No. 25-

IN THE

Supreme Court of the United States

RUSSIAN FEDERATION,

Petitioner,

v.

HULLEY ENTERPRISES LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"A foreign state shall not be immune from the jurisdiction" of a United States court where "the action is brought ... to confirm an award made pursuant to ... an agreement to arbitrate," and such agreement was "made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship." 28 U.S.C. §1605(a)(6).

The question presented is:

Whether §1605(a)(6) allows a United States court to exercise jurisdiction without first determining whether the foreign-state defendant agreed to arbitrate "differences ... between" itself and the plaintiff.

PARTIES TO THE PROCEEDING

Petitioner is the Russian Federation ("Russia"), a sovereign "foreign state" as defined under 28 U.S.C. §1603(a). Petitioner was the Appellant before the United States Court of Appeals for the District of Columbia Circuit and the defendant (Respondent) before the United States District Court for the District of Columbia.

Respondents are Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd. Respondents were the Appellees before the United States Court of Appeals for the District of Columbia Circuit and the plaintiffs (Petitioners) before the United States District Court for the District of Columbia.

RELATED PROCEEDINGS

Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd. v. The Russian Federation, No. 23-7174 (D.C. Cir. Aug. 5, 2025)

Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd. v. The Russian Federation, No. 14-cv-1996 (D.D.C. Nov. 17, 2023)

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INTRODUCTION

This Petition addresses many of the same legal questions—*i.e.*, under the same U.S. statute and the same international treaty—as another petition for certiorari pending in *Kingdom of Spain v. Blasket Renewable Investments, LLC,* No. 24-1130. There, this Court has invited the Solicitor General to provide the views of the United States. Orders in Pending Cases (Oct. 6, 2025).

The defendant here is a foreign state, Russia, just as the defendant in *Blasket* is a foreign state, Spain. Both are presumptively entitled to jurisdictional immunity under the Foreign Sovereign Immunities Act ("FSIA") at 28 U.S.C. §1604. As in *Blasket*, the plaintiffs here likewise allege that Article 26 of the 1994 Energy Charter Treaty ("ECT") constitutes an "agreement to arbitrate," as required under the FSIA's "arbitration" exception at §1605(a)(6). As to the specific immunity question addressed herein, the D.C. Circuit ruled against Russia based on the *Blasket* precedent. App. 13a–14a (citing *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024)).

This Petition should be granted because the D.C. Circuit's rulings—in *Blasket* and here—conflict with decisions of the Second and Fifth Circuits as to important, recurring questions involving foreign relations.

In particular, the D.C. Circuit held that the eligibility of specific plaintiffs to arbitrate under a purported "agreement to arbitrate" is not a jurisdictional element under §1605(a)(6). According to the D.C. Circuit, whether plaintiffs are "proper

beneficiaries of the arbitration clause" is purportedly "not jurisdictional" under the FSIA. App. 13a–14a (emphasis added).

The D.C. Circuit's interpretation conflicts directly with rulings of the Second and Fifth Circuits. Those courts hold that a plaintiff's alleged "third party *beneficiary* status" does indeed determine "jurisdiction" under the FSIA. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1015 (2d Cir. 1993) (emphasis added); *see also Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 802 (5th Cir. 2021) (holding that the district court's analysis of the plaintiffs' contractual theories—including the third-party beneficiary doctrine—was "quite accurate," but implicated "lack of jurisdiction" under the FSIA, rather than only the arbitral award's invalidity).

This categorization is of critical importance to foreign sovereign defendants. Jurisdictional facts under the FSIA must be decided at "the outset of the case" before commencing the more burdensome "merits phase of the litigation." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 174, 178–79 (2017). Moreover, the FSIA requires that the relevant facts "show" and "not just arguably show" that each jurisdictional element is satisfied. *Id.* at 187.

Here, the plaintiffs were not eligible to arbitrate with Russia under Article 26 of the ECT or to litigate against Russia under §1605(a)(6). Significantly, Article 26 establishes the same type of procedural mechanism that this Court has previously characterized as "investor-state dispute resolution." *See ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S.

