IN THE ARBITRATION UNDER THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND UKRAINE CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT BETWEEN

OPTIMA VENTURES LLC, OPTIMA 7171 LLC AND OPTIMA 55 PUBLIC SQUARE LLC

Claimants

-and-

UNITED STATES OF AMERICA

Respondent

ICSID CASE NO. ARB/21/11

PRELIMINARY OBJECTIONS OF THE UNITED STATES OF AMERICA

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I. Introduction

1. The United States respectfully submits these Preliminary Objections pursuant to Rule 41(5) of the 2006 ICSID Arbitration Rules, requesting that the Tribunal dismiss in their entirety Claimants' claims as manifestly lacking in legal merit.

2. This arbitration implicates significant law enforcement interests of the United States to deter serious transnational crimes through forfeiture of the proceeds of such crimes. Specifically, the claims in this arbitration arise out of two civil forfeiture complaints filed by the U.S. Department of Justice in the Southern District of Florida in connection with the alleged violation of U.S. money laundering laws. These civil forfeiture complaints allege that commercial real estate in Dallas, Texas and Cleveland, Ohio was acquired with funds embezzled from PrivatBank, one of the largest banks in Ukraine, as part of a multibillion-dollar money laundering scheme.

3. As alleged in the forfeiture complaints, Ihor Kolomoisky and Gennaidy Boholiubov, oligarchs who previously owned PrivatBank, embezzled and defrauded the bank of billions of dollars. After nearly a decade of obtaining fraudulent loans and lines of credit, the scheme was uncovered and the bank then had to be nationalized by the National Bank of Ukraine. At that time, a staggering 95 percent of corporate lending at PrivatBank was to parties related to shareholders and their affiliates. Kolomoisky and Boholiubov laundered a significant portion of the criminal proceeds by using an array of shell companies' bank accounts, primarily at PrivatBank's Cyprus branch, and transferring those funds to the United States.

4. Associates of Kolomoisky and Boholiubov, Mordechai Korf and Uriel Laber, operating out of offices in Miami, Florida, are alleged to have created a web of entities, typically under a variation of the name "Optima," to launder the misappropriated funds through the purchase of properties in the United States. Korf and Laber purchased hundreds of millions of dollars in real

estate and businesses across the country, including the properties subject to the two forfeiture complaints underlying this arbitration: a Dallas office park formerly known as the CompuCom Headquarters, and an office tower known as 55 Public Square in Cleveland. In the wake of the fraud's uncovering, PrivatBank also filed civil cases against Kolomoisky and Boholiubov in the United States, the United Kingdom, Cyprus, and Israel. These cases, several of which have resulted in worldwide freezing orders, are ongoing.

5. The United States has a compelling interest in enforcing its federal laws against money laundering. A crucial tool in this law enforcement effort, civil forfeiture deprives individuals engaged in criminal activity of the proceeds and benefits of their crimes. Seizing such properties, even if the underlying criminal conduct occurred abroad, also serves to deter would-be perpetrators of criminal offenses within the United States. In particular, money laundering can pose a threat to financial sectors, but it can also have serious, real-life adverse impacts on law and order, the environment, and human health and safety.

6. Notably, civil forfeiture complaints, including those at issue here, are merely allegations that the properties are subject to forfeiture – the government has the burden of establishing by a preponderance of the evidence at trial that the assets may be forfeited. If the government is unable to do so, the property is returned, and the government is required to reimburse the legal fees and expenses of any claimant that successfully challenged the forfeiture.

7. Rather than challenge the pre-trial orders or forfeiture cases at the U.S. district or appellate courts, as Claimants are entitled to do and would be the normal course, Claimants filed this arbitration, alleging that the civil forfeiture cases, in particular pre-trial district court orders entered to prevent the dissipation of the assets, violate the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment

(the "U.S.-Ukraine BIT," "BIT," or "Treaty"). Specifically, Claimants allege breaches of Article II(3)(a) ("fair and equitable treatment"), Article III(1) ("expropriation"), and Article VIII ("preservation of rights") of the BIT. In so doing, Claimants are seeking, effectively, to appeal those pre-trial orders to this Tribunal in the guise of treaty claims, before any domestic trial has taken place, and before any judgment of forfeiture has been entered.

8. If Claimants are successful in this effort, the consequences for legitimate law-enforcement efforts would be far-reaching. Every civil forfeiture case involving property in the United States purportedly owned or controlled by Ukrainian (or other foreign) "investors" could effectively be nullified by commencing an investor-State arbitration, rather than decided in the first instance by domestic courts.

9. Here, Claimants ask that this Tribunal order the United States to compensate them for the value of the properties subject to forfeiture for money laundering, a brazen attempt to preempt the U.S. district court's final determination as to whether these properties were, in fact, purchased with the proceeds of crime. In other words, Claimants are requesting this Tribunal to order the United States to pay Claimants the equivalent of monies that a U.S. court may yet determine were the proceeds of crime laundered in violation of U.S. law. This Tribunal should not countenance Claimants' efforts. Rather, this Tribunal can and should summarily dismiss Claimants' claims as manifestly lacking in legal merit on several grounds. Indeed, Claimants' claims are precisely the kind of unmeritorious and frivolous claims that ICSID Arbitration Rule 41(5) was designed to address in a preliminary phase of the proceedings to avoid the unnecessary time and expense of litigating claims that cannot succeed as a legal matter.

10. The United States hereby raises four preliminary objections pursuant to ICSID Rule 41(5), two pertaining to jurisdiction and two pertaining to the merits. If successful, the first jurisdictional

objection would dispose of Claimants' case in its entirety; the second jurisdictional objection would dispose of Claimants' Article VIII claim; and the two merits objections would collectively eliminate Claimants' alleged substantive claims.

11. **Jurisdictional Objection 1:** The United States' first jurisdictional objection concerns Claimants' failure to comply with the BIT's mandatory six-month cooling-off period. As a precondition to arbitration, noncompliance with Article VI(3) of the BIT fails to engage the United States' consent to arbitrate. In this case, Claimants filed their claims only four months after the earliest time the dispute can be said to have arisen with respect to the Texas case, and a mere 36 days after the dispute arose with respect to the Ohio case (in both cases, without attempting to seek a resolution through consultation and negotiation). The Tribunal should dismiss Claimants' claims in their entirety on this ground alone.

12. **Jurisdictional Objection 2:** The United States' second jurisdictional objection concerns Claimants' "prescriptive" or "adjudicatory" comity argument styled as an Article VIII claim. The United States has not consented to arbitrate such a claim. Under Article VI of the BIT, U.S. consent to jurisdiction is limited to alleged breaches of "any right conferred or created by this Treaty with respect to an investment." Article VIII does not confer or create any right (as opposed to, for example, Articles II-IV); it merely makes clear that the Treaty does not derogate from laws, practices, decisions, or obligations that arise outside the Treaty. As such, it cannot form the basis of an "investment dispute" under the BIT, and is therefore manifestly without legal merit. The Tribunal should dismiss the Article VIII claim as outside of its jurisdiction.

13. **Merits Objection 1**: The United States' first merits objection is that Claimants' claims, based on non-final judicial acts, cannot form the predicate of a breach of Articles II(3)(a) or III(1) of the U.S.-Ukraine BIT as a matter of law. It is well established with respect to claims based on

judicial measures that judicial finality is a substantive element of the delict. Claimants' claims based on judicial measures in the underlying forfeiture proceedings lack the requisite judicial finality and are grossly premature and unripe. They are manifestly without legal merit and should be rejected.

14. **Merits Objection 2:** The United States' second merits objection concerns Claimants' allegations regarding "prescriptive jurisdiction." Claimants allege that the U.S. exercise of its statutory authority with respect to Claimants' property violated purported customary international law rules on prescriptive jurisdiction, and that this alleged violation, in turn, constitutes a violation of Article II(3)(a) of the BIT. Article II(3)(a) is not a conduit for enforcing every rule of international law. Rather, Article II(3)(a) addresses only breaches of the minimum standard of treatment for aliens under customary international law – a standard that does not include putative violations of the supposed customary international law on prescriptive jurisdiction. The Tribunal should dismiss this claim as manifestly lacking legal merit.

15. In sum, although the United States does not accept the facts as pled by Claimants, even assuming for purposes of these Rule 41(5) objections that those facts are true, Claimants' claims are without foundation and manifestly lack legal merit. ICSID Rule 41(5) provides a mechanism to dispose of frivolous claims at a preliminary stage of the proceedings to avoid the need to expend time and resources defending them. The Tribunal should issue an Award dismissing Claimants' claims in their entirety and award the United States the costs it has incurred in this arbitration.

II. Background Facts Pertinent to 41(5) Objections

A. U.S. Law Provides for the Civil Forfeiture of Assets and the Proceeds of Crime, Including the Crime of Money Laundering

16. U.S. law has long provided for the confiscation of the proceeds of crime, including civil forfeiture for laundered proceeds of criminal activity. Drawing on English admiralty law,[1] the very first U.S. Congress created forfeiture statutes for customs violations in 1789.[2] In the 20th century, Congress expanded forfeiture to reach property involved in drug trafficking and other crimes.[3] Then, as part of the Money Laundering Control Act of 1986, Congress expanded civil forfeiture to cover money laundering activities.[4]

17. In expanding civil forfeiture to cover money laundering, Congress recognized that the United States has significant interests in ensuring properties within its jurisdiction are not acquired or improved with the proceeds of money laundering, even if the underlying unlawful conduct occurred abroad. As explained in the U.S. House of Representatives Report for draft legislation that eventually became the Civil Asset Forfeiture Reform Act of 2000, the United States allows for forfeiture of property in these circumstances in part to "make[] it more difficult for international criminals to use the United States as a haven for the profits from their crimes."[5] The Act was

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[1] *See, e.g.*, Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 93-96 (1996) (R-0001); *see also* H.R. REP. NO. 105-358(I), 105th Cong., 1st Sess. 1997, Sec. 22 at 20 (Oct. 30, 1997) (R-0002).

[2] STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 44 (3d ed. 2022) (R-0003).

[3] U.S. DEP'T OF JUST., ASSET FORFEITURE PROGRAM, FISCAL YEAR 2021 PERFORMANCE BUDGET, CONGRESSIONAL JUSTIFICATION 1-3 (R-0004); 21 U.S.C. § 881(a)(7) (2002) (R-0005); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976, 2050-51 (1984) (R-0006).

[4] Money Laundering Control Act of 1986, Pub. L. 99-570, 100 Stat. 3207-18–3207-21 (1986) (codified at 18 U.S.C. §§ 1956–57 (1988)) (R-0007).

[5] H.R. REP. NO. 105-358(I) at 59 (R-0002) (explaining that "[s]uch crimes currently include drug trafficking, terrorism and other crimes of violence and bank fraud"). Congress also expanded forfeiture to cover such an offense to "permit[] the United States to assist foreign governments in recovering the proceeds of crimes committed abroad." *Id.*

subsequently amended to reach, *inter alia*, proceeds of foreign corruption and fraud by or against a foreign bank if the property is found in the United States.[6]

18. The responsibility for anti-money laundering enforcement efforts, including forfeiture cases, lies with the U.S. Department of Justice, and chiefly the Money Laundering and Asset Recovery Section (MLARS). Within MLARS, the Department's Kleptocracy Asset Recovery Initiative investigates and litigates to recover the proceeds of foreign corruption, including proceeds laundered in the United States.

