the case on the basis of *forum non conveniens*. *Id.* at 180. Central to the court's decision was the fact that the only defendant was a United States company and the dispute was "primarily over whether a United States company should be liable in damages." *Id.*

In sharp contrast, Plaintiffs sued not only a United States company, but also the Republic of Angola and several Angolan government entities. The issues here are not simply whether a United States company is liable for damages, but also include, for instance, whether a sovereign state violated international law by seizing Plaintiffs' assets and whether GE tortiously interfered (likely according to Angolan law) with that government's energy contracts. *See* Compl. ¶¶ 249-271, 278-283. Further, while it was clear that the refugee plaintiffs in *Bigio* would not obtain justice from the Egyptian courts, Plaintiffs here are simultaneously litigating an action in an Angolan court based on these same facts. *Id.* ¶ 197; Dkt. 112, Exh. 1. It is far from clear how that case will be resolved. Plaintiffs also baldly assert that Angola expropriated their assets "based on Plaintiffs' foreign status—that is, Portuguese," but do not plead any facts to support a discriminatory

animus. Compl. ¶ 257. So to the extent that Plaintiffs here (two corporations) analogize themselves to the plaintiffs in *Bigio*—three Jewish refugees fleeing persecution in Egypt and a company that they controlled—such that they should be considered a "foreign group," this readily fails. *Bigio* does not control here.

Plaintiffs also argue that deference is warranted because subject-matter and personal jurisdiction are proper against all Defendants. Opposition at 36. The Angolan Defendants argue that the Court lacks subject-matter jurisdiction over Plaintiffs' claims against them, Angolan Defendants' Motion at 12-31, and the GE Defendants argue that personal jurisdiction is lacking as to both GE subsidiaries, GE Defendants' Motion at 41-44. The Court does not reach these issues. Regardless, although Plaintiffs "should not be compelled to mount a suit in a district where [they] cannot be sure of perfecting jurisdiction over the defendant," *Iragorri*, 274 F.3d at 73, here all Defendants agree they can be sued in Angola, *see* Angolan Defendants' Motion at 36; GE Defendants' Motion at 18.

Plaintiffs' remaining arguments for why their choice of forum deserves great deference are similarly unavailing and only show that Plaintiffs' choice deserves less deference. Plaintiffs argue deference is warranted because they "forewent their jury right" in order to sue here. Opposition at 36 (emphasis omitted).[5] This affords Plaintiffs' choice of forum some deference. *See Accent*

5. The Complaint does not contain a jury demand and the parties submitted a proposed case management plan and scheduling order that provided that the case is not to be tried to a jury, Dkt. 67 ¶ 16.

Delight Int'l Ltd. v. Sotheby's, 394 F. Supp. 3d 399, 410 (S.D.N.Y. 2019) ("[W]eighing in favor of deference is the fact that Plaintiffs cannot intend to exploit the generosity of American juries because they have waived any right to a jury trial."). Finally, Plaintiffs rely on the fact that some relevant documents are in the English language, not the Portuguese language, and that all parties "have retained highly competent New York counsel who are fully capable of litigating this dispute in this forum." Opposition at 40 (emphasis omitted) (quoting *Ancile Inv. Co. v. Archer Daniels Midland Co.*, No. 08 Civ. 9492 (PAC), 2009 WL 3049604, at *6 (S.D.N.Y. Sept. 23, 2009)). These considerations also warrant some minimal degree of deference to Plaintiffs' choice of forum, but they are outweighed by the substantial number of witnesses and key evidence located outside the United States, as discussed above.

***12** For the reasons stated, the Court concludes that Plaintiffs' choice of forum here may be driven by forum shopping. This action has only an attenuated connection to this District but an obvious connection to Angola. Thus in sum, and considering the "totality of circumstances," *Norex Petroleum Ltd.*, 416 F.3d at 157, the Court affords minimal deference, not great deference, to Plaintiffs' choice of forum.

B. Adequate Alternative Forum

The Court next must determine whether there is an "adequate alternative forum" in which Plaintiffs could pursue these claims. *Iragorri*, 274 F.3d at 73. An

adequate alternative forum exists if (1) "the defendants are amendable to service of process there" and (2) the alternative forum "permits litigation of the subject matter of the dispute." *Pollux Holding Ltd.*, 329 F.3d at 75. All Defendants here consent to service in Angola. *See* Angolan Defendants' Motion at 36 ("The Angolan Defendants are certainly amendable to service in Angola."); GE Defendants' Motion at 18 ("The GE Defendants consent to service in Angola."). Thus the first element of the alternative forum test is satisfied. *See Palacios*, 757 F. Supp. 2d at 355 (concluding that the defendant showed it was amendable to service of process in Guatemala because it said so in its memorandum in support of its motion to dismiss).

Next, the Court must determine whether an Angolan forum would "permit[ ] litigation of the subject matter" of this dispute. *Pollux Holding Ltd.*, 329 F.3d at 75. "The availability of an adequate alternative forum does not depend on the existence of the identical cause[s] of action in the other forum." *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998). Instead, the foreign court must be able "to litigate the essential subject matter of the dispute." *Palacios*, 757 F. Supp. 2d at 357 (internal quotations omitted). So long as some of Plaintiffs' claims could be brought in Angola, *BFI Grp. Divino Corp.*, 298 F. App'x at 91-92, "the forum permits litigation of the subject matter of the dispute," *Monegasque De Reassurances S.A.M.*, 311 F.3d at 499.