619, 622 (2022); *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 43 (2014) (discussing commentaries on "investor-state disputes" (citation omitted)). Russia will adopt this same label herein, abbreviated as "ISDR."

The relevant ISDR clause here did not permit any claims by these plaintiffs against Russia. On the contrary, these plaintiffs are merely the offshore proxies (alter egos) of certain *Russian* oligarchs—*i.e.*, not genuine "*foreign*" investors, as required by the ECT and ISDR clauses generally. *E.g.*, *ZF Auto.*, 596 U.S. at 636–37 (explaining the relevant ISDR clause was "designed to attract *foreign* investors" (emphasis added)); *BG Grp.*, 572 U.S. at 40 (explaining the ISDR clause granted "protections to *foreign* investors" (emphasis added)). Accordingly, §1605(a)(6) is not satisfied here—because there was never an agreement to arbitrate "differences … between" Russia and these plaintiffs. Nor was Article 26 of the ECT made by Russia "with or for the benefit" of these plaintiffs, as §1605(a)(6) requires. Nor was any "legal relationship" between Russia and these plaintiffs "defined" under the ECT, as §1605(a)(6) further requires, because these plaintiffs were not genuine "Investor[s] of *another* Contracting Party" under Article 26 of the ECT. *See* App. 242a–243a (emphasis added). None of these explicit jurisdictional requirements is satisfied here under the FSIA.

In this respect, Russia's argument is closely analogous to Spain's argument in *Blasket*. According to Spain, by incorporating "principles of international law" (*e.g.*, App. 246a), the ECT also necessarily includes the law of the European Union ("EU") and, therefore, excludes EU nationals from bringing ISDR

claims against EU Member States. In other words, both Russia and Spain assert that the eligibility of specific plaintiffs to bring claims against specific foreign states implicates a jurisdictional question under §1605(a)(6).

Indeed, Russia's argument has even more in common with the United States' previous arguments under the 1993 North American Free Trade Agreement ("NAFTA"). As the U.S. State Department has explained, neither NAFTA nor ISDR clauses generally are invocable by "foreign juristic persons in which *nationals of the respondent State hold the controlling interest*," where any purported "foreign nationality is more fictitious or nominal than real." U.S. State Dep't, *Digest of United States Practice in International Law* (2002) (App. 276a–277a) (emphasis added) (internal quotation marks and citation omitted). On this basis, the United States argued—successfully—that a U.S. investor was prohibited from using a Canadian shell company to maintain a claim against the United States. *E.g.*, U.S. Reply Br., *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Apr. 26, 2002) (App. 292a–293a).

In addition to Spain, Russia, and the United States, similar arguments have also been made either in *Amicus Curiae* submissions or appellate briefs filed recently by the European Union, Bulgaria, India, Poland, Nigeria, and Romania. In other words, these questions demonstrably implicate recurring questions with global significance—simultaneously involving U.S. foreign relations and billions of U.S. dollars. Indeed, the present case alone concerns an amount in controversy exceeding $50 billion. App. 2a–4a.

Accordingly, the present case provides a useful and compelling vehicle to analyze a question with significance for many foreign governments around the world and the potential reciprocal treatment of the United States itself.

OPINIONS BELOW

The court of appeals' opinion (App. 1a) is reported at 149 F.4th 682. The district court's opinion (App. 20a) is available at 2023 WL 8005099.

JURISDICTION

The D.C. Circuit issued its Opinion on August 5, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1605(a)(6) of Title 28 is reproduced in the Appendix. App. 105a.

STATEMENT

A. Legal background

Foreign states are "presumptively immune from the jurisdiction of United States courts" under 28 U.S.C. §1604, subject to enumerated "exceptions." *Federal Republic of Germany v. Philipp*, 592 U.S. 169, 173 (2021). This case implicates §1605(a)(6), which requires an "agreement to arbitrate" to establish subject-matter jurisdiction.

