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In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2016

ARGUED: FEBRUARY 13, 2017

DECIDED: SEPTEMBER 8, 2017

No. 16-266-cv

IN RE GRAND JURY SUBPOENAS RETURNABLE DECEMBER 16, 2015

Appeal from the United States District Court
for the Eastern District of New York.
No. 15-mc-2346 – John Gleeson, *District Judge*.

Before: WALKER, LIVINGSTON, *Circuit Judges*, AND BRICCETTI, *District Judge*.*

A Chinese construction company (the Company) and seven of its employees (collectively, Appellants) appeal from an order of the United States District Court for the Eastern District of New York (Gleeson, J.) denying their motion to quash subpoenas requiring the

* Judge Vincent L. Briccetti, of the United States District Court for the Southern District of New York, sitting by designation.

1 employees to appear before a grand jury. Appellants argue that the
2 district court erred in concluding that the employees are not entitled
3 to diplomatic immunity because they were not registered with the
4 United States Department of State. Appellants further contend that,
5 even if the employees were required to register, that requirement
6 was satisfied when the employees applied for their visas. Because
7 we conclude that the 2009 Bilateral Agreement between the United
8 States and the People's Republic of China (PRC) incorporates a 2003
9 Diplomatic Note that imposes a registration requirement on
10 construction personnel, which was not fulfilled here, we AFFIRM
11 the order of the district court.

12 _____
13 HAROLD J. RUVOLDT, JR. (Cathy A. Fleming & Eric
14 H. Jaso *on the brief*), Fleming Ruvoldt PLLC, New
15 York, NY, *for Appellant*.

16
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20 Attorneys, *on the brief*), *for* Bridget M. Rohde,
21 Acting United States Attorney for the Eastern
22 District of New York, *for Appellee*.

23 _____
24 JOHN M. WALKER, JR., *Circuit Judge*:

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26 its employees (collectively, Appellants) appeal from an order of the
27 United States District Court for the Eastern District of New York

1 (Gleeson, J.) denying their motion to quash subpoenas requiring the
2 employees to appear before a grand jury. Appellants argue that the
3 district court erred in concluding that the employees are not entitled
4 to diplomatic immunity because they were not registered with the
5 United States Department of State. Appellants further contend that,
6 even if the employees were required to register, that requirement
7 was satisfied when the employees applied for their visas. Because
8 we conclude that the 2009 Bilateral Agreement between the United
9 States and the People's Republic of China (PRC) incorporates a 2003
10 Diplomatic Note that imposes a registration requirement on
11 construction personnel, which was not fulfilled here, we AFFIRM
12 the order of the district court.

13 BACKGROUND

14 Because this matter relates to a grand jury investigation, we
15 provide an abbreviated version of the facts and only discuss
16 information that will not compromise the integrity of the underlying
17 grand jury investigation.¹ The Company was selected by the PRC to
18 provide construction and related services for Chinese diplomatic

¹ On February 16, 2016, we granted Appellants' unopposed motion under Federal Rule of Criminal Procedure 6(e)(6) to seal this appeal in its entirety because it relates to a grand jury investigation. We have determined, however, that we can resolve the question of diplomatic immunity without disclosing information that would contravene the secrecy of the grand jury proceedings mandated by Rule 6(e).

1 and consular missions to the United States pursuant to a 2009
2 Bilateral Agreement between the United States and the PRC
3 (Bilateral Agreement). Under this agreement, the Company brings
4 Chinese nationals into the United States to work on its projects. The
5 Bilateral Agreement provides for qualified individuals to enter the
6 United States pursuant to A-2 or other appropriate visas issued by
7 the Department of State.

8 Seven employees of the Company, construction personnel
9 who were attached to a PRC mission, entered the United States on
10 A-2 and G-2 visas. When these employees were later served with
11 subpoenas requiring them to appear before a grand jury in the U.S.
12 District Court for the Eastern District of New York, Appellants
13 moved, pursuant to 22 U.S.C. § 254(d), to quash these subpoenas on
14 the basis that the employees are entitled to diplomatic immunity.
15 The district court denied that motion and this timely appeal
16 followed.