In support of their motion, the GE Defendants submitted a declaration from Angolan law professor Sofia

Vale. Dkt. 53. Professor Vale concluded that in Angola, Plaintiffs could bring similar claims to those alleged in the Complaint. *Id.* ¶¶ 2.4-2.4.8.4. Plaintiffs do not argue otherwise. *See* 4/19/2021 Tr. at 56-57; *see also* Opposition at 49-50. In Plaintiffs' own words, their claims involve "humdrum commercial-law principles." Opposition at 49. Their claims would thus seem to exist in most jurisdictions around the world. Moreover, it appears that at least some of Plaintiffs' claims are brought under Angolan law, which suggests they certainly could be heard by an Angolan court. *See Pollux Holding Ltd.*, 329 F.3d at 75 ("[W]ith several of appellants' claims asserted under English statutory law, there can be no doubt that England permits litigation to resolve commercial disputes of the type presented in this case."). That Plaintiffs' taking claims are brought under international law, *see* Compl. ¶¶ 249-271, also does not mean they cannot be brought in Angola. *See Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 553 (S.D.N.Y. 2001) ("The United States ... has no special public interest ... in providing a forum for plaintiffs pursuing an international law action against a United States entity that plaintiffs can adequately pursue in the place where the violation actually occurred."), *aff'd*, 303 F.3d 470 (2d Cir. 2002). For these reasons, the Court easily concludes that Angola would "permit[ ] litigation of the subject matter of the dispute." *Monegasque De Reassurances S.A.M.*, 311 F.3d at 499.

***13** Although they did not argue it in their Opposition or Sur-Reply, Plaintiffs now argue (due to the Court's questioning at oral argument) that they may not be able to bring their breach of contract claims against Angola.

Dkt. 115 at 3. Plaintiffs rely on a declaration from another Angolan law professor which states that these claims are "subject to a mandatory legal limitation of 180 business days" and "[i]f the 180 business days run from the date MINEA gave notice of termination of AE's 13 contracts," the "180-day limit" has expired. *Id.*, Exh. 4 ¶ 3. Plaintiffs therefore do not argue that their claims will definitely be barred because they do not seem to know when the accrual period began. *See id.* at 3 ("*if* the period [for accrual purposes] began the day of the termination notice" (emphasis added)). So assuming this limitation applies to these claims (which Defendants contest, *see* Dkts. 113 at 1, 117 at 1, 120 at 2, 121 at 1), it is not certain that the limitations period has run. And this says nothing of Plaintiffs' other eight claims for unjust enrichment, taking of physical assets in violation of international law, taking of intangible assets in violation of international law, conversion, tortious interference with contract, tortious interference with prospective business relations, accounting, and aiding and abetting. Compl. ¶¶ 241-298. Thus even if Plaintiffs' two breach of contract claims against the Angolan Defendants may not be brought, Angola still "permits litigation of the subject matter of the dispute," *Monegasque De Reassurances S.A.M.*, 311 F.3d at 499, because the availability of an adequate alternative forum does not depend on the existence of an identical cause of action in the other forum for each claim. *See PT United Can Co.*, 138 F.3d at 74; *BFI Grp. Divino Corp.*, 298 F. App'x at 91-92.

Still, "[a]n alternative forum is not adequate where there is 'a complete absence of due process or an inability

of the forum to provide substantial justice to the parties.' " *Palacios*, 757 F. Supp. 2d at 355 (quoting *Monegasque De Reassurances S.A.M.*, 311 F.3d at 499). Plaintiffs argue that Angola is not an adequate forum because the nation is plagued by corruption and its legal system affords no due process. Opposition at 41 ("Plaintiffs' [w]ell-[f]ounded [c]orruption [c]oncerns [u]nderline [t]heir [c]hoice of [f]orum."); *id.* ("Angola has so far refused to accord AE basic due process."); *see, e.g.*, Compl. ¶¶ 22 n.1 ("AE is pessimistic that the [Angolan] Court will provide AE any due process."), 24 ("To date, the Angolan legal system has provided AE no due process."), 193 ("[C]orruption is rampant ... and there is no due process of law [in Angola]."), 198 ("[T]he Angolan Supreme Court has done nothing—disregarding its own procedural deadlines without explanation."). This argument fails.

The Second Circuit is "reluctant to find foreign courts 'corrupt' or 'biased.' " *Monegasque De Reassurances S.A.M.*, 311 F.3d at 499. Indeed it has "repeatedly emphasized" that "[i]t is not the business of [American] courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." *Blanco*, 997 F.2d at 982 (first alteration in original) (internal citations and quotation marks omitted); *accord PT United Can Co.*, 138 F.3d at 73 ("[C]onsiderations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards."). Thus, "[t]he 'alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record." *Base Metal Trading SA*, 253 F. Supp. 2d at 706 (quoting *Eastman*

Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) (collecting cases)).