The purported "agreement to arbitrate" here is supposedly Article 26 of the 1994 ECT. Specifically, Article 26 contains a standard ISDR clause,

whereunder the ECT's Contracting Parties each offer to arbitrate "[d]isputes between a Contracting Party and an Investor of another Contracting Party." App. 242a–243a.

As this Court has previously explained, the fundamental purpose of such ISDR clauses is for the treaty parties to promote and protect *foreign* investment by offering to arbitrate with *foreign* investors. In *ZF Automotive*, therefore, this Court analyzed an ISDR treaty concluded in 1999 between Russia and Lithuania, which was "designed to attract *foreign* investors." 596 U.S. at 636–37 (emphasis added). In *BG Group*, this Court considered another ISDR treaty concluded in 1990 between the U.K. and Argentina, which likewise granted "protections to *foreign* investors." 572 U.S. at 40 (emphasis added).

The ECT's text confirms that understanding. Under Article 26, each Contracting Party offers to arbitrate exclusively with "an Investor of *another* Contracting Party" (App. 242a) (emphasis added). Indeed, the ECT repeatedly distinguishes between [1] "Investors of *other* Contracting Parties," to whom each Contracting Party grants a range of protections, and [2] each Contracting Party's "*own* Investors," to whom the ECT grants no such protections. *See* ECT, Arts. 10, 12, 13, 14 (App. 224a–235a (emphasis added)). In other words, only *foreign* investors are covered by the ISDR clause or by the ECT's other substantive protections.

The ECT further confirms this understanding at Article 2, which describes the ECT as establishing the "legal framework" for implementing "the objectives and principles" of the ECT's political forerunner, the 1991 European Energy Charter ("EEC") (App. 207a). *See also* Final Act of the European Energy Charter

Conference, Dec. 17, 1994 (App. 249a–253a) (chronicling how the 1994 ECT was negotiated to implement the 1991 EEC).

As the 1991 EEC provided explicitly, one of the core purposes of the ECT system was to "promote the *international* flow of investments" by establishing "a stable, transparent legal framework for *foreign* investments" (App. 140a) (emphasis added).

B. Factual and procedural background

1. The arbitration

Plaintiffs here are Hulley Enterprises Limited, Veteran Petroleum Limited, and Yukos Universal Limited (collectively "HVY"). HVY are three offshore shell companies, which were originally registered in Cyprus and the Isle of Man in 1997. *E.g.*, App. 2a, 323a–326a. HVY are owned by a Gibraltar corporation, Group Menatep Limited ("GML"), which is owned in turn by six offshore trusts organized on the island of Guernsey. App. 326a–340a.

Russia has proffered evidence that HVY and GML are merely the proxies (alter egos) of Russian nationals—*i.e.*, a group of Russian oligarchs led by Leonid B. Nevzlin (the "Russian Oligarchs"). App. 3a, 83a–84a. For example, Russia has obtained a copy of a secret "Shareholders' Agreement" concluded by the Russian Oligarchs in 2000, as well as a secret "Deed of Accession" signed by the offshore trustee in 2003. App. 390a–397a (allocating to the Russian Oligarchs the "voting rights" for GML and all "enterprises directly or indirectly held" through GML, such as HVY themselves).

In 2005, HVY purported to commence ISDR arbitration against Russia under Article 26 of the ECT. HVY alleged that Russia had supposedly "expropriated" the value of HVY's majority shareholding in a Russian corporation known as OAO YUKOS Oil Company ("YUKOS") through the supposedly improper assessment of taxes. App. 2a–3a, 25a–26a.

These same arguments were rejected by the European Court of Human Rights in parallel proceedings. In two separate judgments issued in 2011 and 2013, the European Court agreed with Russia—*i.e.*, that YUKOS had indeed engaged in a massive, illegal scheme to commit fraudulent tax evasion. *See, e.g., OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Judgment ¶¶591–93 (ECtHR Sept. 20, 2011) (confirming the YUKOS tax arrangements were "obviously aimed at evading the general requirements of the Tax Code"); *Khodorkovskiy and Lebedev v. Russia*, Apps. Nos. 11082/06, 13772/05, Judgment ¶786 (ECtHR July 25, 2013) (same).