19. The United States Code, at 18 U.S.C. § 981 *et seq.*, and Supplemental Rule G of the Federal Rules of Civil Procedure set out the procedures for federal civil forfeiture cases.[7] As an initial step, the Department of Justice files a forfeiture complaint, verified under penalty of perjury, alleging that a property is subject to civil forfeiture pursuant to statutory authority.[8] The case is filed *in rem*, meaning that it is a case to condemn specific property as proceeds of crime, and not a case against any person.[9] Civil forfeiture does not depend on a criminal conviction, and so the government may file a civil forfeiture case without a criminal indictment.[10] When seeking a

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[6] Stefan D. Cassella, *Provisions of the USA PATRIOT Act Relating to Asset Forfeiture in Transnational Cases*, 10 J. FIN. CRIME No. 4 303, 304 & n.3 (2003) (R-0008) (citing changes to 18 U.S.C. §§ 981(a)(1)(B) and 1956(c)(7)(B)).

[7] Stefan D. Cassella, *Overview of Forfeiture Law in the United States*, 55 U.S. ATT'YS' BULL. 8, 16 (Nov. 2007) (R-0009).

[8] *Id.* at 16.

[9] *Id.*

[10] *See* Jeffrey Simser, *Perspectives on Civil Forfeiture*, *in* CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME 13, 13-15 (Simon N.M. Young ed., 2009) (R-0010); *see also United States v. Cherry*, 330 F.3d 658, 668 n.16 (4th Cir. 2003) (R-0011) ("The most notable distinction between civil and criminal forfeiture is that civil forfeiture proceedings are brought against property, not against the property owner; the owner's culpability is irrelevant in deciding whether property should be forfeited."); *United States v. One-Sixth Share of James J. Bulger in All Present & Future Proceeds of Mass Millions Lottery Ticket No. M246233*, 326 F.3d 36, 40 (1st Cir. 2003) (R-0012) ("Because civil forfeiture is an in rem proceeding, the property subject to forfeiture is the defendant. Thus, defenses against the forfeiture can be brought only by third parties, who must intervene."); *United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 657 (3d Cir. 2002) (R-0013) ("[Civil] forfeiture is not conditioned upon the culpability of the owner of the defendant property.").

judgment of forfeiture of real property, the government provides notice of the case in multiple ways.[11] Any person or entity with an interest in the property may file a claim, effectively intervening in the case that is otherwise against property. That person or entity is then termed a "claimant" in the case, and acts much like a defendant in any civil case.[12]

20. Either before or after filing a civil forfeiture complaint, the government may seek a pre-trial temporary restraining order to enjoin dissipation of the defendant property.[13] A court may issue such an order "to preserve the property, to prevent its removal or encumbrance, or to prevent its use in a criminal offense."[14] A court may issue such an order on an *ex parte* basis.[15]

21. A court also may approve the sale of an asset pre-trial, called an "interlocutory sale," if, for example, the property is "at risk of deterioration" or "subject to a mortgage or to taxes on which the owner is in default."[16] Following a sale, funds are held in an interest-bearing escrow account maintained by the United States pending the outcome of the litigation.[17] Any temporary

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[11] The government identifies parties with a likely interest in the real property (*i.e.*, potential "claimants" to the property) and provides notice and a copy of the complaint to "any person who reasonably appears to be a potential claimant." FED. R. CIV. P., SUPP. R. ADMIRALTY OR MAR. CLAIMS & ASSET FORFEITURE ACTIONS R. G(4)(b)(i) (R-0014); *see also* ASSET FORFEITURE & MONEY LAUNDERING SECTION, U.S. DEP'T OF JUST., ASSET FORFEITURE POLICY MANUAL 57-58, 60 (2021) (R-0015). It generally posts notice of the complaint on the property itself. 18 U.S.C. § 985(c)(3) (2000) (R-0016). It also frequently records a *lis pendens* notice – a notice "recorded in the chain of title to real property." *Lis Pendens,* BLACK'S LAW DICTIONARY (11th ed. 2019) (R-0017). In addition, the government advertises the forfeiture case on a website, www.forfeiture.gov – a clearinghouse for such cases.

[12] *See, e.g.*, *One-Sixth Share of James J. Bulger in All Present & Future Proceeds of Mass Millions Lottery Ticket No. M246233*, 326 F.3d at 40-41 (R-0012).

[13] 18 U.S.C. § 983(j) (2016) (R-0018).

[14] FED. R. CIV. P., SUPP. R. ADMIRALTY OR MAR. CLAIMS & ASSET FORFEITURE ACTIONS R. G(7)(a) (R-0014).

[15] *See, e.g.*, S. REP. NO. 98-225, Comprehensive Crime Control Act of 1984, *reprinted in* 1983 WL 25404, 3386 (Aug. 4, 1983) (R-0019). If such pre-trial orders are issued *ex parte* or the underlying motion is opposed, the government must show probable cause that the property will be subject to forfeiture, the same standard that is used for seizures in criminal cases. *See* Ellen Zimiles & Rachel Sazanowicz, *Civil Asset Forfeiture – Restraining Order and Hearing*, *in* DEFENDING CORP. & INDIV. IN GOV. INVEST. § 17:8 (Mar. 2020) (R-0020) (citing *United States v. Melrose East Subdivision*, 357 F.3d 493, 496, 501 (5th Cir. 2004)).

[16] FED. R. CIV. P., SUPP. R. ADMIRALTY OR MAR. CLAIMS & ASSET FORFEITURE ACTIONS R. G(7)(b) (R-0014).

[17] *Id.* G(7)(b)(iv) ("The proceeds [of an interlocutory sale] must be held in an interest-bearing account maintained by the United States pending the conclusion of the forfeiture action.").

restraining or interlocutory sale order may be challenged by a claimant, including through a hearing on such motions at the court's discretion, and interlocutory appeal.[18]

22. As in any civil case brought in the United States, the matter then proceeds to discovery, further motions, and a trial,[19] where it is the government's burden to prove its case by a preponderance of the evidence.[20] Any forfeiture judgment is subject to appeal to a federal circuit court of appeals panel, and from there, if granted, a full *en banc* circuit court of appeals, as well as discretionary review by the U.S. Supreme Court. Any claimant who prevails in a civil forfeiture case is entitled to the return of the claimed property, with interest if the funds were held in escrow, as well as reimbursement by the government of legal fees incurred in litigation.[21]

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[18] *Id.*; S.D. FLA. L.R. 7.1(b)(2) (2020) (R-0021) ("A party who desires oral argument or a hearing of any motion shall request it within the motion or opposing memorandum in a separate section titled 'request for hearing.' The request shall set forth in detail the reasons why a hearing is desired and would be helpful to the Court and shall estimate the time required for argument. The Court in its discretion may grant or deny a hearing as requested, upon consideration of both the request and any response thereto by an opposing party."); *United States v. Melrose East Subdivision*, 357 F.3d 493, 498 n.2 (5th Cir. 2004) (R-0022) (considering a restraining order in a civil forfeiture matter subject to interlocutory appellate review under 28 U.S.C. § 1292(a)(1)); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008) (R-0023) ("That which we call an injunction by any other name is reviewable on interlocutory appeal. We therefore join our fellow circuits and hold that the seizure warrant and restraining order are properly within our jurisdiction to hear interlocutory appeals under § 1292(a)(1).").

[19] Cassella, 55 U.S. ATT'YS' BULL. at 16 (R-0009).

[20] 18 U.S.C. § 983(c) (2016) (R-0018); *see also* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2450, 2455 (2016) (R-0024) ("To be sure, *some* forms of punishment can be imposed only through criminal process. Cases in which the government asks a court to punish someone with death or imprisonment surely trigger the special procedural protections that the Constitution requires for criminal prosecutions. But centuries of practice support the idea that civil process can be used to declare the loss of property, even when that loss is punitive.") (emphasis in original).

[21] 28 U.S.C. § 2465(a), (b) (2018) (R-0025) (Subpart (b)(1) of the statute ensures that "in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for: (A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant; (B) post-judgment interest, as set forth in section 1961 of this title; and (C) in cases involving . . . the proceeds of an interlocutory sale – (i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and (ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid . . . ."); *see also* Cassella, 55 U.S. ATT'YS' BULL. at 19 (R-0009) ("This is so regardless of how meritorious the Government's case was. In contrast, in criminal forfeiture cases, third parties are entitled to attorneys fees only in the relatively rare case in which the Government's case was not 'substantially justified.'") (citation omitted).

B. Civil Forfeiture Is Recognized as a Critical Tool in Global Efforts to Combat Money Laundering

23. The United Nations High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda estimates money laundering globally to amount to some $1.6 trillion annually, or 2.7% of global GDP.[22] According to the International Monetary Fund, money laundering and related activities in many jurisdictions around the world "can threaten the stability of a country's financial sector and a country's external stability more generally. This, in turn, can affect law and order, good governance, regulatory effectiveness, foreign investments and international capital flows."[23]

24. Several international conventions require States Parties both to criminalize money laundering as well as take steps to confiscate proceeds of money laundering: the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[24] the UN Convention Against Transnational Organized Crime,[25] and the UN Convention Against Corruption.[26] The UN

[22] *Tax Abuse, Money Laundering and Corruption Plague Global Finance,* UNITED NATIONS, DEP'T ECO. & SOC. AFFAIRS (Sept. 24, 2020) (R-0026) (citing United Nations High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda, *FACTI Panel Interim Report* (Sept. 2020)).

[23] *The IMF and the Fight Against Money Laundering and the Financing of Terrorism,* INT'L MONETARY FUND (July 14, 2021) (R-0027).

[24] U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 3(1)(b)(i), *opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 95 (entered into force Nov. 11, 1990) ("Vienna Convention") (RL-001) (requiring States to adopt measures to criminalize "[t]he conversion or transfer of property, knowing such property is derived from any offense" specified in Article 3(1)(a)); *id.* art. 5(1) (requiring parties to adopt measures enabling the confiscation of proceeds "derived from offences" in Article 3(1), or "property the value of which corresponds to that of such proceeds").

[25] U.N. Convention Against Transnational Organized Crime, art. 6(1), *opened for signature* Dec. 12, 2000, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003) ("Palermo Convention") (RL-002) (requiring States to adopt measures to criminalize various forms of money laundering); *id.* art. 12(1) (requiring States to adopt measures necessary to enable the confiscation of proceeds of crime derived from offenses covered by the Convention or property equivalent in value, and "[p]roperty, equipment or other instrumentalities used in or destined for use in offences covered by this Convention").

[26] U.N. Convention Against Corruption, art. 23(1), *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) ("Merida Convention") (RL-003) (mirroring art. 6(1) of the Palermo Convention); *id.* art. 31(1) (mirroring art. 12(1) of the Palermo Convention).

Convention Against Corruption also instructs States Parties to "[c]onsider taking such measures as may be necessary to allow confiscation of . . . property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases."[27] The United States is a party to all of these Conventions, as is Ukraine.