Plaintiffs concede that "corruption concerns are generally insufficient" to show that an alternative forum is inadequate. Opposition at 41. But Plaintiffs ask the Court to conclude that their corruption concerns are sufficient because "there is much more here." *Id.* Plaintiffs rely on three sources to show that no adequate Angolan forum exists: (1) AE's experience litigating in Angola; (2) U.S. Department of State reports discussing corruption in Angola; and (3) a GE internal document that noted there is "inherent corruption risk in Angola." *Id.* at 41-42 (internal quotation marks omitted). None of these show that Angolan courts have "inadequate procedural safeguards" such that *forum non conveniens* dismissal is improper. *See PT United Can Co.*, 138 F.3d at 73.

With regard to AE's experience litigating many of these very issues in Angola, Plaintiffs' main gripe seems to be that an Angolan court held an *ex parte* proceeding at which it issued an injunction that allowed Angola to seize some of AE's turbines and other assets. Compl. ¶¶ 212-214; Opposition at 42. Plaintiffs cite no authority for why such a proceeding renders a judicial system inadequate. The Court readily dismisses this argument especially when courts in this country hold *ex parte* hearings in appropriate circumstances, such as to hear certain applications for injunctive relief and to freeze certain assets.

***14** In their Complaint, but not in their Opposition, Plaintiffs seem to argue that Angolan courts are corrupt in part because the Angolan Supreme Court is moving too slowly and has missed unspecified procedural deadlines. *See* Compl. ¶ 198 ("[T]o date, the Angolan Supreme Court has done nothing—disregarding its own procedural deadlines without explanation—and the Angolan state, the respondent in those administrative proceedings, has also not responded to AE's filings."). To the extent Plaintiffs continue to raise this argument even after Angola has filed a brief in opposition to AE's motion, *see* Dkt. 119 at 4, it fails. First, the Court notes that prior to AE's appeal to the Angolan Supreme Court, other aspects of the Angolan government heard and rejected AE's claims. *See* Compl. ¶¶ 195 (alleging that MINEA denied AE's administrative appeal in a letter), 196 (alleging that the President of Angola denied AE's appeal of MINEA's decision in a "one-sentence decision"). Further, Plaintiffs charged the Angolan Supreme Court with having "done nothing" less than four months after AE filed its appeal. *See* Dkt. 59, Exh. 26 at 140. Plaintiffs fail to explain why this relatively short amount of time caused them to conclude that the Angolan Supreme Court would not provide them "any due process." *See* Compl. ¶ 22 n.1.

Plaintiffs next point to a 2019 State Department Country Report for Angola that recognized "political influence in the decision-making process" of Angola's "judicial system" and commented that "[g]overnment corruption at all levels was widespread." Opposition at 42 (quoting U.S. Dep't of State, 2019 Country Reports on Human Rights Practices: Angola, at 6, 16, https://www.

state.gov/reports/2019-country-reports-on-human-rights-practices/angola/). The Complaint also alleges that Angola "intends to live up to its poor international reputation," citing a 2018 State Department investment report that said the Angolan judicial system "lacks resources and independence to play an effective role," Angola's "legal framework is obsolete," its "[c]ourts remain wholly dependent on political power," and "[c]orruption remains pervasive and institutionalized" throughout the country. Compl. ¶ 23 (quoting U.S. Dep't of State, 2018 Investment Climate Statements: Angola, https://www.state.gov/reports/2018-investment-climate-statements/angola/). The Complaint goes on to generally allege that "the U.S. State Department has recognized that Angola's legal system does not provide due process, and advises that corruption in the country is pervasive." *Id.* ¶ 27; *see also id.* ¶ 193 & n.6.

While Plaintiffs cherry-pick portions of these reports that discuss problems with Angolan courts, they ignore aspects that paint a somewhat brighter picture of the judiciary in Angola. For example, the 2018 report also notes that Angolan courts "base their judgments on legislation" and the Angolan constitution "guarantee[s] judiciary independence." U.S. Dep't of State, 2018 Investment Climate Statements: Angola, https://www.state.gov/reports/2018-investment-climate-statements/angola/. Further, that report notes that "[t]here is a general right of appeal" in Angola and discusses several methods of "enforcing judgments." *Id.*

Regardless, the vague, general statements on which Plaintiffs rely do little to show that Angola is not an adequate forum. *See Palacios*, 757 F. Supp. 2d at 359 ("[C]onclusory State Department summaries are not dispositive of the adequacy inquiry[.]"); *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 524-25 (S.D.N.Y. 2006) (rejecting State Department reports as "insufficient to demonstrate the inadequacy of Turkey as an alternative forum"), *aff'd*, 343 F. App'x 623 (2d Cir. 2009); *Base Metal Trading SA*, 253 F. Supp. 2d at 708 n.23 (concluding that State Department reports on Russia "provide[d] only minimal information about the Russian judiciary" and "d[id] not suffice to show the Russian forum inadequate"). Indeed, courts have dismissed cases on the basis of *forum non conveniens* despite portions of State Department reports suggesting corruption in a foreign forum. *See, e.g.*, *Palacios*, 757 F. Supp. 2d at 359 n.7 (dismissing on the ground of *forum non conveniens* even after recognizing that the State Department's 2009 report on Guatemala noted that "[t]here were numerous reports of corruption, ineffectiveness, and manipulation of the judiciary" (internal quotation marks omitted)); *Aguinda*, 142 F. Supp. 2d at 545 (dismissing on the ground of *forum non conveniens* despite noting that the State Department's 2000 report on Ecuador "describe[d] Ecuador's legal and judicial systems as politicized, inefficient, and sometimes corrupt so far as certain human rights practices [were] concerned" (internal quotation marks omitted)).

