Appeal No. 15-56424

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY COOPER, ET AL.,
Plaintiffs-Appellees,
v.

TOKYO ELECTRIC POWER COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 12-cv-03032 (Hon. Janis L. Sammartino)

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE GENERAL ELECTRIC COMPANY IN SUPPORT OF APPELLANT AND URGING REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Ninth Circuit Rule 29-3, *amicus curiae* General Electric Company ("GE") respectfully requests leave of the Court to file the attached brief in support of Appellant Tokyo Electric Power Company ("TEPCO") and urging reversal. GE seeks to address a single issue—briefed but not passed upon below—which the United States has raised in its *amicus* brief, filed on December 19, 2016. GE sought all parties' consent to the filing of this brief. Appellant granted consent. Appellees did not respond to GE's multiple requests for consent or otherwise provide a statement of their position on GE's request.

This Court may grant leave to file an *amicus* brief upon a showing that the submission is "desirable" and that "the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3)(B). The "predominant practice in the courts of appeals," expressed by then-Judge Samuel Alito, is to grant motions for leave to participate as *amicus* "unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted." *Neonatology Assocs. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.). The lenient requirements of Rule 29 are easily met here.

Amicus GE is a Fortune 10 company and an international leader in the power and energy industries. GE's interest in this case is direct and pressing. While GE

is not a party to this appeal, GE is a defendant in this matter in the district court. Plaintiffs assert tort claims stemming from alleged exposure in 2011 to radiation released after a massive earthquake and tsunami caused an accident at Japan's Fukushima-Daiichi National Power Plant. Plaintiffs sued GE on the theory that, more than 40 years ago, GE defectively designed the plant's reactors, even though the natural disaster that precipitated the accident overwhelmed all of Japan's tsunami defense systems and the basic reactor design has been safely used for decades throughout the world.

GE and TEPCO separately moved to dismiss. While GE made many of the same arguments as TEPCO, GE raised additional grounds for dismissal, including, most relevant here, that the district court lacked subject matter jurisdiction over this case under the Convention on Supplementary Compensation for Nuclear Damage ("CSC"). ECF No. 87. The CSC is a binding international treaty to which the United States and Japan are parties. It vests exclusive jurisdiction over nuclear accidents in the nation where the accident occurred (here, Japan). In light of this interlocutory appeal concerning TEPCO's motion to dismiss, however, the district court dismissed GE's motion as moot and stayed proceedings below. The district court has not considered GE's arguments on subject matter jurisdiction under the CSC, and the parties did not raise or brief the question in their principal briefs on appeal.

But the United States' December 19, 2016 Statement of Interest has now placed that question squarely at issue. In explaining its view that this lawsuit should proceed in U.S. court, the United States argues that the CSC's jurisdictional provision does not apply to this case. U.S. Br. 13-15. GE is uniquely positioned to respond to the United States' argument, having raised and briefed this very question below. ECF No. 87, at 5-9; ECF No. 93, at 1-3. GE respectfully submits that the attached brief, which demonstrates that the CSC's jurisdictional provision applies here and deprives U.S. courts of subject-matter jurisdiction over this case, is directly relevant to the questions before the Court and will assist the Court's disposition of this appeal.

Moreover, granting leave to participate as *amicus* is appropriate where "the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest." *Nat'l Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). A fortiori, amicus participation is particularly justified where the amicus, though not a party to the appeal, is a defendant in the same case below, and the court's resolution of the appeal will dispose of the amicus's rights and interests.

It is hard to imagine how a party's interests could be more direct or materially affected than here. While this appeal concerns only TEPCO's motion to

dismiss, GE is a defendant in this matter before the district court and made many of the same arguments as TEPCO in support of dismissal. And as GE argued to the district court and explains in the attached *amicus* brief, the CSC's jurisdiction-channeling provision is an additional basis for dismissing all the claims against both TEPCO and GE from U.S. court. That issue is now before this Court in light of the United States' brief, and this Court should afford GE the opportunity to be heard. Reversal of the district court on this or any of the other grounds presented to this Court will also require dismissal of the pending case against GE.