In the ECT proceedings, however, the ISDR arbitrators ultimately disagreed with the European Court. In a set of arbitral awards issued in 2014, these arbitrators concluded that Russia's tax assessments violated the ECT and, accordingly, ordered Russia to pay HVY compensation of more than $50 billion. App. 3a–4a.

As Russia later discovered, however, the ECT awards were obtained by fraud and deception. Among other misconduct, HVY falsely represented to the ISDR arbitrators that only "the Trustees have '*meaningful control*' over the voting rights attaching to the GML shares – no other party does." App. 350a,

360a. In 2018, however, Russia was finally able to obtain copies of the 2000 Shareholders' Agreement and 2003 Deed of Accession from a U.K. journalist. These two secret instruments had not previously been disclosed to Russia. When read together, these instruments directly refute HVY's false statements regarding the Russian Oligarchs' supposed lack of control over GML and HVY. *See* App. 390a–397a.

2. The post-arbitration litigation

Since 2014, HVY and Russia have contested the validity of the ECT awards in parallel lawsuits across Europe, Asia, and North America. App. 21a. Some of those proceedings were abandoned by HVY (in Belgium, France, Germany, and India). One such proceeding is now mostly concluded (in the Netherlands). Others are still ongoing today (in Luxembourg, Singapore, U.K., and U.S.).

In the U.S. litigation, Russia moved to dismiss under the FSIA. On multiple grounds, Russia argued that §1605(a)(6) is not satisfied here because there was never an "agreement to arbitrate" disputes "between" Russia and HVY, as the FSIA explicitly requires. App. 4a.

The district court rejected Russia's motion to dismiss in 2023, which the D.C. Circuit partially reversed in 2025. App. 18a. In particular, the D.C. Circuit accepted Russia's first ground for appeal and rejected the second. (It is the *second* of these two grounds—which the D.C. Circuit rejected under the *Blasket* precedent—that is now the focus of the present Petition.)

First, Russia had argued that Article 26 of the ECT did not contain any offer by Russia to arbitrate "with anybody or about anything" because Russia had only

signed—and never ratified—the ECT. App. 10a–13a.[1] As the D.C. Circuit rightly concluded, "[t]his argument pertains to ... jurisdiction under the FSIA's arbitration exception to sovereign immunity." App. 11a. Accordingly, the D.C. Circuit reversed this part of the district court's ruling. On remand, the district court will be required to consider the effects of Russia's signature as a part of the FSIA analysis.

Second, Russia argued that, even if Russia had offered to arbitrate with *foreign* investors under the ECT (which Russia did not do), then HVY would still not be eligible to accept that offer. This is because the ISDR clause at Article 26 only permits arbitration of "[d]isputes between a Contracting Party and an Investor of *another* Contracting Party." App. 242a–243a (emphasis added).

By its plain terms, this ISDR clause does not authorize *Russian* nationals to bring claims *against Russia*—whether on their own behalf or through offshore proxies like HVY. In this regard, based on the 2003 Deed of Accession and other similar evidence, Russia will prove in due course that HVY are merely "alter egos" of Leonid Nevzlin and his fellow Russian Oligarchs. *See* App. 390a–397a.

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[1] By the ECT's terms, therefore, Russia was only a "signatory" and not a "Contracting Party." Under Article 45(1) of the ECT, therefore, Russia had not committed to apply the ECT in its entirety, but only "provisionally" and only "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." App. 11a. As Russia further explained, Russian law does not permit arbitration of the types of "public law disputes" that are authorized under Article 26 absent a ratified treaty. For this reason, Russia had not made any commitments to participate in ISDR upon signing the ECT. App. 10a–13a.

