UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF COLUMBIA

VENEZUELA US SRL, Petitioner, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Respondent.	Civil Action No. 22-cv-3822-JMC

REPLY MEMORANDUM IN SUPPORT OF PETITION TO RECOGNIZE AND ENFORCE A FOREIGN ARBITRAL AWARD

FRESHFIELDS BRUCKHAUS DERINGER US LLP
Elliot Friedman (D.C. Bar No. NY0106)
Sam Prevatt (*pro hac vice* forthcoming)
Paige von Mehren (*pro hac vice*)
601 Lexington Avenue, 31st Floor
New York, New York 10022
Telephone: (212) 277-4000
Facsimile: (212) 277-4001
elliot.friedman@freshfields.com
sam.prevatt@freshfields.com
paige.vonmehren@freshfields.com

Attorneys for Petitioner Venezuela US SRL

Dated: January 5, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Statutes

Treaties

Petitioner Venezuela US SRL ("VUS") respectfully submits this Reply Memorandum ("Reply") in support of the Petition to Recognize and Enforce a Foreign Arbitral Award, dated December 27, 2022, ECF No. 1 ("Petition"), and in response to the Memorandum in Opposition to Petition to Recognize and Enforce a Foreign Arbitral Award, dated December 11, 2023, ECF No. 20 ("Opposition" or "Opp.") submitted by Respondent the Bolivarian Republic of Venezuela ("Venezuela").[1]

PRELIMINARY STATEMENT

Petitioner VUS initiated arbitration against Venezuela more than a decade ago. During the Arbitration, the Tribunal received hundreds of pages of briefing from each side, considered issues of jurisdiction, liability, and damages in three separate phases, held three separate hearings, and issued three reasoned awards. The resulting Final Award is the product of a robust and fair international arbitral proceeding in which Venezuela participated fully.

Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201 et seq. ("FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "New York Convention"), require international arbitration awards to be recognized and enforced in a summary procedure. Enforcement is mandatory unless one of the New York Convention's narrow grounds for non-enforcement applies. None applies here. The Final Award should therefore be recognized and enforced.

Venezuela makes one argument in response. According to Venezuela, enforcing the Final Award would be contrary to the public policy of the United States because representatives

[1] References to the "First Friedman Declaration" or "First Friedman Decl." are to the Declaration of Elliot Friedman dated December 27, 2022, ECF No. 1-1. References to "Supp. Friedman Decl." are to the Supplemental Declaration of Elliot Friedman dated January 5, 2024 and submitted contemporaneously with this Reply. Capitalized terms not defined herein are as defined in the Petition.

of the Venezuelan government led by Nicolás Maduro, and not representatives of the Venezuelan government formerly led by Juan Guaidó and recognized by the United States (the "Interim Government"), participated in the third and final phase of the Arbitration. That objection comes not at the eleventh hour, but long after midnight. The Interim Government had actual notice in February 2021 of the facts of which it now complains, yet it made no attempt to intervene, object, or indeed do anything at all until well after the Final Award was rendered (and the Arbitration concluded) in November 2022. The doctrine of waiver puts a stop to that kind of gamesmanship.

Yet even if the objection were not waived, it is foreclosed by recent precedent. Venezuela contends that enforcing the Final Award would amount to the Court recognizing the Maduro regime, thus contravening the Executive Branch's recognition of the Interim Government as the proper representative of Venezuela. But the D.C. Circuit has already rejected that argument. Enforcing an arbitral award against Venezuela cannot undermine the Executive's authority because enforcement does not entail "recognizing" any particular Venezuelan government regime. *See Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela, Ministerio del Poder Popular para Relaciones Exteriores*, 87 F.4th 510, 522 (D.C. Cir. 2023) ("*Valores Mundiales II*"). And even if, counterfactually, enforcing the Final Award somehow implicated the Executive Branch's recognition of the Interim Government, Venezuela has not even attempted to show that enforcement would violate the United States' "most basic notions of morality and justice," which is the controlling test for establishing a breach of public policy. *Tatneft v. Ukraine*, 21 F.4th 829, 837 (D.C. Cir. 2021).

Venezuela has not discharged its substantial burden to oppose enforcement. VUS is therefore entitled to recognition and enforcement of the Final Award under Chapter 2 of the FAA and the New York Convention.

BACKGROUND

The essential facts relevant to the recognition and enforcement of the Final Award were set out in the Petition and the First Friedman Declaration. *See* Pet. ¶¶ 2–4, 12–18; First Friedman Decl. ¶¶ 2–13. In brief, following a nearly decade-long Arbitration under the Treaty, the Final Award ordered Venezuela to pay VUS, a wholly owned subsidiary of Occidental Petroleum Corporation, more than US$ 58.8 million in compensation, more than US$ 46.6 million in pre-award interest, US$ 3.2 million and EUR 615,000 in legal fees and arbitration costs, and post-award interest. *See* Pet. ¶ 3; Certificate under Rule LCvR 26.1, ECF No. 2.