17 DISCUSSION

18 We must resolve whether, in order to receive diplomatic
19 immunity, the employees were required to register with the State
20 Department upon being attached to a PRC mission and, if so,
21 whether the employees' visa applications constituted such
22 registration. Appellants argue that they are entitled to diplomatic
23 immunity because: (1) the Bilateral Agreement does not impose a

1 registration requirement as a pre-condition to receiving immunity
2 and (2) even if the Bilateral Agreement contains such a requirement,
3 the employees fulfilled it by providing the information required to
4 secure their visas.

5 We review a district court's denial of a motion to quash a
6 grand jury subpoena for abuse of discretion, *see In re Edelman*, 295
7 F.3d 171, 173, 175 (2d Cir. 2002), but its interpretation of the terms of
8 a treaty or a diplomatic agreement *de novo*, *see Swarna v. Al-Awadi*,
9 622 F. 3d 123, 132 (2d Cir. 2010).

10 **I. The VCDR, Diplomatic Note, and Bilateral Agreement**

11 The resolution of this appeal depends on our interpretation of
12 three related documents: (1) the Vienna Convention on Diplomatic
13 Relations (VCDR); (2) a 2003 diplomatic note circulated by the State
14 Department (Diplomatic Note or Note); and (3) the Bilateral
15 Agreement.

16 The VCDR is an international treaty, signed on April 18, 1961
17 and effective on April 24, 1964 upon the ratification of twenty-two
18 states. Now ratified by 191 signatories, the VCDR sets forth the
19 privileges and immunities to which certain diplomatic officials are
20 entitled. The VCDR specifies that "diplomatic agent[s]" are immune
21 from the criminal, civil, and administrative jurisdiction of the
22 receiving State, with only a few exceptions that are not relevant here.
23 *See Vienna Convention on Diplomatic Relations*, art. 31(1), April 18,

1 1961, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter VCDR];
2 Multilateral Treaties Deposited with the Secretary-General,
3 <https://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited
4 Sept. 7, 2017). The purpose of bestowing these diplomatic privileges
5 under the VCDR is “to ensure the efficient performance of the
6 functions of diplomatic missions.” VCDR, preamble.

7 As is relevant to this appeal, the VCDR requires that “[t]he
8 Ministry for Foreign Affairs of the receiving State . . . shall be
9 notified of . . . the appointment of members of the mission [including
10 administrative and technical staff].” *Id.*, art. 10(1)(a). The State
11 Department has a long-standing policy, based on this provision of
12 the VCDR, that all foreign personnel must register with the State
13 Department to be entitled to diplomatic immunity. In 2003, the State
14 Department reminded the Chiefs of Mission of this policy by
15 unilaterally issuing the Diplomatic Note, which reiterated “the
16 requirement, under Article 10 of the VCDR . . . to notify the
17 Department promptly of the arrival or appointment . . . of all
18 members of the missions or consulates.” Appellee’s App. 9.

19 Pursuant to the VCDR, the United States and the PRC have
20 executed a series of bilateral agreements permitting each
21 government to conduct construction work on its embassy and
22 consulate facilities located in the other country. The 2009 Bilateral
23 Agreement, which is relevant here, applies to then “existing bilateral

1 diplomatic and consular locations,” including the PRC embassy in
2 Washington, D.C., the United States embassy in Beijing, China, the
3 United States and PRC consulates, and the PRC Permanent Mission
4 to the United Nations located in New York. Appellants’ App. 45.
5 The Bilateral Agreement specifies that the United States and the
6 PRC, when engaging in construction at these sites in the other
7 country, may use “project-related personnel and companies of
8 [their] own choosing” and bring their own nationals to serve as
9 “construction personnel.” *Id.* at 48. Such personnel “shall be
10 attached . . . to the . . . diplomatic mission as administrative and
11 technical staff” and “shall enjoy the privileges and immunities
12 accorded administrative and technical staff . . . under the VCDR.”
13 *Id.* at 49. Although the Bilateral Agreement does not explicitly
14 require that construction personnel register with the State
15 Department to receive immunity, it incorporates “relevant
16 diplomatic notes” regarding issues “not addressed.” *Id.* at 55.

