IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TAMILS AGAINST GENOCIDE, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 09-00598 (RJL)
	)	
TIMOTHY GEITHNER,	)	
in his official capacity as Secretary of the Treasury and Member of the Board of Governors of the International Monetary Fund	)	
	)	
MEG LUNDSAGER	)	
in her official capacity as Executive Director of the International Monetary Fund	)	
	)	
Defendants.	)	
_____	)	

DEFENDANTS' MOTION TO DISMISS

Defendants Timothy Geithner and Meg Lundsager, through their undersigned counsel, move this Court for an order, pursuant to Fed. R. Civ. P. 12(b)(1) and/or Fed. R. Civ. P. 12(b)(6), dismissing this case with prejudice. This motion is supported by the attached memorandum of points and authorities.

Respectfully submitted,

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Date: May 20, 2009

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TIMOTHY GEITHNER,	)	
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Treasury and Member of the Board of	)	
Governors of the International Monetary	)	
Fund, and	)	
	)	
MEG LUNDSAGER	)	
in her official capacity as Executive	)	
Director of the International Monetary	)	
Fund	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiff Tamils Against Genocide, Inc., filed this action against defendants Timothy Geithner and Meg Lundsager seeking a declaratory judgment that defendants, in their official capacity as the United States' representatives to the International Monetary Fund ("IMF"), must oppose Sri Lanka's application for a multibillion dollar loan from the IMF because the government of Sri Lanka ("GOSL") is allegedly engaged in a pattern of gross violations of internationally recognized human rights that is threatening the Sri Lankan relatives of plaintiff's members. As explained below, for a variety of reasons, this lawsuit must be dismissed.

First, plaintiff lacks standing and therefore cannot satisfy Article III's "case" or "controversy" requirement. Plaintiff's core theory is that there may be a vote on Sri Lanka's

loan application sometime reasonably soon, and (1) *if* the United States votes against the application, there is a "*reasonable probability*" that the application will be denied, and (2) *if* the application is denied, it is "*reasonably likely*" that Sri Lanka may diminish its alleged pattern of human rights violations, and (3) *if* Sri Lanka diminishes its human rights violations, plaintiff's members' relatives living in Sri Lanka may be less likely to be subjected to such human rights violations. Such speculation about a series of remote contingencies involving third parties not before the Court does not satisfy the redressability, causation, and injury prongs of the standing inquiry. Accordingly, plaintiff's complaint must be dismissed for lack of standing.

Second, this Court lacks jurisdiction because plaintiff's complaint presents a political question. Plaintiff seeks to have this court make decisions about the propriety of foreign aid expenditures and the best way to prevent alleged human rights abuses. But such foreign policy decisions are inherently political, and the Constitution has committed such decisions solely to the political branches.

Third, plaintiff's complaint must be dismissed because there is no private right of action to enforce the "policy goals" set forth in the statute relied on by plaintiff, 22 U.S.C. § 262d. Plaintiff concedes that Congress did not create a private right of action expressly, but contends that this Court should create such a right because Congress did not expressly preclude judicial review. But plaintiff has the governing standard precisely backwards. Because Congress did not create a private right of action expressly, and because, indeed, it created alternative mechanisms for Congress itself to monitor the Executive Branch's actions, plaintiff simply has no private right of action.

Finally, this civil suit must be dismissed because, under federal law, both defendants are immune from legal process for acts committed in their official capacities as Governor and Executive Director of the IMF.

This is not the first time in which plaintiffs similarly situated to the one here have come to federal courts seeking to use foreign aid decisions to redress an alleged injury caused by a foreign sovereign nation. At least three prior cases were dismissed for lack of standing, *see Talenti v. Clinton*, 102 F.3d 573 (D.C. Cir. 1996); *Betteroads Asphalt Corp. v. United States*, 106 F. Supp. 2d 262 (D.P.R. 2000); *Aerotrade, Inc. v. Agency for Int'l Dev.*, 387 F. Supp. 974 (D.D.C. 1974), and a fourth case, involving the Executive Branch's vote on an Inter-American Development Bank ("IDB") loan, was dismissed for lack of standing, for failing to state a claim, and based on the immunity of certain of the defendants. *See Atlantic Tele-Network Inc. v. Inter-American Dev. Bank*, 251 F. Supp. 2d 126 (D.D.C. 2003). There is no basis for reaching a different result here.