Indeed, the exclusion of "alter ego" claimants under ISDR clauses is confirmed by the U.S. State Department based on applicable principles of international law.[2] That is, ISDR clauses are not invocable by "foreign juristic persons in which *nationals of the respondent State* hold the controlling interest," where any purported "foreign nationality is more fictitious or nominal than real." U.S. State Dep't, *Digest of United States Practice in International Law* (2002) (App. 276a–277a) (cleaned up, emphasis added). "It would be a significant affront to the intentions of the Parties—and, indeed, the sovereignty of each of those Parties" for an ISDR tribunal to require a respondent state "to pay an award to an enterprise that is owned or controlled by its own nationals" and thus effectively "'indemnify *its own citizens*'" under "'a treaty with *another country*.'" App. 270a (quoting *Burthe v. Denis*, 133 U.S. 514, 520–21 (1890) (emphasis added)).

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[2] Under international law, "the separate status of an incorporated entity may be disregarded" through "the process of 'lifting the corporate veil'" in cases where the incorporated entity is "extensively controlled by its owner." *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 628–29 & n.20 (1983) (citing *The Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3, 39 (Feb. 5, 1970)); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995) (citing *Barcelona Traction* for the principle that "separate corporate existence" must be disregarded where "sufficient control" is demonstrated under "international law"); United Nations, *Yearbook of Int'l L. Comm'n*, Vol. 2, Part 2, p. 48 (2001) (acknowledging the exception to the "general separateness of corporate entities ... where the 'corporate veil' is a mere device or a vehicle for fraud or evasion" under "international law").

On this basis, the United States argued successfully in *Loewen v. United States* that a U.S. investor was prohibited from using a Canadian shell company to maintain a claim against the United States under the ISDR clause in the 1993 NAFTA. Because the Canadian shell company was "under the domination" of the U.S. investor, the Canadian shell company was merely an "alter ego" and not "a separate and independent entity" for the purpose of analyzing nationality in ISDR. App. 292a–293a. The *Loewen* tribunal accepted the United States' argument and rejected the claims of the Canadian shell company.[3] The United States later defended this result in a U.S. court.[4]

Other ISDR tribunals subsequently confirmed the *Loewen* analysis and "the possibility of piercing the corporate veil" when analyzing nationality in ISDR.[5] Moreover, the ECT Contracting Parties explicitly confirmed the exclusion of "alter ego" claimants by

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[3] According to the *Loewen* tribunal, the 1993 NAFTA required *genuine* "diversity of nationality as between a claimant and the respondent government" because "it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents," including through a proxy (alter ego), without stating such intent clearly. App. 301a, 306a.

[4] *E.g.*, Opp'n Br. 13, *Loewen v. United States*, No. 04-cv-2151 (D.D.C. Mar. 25, 2005) (explaining that "[b]ecause an American corporation may not pursue a claim against the United States under NAFTA," the claims of the Canadian shell company were properly "dismissed for lack of jurisdiction").

[5] *E.g., TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (Dec. 19, 2008) ¶¶ 117–18 (ECF 245-17); *see also KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (Oct. 17, 2013) ¶ 134 (ECF 245-16) (collecting cases).

adopting the criterion of "control in fact" in a supplemental "Understanding" signed upon concluding the ECT in 1994. App. 202a–203a, 252a–253a.

The D.C. Circuit, however, did not consider any of Russia's arguments regarding this point as part of the jurisdictional analysis under the FSIA—*i.e.*, whether HVY were "proper beneficiaries of the arbitration clause." App. 13a. On the contrary, the D.C. Circuit was "squarely" compelled by circuit precedent, *NextEra*, 112 F.4th at 1103, to conclude that this question does not concern sovereign immunity. App. 13a–14a.

REASONS FOR GRANTING THE PETITION

1. This Court should grant certiorari to resolve multiple splits of authority—including the straightforward circuit split regarding the "beneficiary" question under §1605(a)(6), as described by Spain in *Blasket,* No. 24-1130, and presented even more starkly here.