17 Here, the district court determined that the Bilateral
18 Agreement, which recognizes immunity for construction personnel,
19 incorporates the Diplomatic Note, which imposes a registration
20 requirement on construction personnel. Appellants take issue with
21 this determination. We therefore address in this opinion: (1)
22 whether, pursuant to the Diplomatic Note, construction personnel
23 must be registered with the State Department before they are

1 entitled to diplomatic immunity and (2) if so, whether the Bilateral
2 Agreement incorporates the Note, thereby subjecting the Appellants
3 to the registration requirement contained therein.

4 II. Jurisdiction

5 Before proceeding to the merits, however, we first must
6 determine whether we have jurisdiction over this matter. We must
7 consider whether we are deprived of jurisdiction because the denial
8 of Appellants' motion to quash the subpoenas is not a final
9 judgment of the district court from which an appeal can be taken
10 and whether, even if we possess jurisdiction, prudential
11 considerations counsel against exercising it.

12 Our jurisdiction usually is limited to appeals from final
13 judgments. *See* 28 U.S.C. § 1291. A final judgment is a judgment
14 that effectively ends the litigation such that there is nothing left to
15 decide. An order disposing of a motion to quash a grand jury
16 subpoena generally is not such a final judgment. *See United States v.*
17 *Punn*, 737 F.3d 1, 5 (2d Cir. 2013); *United States v. Nixon*, 418 U.S. 683,
18 690-91 (1974). There is an exception to the final judgment rule,
19 however, when the order in question meets the requirements of the
20 collateral order doctrine. Under this exception, an appellate court
21 has jurisdiction over a non-final judgment "if such order (1)
22 'conclusively determined the disputed question'; (2) 'resolved an
23 important question completely separate from the merits of the

1 action'; and (3) 'was effectively unreviewable on appeal from a final
2 judgment.'" *In re Air Crash at Belle Harbor*, 490 F.3d 99, 109 (2d Cir.
3 2007) (citations omitted).

4 Here, the district court's order denying the Appellants'
5 motion meets all three of these requirements. The district court
6 conclusively determined that the employees were not entitled to
7 diplomatic immunity, an issue that is "important" and "completely
8 separate" from the merits of the case. *See id.* And because the issue
9 of whether these individuals are entitled to immunity determines
10 whether they will be subjected to any further processes in the United
11 States courts, a later recognition of immunity does not mitigate the
12 harm and the order is "effectively unreviewable on appeal from a
13 final judgment." *See id.*; *cf. Mitchell v. Forsyth*, 472 U.S. 511, 525-27
14 (1985) (the collateral order doctrine exception applies to the defenses
15 of double jeopardy, absolute immunity, and qualified immunity
16 because each possesses the same "essential attribute"—the recipient
17 is guaranteed the right not to be subjected to further court
18 processes—which is lost if appellate review awaits a final
19 judgment). Accordingly, under the collateral order doctrine, we
20 have jurisdiction to review the district court's denial of Appellants'
21 motion to quash the subpoenas.

22 Although we properly have jurisdiction, Appellants argue
23 that neither we nor the district court should exercise jurisdiction

1 over this matter due to prudential considerations. Specifically,
2 Appellants contend that this case presents a non-justiciable political
3 question because Section 16 of the Bilateral Agreement specifies that
4 “the Parties shall first address [any] dispute through informal
5 working-level consultations” and that any remaining dispute “shall
6 be resolved through diplomatic channels.” Appellants’ App. 55.
7 This argument is waived.