Plaintiff's complaint must be dismissed.

BACKGROUND

I. THE IMF AND 22 U.S.C. § 262d

The IMF is an international organization comprised of 185 member countries that, among other things, provides financial support to countries confronting balance of payment difficulties. Compl. ¶ 9. The IMF was founded in 1944 and is governed by its Articles of Agreement, which have been accepted by the United States. Compl. ¶ 9; *see also* 22 U.S.C. § 286 (authorizing the President to accept membership in the IMF); IMF Articles of Agreement, *available at* http://www.imf.org/external/pubs/ft/aa/index.htm (attached as Exhibit A). The IMF is governed by a Board of Governors, which consists of one Governor from each member nation, and a twenty-four member Executive Board responsible for much of the daily business of the IMF. Compl. ¶¶ 6, 7, 9; IMF Articles of Agreement, Art. XII. Defendant Geithner currently serves as the United States' representative on the IMF Board of Governors. Compl. ¶ 6. Defendant Lundsager is the current IMF Executive Director appointed by the United States. *Id.* at ¶ 7. Both the Board of Governors and the Executive Board are governed by majority vote, but the voting power of each member nation is weighted to reflect its "quota" or financial contribution to the IMF. *Id.* at ¶¶ 6, 7; IMF Articles of Agreement, Art. XII, § 5. The United States, through its representatives, currently exercises 16.77% of the voting power of both the Board of Governors and the Executive Board. Compl. ¶¶ 6, 7.

In this lawsuit, plaintiff seeks a declaratory judgment that any vote by the United States' representatives at the IMF in favor of a loan to the government of Sri Lanka would violate the "policy goal" articulated by 22 U.S.C. § 262d. *Id.* at ¶ 41. The portion of this statute relied on by plaintiff provides:

> (a) Policy goals
>
> The United States Government, in connection with its voice and vote in . . . the International Monetary Fund, shall advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in –
>
> (1) a pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person.

22 U.S.C. § 262d(a); *see also* Compl. ¶ 25. Nothing in 22 U.S.C. § 262d(a) purports to instruct government officials to support or oppose any particular set of loans, and plaintiff cites no other provision of law in support of its claims. *But see* 22 U.S.C. § 262d(f) (purporting to "instruct[]" the U.S. Executive Directors "to oppose any loan, any extension of financial assistance, or any technical assistance to any country described in subsection (a)(1) or (2) of this section, unless such assistance is directed specifically to programs which serve the basic human needs of the citizens of such country.").

Moreover, the statute provides no express private cause of action to enforce the "policy goals" on which plaintiff relies or, indeed, to enforce any other portion of the statute. *See* 22 U.S.C. § 262d. Instead, the statute requires the Secretary of the Treasury to provide annual reports to the relevant congressional committees describing the voting practices of the United States with respect to loans considered by the Executive Boards of international financial institutions, including whether the United States has opposed any loan on human rights grounds. 22 U.S.C. § 262d(c). The statute also directs the Secretary of the Treasury to consult frequently and in a timely manner with the relevant congressional committees "regarding any prospective

changes in policy direction toward countries which have or recently have had poor human rights records." 22 U.S.C. § 262d(g).[1]

II. PLAINTIFF'S ALLEGATIONS AND REQUESTED RELIEF

According to the complaint, plaintiff is a non-profit membership corporation founded to oppose "the ongoing pattern of gross violations of internationally recognized human rights overwhelmingly targeting Tamils in Sri Lanka by the Sinhalese Buddhist Government of Sri Lanka (GOSL)." Compl. ¶ 4. Plaintiff's complaint consists largely of allegations of the GOSL's pattern of human rights violations. *See id.* at ¶¶ 12-24. Plaintiff asserts that several of its members have relatives in Sri Lanka whose human rights are threatened by the GOSL, and that these "relatives are unable to file suit for themselves in light of the ongoing horrors in Sri Lanka." *Id.* at ¶ 5.