25. Beyond these international conventions, the Financial Action Task Force (FATF), an intergovernmental body with 39 Member States, including the United States, has issued specific recommendations that have been endorsed by over 200 countries on how States should best prevent money laundering.[28] According to the FATF, "[c]ountries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences"[29] – *i.e.*, "the underlying criminal activity that generated proceeds, which when laundered, results in the offense of money laundering."[30] The FATF interpretive note continues that predicate offences "should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had

[27] *Id.* art. 54(1)(c). The Palermo and Merida Conventions also require States Parties to take measures to enable the freezing of assets for eventual confiscation, and provide that predicate offenses for money laundering "shall" include "offences committed both within and outside the jurisdiction of the State Party in question," so long as the conduct is a criminal offense in the foreign State and that same conduct would be a criminal offense if committed within its own territory. Palermo Convention, arts. 6(2)(c), 12(2) (RL-002); Merida Convention, arts. 23(2)(c), 31(2) (RL-003).

[28] FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS 7 (2012, updated Oct. 2021) ("FATF RECOMMENDATIONS") (R-0028); FIN. ACTION TASK FORCE, *Countries* (R-0029). The FATF has the mandate to "set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system." FIN. ACTION TASK FORCE, *What Do We Do* (R-0030).

[29] FATF RECOMMENDATIONS at 12 (R-0028). The interpretative note to this recommendation expands that: "The offence of money laundering should extend to any type of property, regardless of its value, that directly or indirectly represents the proceeds of crime. When proving that property is the proceeds of crime, it should not be necessary that a person be convicted of a predicate offence." *Id.* at 38.

[30] PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM I-3 (The World Bank, 2d. ed. 2006) (R-0031).

it occurred domestically," and that "[c]ountries may provide that the only prerequisite is that the conduct would have constituted a predicate offence, had it occurred domestically."[31]

26. The FATF further recommends that countries adopt measures "to enable their competent authorities to freeze or seize and confiscate . . . (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences . . . or (d) property of corresponding value," including "provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property . . . ."[32] The FATF also recommends that "[c]ountries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated *without requiring a criminal conviction (non-conviction based confiscation)*," to the extent consistent with their domestic law.[33]

27. In line with these recommendations, many States beyond the United States provide for civil forfeiture to combat transnational crime, including money laundering. According to the World Bank, civil forfeiture is recognized in many jurisdictions as an effective tool for "the recovery and return of the proceeds and instrumentalities of crime."[34]

C. The "Optima Scheme": Kolomoisky and Boholiubov's Scheme to Launder Money Embezzled from PrivatBank in the United States Through the Purchase of Assets by the "Optima" Companies

28. This consolidated ICSID arbitration brought under the U.S.-Ukraine BIT concerns millions of dollars in U.S. commercial real estate owned by U.S. companies whose ultimate beneficial owners include U.S. persons, as well as Kolomoisky and Boholiubov. Through a web of U.S. and

[31] FATF RECOMMENDATIONS at 38 (R-0028).

[32] *Id.* at 12.

[33] *Id.* (emphasis added).

[34] JEAN-PIERRE BRUN ET AL., ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS 16 (2d. ed. 2021) (R-0032).

foreign-registered companies, Kolomoisky and Boholiubov laundered proceeds they are alleged to have embezzled from PrivatBank in Ukraine by purchasing U.S. steel mills in Ohio and West Virginia, as well as commercial properties in Ohio, Texas, and Kentucky.

1. PrivatBank

29. Kolomoisky, Boholiubov, and others founded PrivatBank in Ukraine in 1992.[35] By 2006, Kolomoisky and Boholiubov had become majority shareholders with combined direct and indirect holdings between 80 percent and nearly 100 percent.[36] Both sat on the bank's supervisory board and controlled the bank.[37] By 2016, PrivatBank had grown into one of Ukraine's largest banks, with 30 regional offices and 2,445 branch offices in Ukraine, and a branch in Cyprus.[38] To attract deposits from retail and commercial customers, PrivatBank offered high interest rates.[39] The bank had over 20 million customers – nearly half of Ukraine's population.[40] It was of systemic importance to Ukraine's financial system.[41]

30. In November 2016, news broke that PrivatBank's July 2016 loan book listed "only a handful of identifiable large-scale borrowers in the bank's roughly €6 [billion] loan business, with the rest being no-name Ukrainian shell firms or offshore[] vehicles."[42] Shortly thereafter, the National Bank of Ukraine found PrivatBank to have a capital shortfall of approximately $5.65

[35] *JSC Commercial Bank PrivatBank v. Kolomoisky* [2019] EWCA (Civ) 1708 [7] (Eng.) (R-0033).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky,* No. CV 2019-0377-JRS, 2021 WL 3722095 at *7 (Del. Ch. Aug. 23, 2021) (R-0034).

[40] *Kolomoisky*, [2019] EWCA (Civ) 1708 [7] (Eng.) (R-0033).

[41] *Kolomoisky,* 2021 WL 3722095 at *1 (R-0034).

[42] Graham Stack, *Privat Investigations: PrivatBank Lending Practices Threaten Ukraine's Financial Stability*, BNE INTELLINEWS at 3 (Nov. 1, 2016) (R-0035).

billion, with over 95 percent of its corporate loans made to companies linked to its shareholders.[43] The National Bank declared PrivatBank insolvent on December 18, 2016.[44] The Ukrainian government then stepped in to nationalize PrivatBank,[45] which Christine Lagarde, then the Managing Director of the International Monetary Fund, called an "important step in [Ukraine's] efforts to safeguard financial stability" and "to maintain public confidence in the banking system."[46] PrivatBank's supervisory board members, including Kolomoisky and Boholiubov, were dismissed and replaced by a new management team.[47]

31. In the nationalization's aftermath, the National Bank of Ukraine retained Kroll Inc., a multinational corporate investigations firm, to ascertain whether wrongdoing or banking malpractice had taken place at PrivatBank between 2006 and 2016.[48] According to the National Bank's summary, Kroll's investigation found "a large scale and coordinated fraud over at least a ten year period, which resulted in the Bank suffering a loss of at least USD 5.5 billion."[49] Kroll reportedly identified a scheme whereby PrivatBank issued loans to related companies; cycled loan funds through dozens of transactions within and outside of Ukraine, including the United States; and repaid old related-party loans with proceeds from new loans.[50] Prior to nationalization in

[43] *Ukraine's Biggest Lender PrivatBank Nationalised,* BBC (Dec. 19, 2016) (R-0036).

[44] *Id.*

[45] Anton Troianovski, *A Ukrainian Billionaire Fought Russia. Now He's Ready to Embrace It.*, N.Y. TIMES (Nov. 13, 2019) (R-0037).

[46] *IMF Statement on the Stability of the Banking System in Ukraine,* INT'L MONETARY FUND (Dec. 19, 2016) (R-0038).

[47] *Kolomoisky* [2019] EWCA (Civ) 1708 [8] (Eng.) (R-0033).

[48] *Banking Investigation Ukraine – PrivatBank,* KROLL (June 22, 2018) (R-0039).

[49] NAT'L BANK OF UKRAINE, *Fraud Identified in PJSC CB "PRIVATBANK" for the Period Before Nationalisation* at 2 (Jan. 16, 2018) (R-0040).

[50] *Id*. at 3.

December 2016, more than 95 percent of corporate lending was to parties related to former shareholders and their affiliates.[51]

32. A flurry of legal cases from Ukraine to Cyprus, Israel, the United Kingdom, and the United States ensued over PrivatBank's loan book.

33. In the United Kingdom, PrivatBank, under new management following nationalization, filed suit against Kolomoisky and Boholiubov along with corporate defendants, claiming misappropriation through money laundering of loan funds made by the bank to some 46 companies, all incorporated in Ukraine and controlled by Kolomoisky and Boholiubov.[52] A U.K. court issued a worldwide freezing order for up to $2.6 billion in December 2017.[53] Kolomoisky and Boholiubov's efforts to lift the freezing order failed on appeal, as did their application to have the court stay the U.K. proceedings pending litigation in Ukrainian courts.[54] Further proceedings are pending in the High Court Chancery Division.[55]

34. In the United States, the Federal Bureau of Investigation (FBI) opened an investigation of suspected financial crimes by Kolomoisky and Boholiubov in 2018.[56] A grand jury was

[51] NAT'L BANK OF UKRAINE, *Kroll Confirms: Before Nationalisation PrivatBank Was Subjected to a Large Scale and Coordinated Fraud, Which Resulted in a Loss of at Least USD 5.5 Billion* (Jan. 16, 2018) (R-0041).

[52] *Kolomoisky* [2019] EWCA (Civ) 1708 [16] (Eng.) (R-0033).

[53] *Id.* at [11].

[54] *See generally id.* at [212], [267]; *see also id.* at [2] (acknowledging that a lower court had sided with Kolomoisky and Boholiubov before the Court of Appeal reversed).

[55] *JSC Commercial Bank PrivatBank v. Kolomoisky* [2022] EWHC (Ch) 775 [2]-[3] (Eng.) (R-0042); *see also JSC Commercial Bank PrivatBank v. Kolomoisky* [2022] EWHC (Ch) 1445 (Eng.) (R-0043).

[56] Betsy Swan, *Billionaire Ukrainian Oligarch Ihor Kolomoisky Under Investigation by FBI*, DAILY BEAST (Apr. 8, 2019) (R-0044); *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, United States' Mot. Stay Civil Forfeiture Actions Pending Resolution of Related Criminal Action at 2, 4 (S.D. Fla. Feb. 19, 2021) (R-0045).

empaneled in Cleveland.[57] On August 4, 2020, it was reported that the FBI searched two offices of Kolomoisky and Boholiubov's entities in Miami and in Cleveland "as part of an investigation out of the U.S. Attorney's Office for the Northern District of Ohio, which has been ongoing for more than a year."[58] The Department of Justice's investigation has been supported by multiple offices and agencies, including the FBI's International Corruption Unit, the Internal Revenue Service Criminal Investigation, and U.S. Customs and Border Protection.[59]

35. In February 2021, Ukrainian authorities announced charges against three PrivatBank officials – the former CEO and two other former managers.[60] Charges against two additional PrivatBank officials were filed the following month.[61] According to Ukrainian news sources, the Ukrainian National Anti-Corruption Bureau is investigating "all the transactions conducted by PrivatBank" under Kolomoisky and Boholiubov's ownership.[62]

36. Meanwhile, in May 2019, PrivatBank filed suit for $600 million in Delaware state court against Kolomoisky; Boholiubov; their U.S. associates Mordechai Korf, Chaim Schochet, and Uriel Laber; as well as their companies, which generally carried "Optima" in the entities' name.[63]

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[57] Michael Sallah et al., *This Billionaire Oligarch Is Being Investigated by a US Federal Grand Jury for Alleged Money Laundering*, BUZZFEED NEWS (May 19, 2020) (R-0046).

[58] Pat Milton & Jeff Pegues, *Federal Agents Raid Offices of Company Tied to Ukrainian Oligarch*, CBS NEWS (Aug. 4, 2020) (R-0047).

[59] DEP'T JUST., OFF. PUB. AFFS., Press Release: Justice Department Seeks Forfeiture of Two Commercial Properties Purchased with Funds Misappropriated from PrivatBank in Ukraine (Aug. 6, 2020) (R-0048).