8 The political question doctrine is prudential in that it
9 implicates the exercise of jurisdiction rather than the question of
10 whether jurisdiction exists. *See Baker v. Carr*, 369 U.S. 186, 199-200
11 (1962). Because “[w]e ordinarily will not consider issues raised for
12 the first time in a reply brief,” *McBride v. BIC Consumer Prods. Mfg.*
13 *Co.*, 583 F.3d 92, 96 (2d Cir. 2009), a party may waive a challenge to
14 our jurisdiction on the basis of the political question doctrine if the
15 argument is not properly raised before the district court or in its
16 opening brief on appeal, *Hwang Geum Joo v. Japan*, 413 F.3d 45, 49 n.2
17 (D.C. Cir. 2005) (rejecting party’s argument regarding political
18 question doctrine because it was “raised for the first time in the
19 appellants’ fourth and final brief on appeal”); *767 Third Ave. Assocs.*
20 *v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152,
21 162 (2d Cir. 2000) (rejecting party’s argument regarding political
22 question doctrine because it was raised for the first time on appeal).

1 Appellants first raised this argument in supplemental briefing
2 on appeal after filing both their opening and reply briefs. There is
3 no justifiable excuse for their failure to raise this argument earlier
4 before the district court or this Court. Appellants try to explain their
5 delay in raising the political question argument by pointing to a
6 series of diplomatic notes recently exchanged between the United
7 States and the PRC that further evince a disagreement as to the
8 interpretation of the Bilateral Agreement, purportedly rendering this
9 dispute a political question pursuant to Section 16. But the
10 underlying basis of this claim—Section 16 of the Bilateral
11 Agreement—could have supported Appellants’ political question
12 argument from the outset of this case.

13 Having concluded that we properly have jurisdiction and that
14 Appellants have waived their argument that we should not exercise
15 our jurisdiction based on prudential considerations, we now turn to
16 the merits of the appeal.

17 **III. Registration of the employees was a pre-condition for**
18 **diplomatic immunity**

19 The parties agree that the employees were present in the
20 United States pursuant to the Bilateral Agreement and that the
21 Agreement itself does not explicitly contain a registration
22 requirement. But the Bilateral Agreement also incorporates
23 “relevant diplomatic notes” regarding issues “not addressed.”
24 Appellants’ App. 55. The question, therefore, is whether the

1 Bilateral Agreement imposes a registration requirement as a
2 pre-condition to immunity by incorporating the Diplomatic Note.
3 As a general matter, “[t]he clear import of treaty language controls
4 unless application of the words of the treaty according to their
5 obvious meaning effects a result inconsistent with the intent or
6 expectations of its signatories.” *Sumitomo Shoji Am., Inc. v. Avagliano*,
7 457 U.S. 176, 180 (1982) (citation omitted). In determining the intent
8 of the signatories, we customarily give “great weight” to the
9 Executive Branch’s interpretation of such a treaty. *See Swarna*, 622
10 F.3d at 133.

11 Appellants argue that the clear import of the Bilateral
12 Agreement and the Diplomatic Note is that construction personnel
13 are not required to register in order to receive immunity because: (1)
14 the Note does not condition immunity on the registration of any
15 foreign personnel, including construction personnel and (2) even if it
16 does, the Note cannot implicitly and unilaterally amend the Bilateral
17 Agreement. We address each of these arguments in turn.

18 **A. Construction personnel must register to receive**
19 **immunity under the Diplomatic Note**

20 Appellants contend that the Diplomatic Note does not require
21 construction personnel to formally register with the State
22 Department for two reasons: (1) the Note does not explicitly require
23 any foreign personnel to register before they are entitled to

1 immunity and (2) construction personnel do not fall within the
2 scope of the Note. Neither argument has merit.

3 First, Appellants correctly assert that the Diplomatic Note
4 does not explicitly make immunity conditional upon registration. A
5 reasonable reading of the Note, however, leads us to conclude that
6 registration is required for foreign personnel to possess diplomatic
7 immunity. The Note specifies, for instance, that “notif[ication]” of
8 the State Department is a “requirement[] under Article 10 of the
9 [VCDR].” Appellee’s App. 9 (reminding all Chiefs of Mission “of
10 the *requirement*, under Article 10 of the [VCDR] to notify the
11 Department promptly of the arrival or appointment . . . of all
12 members of the missions.” (emphasis added)). The Note further
13 elaborates that these reporting requirements are “*essential to*
14 *continued enjoyment* by members of the missions . . . of the rights,
15 privileges and immunities to which they may be entitled.” *Id.* at 10
16 (emphasis added). These provisions strongly suggest that foreign
17 personnel receive immunity only after they have been officially
18 attached to a mission and the receiving state has been duly
19 informed.