Plaintiff alleges that the GOSL has submitted an application to the IMF for a loan of $1.9 billion to address severe balance of payment difficulties, and that the IMF's Executive Board is likely to make a decision with respect to this application soon, though "no fixed date has been made public." *Id.* at ¶¶ 8-10. Although the United States exercises only 16.77% of the voting power of the Executive Board, plaintiff alleges – "[o]n information and belief" – that "no loan has ever been approved by the IMF over the opposition of the United States." *Id.* at ¶ 6. Accordingly, plaintiff claims that "[i]f Defendants use their influence and vote against Sri Lanka's $1.9 billion IMF loan request, there is a reasonable probability that it will be defeated

[1] As codified, the statute contains a second subsection (g), which directs the President to consider whether a country has engaged in violations of religious freedom for purposes of determining whether a country engages in a pattern of gross violations of human rights. 22 U.S.C. § 262d(g).

by the IMF's Executive Committee." *Id.* at ¶ 26. Plaintiff further asserts that "[i]f Sri Lanka is denied its $1.9 billion loan request by the IMF, it is reasonably likely that its pattern of gross violations of internationally recognized human rights will diminish or end in order to qualify for IMF funding . . . ." *Id.* at ¶ 32. And, plaintiff reasons, if Sri Lanka diminishes its alleged pattern of violating human rights, the possibility that the relatives of plaintiff's members may be the subject of such a pattern of human rights violations will diminish also. *Id.* at ¶ 37.

Plaintiff claims that, although Congress did not expressly create a private cause of action to enforce the "policy goal" articulated in 22 U.S.C. § 262d, it has also "declined in express or implied language to *withhold* judicial review of claimed violations of 22 U.S.C. 262d. . . ." *Id.* at ¶ 40 (emphasis added). According to plaintiff's logic, by articulating this "policy goal" without creating (or expressly withholding) a private cause of action, Congress must have intended to create a judicially enforceable private cause of action because "[a]bsent a private cause of action, there would be no practical method to subject the actions of the Secretary of Treasury or Executive Director under 22 U.S.C. 262d to judicial review." *Id.* at ¶ 39. Plaintiff asks the Court to enforce this alleged private cause of action by agreeing with plaintiff that the GOSL is engaged in a pattern of gross violations of internationally recognized human rights and issuing a declaratory judgment that defendants must oppose any IMF loans to the GOSL. *Id.* at ¶ 41.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO BRING THIS ACTION

"Article III of the Constitution limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies,' and Article III standing . . . enforces the Constitution's case-or-controversy requirement." *Hein v. Freedom From Religion Fdn.*, 551 U.S. 587, —, 127 S.Ct. 2553, 2562 (2007) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, —, 126 S.Ct. 1854, 1861 (2006)). The requisite elements of this "irreducible constitutional minimum of standing" are well established:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted). As the party invoking the Court's jurisdiction, plaintiff bears the burden of establishing each of these elements. *Id.* at 561. Plaintiff cannot sustain its burden with respect to any of the requisite elements of Article III standing. Consequently, this case must be dismissed for lack of jurisdiction.

A. Plaintiff Can Only Speculate that its Members' Relatives' Alleged Injury Is Likely to be Redressed by a Favorable Decision

Plaintiff fails to establish its standing because it is purely speculative to suggest that defendants' opposition to Sri Lanka's loan application would redress the alleged threat to plaintiff's members' relatives' human rights. "Redressability examines whether the relief

sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *In Re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989)). Thus, the redressability prong of the standing requirement focuses on whether a federal court is the appropriate forum for addressing the asserted injury. *Id.* at 664.

As described above, plaintiff speculates that opposition to Sri Lanka's loan by defendants will influence other members of the Executive Committee of the IMF to also oppose the loan, Compl. ¶ 26, and that denial of the loan will somehow induce the GOSL to "diminish" its alleged pattern of human rights abuses. *Id.* at ¶ 32. Such speculation is insufficient to demonstrate redressability. When, as here, "the plaintiff is not [it]self subject to the challenged government action or inaction, it is 'substantially more difficult' to establish redressability." *Talenti v. Clinton*, 102 F.3d 573, 577 (D.C. Cir. 1996) (quoting *Lujan*, 504 U.S. at 562). "In such cases, the court's ability to redress the injury 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). And, as a result, it is well established that "standing to challenge a government policy cannot be founded merely on speculation as to what third parties will do in response to a favorable ruling." *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1274 (D.C. Cir. 2007) (citing *Allen v. Wright*, 468 U.S. 737, 758-59 (1984); *Simon*, 426 U.S. at 42-43); *see also Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) ("[M]ere 'unadorned speculation' as to the existence

of a relationship between the challenged government action and the third-party conduct 'will not suffice to invoke the federal judicial power.'") (quoting *Simon*, 426 U.S. at 44).