GE therefore respectfully requests that the Court grant its motion for leave to file a brief of *amicus curiae*.

Respectfully submitted,

/s/ John B. Bellinger, III

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Counsel for Amicus Curiae General Electric Company

Dated: January 30, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2017, I electronically filed the foregoing motion with the Clerk of Court by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John B. Bellinger, III

Dated: January 30, 2017 John B. Bellinger, III

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* General Electric Company states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

General Electric Company ("GE") is a Fortune 10 company and an international leader in the power and energy industries, among many others. GE has a direct interest in this case. Although GE is not a party to this appeal, GE is a defendant in the district court. Plaintiffs assert tort claims stemming from alleged exposure in 2011 to radiation after an earthquake and tsunami caused an accident at Japan's Fukushima-Daiichi National Power Plant ("FNPP"), owned and operated by Defendant Tokyo Electric Power Company ("TEPCO"). Plaintiffs sued GE on the theory that GE defectively designed the FNPP's reactors more than forty years ago.

GE and TEPCO separately moved to dismiss. GE made many of the same arguments as TEPCO, but also raised other grounds for dismissal, including that the court lacked subject matter jurisdiction under the Convention on Supplementary Compensation for Nuclear Damage ("CSC"), a treaty to which the United States and Japan are parties. In light of this interlocutory appeal on TEPCO's motion to dismiss, the district court stayed proceedings and denied GE's

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae* or its counsel made such a monetary contribution. GE sought all parties' consent to the filing of this *amicus* brief. Appellant consented. Appellees did not respond to GE's request for consent.

motion as moot. The district court did not address GE's argument about the CSC, and the parties did not raise it in their principal briefs on appeal.

The United States, however, argued in its brief that the CSC does not apply to this case. GE is uniquely positioned to respond to that argument, having raised and briefed the issue below. Because a decision reversing the district court on any of the grounds now before this Court would require dismissing the case against GE, GE submits this *amicus* brief to explain that the CSC's jurisdictional provision applies to this case and requires dismissal of *all* the claims against TEPCO and GE.

INTRODUCTION

GE agrees with the grounds for dismissal outlined in TEPCO's briefs. In addition, dismissal is required because the CSC confers exclusive jurisdiction over claims arising from nuclear accidents upon the courts of the nation where the accident occurred. In this case that nation is Japan. The CSC entered into force in April 2015, while this case was pending. Under well-accepted principles of domestic and international law, a statutory or treaty provision conferring or removing jurisdiction applies to all cases pending at the time the provision becomes effective. The CSC's jurisdictional provision thus divests U.S. courts of subject matter jurisdiction over this case.

BACKGROUND

In November 2014, nearly two years after Plaintiffs sued TEPCO, and more than three years after the accident, Plaintiffs filed a Third Amended Complaint adding GE as a defendant. ER286-381.

In February 2015, GE moved to dismiss. GE asserted many of the same grounds for dismissal as TEPCO, including the political question doctrine, the Firefighter's Rule, *forum non conveniens*, and international comity. GE also asserted several additional reasons for dismissal, including: (1) the district court lacked subject matter jurisdiction under the CSC; and (2) Japanese law governs the

claims against GE and restricts liability for nuclear incidents to the licensed operator of the nuclear power plant, here TEPCO.[2] ECF No. 87.

Meanwhile, in October 2014, the district court denied TEPCO's motion to dismiss the Second Amended Complaint, ER58-90, and in November 2014, TEPCO moved for reconsideration of that order and for certification for interlocutory appeal under 28 U.S.C. § 1292(b), ECF No. 90. In June 2015, after briefing was complete on GE's motion to dismiss, the district court amended its October 2014 order and certified that order for interlocutory appeal. ER4. The court stayed the entire case pending this appeal and denied GE's motion as moot. ER2, ER3.