20 The Note is wholly consistent with both the text and purpose
21 of the VCDR. Article 10 of the VCDR explicitly requires notification
22 of the receiving state upon the attachment of diplomatic personnel:
23 “[t]he Ministry for Foreign Affairs of the receiving State, or such

1 other ministry as may be agreed, *shall be notified* of . . . the
2 appointment of members of the mission.” VCDR, art. 10(1)(a)
3 (emphasis added). The VCDR’s preamble sheds additional light on
4 the reason for this notification requirement: “the purpose of
5 [diplomatic] privileges and immunities is . . . to ensure the efficient
6 performance of the functions of diplomatic missions.” *Id.*, preamble.
7 If the receiving state were unaware of which personnel are entitled
8 to immunity, and a determination could be made only after a
9 lengthy judicial inquiry, the efficient performance of a diplomatic
10 mission’s functions would be frustrated.

11 Second, the Appellants argue that, even if the Diplomatic
12 Note requires registration as a condition for receiving immunity, the
13 Diplomatic Note does not apply to construction personnel. This
14 argument, however, is contrary to the express language of the
15 relevant documents. The VCDR and the Note both specify that the
16 registration requirement applies to members of a country’s mission,
17 *id.*, art. 1(c), 10(1)(a); Appellee’s App. 5-6, and the VCDR further
18 defines these members as including “administrative and technical
19 staff,” VCDR, art. 1(c). The Bilateral Agreement explicitly mandates
20 that construction personnel are attached to the “diplomatic mission
21 as administrative and technical staff.” Appellants’ App. 49. The
22 construction personnel described in the Bilateral Agreement plainly
23 fall within the scope of the VCDR and the Diplomatic Note. Indeed,

1 the very purpose of the Bilateral Agreement is to provide
2 construction personnel the same privileges and rights as those
3 afforded to all other mission personnel “in accordance” with the
4 VCDR. *Id.* at 44. Carried to its logical end, Appellants’ argument
5 would seem to require us to hold that construction personnel are
6 entitled to *greater* rights and privileges than other mission personnel,
7 *i.e.*, diplomatic immunity without satisfying the registration
8 requirement.

9 **B. The Bilateral Agreement incorporates the**
10 **Diplomatic Note**

11 Appellants next contend that the Diplomatic Note should not
12 have any bearing on our interpretation of the Bilateral Agreement
13 because, if it did, it would “implicitly” or unilaterally modify the
14 Agreement contrary to the Agreement’s own terms. The Bilateral
15 Agreement, however, incorporates “relevant diplomatic notes” that
16 regard matters “not addressed” in the Bilateral Agreement.
17 Appellants’ App. 55. Such notes, therefore, do not modify the
18 agreement; they are part of it. The Diplomatic Note falls within this
19 category: the parties do not dispute that (1) registration is not
20 addressed in the Bilateral Agreement; and (2) the subject of the
21 Diplomatic Note—a reminder of the registration requirement under
22 the VCDR—is relevant to the Bilateral Agreement, which references
23 the rights afforded to construction personnel under the VCDR.

1 Appellants contend, however, that the Diplomatic Note is a
2 unilateral attempt to amend the Bilateral Agreement and that
3 Section 16.2 of the Bilateral Agreement permits amendments only
4 upon mutual agreement. Section 16.2 does require that certain
5 amendments be made pursuant to mutual agreement: “If any issue
6 is not addressed in [the Bilateral Agreement], the Parties shall refer
7 to their past agreements and relevant diplomatic notes for
8 resolution. Any issue not addressed in these documents shall be
9 addressed through mutual consultation between the Parties.” *Id.*
10 As we have noted, however, Section 16.2 makes clear that the
11 Diplomatic Note does not alter the Bilateral Agreement; it is part of
12 it. Mutual consultation is required only if there are no relevant
13 diplomatic notes to be incorporated. That is not the case here.