The opinion of the Court of Appeals for the District of Columbia in *Talenti v. Clinton*, 102 F.3d 573 (D.C. Cir. 1996), presents a particularly relevant application of this principle. In *Talenti*, the court of appeals affirmed the dismissal for lack of standing of a lawsuit seeking suspension of all United States government aid to the Italian government in order to redress the alleged expropriation of plaintiff's property by the Italian government. *Talenti*, 102 F.3d at 575-78. The court of appeals found that it would be "'mere speculation' to assume that a judgment in Talenti's favor would at all ameliorate Talenti's injury" because "there is 'considerable uncertainty as to whether such action would aid plaintiff . . . or would tend to drive [the foreign government] into even greater intransigence.'" *Id.* at 577-78 (quoting *Aerotrade*, 387 F. Supp. at 975). The court of appeals elaborated on why this basic uncertainty was fatal to plaintiff's standing:

> In order to find standing, we would have to assume that the Italian government would respond to the suspension of aid by negotiating a resolution of Talenti's claim. We have no reason to think a foreign government would be so inclined. The suspension of foreign assistance is a contentious act that may threaten diplomatic relations and undermine American influence abroad. It seems equally plausible that a foreign government would find it in the country's long-term interest to forego American aid to save face. In any case, "[a] court is rightly reluctant to enter a judgment which may have no real consequence, depending on the putative cost-benefit analyses of third-parties over whom it has no jurisdiction and about whom it has no information."

Id. at 578 (quoting *Branton v. Fed. Comm. Comm'n*, 993 F.2d 906, 912 (D.C. Cir. 1993)); *see also Atlantic Tele-Network*, 251 F. Supp. 2d at 129-30 (holding it too speculative to conclude that withholding financial assistance from the government of Guyana would redress plaintiff's

alleged injury from Guyana's alleged breach of plaintiff's contract); *Betteroads*, 106 F. Supp. 2d at 267 (same with respect to the government of the Dominican Republic).

Plaintiff's allegations of redressability are even more speculative than the analogous cases cited above because plaintiff's redressability argument depends not only on the independent actions of the GOSL, but also the independent actions of the other twenty-three Executive Directors of the IMF, and the independent actions of non-governmental actors in Sri Lanka. Compl. ¶¶ 7, 8, 26, 37. Accordingly, it is wholly speculative for plaintiff to assume that its purported injury (actually the asserted potential injury to its members' relatives) would be redressed by a favorable ruling. The complaint should be dismissed for lack of standing.

B. The Alleged Injury Is Not Traceable to Defendants' Proposed Action

Plaintiff also fails to demonstrate a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The causation prong of the standing inquiry "examines whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff." *Florida Audubon*, 94 F.3d at 663 (internal citations and quotations omitted). In essence, causation is focused on whether the plaintiff has named the appropriate defendant. *Id.* at 664.

Plaintiff's complaint fails to allege, much less demonstrate, that the alleged injury is caused by the defendants. Plaintiff alleges only that the GOSL has violated the human rights of plaintiff's members' relatives, and that these relatives are threatened with "imminent physical danger from the GOSL . . . because of its pattern of gross violations of internationally recognized human rights." Compl. ¶ 5; *see also* Compl ¶ 30, Exhibits 1-6. By contrast, plaintiff does not allege that defendants have caused the alleged injury here. Instead, plaintiff alleges that if

defendants oppose the loan "there is a reasonable probability that it will be defeated by the IMF's Executive Committee," *id.* at ¶ 26, and that it is "reasonably likely" that denial of the loan will "diminish" Sri Lanka's alleged "pattern of gross violations of internationally recognized human rights." *Id.* at ¶ 32.