The district court thus has not ruled on the additional arguments raised in GE's motion, including the argument that U.S. courts lack subject matter jurisdiction. The district court's October 2014 order denying TEPCO's motion to dismiss simply noted that the CSC was not yet in force, ER74-75, and its amended order did not address it further, ER31; U.S. Br. 13 n.4.

The United States argued in its Statement of Interest that the CSC's jurisdictional provision does not apply to this case. Whether that provision removes subject matter jurisdiction is a purely legal question that this Court can

[2] While GE asserts that Japanese law applies, the choice-of-law analysis has no bearing on whether the case should be dismissed under the political question doctrine or the Firefighter's Rule. There is no material difference between Japanese and California law on superseding cause or assumption of risk.

and should consider in the first instance. *See, e.g.*, *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004). Because the United States raised this issue, and this Court's resolution of it may affect GE, GE submits this *amicus* brief in response to the United States' arguments.

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction

A. The CSC Grants Exclusive Jurisdiction to Japanese Courts

The CSC is a comprehensive treaty that allocates financial responsibility for nuclear accidents. Central to this appeal is Article XIII(1), which states that, with exceptions not relevant here, "jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the Contracting Party [*i.e.*, the nation] within which the nuclear incident occurs." S. Treaty Doc. No. 107-21 (2002).

The treaty's objective is to provide clear, consistent rules to resolve legal disputes arising from nuclear accidents—to protect potential victims while simultaneously ensuring that companies will continue to invest in nuclear power. Letter of Transmittal from President Bush to the Senate of the United States, S. Treaty Doc. 107-21, at iii-iv. The CSC's jurisdictional provision thus assigns responsibility to a single nation's courts to avoid disparate, inconsistent, overlapping decisions and to provide certainty for both plaintiffs and defendants.

It assigns that responsibility to the courts of the nation where the accident occurs, because that nation has the predominant interest in addressing claims for compensation and ensuring the availability of funds to compensate victims. In submitting the CSC to President Bush for transmittal to the Senate, Secretary of State Colin Powell explained: "[A]fter the United States deposits its instrument of ratification to the CSC, the effect of Article XIII will be to remove jurisdiction from all U.S. Federal and State courts over cases concerning nuclear damage from a nuclear incident covered by the CSC except to the extent provided in the CSC." Letter of Submittal, Aug. 7, 2001, S. Treaty Doc. 107-21, at xv. As State Department officials explained during the Senate ratification hearing, Article XIII was consistent with the existing U.S. policy of "consolidating all [nuclear liability] claims in a single forum with the focus on expedited compensation of victims." ER176.

Separate provisions of the CSC channel exclusive liability to the operator of a nuclear installation (here, TEPCO) and require contracting nations to establish sufficient funds to compensate victims. CSC art. III; Annex arts. 2, 3. The CSC thus reflects principles embodied in U.S. and Japanese domestic law. Specifically, the Price-Anderson Act and Japan's Act on Compensation for Nuclear Damage both channel all responsibility for nuclear accidents within their respective territory

to plant operators. 42 U.S.C. § 2210; *see Rainer v. Union Carbide Corp.*, 402 F.3d 608, 624 (6th Cir. 2005); ER657-67.

The U.S. Senate gave its advice and consent to U.S. ratification of the CSC on August 3, 2006, and President Bush ratified it on March 12, 2008. The United States deposited the instrument of ratification on May 21, 2008. Japan deposited its instrument of ratification on January 15, 2015. Japan's ratification provided the final trigger for the CSC's entry into force on April 15, 2015, while this case was pending below. CSC art. XX(1); Int'l Atomic Energy Agency (IAEA), Convention on Supplementary Compensation for Nuclear Damage, goo.gl/45EqHJ.

There is no dispute that, if the CSC's jurisdictional provision applies here, Japanese courts have exclusive jurisdiction over this action, and this case must be dismissed for lack of subject matter jurisdiction.