[60] Natalia Zinets, *Ukraine Adds Embezzlement Case to PrivatBank Dispute; Ex-CEO Listed as Suspect*, REUTERS (Feb. 23, 2021) (R-0049); *see also* NAT'L ANTI-CORRUPTION BUREAU OF UKR., *Former PrivatBank Top Managers Notified of Suspicion* (Feb. 23, 2021) (R-0050).

[61] NAT'L ANTI-CORRUPTION BUREAU OF UKR., *NABU Notifies Three Ex-PrivatBank Officials of Suspicion of UAH 8.2 Billion Embezzlement* (Mar. 15, 2021) (R-0051).

[62] *NACB Analyzing All PrivatBank Transactions, Including Those Mentioned in Pandora Papers, as Part of Its Investigation,* UKRAINENEWS (Oct. 4, 2021) (R-0052); *see also Pandora Papers: The Secret Owners of UK Property Worth Billions,* BBC (Oct. 5, 2021) (R-0053).

[63] *Kolomoisky*, 2021 WL 3722095 at *2-6, 18, 38 (R-0034).

PrivatBank asserted claims of unjust enrichment, fraud, racketeering, and civil conspiracy with respect to "hundreds of millions of dollars' worth of United States assets," which the court referred to as the "Optima Scheme."[64] The court denied a motion to dismiss the case under the doctrine of *forum non conveniens*, noting that the "Defendants admitted at oral argument that PrivatBank could not litigate the Optima Scheme anywhere else."[65] The court also denied the defendant's request for a full stay of the Delaware case pending the outcome of litigation in Ukraine.[66] Like the London courts, the Delaware court took measures to preserve the status quo, "requiring judicial approval before specific United States assets . . . may be sold or encumbered."[67] The court thereby rejected the defendants' competing, narrower proposal that would have limited the order "to encumbered assets with massive debt and little equity value."[68]

2. The U.S. Forfeiture Cases

37. The U.S. Department of Justice also brought suit in connection with the Optima scheme. On August 6, 2020, it filed two verified *in rem* civil forfeiture complaints against commercial real estate property in Dallas, Texas (the "Texas case"), and the ownership interests in a company that held commercial real estate in Louisville, Kentucky (the "Kentucky case").[69]

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[64] *Id.* at *1, 18.

[65] *Id.* at *21, 39.

[66] *Id.* at *19, 32, 36-37, 39 (explaining that "the application of foreign law may not be dispositive," that "it is difficult to predict whether these [Ukrainian] actions will continue apace," and further that "a temporary stay to be revisited following this Court's adjudication of certain threshold procedural issues will properly account for the risk that the Ukrainian Litigation stalls").

[67] *Id.* at *37, 39.

[68] *Id.* at *37.

[69] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Compl. Forfeiture In Rem (S.D. Fla. Aug. 6, 2020) (C-0003); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Compl. Forfeiture In Rem (S.D. Fla. Aug. 6, 2020) (C-0004). Note that the United States has labeled exhibits attached to Claimants' Request for Arbitration in *Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America* as "C-0001," "C-0002," etc., for ease of reference.

38. The complaints, filed in the U.S. District Court for the Southern District of Florida ("district court"), allege that the former owners of PrivatBank, Kolomoisky and Boholiubov, stole over $5 billion from PrivatBank through a scheme in which they used their control of the bank to obtain fraudulent loans on behalf of companies they owned or controlled.[70] The complaints further allege that the scheme involved laundering the fraudulently obtained loan proceeds by transferring them to and through a vast network of companies with accounts at PrivatBank's Cyprus branch in a series of transactions designed to disguise the nature, source, ownership, and control of the funds.[71] According to the Department of Justice, Kolomoisky and Boholiubov then laundered the fraudulent loan proceeds by transferring a portion of the funds to a web of related business entities in the United States.[72] These entities were used to funnel the misappropriated PrivatBank funds into properties and businesses in the United States, including by purchasing more than five million square feet of commercial real estate in these three cases.[73]

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[70] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Compl. Forfeiture In Rem ¶ 10 (S.D. Fla. Aug. 6, 2020) (C-0003); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Compl. Forfeiture In Rem ¶ 11 (S.D. Fla. Aug. 6, 2020) (C-0004); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Compl. Forfeiture In Rem ¶ 10 (S.D. Fla. Dec. 30, 2020) (C-0005).

[71] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Compl. Forfeiture In Rem ¶ 18 (S.D. Fla. Aug. 6, 2020) (C-0003); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Compl. Forfeiture In Rem ¶ 19 (S.D. Fla. Aug. 6, 2020) (C-0004); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Compl. Forfeiture In Rem ¶ 18 (S.D. Fla. Dec. 30, 2020) (C-0005).

[72] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Compl. Forfeiture In Rem ¶ 19 (S.D. Fla. Aug. 6, 2020) (C-0003); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Compl. Forfeiture In Rem ¶ 20 (S.D. Fla. Aug. 6, 2020) (C-0004); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Compl. Forfeiture In Rem ¶ 19 (S.D. Fla. Dec. 30, 2020) (C-0005).

[73] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Compl. Forfeiture In Rem ¶¶ 19-21 (S.D. Fla. Aug. 6, 2020) (C-0003); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Compl. Forfeiture In Rem ¶¶ 20-22 (S.D. Fla. Aug. 6, 2020) (C-0004); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Compl. Forfeiture In Rem ¶¶ 19-21 (S.D. Fla. Dec. 30, 2020) (C-0005).

39. On August 18, 2020, the Department of Justice recorded a notice of *lis pendens* in Dallas County with respect to the Texas property, thereby putting on notice of the pending litigation all persons with an interest in the property.[74] The Department then applied for an *ex parte* pre-trial restraining order with respect to the Texas property.[75] The district court granted that order, finding that "[t]he facts alleged in the Complaint, and summarized in the Government's Application, establish probable cause that the Defendant Asset is subject to forfeiture to the United States."[76] The order required claimants to maintain the status quo of the Dallas property.[77] The district court also entered a pre-trial restraining order in the Kentucky case.[78]

40. On October 5, 2020, Optima Ventures LLC, Optima 7171, LLC, Korf, and Laber filed claims and demanded a jury trial in the Texas case.[79] Simultaneously, Korf and Laber, as well as Optima CBD 500, LLC, and Optima CBD Investments, LLC, filed claims with respect to the Kentucky property.[80] The day before the Texas and Kentucky cases were assigned to the same

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[74] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Notice Lis Pendens (S.D. Fla. Aug. 18, 2020) (R-0054).

[75] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, *Ex Parte* Application for Post-Compl. Restraining Order Pursuant to 18 U.S.C. § 983(j)(1)(A) and Mem. Law Supp. Thereof (S.D. Fla. Sept. 3, 2020) (R-0055).

[76] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, *Ex Parte* Restraining Order and Order Directing Clerk to Unseal ¶¶ 3-5 (S.D. Fla. Sept. 4, 2020) (R-0056).

[77] *Id.* ¶ 5.

[78] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, *Ex Parte* Restraining Order ¶ 5 (S.D. Fla. Aug. 14, 2020) (R-0057).

[79] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Claim of Optima 7171, LLC (S.D. Fla. Oct. 5, 2020) (R-0058); *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Claim of Optima Ventures LLC (S.D. Fla. Oct. 5, 2020) (R-0059); *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Claim of Mordechai Korf (S.D. Fla. Oct. 5, 2020) (R-0060); *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Claim of Uriel Laber (S.D. Fla. Oct. 5, 2020) (R-0061). They also reserved their purported rights to bring treaty claims under the U.S.-Ukraine BIT.

[80] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Claim of Mordechai Korf (S.D. Fla. Oct. 5, 2020) (R-0062); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Claim of Uriel Laber (S.D. Fla. Oct. 5,

judge,[81] all claimants moved jointly to vacate the *ex parte* restraining orders and requested a post-restraint hearing.[82]

41. On December 30, 2020, the Department of Justice filed another *in rem* civil forfeiture case – this one against an office tower located at 55 Public Square in Cleveland, Ohio (the "Ohio case").[83] The United States served notice of the case on the property owner of record, Optima 55 Public Square, LLC.[84] The property at 55 Public Square was already in distress at the time the forfeiture case was filed.[85] Accrued property taxes and associated late penalties owed on the property exceeded $1.5 million.[86] On January 19, 2021, Optima 55 Public Square, LLC, Optima Ventures LLC, Korf, and Laber, as partial owners of Optima Ventures LLC, filed claims, demanded a jury trial, and reserved their purported rights under the U.S.-Ukraine BIT.[87] The district court held a status conference on February 9, 2021, to address the matter, and the claimants

2020) (R-0063); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Claim of Optima CBD Investments LLC (S.D. Fla. Oct. 5, 2020) (R-0064); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Claim of Optima CBD 500, LLC (S.D. Fla. Oct. 5, 2020) (R-0065).

[81] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Transfer Order (S.D. Fla. Oct. 13, 2020) (R-0066).

[82] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants' Time-Sensitive Joint Mot. Vacate *Ex Parte* Restraining Order (S.D. Fla. Oct. 12, 2020) (R-0067).

[83] *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Compl. Forfeiture In Rem (S.D. Fla. Dec. 30, 2020) (C-0005).

[84] *Id*.

[85] *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Agreed Mot. Authorize Interlocutory Sale and Inc. Mem. Law at 3-4 (S.D. Fla. Feb. 9, 2021) (R-0068).

[86] *Id.*

[87] *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Claim of Optima 55 Public Square, LLC (S.D. Fla. Jan. 19, 2021) (R-0069); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Claim of Optima Ventures LLC (S.D. Fla. Jan. 19, 2021) (R-0070); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Claim of Mordechai Korf (S.D. Fla. Jan. 19, 2021) (R-0071); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Claim of Uriel Laber (S.D. Fla. Jan. 19, 2021) (R-0072).

agreed that the best way to preserve value was to allow a pending sale of the property to proceed.[88] Accordingly, the district court entered an interlocutory sale order authorizing the sale of the property with proceeds to be held in an interest-bearing escrow account pending the resolution of the forfeiture case.[89]

42. Instead of further litigating in the district court, on February 5, 2021, the Optima claimants in the Texas case filed alternative motions in the district court to compel ICSID arbitration and dismiss the forfeiture cases, or else stay the case.[90] Optima Ventures LLC and Optima 7171, LLC, then filed their ICSID Request for Arbitration concerning the Texas case on February 8. The United States received the notice from ICSID on February 10, 2021.

43. Shortly thereafter, the Optima claimants in the Ohio case filed a parallel round of alternative motions in the district court.[91] Optima Ventures LLC and Optima 55 Public Square,

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[88] *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Agreed Mot. Authorize Interlocutory Sale and Inc. Mem. Law at 1-2 (S.D. Fla. Feb. 9, 2021) (R-0068) (noting that "[t]he parties have agreed to the terms of the sale and agree that it is in the best interest of all parties to sell at this time," and adding that "[t]he parties agree that the sale of the Property at this time will maximize and preserve the value of the Property by avoiding fees and costs related to an outstanding mortgage, property taxes, maintenance costs, and other expenses that would accrue if the Property were not sold"); *see also United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Order Granting Unopposed Mot. Interlocutory Sale ¶ 3 (S.D. Fla. Feb. 11, 2021) (R-0073) (confirming that the claimants consented to an interlocutory sale).