Thus, plaintiff's attempt to tie defendant's possible future actions to the alleged injury depends on a chain of remote contingencies that will actually be determined by the actions of third parties not before the Court (*e.g.*, the twenty-three other Executive Directors at the IMF, the GOSL, and other individuals in Sri Lanka) who may influence the likelihood that plaintiff's members' relatives will be subject to human rights abuses. In such scenarios, "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain [plaintiff's] standing." *Allen*, 468 U.S. at 759. Thus, for example, in *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), the Supreme Court held that plaintiffs' allegation that an Internal Revenue Service ruling "had 'encouraged' hospitals to deny services to indigents" was insufficient to establish the causation prong of the standing inquiry. *Id.* at 42. The Supreme Court reasoned that "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS officials' alleged] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. Likewise, any threat to plaintiff's members' relatives' human rights is not "fairly . . . trace[able] to the challenged actions of the defendant[s]," but rather is clearly "the result [of] the independent action of . . . third part[ies] not before the court." *Lujan*, 504 U.S. at 560. As a result, plaintiff cannot satisfy the causation prong of the standing inquiry.

C. Neither Plaintiff Nor Its Members Have Alleged That They Are Threatened with Imminent Injury to a Legally Protected Interest

This case should also be dismissed due to plaintiff's failure to allege that either it or its members are threatened with a cognizable injury. Plaintiff, a non-profit corporation, has not alleged injury to itself. Plaintiff, therefore, must meet the requirements of associational standing set forth in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977), including the requirement that "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Id.* at 342 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Yet, plaintiff's members do not allege that they are threatened with violations of their human rights – they reside in the safety of the United States and Canada. *See* Compl., Exhibits 1-6. Instead, plaintiff seeks to base its standing on the alleged threat to the human rights of its members' relatives who remain in Sri Lanka. *See* Compl. ¶ 5 ("Six TAG members have filed affidavits with this Complaint testifying to the imminent physical danger from the GOSL confronted by *their relatives* in Sri Lanka because of its pattern of gross violations of internationally recognized human rights . . . .") (emphasis added); *see also* Compl. ¶ 30. Apparently, plaintiff seeks to establish its associational standing through its members' third-party standing, but it can do so only if its members have suffered or will imminently suffer an injury-in-fact that is independent of their relatives' alleged injuries. *See, e.g., Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 293 (3d Cir. 2002) ("So long as the association's members have or will suffer sufficient injury to merit standing *and* their members possess standing to represent the interests of third-parties, then associations can advance the third-party claims of their members without suffering injuries themselves.") (emphasis added).

As a general rule, a plaintiff may bring claims on behalf of an absent third party only if it has satisfied three conditions: (1) the plaintiff has suffered or will imminently suffer "an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute," (2) the plaintiff "must have a close relation to the third party," and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (quoting *Singleton v. Wulff*, 428 U.S. 106, 112-16 (1976)). Plaintiff alleges that its "members are the best representatives of their relatives in Sri Lanka," and that "their relatives are unable to file suit for themselves in light of the ongoing horrors in Sri Lanka." Compl. ¶ 5. Even assuming these allegations are sufficient to satisfy the second and third requirements for third-party standing, plaintiff has not alleged that its members have suffered an independent injury-in-fact, and therefore plaintiff's members do not have third-party standing on behalf of their relatives. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 & n. 2 (2004); *id.* at 136-37 (Ginsburg, J., dissenting) (recognizing that a court must first determine whether a litigant has suffered an independent injury-in-fact sufficient to satisfy Article III before proceeding to the "prudential" considerations of whether the litigant has a sufficiently close relation to the third party and the third party cannot protect his own interests); *Singleton*, 428 U.S. at 112-13; *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1361 & n.13 (D.C. Cir. 2000) ("Prudential standing aside, if the litigant has not suffered injury there is no constitutional standing."). Thus, because plaintiff's members are not threatened with a cognizable injury-in-fact, plaintiff cannot rely on its members' relatives' alleged injury to meet the requirements for associational standing. Accordingly, this suit must be dismissed.

II. THIS CASE PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

This case should also be dismissed for lack of jurisdiction because it presents a nonjusticiable political question. *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (noting that nonjusticiable political questions deprive federal courts of jurisdiction). Plaintiff seeks a declaratory judgment that defendants would be in violation of 22 U.S.C. § 262d if defendant Lundsager fails to oppose the pending $1.9 billion loan application of the GOSL. Compl. ¶ 41. This Court, however, may not substitute its judgment for that of defendants and determine that the GOSL has been engaged in "a pattern of gross violations of internationally recognized human rights." 22 U.S.C. § 262d(a). Such determinations involve sensitive political and policy judgments that, under both the Constitution and the very statute plaintiff seeks to invoke, are committed to the Executive Branch.