Neither the Opposition nor the accompanying Declaration of Eloy G. Barbará de Parres dated December 8, 2023, ECF No. 20-1 ("Barbará Declaration" or "Barbará Decl.") disputes any of those facts. Those submissions do, however, raise a few points in need of clarification:

- The law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis"), which represents Venezuela in this proceeding, initially represented Venezuela in the Arbitration at the instruction of the Maduro regime. Opp. at 3. That apparently changed in or around early 2019, when Curtis instead began representing the Interim Government, *see* Barbará Decl. ¶¶ 7, 12, but neither Curtis nor the Interim Government informed the Tribunal of that change. Supp. Friedman Decl. ¶ 9.
- Venezuela's liability for breaching the Treaty was determined on the basis of submissions made in the first and second phases of the arbitration, prior to the May 2018 Venezuelan elections and related events that led to a change in the U.S. government's recognition

policy, and during which Curtis represented Venezuela at the instruction of the Maduro regime. *See* Supp. Friedman Decl. ¶¶ 6–8. Venezuela's replacement counsel team, Guglielmino & Associados S.A. ("Guglielmino"), addressed only the amount of damages owed following the Tribunal's liability finding. *Id.* ¶ 8.

- Venezuela alleges that "the arbitral tribunal allowed the unrecognized, illegitimate Maduro regime to replace the Republic's counsel to the exclusion of the Interim Government," Opp. at 2, but that is not accurate. The question of which regime was authorized to represent Venezuela during the damages phase of the Arbitration was never raised before the Tribunal. Supp. Friedman Decl. ¶ 10. Accordingly, the Tribunal did not "exclude" anyone.[2]
- Venezuela states that "the tribunal accepted the replacement of the Republic's counsel without notifying Curtis." Opp. at 5. But representatives of the Interim Government, including Curtis, had actual knowledge that Venezuela had changed counsel in the Arbitration as early as February 2021, when the Tribunal published its February 5, 2021 Partial Award. *See* Barbará Decl. ¶ 10. Neither the Interim Government nor Curtis sought to intervene in the Arbitration in the 21 months that then passed before issuance of the Final Award. *See* Supp. Friedman Decl. ¶¶ 9–10. Venezuela's Interim Government had ample opportunity to raise an objection to the Tribunal before the Arbitration concluded, but chose not to do so.

[2] Venezuela raised this issue in arbitrations brought by other plaintiffs, but neither Venezuelan regime sought to raise it in the present Arbitration. *See* Supp. Friedman Decl. ¶ 11; *infra* at 19–20.

ARGUMENT

The "principal purpose" of the New York Convention and Congress's implementation of it "was to 'remove pre-existing obstacles to enforcement' of foreign arbitration awards." *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, Civ. A. No. 90–0169 (JGP), 1992 WL 122712, at *3 (D.D.C. May 29, 1992) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974)). As a result, courts have little discretion to refuse or defer the enforcement of foreign arbitral awards. *See, e.g.*, *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012). They may do so "only on the grounds explicitly set forth in Article V of the [New York] Convention." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) (citation omitted). Recognition and enforcement proceedings are thus "generally summary in nature," where "the showing required to avoid summary confirmation is high." *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011) (citations omitted). The party opposing enforcement of an award bears the "heavy burden" of establishing that one of the defenses to enforcement under the New York Convention applies. *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 64 (D.D.C. 2013); *see also BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 250 (D.D.C. 2015).

Venezuela's sole defense to summary enforcement is its assertion that recognizing and enforcing the Final Award would violate the public policy of the United States because it effectively "would amount to a recognition of the Maduro regime." Opp. at 2. Venezuela has tried that argument before and lost—both before Judge Reyes of this Court and before the United States Court of Appeals for the District of Columbia Circuit. Buried in footnote four of the Opposition is Venezuela's citation to *Valores Mundiales*, where the D.C. Circuit, affirming the District Court, held that enforcement of an arbitral award against Venezuela "in no way

'recognizes' anyone purporting to act on behalf of" Venezuela or "any government regime in Venezuela." *Valores Mundiales II*, 87 F.4th at 521–22. The analysis can, and respectfully should, end there.

In any event, Venezuela has not come close to satisfying the public policy exception to enforcement. That exception "is construed extremely narrowly," and is "applied 'only where enforcement would violate the forum state's most basic notions of morality and justice,'" *Chevron*, 949 F. Supp. 2d at 69 (quoting *Parsons*, 508 F.2d at 974); *see also Tatneft*, 21 F.4th at 837; *Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107, 1111 (D.C. Cir. 2017); *Newco Ltd. v. Gov't of Belize*, 650 F. App'x 14, 16 (D.C. Cir. 2016). It is therefore unsurprising that the public policy exception is "frequently raised" but "has rarely been successful." *Chevron*, 949 F. Supp. 2d at 69 (quoting *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1097 (9th Cir. 2011)); *see also BCB Holdings*, 110 F. Supp. 3d at 250. The Opposition does not even mention the controlling "most basic notions of morality and justice" standard, let alone attempt to satisfy it.