***15** Furthermore, Plaintiffs' reliance on an internal GE document that discussed "inherent corruption risk in Angola," Opposition at 42 (internal quotation

marks omitted), is far from persuasive. This statement is found in a 2017 report that GE apparently used to assess whether GE Capital should extend the GE Credit Facility to Angola. Compl., Exh. 1 at 6. At that time, Angola was preparing for a new president after its former leader announced he would step down following nearly four decades in power. *See id.* at 5. The GE document suggests that GE was concerned the outgoing regime might use the transition period to "enrich themselves by awarding over-inflated contracts to their supporters." *Id.* While the report recognized "inherent corruption risk in Angola, *particularly in infrastructure development and construction*," *id.* at 6 (emphasis added), it did not discuss Angolan courts at all. Thus, this document does nothing to suggest that an Angolan judicial forum lacks procedural safeguards or is inadequate to hear this case.

Plaintiffs' decision to do business in Angola is relevant for this part of the analysis as well. When they decided to do business in Angola and with the Angolan government, Plaintiffs made a decision to subject themselves to Angolan law. In *Blanco*, the Second Circuit rejected a claim that Venezuela was not an adequate alternative forum saying that "it [was] at least anomalous for a Venezuelan corporation to contract with a Venezuelan bank for the financing of a housing project in Venezuela, specify in both pertinent contracts that litigation concerning them may be brought in Venezuela, and then argue to an American court that the Venezuelan system of justice is so endemically incompetent, biased, and corrupt as not to provide an adequate forum for the resolution of such contractual disputes." 997 F.2d at 981; *see also*

Monegasque De Reassurances S.A.M., 311 F.3d at 499 (rejecting the plaintiff's argument that Ukraine was an inadequate forum in part because the plaintiff "voluntarily conducted business with ... a Ukrainian company, and must have anticipated the possibility of litigation in Ukraine"); *BFI Grp. Divino Corp.*, 298 F. App'x at 92 (affirming the district court's dismissal on *forum non conveniens* grounds and rejecting the plaintiff's argument that Nigerian courts were inadequate in part because of the plaintiff's "desire to engage in a multi-million dollar operation in Nigeria," which showcased a "willingness to conduct business in Nigeria"). So too here. Plaintiffs claim that Angola is a wholly inadequate forum is hard to accept when they incorporated in Angola and did business in Angola with the Angolan government.

Relatedly, AE's ongoing Angolan proceedings are also relevant to this step of the analysis. Despite Plaintiffs' pleas that Angola—the country with which they chose to do more than $1 billion worth of business—is corrupt and its judicial system will afford them no due process, Plaintiffs initially looked to that country's system for recourse. After Angola's termination of the AE-MINEA Contracts, AE pursued an administrative action, filed an appeal with the President of Angola, and then sought judicial review from the Angolan Supreme Court. Compl. ¶¶ 194-197. AE even utilized the laws of this country, *see* 28 U.S.C. § 1782, to provide the Angolan Supreme Court with relevant evidence from GE. *See* Compl. ¶ 22 n.1. As recently as March 25, 2021, Plaintiffs filed a brief in the Supreme Court in Angola arguing that the Angolan litigation should remain in that tribunal rather

than be decided by an arbitrator. *See* Dkt. 112 ¶ 2, Exh. A. Why would Plaintiffs bother to do any of this if they truly believed that in Angola "there is no due process of law"? Compl. ¶ 193. Plaintiffs do not say. But the fact that Plaintiffs have sought relief in the Angolan judiciary cuts against Plaintiffs' claims that Angola is an inconvenient forum. *See Base Metal Trading SA*, 253 F. Supp. 2d at 707 (finding Russia to be an adequate alternative forum where, among other things, the plaintiff had "pursued relief in the Russian courts until the results were not to their liking").

***16** Indeed, Plaintiffs tip their hand when they groan that the Angolan Supreme Court is not moving fast enough. *See* Compl. ¶ 22 n.1 ("[G]iven [the Angolan Supreme Court's] failure to cause the matter to progress, AE is pessimistic that the Court will provide AE any due process."); *see also* ¶ 198 ("[T]he Angolan Supreme Court has done nothing."); Dkt. 119 at 3 (arguing that Angola is an inconvenient forum because one study found that in Angola, the time "between filing a complaint and receiving restitution[ ] takes an average of 1,296 days" (internal quotation marks omitted)). Setting aside the fact that Plaintiffs initially raised these complaints after very little time had passed since the filing of their appeal with the Angolan Supreme Court (less than four months), *see* Dkt. 59, Exh. 26 at 140, and that the litigation is now moving along, *see* Dkt. 119 at 4, these complaints suggest that Plaintiffs are primarily concerned that the Angolan Supreme Court is just not fast paced enough for them. This is far from enough to show that Angola is an inadequate forum. New York courts are not a fallback option for

foreign plaintiffs whenever their homeland's wheels of justice may not spin fast enough for their liking.