[89] *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Order Granting Unopposed Mot. Interlocutory Sale ¶ 5 (S.D. Fla. Feb. 11, 2021) (R-0073).

[90] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants Optima Ventures LLC and Optima 7171, LLC's Mot. Compel Arb. at 21 (S.D. Fla. Feb. 5, 2021) (R-0074); *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants Mordechai Korf and Uriel Laber's Mot. Compel Arb. at 6 (S.D. Fla. Feb. 5, 2021) (R-0075); *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants' Mot. Dismiss Verified Compl. at 16 (S.D. Fla. Feb. 5, 2021) (R-0076).

[91] *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Claimants Optima Ventures LLC and Optima 55 Public Square, LLC's Mot. Compel Arb. at 21 (S.D. Fla. Feb. 19, 2021) (R-0077); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Claimants' Mot. Dismiss Verified Compl. at 18 (S.D. Fla. Feb. 19, 2021) (R-0078).

LLC, then filed a Request for Arbitration concerning the Ohio case on February 24, which ICSID relayed to the United States on March 8. ICSID registered both arbitrations on March 16, 2021.[92]

44. At a hearing held in the district court on May 10, 2021, the parties in the Texas and Ohio cases each sought a voluntary stay of any further proceedings in those cases – albeit for different reasons.[93] The district court granted the stay,[94] and the parties later filed a joint status report confirming that they "continue to agree that a stay is appropriate."[95]

45. The Department of Justice then filed an unopposed motion to authorize the interlocutory sale of the Texas property to an unaffiliated entity for over $23 million.[96] In authorizing the sale, the district court explained that the property was in arrears on its property taxes, and further:

> [T]hat an interlocutory sale . . . is necessary and appropriate to preserve the value of the Property before the conclusion of the pending forfeiture proceedings. This Court further finds that an interlocutory sale of the Property will avoid both the risk of market

[92] ICSID registered the case concerning the Texas property as *Optima Ventures LLC and Optima 7171 LLC v. United States of America* (ICSID Case No. ARB/21/11), and the case concerning the Ohio property as *Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America* (ICSID Case No. ARB/21/12).

[93] Whereas the Department of Justice sought a stay so as to avoid any adverse interference with an ongoing criminal investigation, the Optima claimants in the Texas and Ohio cases requested a stay due to their resort to ICSID arbitration. *Compare United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Mot. Hr'g Tr. at 8 (S.D. Fla. May 10, 2021) (R-0079) (where the Department of Justice explained that 18 U.S.C. § 981(g)(1) "says that the court shall stay the proceedings if there is a related criminal investigation that would be adversely affected by the proceedings"), *with id.* at 4 (where counsel for the Optima claimants explained that the Texas and Ohio cases "have been submitted by claimants to arbitration, to ICSID, I-C-S-I-D. Those arbitration proceedings have begun, and based on claimants' position that once the matters are before the arbitration authorities the case should be stayed, if not dismissed, the claimants are proposing that these proceedings as to Texas and Ohio be stayed.").

[94] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Omnibus Order ¶ 1 (S.D. Fla. May 13, 2021) (R-0080).

[95] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Joint Status Update ¶ 5 (S.D. Fla. Sept. 10, 2021) (R-0081).

[96] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Expedited Unopposed Mot. to Authorize Interlocutory Sale in Case No. 1:20-cv-23278 (S.D. Fla. Sept. 20, 2021) (R-0082).

> fluctuations that could cause the Property to lose value, and the accrual of additional expenses in maintaining the property.[97]

46. The district court instructed that all net proceeds of the sale be held in an interest-bearing escrow account.[98]

47. Thus, the Texas and Ohio cases are stayed indefinitely by agreement of the parties. Meanwhile, with respect to the Kentucky case – which likewise arises out of the Optima scheme but is not part of this arbitration – on December 30, 2022, the district court granted in part and denied in part the Kentucky claimants' motion to dismiss.[99] The district court denied the motion's request to abstain from exercising jurisdiction (on grounds of international comity), but granted the motion in part finding that the Department of Justice had named the wrong defendant *in rem*.[100] The forfeiture complaint was dismissed without prejudice (*i.e.*, with leave to amend).[101] The United States subsequently amended the complaint in that case.[102]

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[97] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Order Granting Unopposed Mot. for Interlocutory Sale ¶ 4 (S.D. Fla. Sept. 22, 2021) (R-0083).

[98] *Id.* ¶ 5.

[99] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23278, Order at 2 (S.D. Fla. Dec. 30, 2022) (R-0084).

[100] *Id.*

[101] *Id.*

[102] *See United States v. Approximately $9,105,221.62 in Funds (Plus Interest) Currently Held by the United States Marshals Service Representing 95% of the Net Proceeds From the Sale of the Real Property Located at 500 West Jefferson Street, Louisville, KY 40202 Known as PNC Plaza*, Case No. 1:20-cv-23278, First Amended Verified Compl. for Forfeiture In Rem (S.D. Fla. Jan. 5, 2023) (R-0085).

III. ICSID Arbitration Rule 41(5): Legal Standard

48. ICSID Arbitration Rule 41(5) provides an expedited mechanism to allow for the disposal of frivolous claims at a preliminary stage of the proceedings.

49. ICSID Arbitration Rule 41(5) provides that:

> Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

50. ICSID has explained that the rationale behind the Rule is to allow for the early dismissal of claims that manifestly lack legal merit, such as the ones advanced by Claimants here, to avoid the need for the parties to expend time and resources arbitrating unmeritorious claims.[103]

51. Such preliminary objections must be filed within 30 days of the Tribunal's constitution. This Tribunal was constituted on July 6, 2022, in accordance with ICSID Arbitration Rule 6, following the acceptance of Dr. Pinto's appointment as presiding arbitrator. Claimants challenged Mr. Chertoff's appointment nine days later, on July 15, 2022, thereby suspending the proceedings per Rule 9(6). Following the December 20, 2022, decision of the Chair of the ICSID Administrative Council, the United States appointed Mr. David Pawlak on January 19, 2023. Following his acceptance of the appointment, the Tribunal was reconstituted on January 24, 2023.

[103] *See* International Centre for Settlement of Investment Disputes, *Manifest Lack of Legal Merit - ICSID Convention Arbitration* (RL-004).

The United States submits these Preliminary Objections on February 14, 2023 (*i.e.*, 21 days following the Tribunal's reconstitution) and therefore has met the temporal requirements of ICSID Rule 41(5).

52. Rule 41(5) objections may pertain either to jurisdiction or the merits of a dispute.[104] The United States, as movant, must establish its objections "clearly and obviously, with relative ease and d[i]spatch."[105] Although the Tribunal may presume the facts as alleged by Claimants to be true, the Tribunal need not accept the facts as alleged by Claimants "at face value" where they are "incredible, frivolous, vexatious or inaccurate or made in bad faith"[106] or where they are "plainly without foundation."[107] The Tribunal must decide whether, "*as a matter of law*, those facts fall within or outside the scope of the consent to arbitrate."[108] Put another way, if the facts fail to trigger a legal claim, the claims manifestly (*i.e.*, clearly and obviously) lack legal merit.

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[104] *See, e.g.*, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award ¶ 6.1.1 (Dec. 10, 2010) (RL-005) (agreeing with the parties "that an objection under Article 41(5): (a) may go either to jurisdiction or the merits; (b) must raise a legal impediment to a claim, not a factual one; and (c) must be established clearly and obviously, with relative ease and dispatch"); *see also Brandes Investment Partners v. Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules ¶ 52 (Feb. 2, 2009) (RL-006) ("There exist no objective reasons why the intent not to burden the parties with a possibly long and costly proceeding when dealing with such unmeritorious claims should be limited to an evaluation of the merits of the case and should not also englobe an examination of the jurisdictional basis on which the tribunal's powers to decide the case rest."); *AFC Investment Solutions S.L. v. Colombia*, ICSID Case No. ARB/20/16, Laudo Sobre la Excepción Preliminar Formulada por la Demandada con Base en la Regla 41(5) ¶ 164 (Feb. 24, 2022) (RL-007-SPA) (applying Rule 41(5) to jurisdictional objections).

[105] *See, e.g.*, *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules ¶¶ 88, 92 (May 12, 2008) (RL-008).

[106] *Id.* ¶ 105 ("In applying Rule 41(5), the Tribunal accepts that, as regards disputed facts relevant to the legal merits of a claimant's claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation.").

[107] *Almasryia for Operating & Maintaining Touristic Construction Co., L.L.C. v. Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules ¶ 33 (Nov. 1, 2019) (RL-009) ("[O]ur task will be to determine whether taking the facts as a given, unless they are plainly without foundation, the claims are such that they 'manifestly' (*i.e.* clearly and obviously) lack legal merit.").

[108] *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5) ¶ 26 (Mar. 11, 2013) (emphasis added) (RL-010).

53. Here, Claimants' claims manifestly lack legal merit, and the case should be dismissed in its entirety. If the Tribunal concurs, it should, moreover, award costs to the United States. In the event the Tribunal does not uphold the United States' objections pursuant to Rule 41(5), the United States reserves the right to raise these and any other objections to jurisdiction, admissibility, or the merits at a later stage.[109]

IV. Claimants' Claims Are Manifestly Without Legal Merit and Should Be Rejected

A. **Jurisdictional Objection 1:** The Claims Must Be Rejected Because Claimants Failed to Comply with the U.S.-Ukraine BIT's Preconditions to Arbitration

54. The United States' consent to arbitration under Article VI(4) of the U.S.-Ukraine BIT is limited to requests for arbitration submitted pursuant to Article VI(3). Article VI(3), in turn, establishes a precondition to the United States' consent to arbitrate investment disputes; namely, that "six months have elapsed from the date on which the dispute arose."[110] Because consent is the "cornerstone" of jurisdiction in investor-State arbitration,[111] Claimants' failure to meet all jurisdictional preconditions is fatal to their claims. As recognized by the International Court of Justice, when consent "is expressed in a compromissory clause in an international agreement, any

[109] ICSID Arbitration Rule 41(5) ("The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit."). In this connection, the United States also reserves the right to request the bifurcation of proceedings to address these and other potential preliminary objections.

[110] Claimants themselves acknowledge that these are requirements of the BIT that must be met before arbitration may commence. *See Optima Ventures LLC and Optima 7171 LLC v. United States of America*, Request for Arbitration ¶ 95 (Feb. 8, 2021).

[111] As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965) (RL-011). *See also* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS ¶ 125 (2009) (RL-012) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself.").

conditions to which such consent is subject must be regarded as constituting the limits thereon."[112] Investor-State tribunals are in accord.[113] Here, Claimants did not wait the requisite six months prior to submitting their claims to ICSID. Thus, the Tribunal lacks jurisdiction over Claimants' claims, and they must be dismissed.