Finally, and in the further alternative, by failing to raise any objection while the Arbitration was ongoing—despite having had contemporaneous actual knowledge, for close to two years, of the facts on which it now relies—Venezuela waived any right to oppose enforcement of the Final Award based on the identity of its representatives in the Arbitration.

Venezuela has not satisfied its heavy burden to resist enforcement of the Final Award. VUS therefore respectfully requests that the Court grant the relief requested in the Petition and recognize and enforce the Final Award.[3] *See* Pet. ¶ 38.

[3] The full value of the Final Award has increased as post-award, prejudgment interest continues to accrue. *See* Supp. Friedman Decl. ¶ 13 (updating interest amounts). VUS

I. Recognizing and Enforcing the Final Award Would Not Result in the Court Recognizing Any Foreign Government

Venezuela's public policy defense fails at the outset because enforcing the Final Award does not require this Court to recognize any particular government of Venezuela. As the D.C. Circuit held in *Valores Mundiales II*, there is a difference between (*i*) a government's right to appear on behalf of a foreign state in a U.S. court and (*ii*) recognizing and enforcing an arbitral award against a foreign state. *See* 87 F.4th at 521–22; *see also Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, No. 19-cv-00046-ACR-RMM, 2023 WL 3453633, at *7 (D.D.C. May 15, 2023) ("*Valores Mundiales I*"). The former requires a U.S. court to defer to the Executive Branch's recognition of a particular foreign government. But the latter—which is the only action at issue in this proceeding—does not implicate the Executive Branch's recognition of a particular foreign government. *Valores Mundiales*, 87 F.4th at 521–22.

There is no dispute that the Constitution vests in the Executive Branch the prerogative of managing the nation's foreign affairs, and that the President has the exclusive power to recognize a foreign state or government. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 28 (2015). The Executive Branch's recognition of a foreign state or government "is conclusive on all domestic courts, which are bound to accept that determination." *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, No. 18-7044, 2019 U.S. App. LEXIS 17543, at *1–2 (D.C. Cir. May 1, 2019) (quoting *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 137–38 (1938)).[4] Courts are, however, "free to draw for themselves" the "legal consequences in

---

would be pleased to provide the Court with updated calculations of prejudgment interest at a date closer to the entry of judgment.

[4] Although U.S. law requires U.S. courts to follow the direction of the Executive Branch in recognizing foreign governments, that law did not bind the Tribunal, which was an international tribunal seated in The Hague, constituted under a bilateral investment treaty

litigations pending before them" of the Executive Branch's recognition of a foreign government. *Guar. Tr.*, 304 U.S. at 138.

The D.C. Circuit has already determined the legal consequences of the Executive Branch's recognition of the Interim Government in the context of proceedings to enforce arbitral awards against Venezuela. In *Valores Mundiales*, Venezuela argued that a court in this district should refuse to enforce an award rendered by an ICSID tribunal because the ICSID committee that heard and rejected Venezuela's bid to annul the award had declined to recognize a representative of the Interim Government during the proceedings. *See Valores Mundiales I*, 2023 WL 3453633, at *3–4, *7. According to Venezuela, "'U.S. courts may not give effect to the acts of the illegitimate Maduro regime in any way'" and "'[e]nforcing an award issued by a court or tribunal that recognized only the Maduro regime' . . . would '[enable] plaintiffs to obtain U.S. court enforcement of judgments and awards that no U.S. court would grant.'" *Valores Mundiales I*, 2023 WL 3453633, at *7 (quoting Venezuela's objections to the Magistrate Judge's report & recommendation). Venezuela makes the same argument in its Opposition. Opp. at 12 ("Since the Maduro regime could not do in a domestic court what it purported to do in the underlying arbitration, it necessarily follows that this Court cannot indirectly give effect to the Maduro regime's acts by converting the resulting award into a U.S. judgment."). The *Valores Mundiales* district court rejected that argument:

> To be sure, the identity of a foreign sovereign's representative before a federal court is left to the Executive. And if lawyers for the Maduro government had attempted to enter notices of appearance on behalf of Venezuela in *this* proceeding over the objection of the government that the U.S. Executive recognized, the Court would likely reject those notices. But that has not

---

between Venezuela and Barbados, and applying international law. *See Valores Mundiales II*, 87 F.4th at 522.

> happened. In enforcing the award, the Court is not recognizing any regime as the current official government of Venezuela.

Valores Mundiales I, 2023 WL 3453633, at *7 (internal citation omitted).