The Court finds that Plaintiffs' vague concerns about "corruption" in Angola and a lack of "due process" in Angolan courts do little to show that Angola lacks "procedural safeguards," *PT United Can Co.*, 138 F.3d at 73, or is an inadequate forum, particularly when Plaintiffs are already litigating there. The Court thus concludes that Angola offers an "adequate alternative forum" for Plaintiffs to pursue these claims. *Iragorri*, 274 F.3d at 73.

C. Balancing the Private and Public Interests

Because Plaintiffs' choice of forum is entitled to minimal deference, and Angola offers an adequate alternative forum for this litigation, the Court turns to the final step of the *forum non conveniens* framework: weighing the relevant private and public interest factors first set out in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Pollux Holding Ltd.*, 329 F.3d at 70. For the following reasons, the Court concludes that both the private and public interest factors weigh in favor of dismissal.

1. Private Interest Factors

The private interest factors under *Gilbert* include: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; ... and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Iragorri*, 274 F.3d at

73-74 (quoting *Gilbert*, 330 U.S. at 508); *accord Pollux Holding Ltd.*, 329 F.3d at 74-75. In considering these factors, "the court should focus on the precise issues that are likely to be actually tried, taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues." *Monegasque De Reassurances S.A.M.*, 311 F.3d at 500 (quoting *Iragorri*, 274 F.3d at 74). The private factor analysis essentially calls for a court to compare "the hardships [the] defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country." *Iragorri*, 274 F.3d at 74.

Here, the private interest factors weigh heavily in favor of litigating this case in Angola. The underlying events took place almost entirely on Angolan soil among Angolan parties. *See, e.g.*, Compl. ¶¶ 1-17. The underlying contracts between Plaintiffs and the Angolan government provided that Plaintiffs would construct and maintain power plants in Angola for the ultimate benefit of the Angolan people. *Id.* ¶¶ 58-62. The alleged breaches of the AE-MINEA Contracts and the Soyo II Concession occurred in Angola. *See, e.g.*, *id.* ¶¶ 177, 181, 202. For example, the Complaint alleges that President Lourenço adopted a resolution that terminated the AE-MINEA Contracts and transferred the work to GE. *Id.* ¶ 177. The Angolan government then sent a termination letter to AE in Angola. *Id.* ¶ 181. Angolan authorities subsequently seized AE's property in Angola. *Id.* ¶ 216. The GE Defendants' supposed fraud that led to these events also occurred in Angola. GE employees, presumably in Angola,

created fake letters using Adobe Photoshop, *id.* ¶ 105, and the CEO of GE Angola, operating "from the safety and secrecy of his home in Luanda," took photographs of the fake letters, *id.* ¶ 107. At a meeting with MINEA and AE (again, presumably in Angola), da Costa showed these letters in an effort to "support his false claims." *Id.* ¶ 141. Plaintiffs do not even allege that the only Defendant at home in New York, GE Co., directly participated in the allegedly tortious activity in Angola.

***17** The primary New York-based activity that Plaintiffs point to is the transfer of funds to New York bank accounts and the fact that these transfers affected GE's accounting objectives in the United States. *Id.* ¶¶ 74-75, 225.c; Opposition at 48; 4/19/2021 Tr. at 40 ("Our case fundamentally at its core is about this attainment that happened in New York in the United States, whereby GE Capital sent money to GE Power in the United States, to pay for turbines that were manufactured, in whole or in part, in the United States, related to contracts in Angola for the supply and installation and provision of those very same U.S. manufactured GE turbines. That's at the core of the case."). This activity does not directly involve the "precise issues that are likely to be actually tried." *Monegasque De Reassurances S.A.M.*, 311 F.3d at 500 (quoting *Iragorri*, 274 F.3d at 74). Whatever conduct allegedly occurred in the United States " 'pale[s] by comparison [to] the magnitude of the factual and legal links' to the alternative forum." *Palacios*, 757 F. Supp. 2d at 361 (alterations in original) (quoting *Turedi*, 460 F. Supp. 2d at 527).[6]

6. The Court notes that the Complaint alleges other events with a connection to the United States generally, albeit not New

Because the core facts here occurred primarily in Angola, the "relative ease of access to sources of proof," *Iragorri*, 274 F.3d at 73, weighs in favor of dismissal. Much of the evidence and many of the witnesses are likely located in Angola and other parts of Africa or, at best, Europe. Plaintiffs focus on the fact that "roughly half of GE's witnesses reside" in the United States. Opposition at 47 (emphasis omitted). To be sure, the Court recognizes that it would be convenient for these witnesses if this action remained in this Court. But this does not meaningfully move the needle. The Angolan government is at the heart of this case, and many Angolan state officials within MINEA, MINFIN, PRODEL, and ENDE—and perhaps even high-ranking members of President Lourenço's administration—would serve as witnesses in this case. *See* Opposition at 38 (noting that there are at least twenty Angolan state officials that could serve as witnesses).