14 Although Section 16.2 provides otherwise, Appellants also
15 suggest that a unilateral diplomatic note cannot bear upon the
16 requirements of a mutual agreement because it is unilateral.
17 Appellants are incorrect, *see, e.g., United States v. Kostadinov*, 734 F.2d
18 905, 912-13 (2d Cir. 1984) (acknowledging the validity of unilateral
19 diplomatic notes sent to Chiefs of Mission specifying that “all
20 mission personnel entitled to diplomatic privileges and immunities
21 [pursuant to the VCDR] . . . must reside in the Washington area”),
22 particularly where, as here, the mutual agreement explicitly

1 provides for the incorporation of documents that may be issued
2 unilaterally.

3 **IV. The employees' visa applications did not satisfy the**
4 **registration requirement**

5 Appellants further argue that, even if registration were a pre-
6 condition for immunity, this condition was satisfied when the
7 employees submitted their A-2 and G-2 visa applications. We
8 disagree.

9 A-2 and G-2 visas are issued to foreign personnel or their
10 immediate family members who intend to engage solely in official
11 activities for the foreign government while in the United States, *see*
12 22 C.F.R. §§ 41.12, 41.22(a), or to enter or transit the United States in
13 pursuance of official duties related to a qualifying international
14 organization, *see id.* §§ 41.12, 41.24(b)(1). The State Department has
15 specified, however, that such visas are “issued to a broad range of
16 persons,” including those who “enjoy no privileges and immunities
17 in the United States.” Appellants’ App. 88. Because these visas can
18 be issued to individuals who are not entitled to diplomatic
19 immunity, they do not necessarily fulfill the purpose that underlies
20 registration—to inform the State Department as to the identities of
21 foreign personnel who should be entitled to diplomatic immunity in
22 the United States.

23 Indeed, in the instant case, the State Department certified that
24 the employees were not formally registered with the State

1 Department, even though they had applied for and received these
2 visas. Such a certification is generally conclusive where, as here, the
3 State Department's interpretation of when diplomatic immunity
4 applies under the relevant agreements is reasonable. *See In re Baiz*,
5 135 U.S. 403, 421 (1890) (“[T]he certificate of the secretary of state . . .
6 is the best evidence to prove the diplomatic character of a person.”);
7 *United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004) (“[W]e
8 hold that the State Department's certification, which is based upon a
9 reasonable interpretation of the Vienna Convention, is conclusive
10 evidence as to the diplomatic status of an individual.” (citing *United*
11 *States v. Kostadinov*, 734 F.2d 905 (2d Cir. 1984))); *Abdulaziz v.*
12 *Metropolitan Dade Cnty.*, 741 F.2d 1328, 1331 (11th Cir.
13 1984) (“[C]ourts have generally accepted as conclusive the views of
14 the State Department as to the fact of diplomatic status.” (citing
15 *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949))).

16 Before the district court, the State Department certified that
17 “[p]ersons enjoying immunity [under the Bilateral Agreement]
18 would be reflected in the records of the Office of Foreign Missions,
19 United States Department of State.” Appellee’s App. 13. The State
20 Department further certified that the construction personnel at issue
21 in this case either “[were] never registered with the U.S. Department
22 of State,” or their registration was terminated prior to the issuance of
23 the grand jury subpoenas. *Id.* at 13-15. We accept the State

1 Department's certification that the Appellants did not satisfy the
2 registration requirement, notwithstanding their visa applications.
3 This affords appropriate deference to the Executive Branch in the
4 realm of foreign relations, particularly where, as here, the Executive
5 Branch's interpretation of the relevant agreements is reasonable,
6 consistent with the apparent purposes underlying the agreements,
7 and essential to the State Department's ability to perform its duties.

8 CONCLUSION

9 In sum, because we conclude that the Executive Branch
10 reasonably interpreted the relevant agreements as requiring
11 construction personnel to register with the State Department before
12 receiving immunity and because that condition was not satisfied
13 here, the Appellants are not entitled to diplomatic immunity. We
14 therefore AFFIRM the district court's order denying the Appellants'
15 motion to quash their subpoenas.