B. The CSC's Jurisdictional Provision Applies to This Lawsuit

Article XIII(1) states that "jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with" the courts of the country in which the accident occurs. That jurisdictional provision is the "supreme law of the land." U.S. Const. art. VI, cl. 2. This lawsuit concerns nuclear damage from a nuclear incident in Japan. The plain words of Article XIII(1) thus provide that jurisdiction lies only with Japanese courts. Moreover, domestic and international

law authorities alike make clear that jurisdictional provisions of statutes or treaties that enter into force while a case is pending apply to that case, absent express indication to the contrary.

1. Jurisdictional Provisions Presumptively Apply to Pending Cases Under Domestic Law

"[T]reaty interpretation should be guided by principles similar to those governing statutory interpretation." *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1251 (D.C. Cir. 2003) (internal quotation omitted); *see also Medellín v. Texas*, 552 U.S. 491, 506 (2008). Article XIII(1) thus applies under longstanding Supreme Court precedent holding that "[p]resent [jurisdictional] law normally governs … because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (internal quotation omitted). The Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.*

In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), for example, the Court applied a statute conferring jurisdiction over cases against a foreign sovereign to conduct occurring many years before the statute's enactment. *Id.* at 694-97. In *Bruner v. United States*, 343 U.S. 112 (1952), the Court applied a jurisdiction-removing statute to pending cases because the law "did not reserve

jurisdiction over pending cases." *Id.* at 115. "Absent such a reservation," the district court lacked jurisdiction "even though [it] had jurisdiction over such claims when petitioner's action was brought." *Id.* Similarly, in *Hallowell v. Commons*, 239 U.S. 506 (1916), the Court applied a statute conferring "exclusive" jurisdiction on the Secretary of the Interior and "tak[ing] away the jurisdiction that for a time had been conferred upon the courts of the United States" because the statute "made no exception for pending litigation." *Id.* at 508. And in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), the Court declared that "when [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 514.

"This rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court," *Bruner*, 343 U.S. at 116-17, and the rule fully applies here. There is no indication that the CSC departs from the usual rule that jurisdictional provisions apply to pending cases, much less any specific reservation for pending cases. *See infra* pp.17-20.

In arguing that the CSC's jurisdictional provision does not apply here, the United States fails to address this binding precedent. U.S. Br. 13-17. Plaintiffs, for their part, contended below that "the presumption against retroactive legislation" bars application of the CSC's jurisdictional provisions to this case.

E.g., *Landgraf*, 511 U.S. at 265. But that presumption is irrelevant here. Statutes are presumed not to apply retroactively to prior conduct, but applying a jurisdiction-channeling statute to a pending case does not constitute retroactive application. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269. A jurisdiction-altering statute has no "retroactive effect" because it does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. "[U]nlike other intervening changes in the law, a jurisdiction-conferring or jurisdiction-stripping statute usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006) (quoting *Hallowell*, 239 U.S. at 508).

Article XIII directs plaintiffs to file suit in Japan instead of the United States; it "simply changes the tribunal that is to hear the case." *Id.* It "affect[s] only *where* a suit may be brought, not *whether* it may be brought at all." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (describing such statutes as jurisdictional). Courts are "bound to apply [the Supreme Court]'s reasoning that a jurisdiction-withdrawing statute does not 'alter[] the nature or validity of' rights or liabilities but 'simply reduce[s] the number of tribunals authorized to hear and determine such rights and liabilities,'" and courts therefore

must apply jurisdictional statutes to pending cases. *Santos v. Guam*, 436 F.3d 1051, 1053 (9th Cir. 2006).

Plaintiffs did not dispute below that Article XIII(1) of the CSC is purely jurisdictional. ECF No. 93 at 6, 8. Instead, Plaintiffs contended that other provisions of the CSC had "substantive" effect because, in addition to granting exclusive jurisdiction to courts of the nation where the accident occurred, "the CSC requires the channeling of all legal liability for nuclear damage to the nuclear facility operator, in this case Tepco and … the amount of liability is severely limited in amount and in time."[3] ECF No. 93 at 6-7. The United States likewise notes that the CSC creates a supplementary compensation fund and has other, non-jurisdictional provisions. *See infra* at 20-22.