The D.C. Circuit affirmed, rejecting any notion that the court's "enforcement of the ICSID awards impl[ies] a denial of the President's recognition of the Guaidó government" because "enforcement cannot seriously be seen as an attempt by this court to 'aggrandiz[e] its power at the expense of another branch.'" *Valores Mundiales II*, 87 F.4th at 522 (quoting *Zivotofsky*, 576 U.S. at 31–32). Notably, "[n]othing" in the courts' enforcement of awards "forces the Executive to contradict his statements recognizing the Guaidó regime." *Id.* The D.C. Circuit went on to hold that, on the other hand, "a refusal to enforce the ICSID awards against Venezuela would require this court to ignore the treaty obligations undertaken by the Executive and approved by the Senate and the implementing legislation passed by Congress. Enforcement, not its opposite, is what the separation of powers requires." *Id.* at 523.

Venezuela's Opposition addresses this controlling authority in a footnote, asserting that *Valores Mundiales* "does not dispose of this case" because "[u]nlike the ICSID Convention, the New York Convention expressly provides a public policy exception to enforcement of awards." Opp. at 7 n.4. But *Valores Mundiales* held that recognizing and enforcing an arbitral award against a sovereign does not implicate the recognition of a foreign government *at all*. *Valores Mundiales* did not turn on the context or terms in which the recognition argument is made; it turned on the fact that a U.S. court does not recognize a particular foreign government simply by enforcing an arbitral award against a foreign state. *See Valores Mundiales II*, 87 F.4th at 523; *see also Guar. Tr.*, 304 U.S. at 137 ("[T]he rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it."); *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 170 (3d Cir. 2023) ("*OIEG II*") ("While the

government controls the state, the state is more than its government."); *Republic of Iraq v. ABB AG*, 768 F.3d 145, 163–64 (2d Cir. 2014) ("[W]hen a foreign government changes, the nation remains. . . . [T]he obligations of a foreign state are unimpaired by a change in that state's government."). While the label given to Venezuela's defense to enforcement may be different between this case and *Valores Mundiales*, the substance of Venezuela's defense is the same—and the D.C. Circuit has held it to be meritless.

Put simply, recognizing and enforcing the Final Award does not require this Court to recognize any particular Venezuelan government regime. *See Valores Mundiales II*, 87 F.4th at 521–22. Rather, enforcement of the Final Award is the necessary result of a faithful application of Chapter 2 of the FAA, which is "legislation Congress passed to implement" the New York Convention, "a treaty the President signed and the Senate approved." *See id.* at 522. Thus, "[e]nforcement, not its opposite, is what the separation of powers requires." *See id.* at 523.

Nor would enforcing the Final Award "infringe on the Executive's policy underlying its decision" to recognize the Interim Government, as Venezuela claims. Opp. at 13 (citing *United States v. Pink*, 315 U.S. 203, 229 (1942)). In so arguing, Venezuela relies on the same passage from *United States v. Pink* that it invoked in *Valores Mundiales*. *Compare* Opp. at 13–14 *with Valores Mundiales II*, 87 F.4th at 523. *Pink* concerned a potential conflict between state and federal law, which the D.C. Circuit held to be irrelevant in the present circumstances:

> Enforcement of the ICSID awards does not implicate a conflict between state and federal law. In this case, federal policy—in the form of the ICSID treaty and its implementing legislation—requires this court to enforce the awards without review of the merits, pursuant to Article 54(1) of the ICSID Convention and [22 U.S.C.] Section 1650a.

Valores Mundiales II, 87 F.4th at 523. The same is true here: federal policy—in the form of the New York Convention as implemented through the FAA—requires enforcement of the Final Award without review of the merits.[5]

Venezuela's public policy defense therefore fails at the outset.

II. Recognizing and Enforcing the Final Award Would Not Violate the United States' Most Basic Notions of Morality and Justice

Even if recognizing and enforcing the Final Award somehow implicated the Executive Branch's recognition of the Interim Government (and it does not), the Court should still enforce the Final Award because Venezuela has failed to satisfy the test for establishing a breach of public policy, *i.e.*, that enforcement would "violate the [United States'] most basic notions of morality and justice." *Tatneft*, 21 F.4th at 837; *see also Chevron*, 949 F. Supp. 2d at 69; *Belize Bank*, 852 F.3d at 1111; *Newco*, 650 F. App'x at 16.

It is axiomatic that "violations of the most basic notions of morality and justice is a high bar." *Gold Rsrv.*, 146 F. Supp. 3d at 132. Any analysis of the public policy defense begins with the "emphatic federal policy in favor of arbitral dispute resolution," as embodied by the New York Convention and the FAA. *Belize Soc. Dev.*, 668 F.3d at 727 (citation omitted). The party opposing enforcement of an award on public policy grounds then bears the "substantial" burden of establishing a "countervailing public policy sufficient to overcome" the "strong" public policy favoring enforcement. *BCB Holdings*, 110 F. Supp. 3d at 250 (citation omitted). This public