York. For example, Plaintiffs allege that GE's Nelson forwarded the fake letters to at least two GE executives in the United States, Compl. ¶ 109, and that at some point, GE's Ribieras in the United States was "directing GE's activities related to GE's take-over of the AE-MINEA Contracts," *id.* ¶ 179; *see also id.* ¶ 225.g. Further, the Complaint touches on the fact that the turbines at issue were shipped from the United States and paid for in United States currency. *Id.* ¶ 225.d-e. Finally, the Complaint notes that GE Co., incorporated in New York, *id.* ¶ 32, guaranteed the GE Credit Facility that GE Capital provided to Angola. *Id.* ¶ 225.b. Plaintiffs do not rely on these facts for support of their position that litigating this case here makes sense. Even so, the Court finds that these stray connections to the United States—which also do not directly concern the claims brought by Plaintiffs—are significantly outweighed by the amount of relevant activity that occurred in Angola.

There are also many employees or former employees of AE and GE who seem to reside in Angola, other parts of Africa, or Europe. *See id.* at 38-39.

All parties agree that many potential witnesses reside outside of New York and on other continents around the globe. Thus many documents and witnesses are likely beyond the reach of the Court's power to compel production, which also weighs in favor of dismissal. *See, e.g.*, *Palacios*, 757 F. Supp. 2d at 361 n.10. For example, in *Allstate Life Insurance Co. v. Linter Group Ltd.*, the Second Circuit affirmed a district court's dismissal of an action on the ground of *forum non conveniens* because "key witnesses" in Australia were not "within the subpoena power of the federal court" and thus could not be "compelled to appear at trial in New York." 994 F.2d 996, 1001 (2d Cir. 1993); *see also Blanco*, 997 F.2d at 982 (affirming the district court's dismissal on the basis of *forum non conveniens* in part because "most, if not all, of the witnesses whose testimony would be required [were] located in Venezuela" and there was "no process available to compel their appearance in New York").[7] And even if

7. During oral argument, Plaintiffs raised for the first time a new theory that they did not posit in their Opposition. Plaintiffs now say that the Court may be able to compel da Costa and Nelson, two witnesses that all parties seem to agree would be essential at trial, to testify here pursuant to 28 U.S.C. § 1783. The Court will not consider arguments raised for the first time during oral argument. *See Saray Dokum Ve Madeni Aksam Sanayi Turizm A.S. v. MTS Logistics, Inc.*, No. 17 Civ. 7495 (JPC), 2021 WL 1199470, at *7 (S.D.N.Y. Mar. 30, 2021) (collecting cases). Even so, section 1783 only applies to "a national or resident of the

the Court could compel some witnesses to come to New York to testify, or they agreed to do so, this would be very costly. *See Palacios*, 757 F. Supp. 2d at 361 ("The cost of obtaining the attendance of cooperative witnesses at trial also mitigates, albeit modestly, in favor of dismissal.").

***18** Plaintiffs argue that "modern technologies" make the location of witnesses and documentary evidence less important, particularly during the COVID-19 pandemic. Opposition at 44-45 (internal quotation marks omitted). But the location of witnesses and evidence remains a valid consideration under binding Second Circuit precedent, *see Iragorri*, 274 F.3d at 74, and courts continue to assess it. *See, e.g.*, *Owens*, 2021 WL 638975, at *4 (granting a motion to dismiss on the ground of *forum non conveniens* in part because "it appear[ed] that almost all of the relevant evidence [was] located in Turkey"). And even so, Plaintiffs' argument cuts both ways. If technological advances make the location of witnesses and documents "less important to the *forum non conveniens* analysis," Opposition at 44 (quoting *Petersen Energía Inversora S.A.U. v. Argentine Republic*, No. 15 Civ. 2739 (LAP), 2020 WL 3034824, at *11 (S.D.N.Y. June 5, 2020)), any evidence in the United

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United States." 28 U.S.C. § 1783(a). It is far from certain that either of these witnesses fit this requirement. *Compare* Dkt. 119 at 1 *with* Dkt. 120 at 2-3. And even if the Court could subpoena them under section 1783, the Court would still exercise its discretion to dismiss this suit on *forum non conveniens* grounds. Although these witnesses would certainly be important, there presumably would be many other essential witnesses who could not be subpoenaed under section 1783, including officials from the Angolan government.

States might just as easily be transmitted electronically to Angola.

Other practical problems also support dismissal on *forum non conveniens* grounds. For example, it appears that the parties here did business primarily in Portuguese, the official language of Angola. Plaintiffs downplay the number of relevant documents that would require translation from Portuguese to English if the case were tried in this District. *See* Opposition at 47. Although many of GE's documents may be in English, it seems that the vast majority, if not all, of AE's and the Angolan Defendants' documents are in Portuguese. For example, for purposes of this motion, the Court could not review the majority of AE-MINEA Contracts because they are in Portuguese. *See* Dkt. 59, Exhs. 1-13; *cf. id.*, Exh. 17 (providing translations of only the arbitration clauses in each contract). These contracts are at the center of some of the claims here, and thus they would have to be translated from Portuguese to English.