But GE does not invoke any substantive provision of the CSC. The only CSC provision that applies is the undeniably jurisdictional Article XIII(1). Courts determining whether a new law's application to a pending case is impermissibly retroactive consider each provision separately; it is not an all-or-nothing inquiry. In *Lindh v. Murphy*, 521 U.S. 320 (1997), for example, the Supreme Court considered whether a particular "section" of the Antiterrorism and Effective Death Penalty Act of 1996 applied to "cases that were already pending when the Act was passed." *Id.* at 322-23. Although the Court held that one portion of the Act

[3] Contrary to Plaintiffs' assertion below, the CSC does not limit liability either in amount or time.

applied to all cases pending enactment, it concluded that the section at issue did not. *Id.* at 327. Here, the Japanese courts, in whom exclusive jurisdiction over this case is vested, will determine what substantive law applies to Plaintiffs' claims and which, if any, of the other CSC provisions may be applied in a manner consistent with anti-retroactivity concerns. But there is nothing impermissible or retroactive in applying existing procedural law to existing lawsuits, or in recognizing that the United States and Japan have agreed by treaty that Japan is the sole available forum for this pending case.

Federal appellate courts have long adhered to this approach. In *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996), this Court held that a jurisdictional provision applied to pending deportation cases even though the same law contained a "series of [additional] amendments … regarding the removal and exclusion of terrorist and criminal aliens" that were not jurisdictional. *Id.* at 398. Likewise, the Federal Circuit applied a portion of the Whistleblower Protection Act that "reduced the number of fora in which [a plaintiff's] claims could be heard" to a pending case without evaluating the effect of any other aspect of the Act. *Moran v. Merit Sys. Protection Bd.*, 152 F.3d 940, 1998 WL 67811, at *5 (Fed. Cir. 1998).

If this Court dismisses this case for lack of subject matter jurisdiction, Japanese courts, whose adequacy and fairness are beyond doubt, *see*, *e.g.*, *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 769 & n.3 (9th Cir.

1991), will be available to decide all issues relating to substantive liability. But because the CSC entered into force on April 15, 2015, U.S. courts no longer have jurisdiction to hear a claim relating to a nuclear incident that occurred in Japan.

2. Jurisdictional Provisions Presumptively Apply to Pending Cases Under International Law

Federal courts regularly consider international law in interpreting international agreements entered into by the United States. *Abbott v. Abbott,* 560 U.S. 1, 18-19 (2010); *Nuru v. Gonzales*, 404 F.3d 1207, 1221 n.9 (9th Cir. 2005); *Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008). And the rule is the same under international law as it is under domestic law: a treaty's jurisdictional provision applies to pending cases absent some contrary indication in the treaty itself.

International courts have long recognized that a treaty's jurisdictional provisions presumptively apply to all cases. In *Mavrommatis Palestine Concessions*, the Permanent Court of International Justice recognized that jurisdiction-channeling provisions of international agreements apply to all disputes and explained "the necessity for an explicit limitation of jurisdiction" if a treaty was not intended to confer jurisdiction over "disputes arising out of events previous to the conclusion of the treaty." 1924 P.C.I.J. (ser. A) No. 2, at 35 (Aug. 30). Subsequent decisions of the International Court of Justice confirm that

jurisdictional provisions presumptively apply to pending cases regardless of whether the case involves pre-enactment conduct.[4]

The drafters of the Vienna Convention on the Law of Treaties ("VCLT") understood this rule.[5] Sir Humphrey Waldock, who served as the Special Rapporteur to the U.N. International Law Commission during the drafting of the VCLT, explained that a treaty provision conferring jurisdiction over disputes applies to "any dispute which *exists* between the parties after the coming into force of the treaty." Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167, at 11 (1964), goo.gl/oGPvKN. "It matters not either that the dispute concerns events which took place prior to that date or that the dispute itself arose prior to it." *Id.*[6]