[5] The New York Convention, like the ICSID Convention, does not permit an enforcing court to review the merits of the underlying dispute. *See, e.g.*, *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 879 (D.C. Cir. 2021) (noting that the court has "no authority to delve into the merits of Moldova's argument" concerning the meaning of the treaty underlying the arbitration); *Gold Rsrv. Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 132 (D.D.C. 2015) ("[E]rroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.") (internal citation omitted)); *Chevron*, 949 F. Supp. 2d at 67 (observing that a court must engage in a "deferential review of the Tribunal's decision").

policy must be so strong that enforcing the award would clearly "undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property." *TermoRio*, 487 F.3d at 938. Even a violation of a "well-established public policy" does not necessarily rise to the level of a violation of "the 'most basic notions of morality and justice.'" *PDV Sweeny, Inc. v. ConocoPhillips Co.*, No. 14-cv-5183 (AJN), 2015 WL 5144023, at *12 (S.D.N.Y. Sept. 1, 2015), *amended on other grounds by* 2015 WL 9413880 (S.D.N.Y. Dec. 21, 2015), *aff'd*, 670 F. App'x 23 (2d Cir. 2016).

Venezuela argues that because the U.S. Constitution "represents the highest source of public policy," the Executive's prerogative to recognize foreign states and foreign governments constitutes "precisely the sort of public policy that Article V(2)(b) [of the New York Convention] was designed to protect." Opp. at 8, 9. Unsurprisingly, Venezuela cites no case law to support that assertion. If Venezuela's argument were correct, a court should refuse to enforce an arbitral award on public policy grounds any time the award is in tension with the U.S. Constitution in any way. That would mean that every arbitration award—including those, like the Final Award, that have nothing to do with U.S. law, U.S. persons, or U.S. territory—would have to be reviewed for compliance with U.S. law before being enforced in the United States. That would eviscerate the very goal of the New York Convention, which is to create a streamlined enforcement mechanism for foreign arbitral awards that does not permit a review of their merits. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (finding that the purposes of the New York Convention included "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which . . . arbitral awards are enforced in the signatory countries"); *TermoRio*, 487 F.3d at 940 (recognition and enforcement proceedings are a "summary procedure"); *Stileks*, 985 F.3d at 879

(noting that the court "ha[d] no authority to delve into the merits of Moldova's argument"); *Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petrol. & Nat. Gas*, 314 F. Supp. 3d 95, 109 (D.D.C. 2018) ("The public policy exception cannot be used to simply question the merits of the underlying award.") (citing *Chevron*, 949 F. Supp. 2d at 69); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) ("The utility of the [New York] Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own.").

Venezuela also fails to cite a single case in which the Executive's prerogative to recognize foreign governments was held to be a source of "public policy" justifying non-enforcement of a foreign arbitral award. Indeed, despite its burden of proof, Venezuela does not even mention the well-settled "most basic notions of morality and justice" standard, much less demonstrate how the Executive's prerogative to recognize foreign governments satisfies it. *Cf. PDV Sweeny*, 2015 WL 5144023, at *12 (denying a public policy defense raised by PDVSA, which is wholly owned by Venezuela, "in light of [PDVSA's] failure to explain how enforcement of the Partial Award would violate the 'most basic notions of morality and justice'").

In any event, the public policy exception "was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'" *Chevron*, 949 F. Supp. 2d at 69 (quoting *Parsons*, 508 F.2d at 974). To do so would "read the public policy defense as a parochial device protective of national political interests [which] would seriously undermine the [New York] Convention's utility." *Parsons*, 508 F.2d at 974. As a result, courts have repeatedly rejected attempts to invoke a U.S. foreign policy imperative or interest as a "public policy" under

the New York Convention. *See, e.g.*, *Iran Ministry of Def.*, 665 F.3d at 1097, 1099 (rejecting a public policy defense based on the United States' policy "against trade and financial transactions with the Islamic Republic of Iran"); *MGM Prods. Grp., Inc. v. Aeroflot Russian Airlines*, 573 F. Supp. 2d 772, 776–77 (S.D.N.Y. 2003) (rejecting a public policy defense based on U.S. sanctions against Iran), *aff'd*, 91 F. App'x 716, 717 (2d Cir. 2004); *Parsons*, 508 F.2d at 974 (rejecting a public policy defense based on the United States' severing of diplomatic relations with Egypt); *Ameropa AG v. Havi Ocean Co.*, No. 10 Civ. 3240(TPG), 2011 WL 570130, at *2 (S.D.N.Y. Feb. 16, 2011) (rejecting a public policy defense based on U.S. sanctions against Iran); *see also Chevron*, 949 F. Supp. 2d at 70 (rejecting a public policy defense based on Ecuador's argument that enforcing an arbitral award would "flout [Ecuador's] sovereignty").

Venezuela bears the "substantial" burden of establishing a public policy defense, *BCB Holdings*, 110 F. Supp. 3d at 250, but it has not even made a start at establishing that the recognition of a particular foreign government reflects this country's "most basic notions of morality and justice," let alone that enforcing the Final Award would violate that purported policy.