55. As the *Murphy v. Ecuador* tribunal found, analyzing the substantively identical provisions of the U.S.-Ecuador BIT,[114] the mandatory six-month "cooling-off" precondition is intended to allow the parties to seek an amicable resolution of the dispute.[115] Article VI(2) provides that the disputing parties "should initially seek a resolution through consultation and negotiation." Article

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[112] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, ¶ 88 (Feb. 3) (RL-013).

[113] *See, e.g., Louis Dreyfus Armateurs SAS v. India*, PCA Case No. 2014-26, Decision on Jurisdiction ¶ 94 (Dec. 22, 2015) (RL-014) ("States are free to condition their consent to arbitration in any way they wish, and when they unmistakably have done so, it is not for tribunals to deem such requirements merely precatory, or to permit them to be sidestepped on policy grounds that essentially substitute the tribunal's judgment for that of the Contracting Parties."); *see also ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction ¶ 336 (July 18, 2013) (RL-015) ("In order for a claimant to benefit from the jurisdictional protection granted by an arbitration mechanism, there is a condition *ratione voluntatis*: the State must have given its consent to such procedure, which allows a foreign investor to sue the State directly at the international level. This consent is expressed broadly or restrictively, with or without conditions of exhaustion of local remedies or waiting periods, as allowing all claims or only certain claims. In other words, the State's consent is given under certain conditions. Just as, for example, the conditions of nationality must be fulfilled before an investor can have access to rights under a BIT, the conditions subject to which the State gives its consent must be fulfilled before a right to arbitration can arise. Such conditions are an inherent part of the State's given consent. In other words, if these conditions are not fulfilled, there is indeed no consent.").

[114] *Compare* Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. VI, Aug. 27, 1993, S. TREATY DOC. No. 103-15 (1993) (RL-016) ("2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute . . . for resolution . . . . 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration . . . ."), *with* Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ukr., art. VI, Mar. 4, 1994, S. TREATY DOC. No. 103-37 ("U.S.- Ukraine BIT, S. TREATY DOC. No. 103-37") (C-0001) ("2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution . . . . 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration . . . .").

[115] *Murphy Exploration and Production Company International v. Ecuador (I)*, ICSID Case No. ARB/08/4, Award on Jurisdiction ¶ 97 (Dec. 15, 2010) (RL-017).

VI(2) also provides that the investor may only submit the dispute to resolution before an investor-State tribunal (among other options) "[i]f the dispute cannot be settled amicably." Here, rather than make use of the cooling-off period or otherwise seek meaningful consultations or negotiations to attempt to settle their claims with the United States amicably, Claimants submitted their Requests for Arbitration well before the mandatory six-month cooling-off period had elapsed.

56. It is beyond dispute that Claimants failed to meet this jurisdictional requirement. The "dispute" addressed in Article VI(3)(a), from which the mandatory six-month period is to be measured, is a reference to an "investment dispute,"[116] defined in relevant part in Article VI(1) as a dispute "arising out of or relating to . . . an alleged breach of any right conferred or created by this Treaty with respect to an investment." As the *Murphy* tribunal observed, a "dispute" under Article VI(1) arises only when the claimant alleges a treaty breach, and the "six-month waiting period shall run from the date of such allegation."[117] Moreover, because the definition of "investment dispute" is a dispute arising out of an alleged breach "with respect to an investment," the six-month cooling-off period runs from the date a claimant makes the respondent State aware of the dispute by alleging a breach of the BIT with respect to a *particular* investment.

57. Here, Claimants acknowledge that with respect to the Optima 7171 claim (*i.e.*, the Texas case), they first provided the United States with "notice of their intention to arbitrate" alleged breaches of the U.S.-Ukraine BIT on October 5, 2020 (styled as a reservation of rights to

[116] *See Id.* ¶¶ 99-101 ("The Tribunal considers that the six-month waiting period calculated 'from the date on which the dispute arose' under Article VI(3)(a) of the BIT comprises every 'investment dispute,' according to the definition set forth in Article VI(1) of the BIT.").

[117] *Id.* ¶ 103.

arbitrate).[118] This is the earliest date the dispute can have arisen. The Optima 7171 claim was submitted to ICSID on February 8, 2021 – a mere four months later.

58. Claimants try to excuse their attempt to shortcut the cooling-off period by pointing to the filing date of the Texas case,[119] but that filing, taken pursuant to U.S. law by the Department of Justice, did not provide notice of any investment dispute under the Treaty. To initiate a dispute under the Treaty, Claimants must provide notice to the United States of their belief that the forfeiture case violated the Treaty. To argue otherwise disregards the purpose of the cooling-off period, which is designed to provide space for amicable settlement following notice to the respondent of the potential investment dispute under the Treaty.

59. Claimants even more flagrantly ignored the mandatory cooling-off period when they submitted the Optima 55 Public Square claim. Claimants acknowledge that the Department of Justice did not file the Ohio case until December 30, 2020. Claimants first provided "notice" of their intent to potentially arbitrate on January 19, 2021 (again styled as a reservation of rights),[120] a mere *36 days* before filing their February 24, 2021, Request for Arbitration in these proceedings.

60. Claimants contend that they met the BIT's six-month cooling-off period because the United States identified 55 Public Square in the August 6, 2020, forfeiture complaint, linking it to "money laundering and derivative of a crime, thereby significantly circumscribing the investment's utility."[121] Thus, according to Claimants, they were entitled to file this case on February 6, 2021.

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[118] *Optima 7171 LLC,* Req. Arb. ¶ 97.

[119] *Id*. ¶ 96.

[120] *See United States v. Real Property Located at 55 Public Square, Cleveland, Ohio,* Case 1:20-cv-25313, Verified Claim of Optima 55 Public Square, LLC ¶ 7 (Jan. 19, 2021) (R-0069); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case 1:20-cv-25313, Verified Claim of Optima Ventures LLC ¶ 7 (Jan. 19, 2021) (R-0070).

[121] *Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America*, Request for Arbitration ¶ 86 (Feb. 24, 2021).

This is wrong. There was no "investment dispute" over the Optima 55 Public Square property until Claimants provided the United States notice of its allegations under the BIT with respect to the *Ohio* property.

61. The August 6, 2020, forfeiture complaint designated only the CompuCom (Texas) property as subject to forfeiture. Any potential future case against other properties was, at that time, theoretical. Claimants themselves acknowledge that the "dispute" concerning the Ohio case was only "called into focus when the United States filed its forfeiture complaint on December 30, 2020."[122] The gravamen, moreover, of Claimants' grievances lies with the conditions placed upon the sale of the 55 Public Square property, conditions that were only effectuated with the district court's February 11, 2021, order authorizing the sale.[123] Thus, no investment dispute could have arisen with respect to the Ohio property until, at earliest, January 19, 2021, when Claimants provided notice of their intent to arbitrate.

62. In sum, the United States has only consented to arbitrate investment disputes under the BIT where certain preconditions are met, namely, as relevant here, where a claimant has waited the requisite period of time to allow for consultation and negotiation. Claimants did not wait anywhere close to the mandatory six-month cooling-off period before filing their claims. In the absence of the United States' consent to arbitrate, the Tribunal lacks jurisdiction over Claimants' claims, and they must be dismissed under Rule 41(5).[124]

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[122] *Id.*

[123] *Id*. at 4 and ¶ 71.

[124] *See, e.g.*, *Almasryia*, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules ¶¶ 34-48 (RL-009) (holding that claimant's failure to abide by the mandatory notice and cooling-off periods of the BIT warranted dismissal under ICSID Rule 41(5)).

B. **Jurisdictional Objection 2:** Article VIII Imposes No Affirmative Obligations on the Host State and Cannot Form the Basis of an "Investment Dispute" Under the U.S.-Ukraine BIT

63. Claimants' Requests for Arbitration further invoke Article VIII of the BIT, alleging that the United States has violated its domestic discretionary principles of "prescriptive" and "adjudicatory" comity and thereby committed a breach of the Treaty.[125] This argument is ill-conceived.

64. Article VIII provides in relevant part that the Treaty shall not derogate from the "laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions" of the host State, nor does it derogate from "international legal obligations" or "obligations assumed by either Party" outside of the BIT "that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations." Known as a "preservation of rights" provision,[126] it does not itself create or confer any affirmative obligation on the host State to provide investments with any particular treatment. Rather, it merely indicates that the Treaty does not derogate from certain entitlements that exist outside the Treaty. It therefore cannot form the basis for an "investment dispute" as defined in Article VI(1): "an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to . . . (c) an alleged breach of any right *conferred or created by this Treaty* with respect to an investment" (emphasis added). As such, the United States has not consented to arbitrate this dispute under Article VI(4) of the BIT, under which the U.S. consent to arbitration is limited to "investment dispute[s]."

[125] *Optima 7171 LLC*, Req. Arb. ¶¶ 19-20, 45-63; *Optima 55 Public Square LLC*, Req. Arb. ¶¶ 25-26, 51-64.

[126] *See* U.S.- Ukraine BIT, S. TREATY DOC. No. 103-37, Letter of Submittal, comments to Article VIII (Preservation of rights) (Sept. 7, 1994) (C-0001).

65. In any event, Claimants have failed to establish, or even allege, that any aspect of the Treaty has derogated from laws, regulations, practices, or procedures available to Claimants in the United States, or that the Treaty has derogated from any obligations of the United States. Thus, to the extent that Article VIII imposes any obligation – which it does not – Claimants have not alleged such a breach in this case.[127]

C. **Merits Objection 1:** Claimants' Claims Lack the Requisite Finality to Form the Basis of a Legally Viable Claim

66. Claimants' claims under BIT Articles II(3)(a) and III(1) are manifestly lacking in legal merit because they are based on non-final judicial acts. The assets at issue are being held in escrow pending the outcome of litigation. The pre-trial court orders at the heart of Claimants' claims are temporary restraints on those assets. Claimants could have challenged the restraints in the U.S. courts. Indeed, they initially filed a motion to vacate the restraints. But rather than proceeding to the merits of the litigation, they have sought a stay of the case pending this arbitration. Under such circumstances, any claim based on judicial measures cannot give rise to a breach of the obligation to accord "fair and equitable treatment." Nor can these non-final judicial acts as a legal matter give rise to a claim of expropriation.

[127] Even if the United States had consented to arbitrate claims under Article VIII, Claimants' claims under this head fail because they are subject to the same requirement of judicial finality discussed with respect to Merits Objection 1.

1. Claimants' Claims Are Manifestly Without Legal Merit Because They Are Based on Non-Final Judicial Acts

67. Claimants' claims are based on pre-trial court orders[128] and an alleged lack of due process[129] in the underlying forfeiture cases before the district court. The judicial measures that Claimants challenge are non-final and cannot support their treaty claims.

68. The obligation to accord "fair and equitable" (FET) treatment in Article II(3)(a) of the U.S.-Ukraine BIT "sets out a minimum standard of treatment based on customary international law."[130] Judicial measures can only breach the customary international law minimum standard of treatment when they result in a denial of justice.[131] A requisite element of a denial of justice claim is judicial

[128] Claimants allege that the pre-trial court orders served to "seize," "encumber," and "expropriate" their investments. For example, with respect to the Texas case, Claimants allege that the district court's restraining order "prohibited [Claimants'] property from being 'transferred, sold, assigned, pledged, distributed, encumbered, attached or disposed of in any manner . . . unless approved in writing by the Government.'" *Optima 7171 LLC*, Req. Arb. at 4. According to Claimants, moreover, the court order to "compel the transfer of the proceeds of the CompuCom Campus sale to the custody of the United States Marshals Service" and the conditioning of the sale of 55 Public Square "on the transfer of the proceeds to the custody of the United States Marshals Service" constitute an expropriation of their investments. *See id.* ¶ 70; *Optima 55 Public Square LLC*, Req. Arb. ¶ 71; *see also id*. at 4.