"The principle that the courts lack jurisdiction over political decisions that are by their nature 'committed to the political branches to the exclusion of the judiciary' is as old as the fundamental principle of judicial review." *Schneider*, 412 F.3d at 193 (quoting *Antolok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989) (opinion of Sentelle, J.)); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803) (recognizing that certain political acts "can never be examinable by the courts"). Thus, in *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), Chief Justice Marshall "described questions of foreign policy as 'belong[ing] more properly to those . . . who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; *to whom are entrusted all its foreign relations*; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.'" *Schneider*, 412 F.3d at 193 (quoting *Palmer*, 16 U.S. at 634). Contemporary application of the political question doctrine derives from the Supreme Court's

opinion in *Baker v. Carr*, 369 U.S. 186 (1962), in which the Supreme Court enumerated six factors that could render a case nonjusticiable:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment of multifarious pronouncements by various departments on one question.

Schneider, 412 F.3d at 194 (quoting *Baker*, 369 U.S. at 217). The presence of any one of these factors renders a case nonjusticiable, *id.*, and the decision of whether or not to vote in favor of a potential IMF loan to Sri Lanka implicates several – if not all – of these factors.

First, the lawsuit raises policy questions that are constitutionally committed to the political branches. As the Supreme Court has cautioned, "The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative – the political – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (citing cases); *see also El-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d. 578, 583 (D.C. Cir. 2009) ("Disputes involving national security and foreign policy decisions are 'quintessential sources of political questions.'") (quoting *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006)). The decisions and conduct of the United States with respect to international organizations are quintessential exercises of foreign policy. As the district court recognized in *Atlantic Tele-Network*, a case seeking to direct U.S. representatives in the Inter-American Development Bank ("IDB") to vote against a particular loan, "[f]oreign

aid, including monetary loans for economic development abroad, is an integral component of this country's international relations. To grant or deny a loan to a foreign nation is a decision fraught with foreign policy implications." *Atlantic Tele-Network*, 251 F. Supp. 2d at 131; *see also Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) ("Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations."). Thus, defendants' decisions with respect to Sri Lanka's loans are not properly subject to judicial inquiry.

The second and third *Baker* factors are also implicated by plaintiff's requested relief. As noted, the statutory mandate of 22 U.S.C. § 262d instructs U.S. Executive Directors to oppose loans to countries engaged in "a pattern of gross violations of internationally recognized human rights." 22 U.S.C. § 262d(a)(1), (f). Plaintiff is effectively asking this Court to substitute its foreign policy judgment for that of defendants, but, as the Supreme Court has recognized, such "decisions [are] of a kind for which the judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948) (citing cases); *see also Schneider*, 412 F.3d at 195-96 (noting that federal "'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'") (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)); *Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975) (per curiam) (explaining that the judiciary lacks aptitude, facilities and responsibility to question President's determination that foreign aid to Israel was necessary).

Finally, the Court could not grant plaintiff's requested relief "without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. Plaintiff recognizes that it has no basis to claim that defendants will not "comply with the voting mandate of § 262d." Compl. ¶ 27. Notwithstanding this fact, plaintiff seeks a declaratory judgment that would direct the United States to vote in a certain manner,[2] in effect, suggesting that the Executive Branch cannot be trusted to faithfully execute the laws of this land. *See Schneider*, 412 F.3d at 198 (holding that a federal court could not pass judgment on the Executive Branch's participation in alleged covert operations without expressing a lack of respect for a coordinate branch of the federal government). Surely, such a claim must be rejected by this Court. Furthermore, granting plaintiff's requested relief could reduce any leverage the United States might be able to exercise over the GOSL to advance human rights in Sri Lanka. *See Smith v. Reagan*, 844 F.2d 195, 199 (4th Cir. 1988) (citing risk that pronouncements by federal courts regarding executive action under the Hostage Act might jeopardize diplomatic negotiations). Accordingly, plaintiff's complaint raises non-justiciable political questions and must be dismissed.