The official International Law Commission commentaries on the VCLT confirm that parties to a treaty conferring jurisdiction "are to be understood as accepting jurisdiction with respect to all disputes *existing* after the entry into force

[4] *See, e.g.*, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia*): *Preliminary Objections*, I.C.J. Reports 1996, ¶ 34, http://www.icj-cij.org/docket/files/91/7349.pdf (affirming jurisdiction under the Genocide Convention over events predating the Convention's entry into force).

[5] The United States is not a party to the VCLT, but the Department of State views the Convention as constituting customary international law on treaty interpretation, and numerous federal courts of appeals have treated it as such. Dep't of State, Vienna Convention on the Law of Treaties, https://www.state.gov/s/l/treaty/faqs/70139.htm; *see Pliego v. Hayes*, 843 F.3d 226, 232 (6th Cir. 2016) (citing cases).

[6] Waldock served as a judge on the International Court of Justice from 1973 to 1981 and as the President of the ICJ from 1979-1981; the Second Circuit has described him as a "highly qualified" scholar of international law and has relied on his teachings as a "source[] of international law." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 132-33 & n.36 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

of the agreement." Draft Articles on the Law of Treaties, with commentaries, Yearbook of the ILC, 1966, Vol. II, at 212, goo.gl/kUEbg0.[7] As one Commission member explained, it is a "general principle" of international law "that a jurisdictional treaty applie[s] to all disputes unless the parties stipulated the exclusion of disputes having their genesis in events prior to the conclusion of the treaty." Statement of Abdulla El-Erian, Yearbook of the ILC, 1966, Vol. I, pt. 2, at 43, goo.gl/EcYb8A.[8]

The United States cites (Br. 13) Article 28 of the VCLT, which states that a treaty's *substantive* provisions presumptively do not "bind a party in relation to any act or fact which took place … before the date of the entry into force of the treaty." Vienna Convention on the Law of Treaties art. 28, May 23, 1969, 1155 U.N.T.S. 331, 339. But that is irrelevant to the issue before this Court, which concerns only the CSC's jurisdictional provision. And the distinction between a treaty's substantive and jurisdictional provisions for purposes of the retroactivity analysis is well established in international law.[9]

[7] The International Law Commission is the United Nations body that is "charged with the task of codifying and developing international law." *Mora*, 524 F.3d at 189 n.7.

[8] Abdullah El-Erian was an Egyptian diplomat and law professor who served as a judge on the ICJ from 1979 to 1981.

[9] *See, e.g.*, *Ping An Life Ins. Co. v. Belgium*, ICSID Case No. ARB/12/29, Award, ¶¶ 186–87 (Apr. 30, 2015), http://www.italaw.com/sites/default/files/case-documents/italaw4285.pdf (discussing numerous cases and stating that "[w]hat is clear is that the temporal application of jurisdictional provisions is a question separate from the retroactivity of substantive provisions").

While a treaty's substantive obligations, absent contrary indication, do not apply retrospectively, the drafters of the VCLT confirmed that that rule does not apply to a treaty's *jurisdictional* articles, which do not alter underlying substantive rights or responsibilities but instead merely regulate the power of the courts to hear the cases before them. "To say … that a treaty could not be in force retroactively was a different proposition from stating that the treaty provisions could not be given retrospective effects. Such retrospective effects could exist in certain cases, such as jurisdictional clauses which made no reservations regarding past events." Statement of Herbert W. Briggs, Yearbook of the ILC, 1966, Vol. I, pt. 2, at 40-41, goo.gl/51l0s1.[10] Absent such a reservation, there is no barrier to applying a jurisdictional clause to an existing case, even if that case concerns events that took place before the clause took effect.