Similarly, trial testimony from non-English speaking witnesses (or those that may speak some English but nonetheless would prefer to testify in another language) would require the assistance of interpreters. The Court thus would have to rely heavily on the accuracy of translations to assess much of the evidence here. This ordeal would be a costly, difficult endeavor. Cost considerations are a "legitimate part of the *forum non conveniens* analysis." *Palacios*, 757 F. Supp. 2d at 362 (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 107 (2d Cir. 2000)). The fact that many relevant documents and potential witness

testimony would be in Portuguese and thus would require translation weighs "strongly in favor" of dismissal on *forum non conveniens* grounds. *Blanco*, 997 F.2d at 982 (explaining that the fact that documentary evidence and trial or deposition testimony would be in Spanish and thus require translation to English "militate[d] strongly in favor of Venezuela as a more appropriate forum" because such difficulties would "result in significant cost to the parties and delay to the court"); *see also Monegasque De Reassurances S.A.M.*, 311 F.3d at 500 (holding that the private interest factors "tip[ped] decided in favor of *forum non conveniens* dismissal" in part because "the pertinent documents [were] in the Ukrainian language"); *Palacios*, 757 F. Supp. 2d at 361 (concluding that the need for "[t]ranslation of all Spanish language testimony and relevant documents" weighed in favor of dismissal); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 542 (S.D.N.Y. 2002) (noting that the private interest factors weighed in favor of *forum non conveniens* dismissal because many documents were in Spanish, many witnesses spoke only Spanish, and thus "the translation requirements alone, of testimony and documents, would double the length of the trial"). In contrast, Angola's official language is Portuguese, putting Angolan courts in a much better position to consider evidence in Portuguese and receive witness testimony in their country's native tongue.

***19** Finally, as part of their private interest factors analysis, Plaintiffs claim that an Angolan forum would be inconvenient as compared to New York because Machado has "grave security concerns" about returning to Angola, citing a declaration provided by Machado. Opposition at 44

(citing Dkt. 82 (the "Machado Declaration" or "Machado Decl.") ¶¶ 3-6). The Machado Declaration provides that he "received specific threats upon [his] life related to the termination of the contracts." Machado Decl. ¶ 4. He notes that he and his family "employ heightened security measures" in Lisbon, Portugal, where they reside. *Id.* ¶ 5. Machado states that if he were to return to Angola to testify he "would fear for [his] safety and indeed [his] life." *Id.* ¶ 6. Plaintiffs' opposition also claims that Machado "was specifically warned not to return" to Angola, Opposition at 44, but this finds no support in the Machado Declaration. Following oral argument, Plaintiffs submitted under seal a new declaration from Machado and one from a member of his security team. *See* Dkt. 115 at 3. These declarations offer some additional, limited details, but provide no substantiation for Machado's claims.

As owner of 99.9% of AE's stock, and as someone who took part in many of the key events at issue here, Machado likely would be an important witness in this action and thus his ability to testify in a given forum is relevant. However, his declarations fails to provide any details about the alleged threats he received. Machado's claims also are called further into question because AE—a company Machado controls—is currently seeking "reinstatement of the contracts" it held with the Angolan government through its action before the Angolan Supreme Court. *See* Opposition at 67 n.66; *see also id.* at 16. Plaintiffs fail to explain why AE continues to try to do business with Angola when its CEO and majority owner apparently would fear for his life if he ever had

to return to the country. *See* Machado Decl. ¶ 3.[8] In any case, the Court assumes Machado's fears are legitimate, and thus his concerns weigh slightly against dismissing this action. *See Iragorri*, 274 F.3d at 75. But because all other private interest factors weigh in favor of dismissal, the Court is unpersuaded that such fears tip the balance in a meaningful way.

2. Public Interest Factors

The *Gilbert* public interest factors that the Court must consider include: "administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002); *see also Gilbert*, 330 U.S. at 508-09; *Iragorri*, 274 F.3d at 74. The first two factors are neutral. There is no indication that Angolan courts are more or less congested than this District, and Plaintiffs

8. Plaintiffs now claim that the contract reinstatement remedy they are currently seeking in the Angolan Supreme Court is either "irrelevant," 4/19/2021 Tr. at 50, or "moot," Dkt. 115 at 2. For support, they cite their March 25, 2021 "réplica" in which they stated (according to a translation from Portuguese to English provided by the Angolan Defendants) that "[t]he passage of time and the grave effects of the damages caused by the illegal recission of the contracts and the consequent destruction of [AE's] business activities make it very difficult for [AE] to reintegrate into its contracts." Dkt. 112, Exh. 1 at 24 ¶ 127. It is far from clear that this means that Plaintiffs no longer seek to win the equitable remedy at issue in the pending Angolan proceeding.

concede that they "g[ave] up on the right to have a jury hear their claims against GE." Opposition at 36. However, the remaining factors weigh in favor of dismissal.