The only case that Venezuela cites in which a court refused enforcement based on public policy is *Hardy v. Government of India*. There, however, a court in this District was confronted with an arbitral award that ordered specific performance against India, a remedy that involved an incursion into Indian territorial sovereignty—the return of a block of land for hydrocarbon exploration—and an award of interest that was, in the court's view, "inseparable" from the award of specific performance. *See Hardy*, 314 F. Supp. 3d at 108, 116. The court did not enforce those parts of the award, as it found that doing so would interfere with "the right of other nations to control the extraction and processing of natural resources within their own sovereign

territories," and that such "forced interference with India's complete control over its territory violates public policy to the extent necessary to overcome the United States' policy preference for the speedy confirmation of arbitral awards." *Id.* at 110, 113. *Hardy* therefore "present[ed] one of the limited circumstances under which a district court can decline to confirm and enforce a foreign arbitral award." *Id.* at 114. But this case implicates none of the comity, specific performance, or territorial issues that were present in *Hardy*. That is, there is "no specific performance element to the award here, and no subsequent threat to [Venezuela's] sovereignty." *Doraleh Container Terminal SA v. Republic of Djibouti*, 656 F. Supp. 3d 223, 236 (D.D.C. 2023) (distinguishing *Hardy*).

Finally, Venezuela's public policy defense fails for another, independent reason. Central to Venezuela's argument is its repeated claim that enforcement of the Final Award would be improper because it was "rendered . . . without the participation of the Interim Government." Opp. at 2; *see also id.* at 6 ("No representatives from the Interim Government participated in the remaining phase [*i.e.*, only the damages phase] of the proceedings."), 13 ("only the Maduro regime purposed to act behalf of Venezuela [in the damages phase]"), 16 ("the Interim Government had no role in the defense of the Republic in the damages phase of the proceedings that resulted in the Final Award"). Venezuela's argument appears to be that the Final Award is fatally flawed because the wrong set of representatives were heard in the final damages phase of the Arbitration. That is a red herring. The *party* to the Arbitration was the Bolivarian Republic of Venezuela—the nation state—and not one government or the other. *See Valores Mundiales I*, 2023 WL 3453633, at *3 n.4 (noting that "Venezuela, the nation, was heard" during the arbitration, notwithstanding a change in government); *OIEG II*, 73 F.4th at 169–70 (emphasizing the "differentiation between government representatives and a sovereign"); Supp. Friedman

Decl., Ex. A, *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Order on the Applicant's [*i.e.*, Venezuela's] Representation (Apr. 3, 2020), ("ConocoPhillips ICSID Order on Representation"), ¶ 29 (finding that "Venezuela is the proper identity of the State [party] . . . in these proceedings," irrespective of any "political question, such as the legitimate government of Venezuela"). Venezuela, the nation state, was heard in the Arbitration. Venezuela, the nation state, raises no due process complaints about the Arbitration, nor could it. Venezuela lost an arbitration under the dispute resolution mechanism to which Venezuela, the nation state, agreed. *See* Pet. ¶¶ 22–23, 35. The resulting Final Award must now be recognized and enforced, and Venezuela has not met its "substantial" and "heavy" burden to show otherwise.

III. Venezuela Has Waived Any Right to Oppose Recognition and Enforcement of the Final Award Based on the Identity of Its Representatives in the Arbitration

In the further alternative, Venezuela has waived any right to oppose enforcement of the Final Award based on the identity of its representatives in the Arbitration. As the Eleventh Circuit recently held, "[a] party can waive a public-policy defense by failing to raise its objection in a timely manner." *Técnicas Reunidas de Talara S.A.C. v. SSK Ingeniería S.A.C.*, 40 F.4th 1339, 1346 (11th Cir. 2022). Venezuela admits that representatives of the Interim Government had actual knowledge that Venezuela changed counsel in the arbitration as early as February 2021, when the Partial Award was published online. *See* Barbará Decl. ¶ 10. And yet the Interim Government made no effort to intervene in the Arbitration during the 21 months that then passed before the Final Award was published in November 2022, or indeed at any other moment until the filing of the Opposition in December 2023. Venezuela's Interim Government had ample opportunity to timely raise an objection but chose not to do so. That objection is therefore waived.

The Opposition argues that a party cannot waive its right to assert a public policy defense to enforcement of an award. *See* Opp. at 7–8. That is wrong. Venezuela relies on *Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria*, 844 F.3d 281 (D.C. Cir. 2016), which held that parties cannot *preemptively and contractually* waive their right to oppose enforcement of an award based on public policy grounds. *Id.* at 288. But that is not the question presented here. As the Eleventh Circuit held in *Técnicas*, there is a difference between an "ex ante contractual waiver," which is impermissible, and waiver based on a party's failure to raise its objection in a timely manner while the arbitration was ongoing, which is permissible. *See* 40 F.4th at 1346. That distinction makes perfect sense. An *ex ante* contractual waiver involves the waiver of a host of unknown potential public policy violations, while the failure to raise an objection despite having full knowledge of the facts constitutes a knowing waiver of a specific objection.[6] That was precisely the case both here and in *Técnicas*.