Academic commentaries, including works by former ICJ judges, also make clear that this rule of treaty interpretation is longstanding, pervasive, and accepted.[11] GE is aware of no federal court decision declining to apply a treaty's jurisdictional provision to pending cases, and Plaintiffs cited none below.

[10] Herbert Briggs was a professor of international law at Cornell Law School who served on the ILC from 1962 to 1966. He was a member of the U.S. delegation that negotiated the VCLT.

[11] *E.g.*, Rosalyn Higgins, *Time and the Law*, 46 Int'l & Comp. L.Q. 501, 502 (1997); Hersch Lauterpacht, *The Development of International Law by the International Court* 243 (1958). Rosalyn Higgins and Hersch Lauterpacht served as judges on the ICJ from 1995 to 2009 and 1955 to 1960 respectively.

3. Article XIII(1) Applies to Pending Cases

Nothing in Article XIII(1) indicates that the drafters intended to exclude actions that arose before the treaty's entry into force. On its face, the provision applies to all "actions," without any temporal limitation.

The United States apparently disagrees with this interpretation. But the views of the Executive Branch on treaty interpretation are "not conclusive," *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184 (1982), and the courts "have final authority to interpret an international agreement for purposes of applying it as law in the United States," Restatement (Third) of Foreign Relations § 326(2). The Supreme Court has rejected Executive Branch interpretations of treaty provisions that were unsupported by "any other authority or precedent." *BG Group PLC v. Argentina*, 134 S. Ct. 1198, 1209 (2014); *see Hamdan*, 548 U.S. at 630 (rejecting government interpretation of Common Article 3 of the Geneva Conventions as "erroneous"); *Perkins v. Elg*, 307 U.S. 325, 328, 335-42 (1939) (rejecting government interpretation of treaty on citizenship). Here, the United States' interpretation of Article XIII is incorrect and unsupported, and warrants no deference.

First, the United States does not disagree that a jurisdictional treaty provision that "us[es] the word 'disputes' without any qualification" presumptively applies to all cases. U.S. Br. 13-14. But the United States suggests that this

general rule of international law does not apply here because the CSC uses the term "actions concerning nuclear damage from a nuclear incident" rather than "the general term 'disputes.'" *Id.* at 14. That is incorrect. There is no meaningful difference between the word "actions" and "disputes." A contested legal action is in fact a dispute.

Nor does the reference to "nuclear damage" and "nuclear incident"—terms defined in the treaty—displace the general presumption. *See id*. The purpose of Article XIII(1) is to channel all claims relating to nuclear accidents to the courts of the country where the accident occurred. The terms "nuclear damage" and "nuclear incident" delineate the types of claims subject to jurisdictional channeling. The United States is attempting to transform these subject-matter limitations into temporal conditions on the treaty's jurisdictional provision. *See id.* But the question is whether there are explicit temporal limitations on the applicability of the jurisdictional provision, and Article XIII contains none.

Second, the United States asserts that the use of the word "occurs" in the present tense forecloses retrospective application of the jurisdictional provision, arguing that the drafters would have used the past tense if they intended Article XIII(1) to apply retrospectively. *Id.*; *see* CSC art. XIII(1) (jurisdiction "shall lie only with the courts of the Contracting Party within which the nuclear incident occurs"). But even using the past tense "occurred" would indicate only that the

nuclear incident happened before the action concerning damages. Since an action relating to a nuclear accident obviously takes place after the accident itself, it is unnecessary to use the verb "occur" in the past tense; the temporal sequence is already implied. Indeed, the other, equally authentic versions of the Convention use a variety of formulations. *See* CSC art. XXVII. The Arabic text, for example, uses the past tense ("*waqa'at*"), and the Spanish uses a past form of the subjunctive ("*haya ocurrido*"). "The terms of the treaty are presumed to have the same meaning in each authentic text." VCLT art. 33(3). The use of the present tense "occurs" in the English version carries no special significance.