First, "the interest in having localized controversies decided at home," *Aguinda*, 303 F.3d at 480, strongly suggests an Angolan forum should hear this dispute. This case has little to do with New York and a lot to do with Angola. At the heart of this case are contracts between Angolan energy companies and the Angolan government to provide power to the Angolan people. Whatever interest New York has in the conduct of GE in Angola is outweighed by the interest of Angola in adjudicating this dispute. *See Turedi*, 460 F. Supp. 2d at 528 (finding that the "United States' interest in adjudicating alleged violations of international law ... as well as charges of corporate misconduct occurring in the United States and involving large American businesses" was outweighed by Turkey's interest in "resolving charges of violations of local and international law by Turkish police"). Again, the fact that funds moved through New York banks does not change this. "Were such a minimal contact with New York to be deemed significant, this Court, located in one of the world's largest and busiest financial centers, would be burdened with countless international financial disputes having no real, substantive link to New York." *Lan Assocs. XVIII, L.P. v. Bank of Nova Scotia*, No. 96 Civ. 1022 (JFK), 1997 WL 458753, at *6 (S.D.N.Y. Aug. 11, 1997).

***20** Further, there is a strong likelihood that in addressing the merits, the Court would need to confront "difficult problems in conflict of laws and the application

of foreign law." *Aguinda*, 303 F.3d at 480. According to the Angolan Defendants, Angolan law governs the AE-MINEA Contracts and the Soyo II Concession, and each contract states that disputes will be resolved by arbitration in Angola or Portugal (with the exception of Contract 3, which apparently does not indicate venue). *See* Angolan Defendants' Motion at 9-10. Plaintiffs dispute this. Opposition at 49-50 & n.49. Although the Court here does not decide which law would apply, this contested issue mitigates in favor of dismissal too. Even though federal courts often must apply foreign law, the doctrine of *forum non conveniens* "is designed in part to help courts avoid conducting complex exercises in comparative law." *Piper Aircraft Co.*, 454 U.S. at 251.

* * *

Angolan companies that do business in Angola and with the Angolan government surely cannot be surprised that they must litigate their claims in Angola. *See Online Payment Solutions Inc. v. Svenska Handelsbanken AB*, 638 F. Supp. 2d 375, 382 (S.D.N.Y. 2009) (concluding that the owner of a company that "chose to establish and operate [his business] in Sweden and England ... should therefore not be surprised that he would need to litigate his corporation's claims in those jurisdictions"); *cf. Guidi v. Inter-Cont'l Hotels Corp.* 224 F.3d 142, 147 (2d Cir. 2000) ("This is not a case where the plaintiff is a corporation doing business abroad and can expect to litigate in foreign courts.").

Although Plaintiffs' choice of forum warrants minimal deference, Angola is an adequate alternative forum.

While some private interest factors weigh in Plaintiffs' favor, the private and public interest factors overall weigh strongly in favor of dismissal. The Court thus concludes that dismissal on the basis of *forum non conveniens* is warranted. Accordingly, the Court need not, and does not, reach Defendants' other arguments. *See Sinochem Int'l Co.*, 549 U.S. at 432.

However, in order to ensure that this case is heard on the merits in Angola, the Court concludes that conditional dismissal is proper. *See Blanco*, 997 F.2d at 984 ("[*F*]*orum non conveniens* dismissals are often appropriately conditioned to protect the party opposing dismissal."); *Owens*, 2021 WL 638975, at *6. Dismissal is conditioned on all Defendants agreeing to accept service in Angola and to waive the assertion of any statute of limitations defenses that may have arisen since the filing of this action.

III. Conclusion

For the reasons stated, the GE Defendants' motion to dismiss and the Angolan Defendants' motion to dismiss are conditionally granted on the basis of *forum non conveniens.* Within thirty days of the filing of this Opinion and Order, the parties shall submit an agreement to litigate in Angola in accordance with the conditions outlined above. The Clerk of Court is respectfully directed to terminate the motions pending at Docket Numbers 50 and 58.

SO ORDERED.

APPENDIX C — ORDER, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, *AENERGY, S.A. V. REPUBLIC OF ANGOLA*, NOS. 21-1510(L), 21-1752(CON) (JUNE 16, 2022)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of June, two thousand twenty-two.

ORDER

Docket Nos: 21-1510 (L)
21-1752 (Con)

AENERGY, S.A., COMBINED CYCLE POWER PLANT SOYO, S.A.,

Plaintiffs - Appellants,

v.

REPUBLIC OF ANGOLA, MINISTRY OF ENERGY AND WATER OF THE REPUBLIC OF ANGOLA, MINISTRY OF FINANCE OF THE REPUBLIC OF ANGOLA, EMPRESA PUBLICA DE PRODUCAO DE ELECTRICIDADE, EP, EMPRESA NACIONAL DE DISTRIBUICAO DE ELECTRICIDADE, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC INTERNATIONAL, INC., GE CAPITAL EFS FINANCING, INC.,

Defendants - Appellees.

Appendix C

Appellants, Aenergy, S.A., and Combined Cycle Power Plant Soyo, S.A., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX D — RELEVANT STATUTORY PROVISIONS

Excerpts from the Foreign Sovereign Immunities Act of 1976

28 U.S.C. § 1330

Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

Appendix D

28 U.S.C. § 1391

Venue generally

. . . .

(f) Civil actions against a foreign state--A civil action against a foreign state as defined in section 1603(a) of this title may be brought--

> (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;
>
> (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;
>
> (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or
>
> (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Appendix D

28 U.S.C. § 1602

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603

Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, 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 (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The 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.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Appendix D

28 U.S.C. § 1604

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to

exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

. . . .

Appendix D

28 U.S.C. § 1606

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.