[2] *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n. 8 (D.C. Cir. 1985) (where federal officers are defendants, declaratory relief is "the practical equivalent of specific relief such as an injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court") (citing *Samuels v. Mackell*, 401 U.S. 66, 73 (1971)).

III. CONGRESS HAS NOT CREATED A PRIVATE RIGHT OF ACTION TO ENFORCE THE POLICY GOAL OF 22 U.S.C. § 262d AND, THEREFORE, PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Section 701 of the International Financial Institutions Act, codified as amended at 22 U.S.C. § 262d, does not create a private right of action. "[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). Accordingly, when the existence of a private cause of action is challenged, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* (citing *Transamerica Mortgage Adv., Inc. v. Lewis*, 444 U.S. 11, 15 (1979)). If the text of the statute does not reveal an intent to create a private cause of action, a "court[] may not create one, no matter how desirable that may be as a policy matter, or how compatible with the statute." *Id.* at 286-87 (citing cases). As the Supreme Court has explained, "'[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" *Id.* at 287 (quoting *Lampf, Pleva, Lipkind, Prupis & Peitgrow v. Gilbertson*, 501 U.S. 350, 365 (1991)).

Nothing in the text of 22 U.S.C. § 262d reflects an intent to create an implied private right of action.[3] To the contrary, the statute's requirement that the Secretary of the Treasury

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[3] Furthermore, although the Court need not consider the statute's legislative history to conclude that no cause of action exists, the legislative history of the original enactment of the International Financial Institutions Act and its subsequent amendments also does not support plaintiff's view that the statute creates a private cause of action. *See, e.g.*, H.R. Rep. No. 95-544, at 10-11 (1977) (Conf. Rep.), *as reprinted in* 1977 U.S.C.C.A.N. 2741 , 2742-44 (describing the original enactment of § 701 without reference to a private cause of action or judicial review); H.R. Rep. No. 98-175, at 58-62 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1898, 1941-45

(continued...)

submit annual reports describing the votes of the Executive Directors of international financial institutions to the relevant congressional committees suggests that Congress intended to enforce its mandate not through private party actions, but rather through exercise of congressional oversight and appropriations powers. *See* 22 U.S.C. § 262d(c).[4] Contrary to plaintiff's suggestion, Compl. ¶ 39, "federal courts" are not required to act as "continuing monitors of the wisdom and soundness of Executive action.'" *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 806 (D.C. Cir. 1987) (quoting *Allen v. Wright*, 468 U.S. at 759-60). Rather, "'such a role is appropriate for the Congress acting through its committees and the power of the purse.'" *Id.*; *see also Smith*, 844 F.2d 201 (declining to imply a private cause of action to enforce the Hostage Act, 22 U.S.C. § 1732, in part due to statutory requirement that "all the facts and proceedings relative [to such actions] shall as soon as practicable be communicated by the President to Congress.").

Likewise, even if this Court were to accept plaintiff's contention that 22 U.S.C. § 262d was designed to benefit those individuals – in this case, plaintiff's members' relatives – whose

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[3](...continued)
(suggesting that Congress would enforce § 701 by withholding funding); H.R. Rep. No. 102-964, at 91 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 2781, 2823 (describing amendment that would include IMF under the requirements of § 701).

[4] Congress' intent to enforce its mandate through its power to appropriate the necessary funds is confirmed by the legislative history accompanying the 1983 amendments to 22 U.S.C. § 262d. *See* H.R. Rep. No. 98-175, at 58 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 1898, 1941 ("The committee reminds the officials charged with carrying out the requirements of [22 U.S.C. § 262d] that it believes that vigorous enforcement of the human rights requirements adhering to U.S. participation in the multilateral development banks is critical to the maintenance of working majorities in the Congress willing to support funding these institutions. Any perception that enforcement of this law is uneven, lax or politicized threatens to alienate precisely those members of Congress who have traditionally provided consistent support for these institutions and cannot be afforded in the present legislative climate.").