[129] Claimants allege a lack of due process in breach of the BIT's "fair and equitable treatment" obligation because the "*ex parte* procedure deprived Claimants of the entire . . . investment without a hearing or opportunity to respond." *Optima 7171 LLC*, Req. Arb. ¶ 79; *see also id.* at 4 ("To date, there has been no hearing or opportunity to challenge the basis for the *Ex Parte* Restraining Order.").

[130] *See* U.S.-Ukraine BIT, S. TREATY DOC. No. 103-37, Letter of Submittal, comments to Article II (Treatment) (Sept. 7, 1994) (C-0001) (explaining that Article II, "Paragraph 3 guarantees that investment shall be granted 'fair and equitable' treatment. It also prohibits Parties from impairing through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. This *paragraph sets out a minimum standard of treatment based on customary international law*.") (emphasis added); *see also id.* (further noting with respect to Article III (Expropriation) that "[e]xpropriation can occur only in accordance with international law standards; that is, for a public purpose; in a nondiscriminatory manner, in accordance with due process of law, and upon payment of prompt, adequate, and effective compensation"); *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award ¶ 195 (Jan. 9, 2003) (RL-018) (observing with respect to the FET provisions of the U.S.-Albania and U.S.-Estonia BITs (which are substantively identical to the U.S.-Ukraine BIT) that "[t]he two bilateral treaties project, according to the U.S. Department of State letters transmitting them to the U.S. Senate, a minimum standard of treatment that is based on customary international law (in the case of the U.S.-Estonia treaty) or based on standards found in customary international law (in the case of the U.S.-Albania treaty).") (citations and internal quotation marks omitted).

[131] *See, e.g.*, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'L & COMP. L.Q. 867, 895 (2014) (RL-019) (concluding that "acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice and not for any other form of delictual responsibility towards foreign nationals"); *see also Lion Mexico Consolidated L.P. v. Mexico,* ICSID Case No. ARB(AF)15/2, Submission of the United States ¶ 9 (June 21, 2019)

finality. The international responsibility of States may not be invoked with respect to non-final judicial acts,[132] unless recourse to further domestic remedies is obviously futile or manifestly ineffective.[133] Consequently, an FET claim under the U.S.-Ukraine BIT based on a judicial act may be properly brought only where it is alleged that the U.S. justice system *as a whole* produces a denial of justice (*i.e.*, when there has been a decision of the court of last resort available).[134]

69. Other investor-State tribunals are in accord. For example, the CAFTA-DR tribunal in *Corona Materials v. Dominican Republic* observed that a denial of justice under international law depends on "the final product of [a] State's domestic legal system."[135] That is, "there can be no denial of justice without a final decision of a State's highest judicial authority."[136] Similarly, the *Chevron and TexPet v. Ecuador* tribunal found that:

> [I]t is well settled that a claimant asserting a claim for denial of justice committed by a State's judicial system must satisfy, whether as a matter of jurisdiction or admissibility, a requirement as to the exhaustion of local remedies or, as now better expressed, a substantive rule of judicial finality. Even the grossest misconduct

(RL-020) (explaining that "an investor's claim challenging judicial measures . . . is limited to a claim for denial of justice under the customary international law minimum standard of treatment"); *Eli Lilly and Co. v. Canada*, ICSID Case No. UNCT/14/2, Submission of the United States ¶¶ 23-24 (Mar. 18, 2016) (RL-021).

[132] *See, e.g.*, *Apotex Inc. v. United States*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶ 282 (June 14, 2013) (RL-022) ("[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.").

[133] *See, e.g., id.* ¶ 284 ("Because each judicial system must be allowed to correct itself, the 'obvious finality' [sic] exception must be construed narrowly. It requires an actual unavailability of recourse, or recourse that is proven to be '*manifestly ineffective*' – which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued.") (emphases in original) (citation omitted).

[134] *See, e.g.*, James Crawford (Special Rapporteur), Int'l Law Comm'n., *Second Report on State Responsibility*, U.N. Doc. A/CN.4/498 ¶ 75 (July 19, 1999) (RL-023) ("[A]n aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.") (footnote omitted).

[135] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 264 (May 31, 2016) (RL-024).

[136] *Id*.

> by a lower court or manifest unfairness in its procedures is not by itself sufficient to amount to a denial of justice by a State . . . .[137]

70. Judicial finality is plainly lacking in this case. The pre-trial court orders explicitly provide that the proceeds from the sale of the properties are to be held in escrow pending the outcome of the forfeiture proceedings.[138] The relevant statutes and rules are designed to protect the value of the property pending litigation.[139] There is no question that the mechanisms for preserving value were followed – Claimants even agreed to the sale of both properties and the holding of the funds in escrow, pending the outcome of the forfeiture proceedings, during which Claimants would have the ability to contest the forfeitures. Nothing about the situation approaches finality.

71. Moreover, rather than challenge the pre-trial orders and the forfeiture cases in the district court, Claimants filed their Requests for Arbitration. As discussed in Section II.C above, the Optima claimants had initially moved to vacate the temporary restraining orders in the Texas case, demanding a post-restraint hearing. In both the Texas and Ohio cases, the Optima claimants also filed motions to compel this arbitration and to dismiss the forfeiture cases. Having submitted their claims to ICSID, the Optima claimants then opted to stay the Texas and Ohio cases before the district court could act on the motions to dismiss.

72. In contrast, in the parallel Kentucky case, which as discussed in Section II.C involves the same Optima scheme, the Optima claimants filed a motion to dismiss, advancing the same general arguments concerning international comity that Claimants raise in their Requests for

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[137] *Chevron Corp. and Texaco Petroleum Co. v. Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II ¶ 7.117 (Aug. 30, 2018) (footnote omitted) (RL-025).

[138] *See* Section II.C, *supra*.

[139] *See generally* Section II.A, *supra*; *see also* FED. R. CIV. P., SUPP. R. ADMIRALTY OR MAR. CLAIMS & ASSET FORFEITURE ACTIONS R. G(7) (Preserving, Preventing Criminal Use, and Disposing of Property; Sales) (R-0014).

Arbitration.[140] The district court, after a full hearing, dismissed the Department of Justice's forfeiture complaint without prejudice, albeit on different grounds.[141]

73. Rather than use the remedies available to them under U.S. law (as they have done in the Kentucky case), Claimants chose to initiate arbitration prematurely before this Tribunal. By short-circuiting the domestic process, Claimants are engaged in the very "extraordinary forum shopping" about which Judge Christopher Greenwood has warned. Judge Greenwood begins by giving an example of how such forum shopping might arise:

> For example, an English court issues freezing orders (formerly known as *Mareva* injunctions) on the basis of an application without notice to the other party (formerly known as an *ex parte* application). The order can, of course, be challenged by the defendant at a subsequent *inter partes* hearing. Yet the act of granting the original *ex parte* order is an act imputable to the State and, if the local remedies rule has been waived, then an alien defendant (or his State of nationality) could bring an international claim alleging that the granting of the order was a denial of justice, notwithstanding that he had not exercised his undoubted right to contest the order at the *inter partes* hearing.[142]

He then explains why that cannot be the rule under international law:

> It is inherently implausible that States would intend to produce such a result, the effect of which would be to give the foreign litigant the opportunity to engage in some quite extraordinary forum shopping and to set aside the entire system of checks and balances within the national judicial system. In the opinion of this writer, international law does not produce such a bizarre result. That is because what constitutes a denial of justice in international law is not the isolated decision to grant a freezing order on an *ex parte* application but only

[140] *Cf. United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Claimants' Mot. Dismiss Verified Compl. (S.D. Fla. May 24, 2021) (R-0086).

[141] The district court dismissed the forfeiture complaint because the Department of Justice had named the wrong defendant *in rem*, but did so without prejudice, providing the Department with leave to amend the complaint and name the correct defendant(s). *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23278, Order (S.D. Fla. Dec. 30, 2022) (R-0084).

[142] Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 56, 64 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (RL-026).

> a failure of *the system of justice*, if that system either does not correct that decision where the decision was manifestly unjust or does not offer any effective means of challenging the decision.[143]

74. The tribunal in *Marfin Investment Group v. Cyprus* came to the same conclusion. There, claimants alleged that a worldwide freezing order entered by a court in Nicosia breached the fair and equitable treatment obligation of the Cyprus-Greece BIT.[144] The tribunal rejected that contention, noting that claimants acknowledged they did not exhaust local remedies.[145] In such circumstances, absent a showing that recourse was unavailable or "manifestly ineffective," the "failure to exhaust local remedies [was] sufficient . . . to warrant a dismissal" of the claims.[146] Like the claimants in *Marfin*, Claimants do not (and cannot) deny that they failed to exhaust remedies. Indeed, Claimants *still* have the opportunity to challenge the pre-trial orders and underlying forfeiture cases in the district court because the proceedings in that court are merely stayed.

75. Finally, it is immaterial that Claimants do not style their claims as "denial of justice" claims. Investors cannot circumvent the finality rule and undermine the integrity of domestic adjudicative processes through creative pleading.[147] Thus, as the NAFTA tribunal in *Lion v. Mexico* recently confirmed, "liability for expropriation . . . arising from the decisions of domestic

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[143] *Id*. (emphasis added).

[144] *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Cyprus*, ICSID Case No. ARB/13/27, Award ¶ 1270 (July 26, 2018) (RL-027).

[145] *Id.* ¶ 1273.

[146] *Id.* ¶¶ 1275, 1277.

[147] *See* Douglas, 63 INT'L & COMP. L.Q. at 894-95 (RL-019) ("In an investment treaty arbitration, can an investor elect not to seek the reversal of a first instance court decision, which has failed to uphold its putative substantive rights, and claim that, as a result of that decision becoming final and binding, it has suffered damage, and that the host State should be liable to pay compensation for that damage because the court decision amounts to an expropriation or some other violation of the investment treaty? Can the investor avoid the application of the finality rule in this way? These questions must be answered in the negative if the integrity of domestic adjudication is to be preserved.").

courts requires a finding of a denial of justice."[148] In any event, even if judicial measures may form the basis of a claim outside the confines of denial of justice, a premise with which the United States does not agree, Claimants' "due process" claims still fail as a matter of law for the very same reason: because Claimants have failed to pursue the process available to them.[149]

2. The Challenged Non-Final Judicial Acts Cannot Constitute an Expropriation as a Matter of Law Because They Have Not Resulted in a Permanent Deprivation of Claimants' Investments

76. Assuming, *arguendo*, that interim judicial decisions (such as the pre-trial orders at issue here) can theoretically form the basis of a claim for expropriation, finality remains necessary to establish substantive elements of the breach.[150] This is so because expropriation requires a *permanent* deprivation of the relevant "investment."[151] In the case of Claimants' expropriation

[148] *Lion Mexico Consolidated L.P. v. Mexico*, ICSID Case No. ARB(AF)/15/2, Award ¶ 188 (Sept. 20, 2021) (RL-028); *see also Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award ¶ 141 (June 26, 2003) (RL-029) ("Claimant's reliance on [NAFTA] Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.").