Moreover, had the drafters wished to limit the temporal scope of the jurisdictional provision, there were numerous ways to clearly and unambiguously indicate such a limitation, as both domestic and international law would require. *E.g.*, Agreement on the Promotion and Reciprocal Protection of Investments, Swed.-Rom., art. 9, May 29, 2002, goo.gl/eoif24 (excluding "any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before [the Agreement's] entry into force"). Indeed, the PCIJ in *Mavrommatis* noted "[t]he reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty." 1924 P.C.I.J. (ser. A) no. 2, at 35. Jurisdictional provisions regularly include such reservations precisely "to counteract the [ICJ's] case-law on the matter of the

retroactivity of the scope of its jurisdiction in the absence of qualification." Shabtai Rosenne, The Law and Practice of the International Court of Justice, 1920-1996, at 580, 785-86 (3d ed. 1997); *e.g.*, Germany's Declaration Recognizing the Compulsory Jurisdiction of the International Court of Justice, May 1, 2008, goo.gl/G5wttg (recognizing jurisdiction over "all disputes arising after the present declaration, with regard to situations or facts subsequent to this date"). No such limitation appears in Article XIII(1).

The United States also errs in arguing that Article XIII(1) cannot apply because it is "attached to the substantive clauses of a treaty as a means of securing their due application." *See* U.S. Br. 14 (internal quotation omitted). The statement in the 1966 ILC Commentaries on which the government relies for that argument referred to treaties like the European Convention on Human Rights, which confers jurisdiction over "all matters concerning the interpretation and application of the Convention and the Protocols thereto." Convention for the Protection of Human Rights and Fundamental Freedoms art. 33, Nov. 4, 1950, 213 U.N.T.S. 221; *see* Draft Articles, *supra*, at 212. The CSC, by contrast, simply creates a compensation regime; it does not define the underlying causes of action. The jurisdiction-channeling provision applies to claims that exist under domestic law; it is not a means for enforcing the CSC's substantive obligations. The narrow exception discussed in the Draft Articles is thus inapposite.

Finally, the United States' policy argument that "retroactive application would significantly undermine the liability regime established by the Convention," U.S. Br. 14-15, is irrelevant. The United States' litigation position finds no support in its contemporaneous explanations of the treaty's purpose and effect, on which basis the Senate gave its advice and consent to ratification. Secretary Powell stated, "[A]fter the United States deposits its instrument of ratification to the CSC, the effect of Article XIII will be to remove jurisdiction from all U.S. Federal and State courts over cases concerning nuclear damage from a nuclear incident covered by the CSC except to the extent provided in the CSC." Letter of Submittal, *supra*, at xv. The State Department did not inform the Senate that Article XIII was part of an "interlocking system" or "inextricably interrelated" with the Convention's substantive provisions. U.S. Br. 7, 15 (internal quotation omitted). Nor is there evidence that the State Department detected any tension between the immediate channeling of jurisdiction in all cases and the compensation system the Convention establishes.

Moreover, the United States' concerns about parties receiving the CSC's benefits without accepting its obligations are unfounded. U.S. Br. 15. Japan has fully met its responsibilities under the CSC, including establishing a significant compensation fund, promptly making the minor amendments to its national law that the CSC required, and committing to funding compensation for accidents in

other countries under the CSC. Japan Br. 1-2; Nuclear Energy Agency, OECD, Nuclear Law Bulletin No. 95, at 75-77 (2015), https://www.oecd-nea.org/law/nlb/nlb95.pdf.

In any event, a party's unilateral policy rationales for entering into a treaty are not a valid source of treaty interpretation. *See* VCLT art. 31. The United States' *ex post facto* policy arguments, even if the United States firmly believes them now, do not reflect the understanding of the parties at the time of drafting.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed and this case should be dismissed.

Respectfully submitted,

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Dated: January 30, 2017

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I hereby certify that on January 30, 2017, the foregoing Brief of *Amicus Curiae* General Electric Company was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on all counsel of record by operation of the CM/ECF system on the same date.

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