human rights are allegedly imperiled by a nation seeking IMF assistance, *see* Compl. ¶ 31, the statute still cannot be read to create a private cause of action. As the Supreme Court has recognized, "the fact that an enactment is designed to benefit a particular class does not end the inquiry; instead, it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation." *Univ. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 771 (1981); *see also Transamerica*, 444 U.S. at 24 ("Section 206 of the [Investment Advisors Act of 1940] . . . concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf."). Here, the statute purports merely to provide guidance to United States officials, rather than bestowing express rights on individuals, and there is "far less reason to infer a private remedy in favor of individual persons where Congress, rather than drafting the legislation with an unmistakable focus on the benefitted class, instead has framed the statute simply as a general prohibition or a command to a federal agency." *Coutu*, 450 U.S. at 772 (internal citations and quotation marks omitted). Caution in creating new private causes of action is, moreover, especially appropriate here, where the cause of action risks substantial interference with the Executive Branch's conduct of foreign policy. Thus, even if the policy goals articulated in 22 U.S.C. § 262d were intended to benefit plaintiff's members' relatives, Compl. ¶ 31, the statute cannot be read to provide a private right of action.

The district court's opinion in *Atlantic Tele-Network* is instructive. The plaintiff in that case, who had constructed a telecommunications system in Guyana pursuant to a contract with the government of Guyana, alleged that the government of Guyana was seeking loans from the

IDB in order to build a competing network in breach of the contract. *Atlantic Tele-Network*, 251 F. Supp. 2d at 128. Plaintiff sued the IDB and two officials of the United States alleged to exercise control over the IDB's lending activity – the U.S. Executive Director and the Secretary of the Treasury – seeking to enjoin the disbursement of any funds to the government of Guyana. *Id.*[5] Plaintiff based its claim for relief on two provisions: the "Gonzalez Amendment" to the Inter-American Development Bank Act, 22 U.S.C. § 283r, and the "Helms Amendment" to the Foreign Assistance Act of 1961, 22 U.S.C. § 2370a(a). *Id.* at 130. Similar to the statute at issue in this case, both of these provisions "purport to instruct the President and his subordinates to act to prevent disbursements to foreign nations that have expropriated the property of United States citizens or repudiated or nullified any contract with a United States citizen." *Id.*[6] The district court declined plaintiff's request to create an implied private right of action on the basis of these statutes, explaining that "neither [provision] contains anything approaching explicit language authorizing private litigants to invoke them for purposes of private debt collection or contract enforcement, and indeed . . . '[i]t would be imprudent for a court to create rights of action that might interfere with the conduct of foreign policy.'" *Id.* (quoting *Israel Aircraft Indus. Ltd. v. Sanwa Bus. Credit Corp.*, 16 F.3d 198, 202 (7th Cir. 1994)). The same logic applies here, and this case should be dismissed for failure to state a claim.

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[5] Plaintiff later amended its complaint, adding the government of Guyana as a defendant. *Id.*

[6] The district court recognized the possibility that the Helms Amendment superseded the Gonzalez Amendment, but did not decide the question. *Id.* at 130 & n. 3.

IV. DEFENDANTS ARE IMMUNE FROM LEGAL PROCESS FOR ACTIONS THAT MAY BE PERFORMED BY THEM IN THEIR OFFICIAL CAPACITY AS GOVERNOR AND EXECUTIVE DIRECTOR OF THE IMF

Finally, this case should be dismissed because defendants Geithner and Lundsager are immune from suit in civil actions such as this. The IMF Articles of Agreement provide that "[a]ll *Governors, Executive Directors*, Alternates, members of committees, representatives appointed under Article XII, Section 3(j), advisors of any of the foregoing persons, officers, and employees of the Fund . . . shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives this immunity." Articles of Agreement, Art. IX, § 8 (emphasis added). These immunities have been expressly incorporated into United States domestic law. *See* 22 U.S.C. § 286h ("The provisions of article IX, sections 2 to 9, both inclusive . . . of the Articles of Agreement of the Fund . . . shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of, the Fund."). The United States accepted membership in the IMF and the IMF Articles of Agreement entered into force in 1945. *See* Office of the Legal Adviser, United States Dept. of State, Treaties in Force 358 (2009). Defendants are being sued civilly for acts that plaintiffs characterize as within their official capacities as Governor and Executive Director of the IMF, respectively, *i.e.*, a vote on Sri Lanka's loan application. *See* Compl. ¶¶ 6, 7, 25. Plaintiff has not alleged that the IMF has waived the immunity of the Governor or the Executive Director from legal process in this civil action. Accordingly, this Court should also dismiss this lawsuit on the basis of defendants' immunity.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court grant defendants' motion to dismiss.

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