[149] "Due process" claims, assuming *arguendo* that such claims with respect to judicial measures are cognizable outside a denial of justice, presuppose that at least some "process" has been tried and found wanting. Where, as here, *no* process has been tried to remedy alleged procedural issues, the alleged breach simply remains inchoate and incomplete. *See, e.g.*, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award ¶ 595 (July 2, 2018) (RL-030) ("In order to rise to the level of a breach of due process, . . . a party alleging a breach of due process rights must avail itself of the domestic legal system in order to remedy alleged procedural deficiencies.").

[150] *See, e.g.*, Berk Demirkol, *Completeness of the Breach and Exhaustion of Local Remedies as a Substantive Requirement*, *in* JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION 75, 102-06 (2018) (RL-031); *see also Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award ¶ 20.30 (Sept. 16, 2003) (RL-032) ("[I]t is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction.") (emphasis in original).

[151] *See, e.g.*, *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability ¶ 506 (Dec. 14, 2012) (RL-033) (holding that "a State measure constitutes expropriation under the Treaty if (i) the measure deprives the investor of his investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine"); *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability ¶ 193 (Oct. 3, 2006) (RL-034) (observing that generally expropriation "must be permanent, that is to say, it cannot have a temporary nature"); *see also Anglia Auto Accessories Limited v. Czech Republic*, SCC

claim, there has been no final decision, *i.e.*, final judgment of forfeiture, necessary to result in a permanent deprivation.

77. Claimants do not (and cannot) allege that the pre-trial orders about which they complain are permanent or irreversible. Claimants acknowledged that the first pre-trial order entered by the district court in the Texas case was a mere "restraining order"[152] – temporary by definition.[153] Subsequently, the district court ruled on two unopposed motions for interlocutory sale of the Texas and Ohio properties in order to preserve the value of those properties, ordering that the net proceeds of the sales be deposited in an interest-bearing escrow account.[154] If a final judgment of forfeiture is not obtained, these monies (as the substitute *res*), would be returned to Claimants with interest, and Claimants would be entitled to recover attorney fees and litigation costs. As explained in Section II.A, it is only upon a final judgment of forfeiture, entered after the government has proven by a preponderance of the evidence that the assets are forfeitable (*e.g.*, as the proceeds of crime), that Claimants' alleged "investments" would be forfeited to the government, and even then, there are avenues of appeal.

78. In sum, Claimants' claims manifestly lack legal merit because they are based on temporary, reversible, pre-trial orders enacted by the lowest-level federal court, which they could have (and initially did) challenge. As such, the temporary restraining orders that form the basis of Claimants'

Arbitration Case V 2014/181, Final Award ¶ 292 (Mar. 10, 2017) (RL-035); *I.P. Busta & J.P. Busta v. Czech Republic*, SCC Arbitration Case V 2015/014, Final Award ¶ 389 (Mar. 10, 2017) (RL-036).

[152] *See Optima 7171 LLC*, Req. Arb. at 4 & ¶ 70 (discussing the applicable "*Ex Parte* Restraining Order").

[153] *See supra*, Section II.A.

[154] *See supra*, Section II.C.2.

expropriation claim are manifestly premature, and cannot engage the United States' international responsibility, as a matter of law.[155]

D. **Merits Objection 2:** Claimants' Allegations Concerning Prescriptive Jurisdiction Cannot Form the Predicate of a "Fair and Equitable Treatment" Claim Under the U.S.-Ukraine BIT

79. Claimants allege that the United States' exercise of prescriptive jurisdiction – that is, its exercise of its statutory authority to initiate forfeiture cases with respect to properties that were purchased with the proceeds of serious transnational crimes – was not "reasonable" and is "contrary to the competing rights of Ukraine,"[156] in breach of Article II(3) of the U.S.-Ukraine BIT. Claimants invoke supposed "[c]ustomary international law . . . general default rules on prescriptive jurisdiction."[157]

80. For the purposes of this Rule 41(5) objection, even assuming the truth of Claimants' factual allegations – which the United States will rebut in a further phase of these proceedings, if any – Claimants' claims manifestly lack legal merit. Article II(3)(a)'s reference to treatment "required by international law" pertains to the customary international law minimum standard of treatment of aliens and does not incorporate unrelated supposed customary international law concerning "prescriptive jurisdiction."

[155] In any event, it is well-established under customary international law that a bona fide, non-discriminatory regulation, exacted as an exercise of a State's police powers, will not be deemed expropriatory. Should this case proceed on the merits, claimants' expropriation claim additionally lacks legal merit because the measures fall squarely within the police powers of the United States. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 712, Comment (g) (1987) (RL-037) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory . . . and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.").

[156] *See, e.g.*, *Optima 55 Public Square LLC*, Req. Arb. ¶¶ 32-33, 47-48. Relatedly, Claimants suggest that the U.S. forfeiture cases are an affront to Ukraine's sovereignty. *See, e.g.*, *id.* ¶¶ 48, 50, 66.

[157] *Id.* ¶ 28.

81. Article II(3)(a) of the U.S.-Ukraine BIT provides in pertinent part that covered investments shall be accorded fair and equitable treatment and shall in no case be accorded treatment less than that "required by international law." As the Treaty transmittal package for the U.S.-Ukraine BIT explains, this paragraph "sets out a minimum standard of treatment based on customary international law."[158]

82. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[159] Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such obligation, which is expressly addressed in Article II(3)(a), is the obligation to provide "fair and equitable treatment." The "fair and equitable treatment" obligation includes, for example, the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings. Other recognized aspects of the customary international law minimum standard of treatment include the obligation to provide "full protection and security," which is also expressly addressed in Article II(3)(a), and the obligation not to expropriate covered investments, except under the conditions specified in Article III.

[158] U.S.-Ukraine BIT, S. TREATY DOC. No. 103-37, Letter of Submittal, comments to Article II (Treatment) (Sept. 7, 1994) (C-0001).

[159] *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) (RL-038); *see also Glamis Gold, Ltd. v. United States*, UNCITRAL, Award ¶ 615 (June 8, 2009) (RL-039) ("The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community."); *see generally* Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y INT'L L. PROC. 51, 58-60 (1939) (RL-040) ("It is . . . apparent that . . . international law, as evidenced by diplomatic practice and arbitral decision, has established the existence of an international minimum standard to which all civilized states are required to conform under penalty of responsibility.").

83. Article II(3)(a)'s reference to treatment "required by international law" does not incorporate treaty obligations, customary international law, or general principles of law beyond the minimum standard of treatment of aliens. Any customary international law rules applicable to States' exercise of prescriptive jurisdiction are not obligations of treatment concerning or for the benefit of individual *investors* (natural or juridical) *or their investments*.[160] Such rules therefore have nothing to do with the minimum standard of treatment of aliens and cannot be incorporated through Article II(3)(a)'s reference to "international law."

84. The International Court of Justice recently rejected a similar attempt to shoehorn the principles of sovereign immunity into a similar minimum-standard-of-treatment provision in the U.S.-Iran Treaty of Amity, which required treatment no less than that "required by international law." As the Court explained:

> The Court observes in this regard that Iran's proposed interpretation of the phrase referring to the "require[ments of] international law" in the provision quoted above is not consistent with the object and purpose of the Treaty of Amity. As stated in the Treaty's preamble, the Parties intended to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations". In addition, the title of the Treaty does not suggest that sovereign immunities fall within the object and purpose of the instrument concerned. Such immunities cannot therefore be considered as included in Article IV, paragraph 2 . . . . The "international law" in question in this provision is that which defines the minimum standard of protection for property belonging to the "nationals" and "companies" of one Party engaging in economic activities within the territory of the other, and not that governing the protections enjoyed by State entities by virtue of the principle of sovereign equality of States.
>
> In addition, the provision in Article IV, paragraph 2, relied on by Iran must be read in the context of Article IV as a whole. Paragraph

[160] *See* Douglas, 63 INT'L & COMP. L.Q. at 896-97 (RL-019) (explaining that whether non-compliance with a norm "within the context of a domestic adjudicative procedure form[s] the predicate conduct for delictual responsibility towards foreign nationals" requires establishing that link "separately from the position that would pertain as between States on the international plane").

> 1 of this Article concerns the "fair and equitable treatment" to be accorded to the nationals and companies of one Party by the other Party and the prohibition of any "unreasonable or discriminatory measures" that would impair their "legally acquired rights and interests". The second sentence of paragraph 2 provides that the property mentioned in the previous sentence (property which must receive protection, in no case less than that required by international law) "shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation". Paragraph 4 concerns "[e]nterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party". Taken together, these provisions clearly indicate that the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature. It cannot therefore be interpreted as incorporating, by reference, the customary rules on sovereign immunities.[161]

85. For similar reasons, the "required by international law" clause in Article II(3)(a) cannot be interpreted as incorporating, by reference, alleged customary rules concerning prescriptive jurisdiction.

86. Even if Article II(3)(a) could be read so expansively as to incorporate principles of prescriptive jurisdiction, which it cannot, Claimants would need to demonstrate that the United States has *no* jurisdiction in cases such as this (*e.g.*, the purchase of U.S. properties in a money laundering scheme with substantial effects in the United States) in order to prevail on their claim as a matter of law. This is so because, even if the U.S. forfeiture cases were brought "contrary to the *competing* rights of Ukraine,"[162] as Claimants allege, it is well-established that instances of

[161] *Certain Iranian Assets (Iran v. United States)*, Preliminary Objections, Judgment, 2019 I.C.J. 7, ¶¶ 57-58 (Feb. 13) (RL-041).

[162] *See, e.g.*, *Optima 55 Public Square LLC*, Req. Arb. ¶ 33 (emphasis added).

concurrent prescriptive jurisdiction are common and that there is no hierarchy of bases of jurisdiction in international law.[163] As Judge Crawford explained:

> It should be stressed that this sufficiency of grounds for jurisdiction is normally considered relative to the rights of other states. There is no assumption (even in criminal cases) that individuals or corporations will be regulated only once, and situations of multiple jurisdictional competence occur frequently. In such situations there is no 'natural' regulator and the consequences of multiple laws applying to the same transaction are managed rather than avoided – double taxation being a case in point.[164]

87. For all of these reasons, Claimants' "prescriptive jurisdiction" claims manifestly lack legal merit and should be rejected at the outset.

V. Conclusion

88. For all of the foregoing reasons, the United States requests that the Tribunal: i) set a schedule for written submissions, as well as an oral hearing on the United States' Rule 41(5) Preliminary Objections, and, following the written and oral phase, ii) issue an Award dismissing Claimants' claims as manifestly lacking in legal merit and ordering Claimants to bear the full costs of these proceedings and to reimburse the United States for all arbitration-related fees and expenses.

Respectfully submitted,

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[163] *See* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 457 (8th ed. 2012) (RL-042).

[164] *Id.*

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