In *Técnicas*, the party resisting enforcement "knew all the relevant facts" concerning the alleged public policy violation "during the arbitration" but had "waited for more than one year—and for the arbitral panel to issue [] a $40 million award—to complain." *Técnicas*, 40 F.4th at 1345–46. Under those circumstances, the court found that the party resisting enforcement had waived its public policy defense and that *Enron Nigeria* was "inapposite" because it dealt with an "ex ante contractual waiver." *Técnicas*, 40 F.4th at 1346. The Eleventh Circuit also noted that its conclusion was "consistent with the 'well settled' principle in the United States 'that a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised . . . when the result turns out to be adverse.'" *Técnicas*, 40 F.4th at 1347

[6] The fact that a party can waive its ability to raise a public policy objection does not prevent a court from raising the ground *sua sponte*, as permitted under Article V(2) of the New York Convention.

(quoting *Marino v. Writers Guild of Am., E., Inc.*, 992 F.2d 1480, 1484 (9th Cir. 1993)); *see also Yukos Capital S.A.R.L. v. OAO Samaraneftegaz*, 963 F. Supp. 2d 289, 299 (S.D.N.Y. 2013) (holding that because the award-debtor had failed to contest the validity of agreements at issue in the underlying arbitration, it "cannot now rely on its own omissions to support a public policy defense" to enforcement, as doing so would "run counter to the strong public policy in favor of arbitration"), *aff'd*, 592 F. App'x 8 (2d Cir. 2014); *Rsch. & Dev. Ctr. "Teploenergetika," LLC v. EP Int'l, LLC*, 182 F. Supp. 3d 556, 571 (E.D. Va. 2016) ("[T]o the extent that a public policy defense is essentially a defense that could have been raised at the [underlying] arbitrations, Respondents are . . . precluded from raising such public policy defense in the instant enforcement proceeding.").[7]

Like the award-debtor in *Técnicas*, Venezuela has waived its public policy objection not through an *ex ante* contractual waiver, but rather through its failure to raise its objection while the Arbitration was ongoing. Venezuela's Opposition makes clear that it had full knowledge of the facts on which it now relies in support of its public policy defense long before the Arbitration concluded. Mr. Barbará acknowledges that the Partial Award was made public in February 2021, shortly after the Tribunal rendered it, and that Mr. Barbará learned at that time that Venezuela had changed its representatives in the Arbitration.[8] Barbará Decl. ¶ 10.

---

[7] None of these cases involved an *ex ante* contractual waiver like the one at issue in *Enron Nigeria*.

[8] The last submissions from Venezuela in the Arbitration prior to the issuance of the Partial Award were made by Curtis in February 2018. *See* Supp. Friedman Decl. ¶ 6; Partial Award ¶¶ 253–56; Barbará Decl. ¶ 5. That is, the entirety of Venezuela's submissions prior to the Interim Award (2016) and the Partial Award (2021), which resolved all questions of jurisdiction and liability, were made by Curtis when they acted for the Maduro regime at that time. The first submission by the new representatives from Guglielmino was not made until after the Partial Award was issued in February 2021.

Venezuela's Interim Government has therefore been on notice that Venezuela's counsel in the Arbitration had changed since at least February 2021—21 months before the Tribunal issued the Final Award in November 2022, and more than two and a half years before Venezuela first raised its public policy defense before this Court in December 2023. But the Interim Government did nothing. That was a much longer period of inaction than the period found to constitute waiver in *Técnicas* (just under one year). *See Técnicas*, 40 F.4th at 1342, 1346.

Moreover, Venezuela's silence in this case was a marked, and unexplained, departure from its approach in other arbitrations: elsewhere, the Interim Government contested the right of representatives appointed by the Maduro regime to represent Venezuela in ongoing arbitrations, arguing that only the Interim Government could represent the interests of the state. *See, e.g.*, *Valores Mundiales II*, 87 F.4th at 513 (noting that "[r]epresentatives for the Interim Government requested the ICSID Annulment Committee to allow it to replace the lawyers representing Venezuela in the annulment proceeding"); *Venezuela Holdings, B.V. v. Republic of Venezuela*, ICSID Case No. ARB/07/27—Resubmission, Order on the Respondent's Representation in this Proceeding (Mar. 1, 2021), ¶¶ 5–10, 20, https://www.italaw.com/sites/default/files/case-documents/italaw170693.pdf (noting that after the Maduro regime replaced Curtis with a different law firm in March 2019, the Interim Government sought to intervene in the proceeding, claiming that only it could represent Venezuela, and subsequently sought to appoint Curtis as counsel); *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award (Sept. 13, 2021), ¶¶ 74–89, https://www.italaw.com/sites/default/files/case-documents/180460.pdf (similarly noting that in March 2019, the Interim Government sought to intervene in the proceeding claiming that only it could represent Venezuela); *see also* Supp. Friedman Decl., Ex. A, ConocoPhillips ICSID Order on Representation, ¶¶ 29–39 (noting that

the Interim Government, represented by Curtis, advocated for its continued participation in the ICSID annulment proceeding). Here, however, the Interim Government did nothing; it instead waited to see what the result of the damages phase of the Arbitration would be before raising any objection.

The time to raise an objection to the change in representation was while the Arbitration was ongoing, as the Interim Government has done in other cases, including the examples cited above. *See Técnicas*, 40 F.4th at 1346–47; *see also Rsch. & Dev. Ctr. "Teploenergetika"*, 182 F. Supp. 3d at 567 ("[F]ailure to attend an arbitration proceeding, and to raise any defense, may result in waiver of a public policy defense at a later proceeding to enforce the arbitration award, to the extent that such public policy defense is essentially a claim or defense that could have been, but was not, raised at arbitration."). The Interim Government cannot now claim that enforcing the Final Award would violate our "most basic notions of morality and justice" when it did not consider the issue of representation to be worth raising contemporaneously. *See Agility Pub. Warehousing Co. K.S.C. v. Supreme Foodservice GmbH*, 495 F. App'x 149, 152 (2d Cir. 2012) (upholding decision to enforce award where "the situation that [the party resisting enforcement] complains of was largely, if not entirely, of [that party's] own making"); *see also Kora Pack Priv. Ltd. v. Motivating Graphics LLC*, No. 4:22-cv-00377-BP, 2023 WL 4826222, at *10 (N.D. Tex. July 27, 2023) ("[A] party complaining about an arbitration award, such as MG here, cannot avoid enforcement due to circumstances that were of its own making.").

IV. Venezuela's Arguments Concerning Execution of the Final Award Are Irrelevant to the Question Before This Court

Finally, Venezuela appears to argue that the Court should refuse to recognize and enforce the Final Award because VUS could then seek to attach Venezuelan assets in the United States. *See* Opp. at 2, 14–16. That is irrelevant to the question before the Court, which is whether

Venezuela has discharged its "heavy burden" of proving that enforcing the Final Award would violate U.S. public policy. *See Chevron*, 949 F. Supp. 2d at 64. By enforcing the Final Award, the Court will simply be affirming that "none of the limited grounds for not recognizing the [Final Award] applies." *OJSC Ukrnafta v. Carpatsky Petrol. Corp.*, 957 F.3d 487, 502 (5th Cir. 2020); *see also TermoRio*, 487 F.3d at 935. Whether Venezuela or its alter egos have attachable assets in the United States, and whether VUS is able to attach those assets in order to satisfy Venezuela's debt under the Final Award, is a separate question for a separate proceeding. *See, e.g.*, *OIEG II*, 73 F.4th at 164 (noting that petitioner first obtained recognition and enforcement of its award in this District, and then began attachment proceedings in Delaware); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 133–34 (3d Cir. 2019) (same); *see generally OI Eur. Grp. v. Bolivarian Republic of Venezuela*, Misc. No. 19-290-LPS, 20-257-LPS, 21-46-LPS, 21-481-LPS, 2023 WL 2609248, at *7–17 (D. Del. Mar. 23, 2023).

CONCLUSION

For the foregoing reasons, VUS respectfully requests that the Court grant the relief requested in the Petition and enter judgment for VUS and against Venezuela.

Dated: January 5, 2024
New York, New York

Respectfully submitted,

By: */s/ Elliot Friedman*

Elliot Friedman (D.C. Bar No. NY0106)
elliot.friedman@freshfields.com
Sam Prevatt (*pro hac vice* forthcoming)
sam.prevatt@freshfields.com
Paige von Mehren (*pro hac vice*)
paige.vonmehren@freshfields.com
FRESHFIELDS BRUCKHAUS DERINGER US LLP
601 Lexington Avenue, 31st Floor
New York, New York 10022
Telephone: (212) 277-4000
Facsimile: (212) 277-4001

Attorneys for Petitioner Venezuela US SRL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January, 2024, I caused true and correct copies of the foregoing Reply Memorandum in Support of Petition to Recognize and Enforce a Foreign Arbitral Award to be filed with the Clerk of Court using the ECF system and thereby served on the following:

Joseph D. Pizzurro (D.C. Bar No. 468922)
Juan O. Perla (D.C. Bar No. 1660389)
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel.: (202) 452-7373
Fax: (202) 452-7333
Email: jpizzurro@curtis.com
Email: jperla@curtis.com

Attorneys for the Bolivarian Republic of Venezuela

Dated: January 5, 2024
New York, New York

Respectfully submitted,

By: */s/ Elliot Friedman*
Elliot Friedman (D.C. Bar No. NY0106)

Attorney for Petitioner Venezuela US SRL