Indeed, as outlined by the *Amicus Curiae* briefing in *Blasket* and summarized below, the D.C. Circuit's decision here implicates three other interrelated conflicts under §1605(a)(6), including: [1] whether an ISDR clause "itself" constitutes an "agreement to arbitrate"; [2] whether "beneficiary" status implicates the "scope" or the "existence" of an arbitration agreement; and [3] whether §1605(a)(6) must be satisfied by a conclusive judicial determination or whether, as the D.C. Circuit holds, a non-frivolous argument is sufficient.

2. The Court should grant certiorari because the D.C. Circuit's analysis contradicts the text and history of the FSIA. As the Second Circuit correctly explained, §1605(a)(6) is satisfied only where the foreign state defendant "*intended* to confer a benefit" on the plaintiff under the purported arbitration agreement. *Cargill*, 991 F.2d at 1019 (emphasis added, quotation marks and citation omitted).

The Second Circuit's interpretation accords with the specific terms used when Congress enacted §1605(a)(6) in 1988, as well as with pre-1988 case law involving contractual "waivers" of sovereign immunity under 28 U.S.C. §1605(a)(1). *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (collecting decisions holding that "waivers" of immunity were invocable only by [1] a "privy" to the contract waiving sovereign immunity and [2] those identifiable "third parties" who can adduce "strong evidence" that "the foreign state *intended*" to include them within the waiver (emphasis added)).

Indeed, far from abrogating that pre-1988 case law, Congress has codified it—by limiting §1605(a)(6) to arbitration agreements "made" by the foreign state either [1] "with" or [2] "for the benefit of a private party." In other words, to invoke §1605(a)(6), the plaintiff must prove *its own eligibility* to arbitrate with the foreign state under one of these two categories. This understanding is further confirmed by the choice of Congress to transplant additional text from Article II(1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 ("New York Convention"). As detailed below, this latter clause

explicitly requires courts to find [1] that at least some kind of "legal relationship" exists between the litigants; [2] that this legal relationship is "defined" in the "agreement ... to submit to arbitration"; and [3] that the "differences" subject to arbitration "arise between" the parties with respect to this "relationship."

The D.C. Circuit's interpretation disregarded all these explicit textual requirements.

3. Finally, the present case implicates a recurring issue with significant consequences—in multibillion-dollar controversies—not only for Russia and Spain, but also for the United States, the European Union, and foreign governments around the world. The present case is a compelling vehicle for these questions' resolution.

I. The Court should resolve the multiple interrelated splits of authority concerning §1605(a)(6) and ISDR clauses.

A. The circuits are split as to whether a plaintiff's "beneficiary" status is "jurisdictional" under the FSIA.

The most straightforward split of authority here is the conflict highlighted by Spain with respect to whether a plaintiff's "beneficiary" status is jurisdictional under the FSIA. As confirmed by the D.C. Circuit's ruling against Russia in the present case, the D.C. Circuit's approach cannot be reconciled with the contrary analysis of the Second and Fifth Circuits.

1. First, before the D.C. Circuit, Russia argued that even if it did consent to the ISDR clause by

signing the ECT, the plaintiffs here "are *not proper beneficiaries* of the arbitration clause." App. 13a (emphasis added). Specifically, "although formally organized under the laws of Cyprus and the Isle of Man," the plaintiffs here are ultimately "controlled by Russian citizens and therefore are not investors 'of *another* Contracting Party'" under the ISDR clause. *Id.* (emphasis added).

The D.C. Circuit concluded explicitly that Russia's argument as to the "beneficiaries" point "is not jurisdictional" under the FSIA, as "squarely" held by the *Blasket* panel. App. 13a–14a.

2. Second, the Second Circuit held exactly the opposite in *Cargill*, 991 F.2d at 1018–19. Specifically, the Second Circuit considered whether a foreign sovereign defendant—a Soviet entity called Novorossiysk Shipping Company—had "intended to confer a benefit" on the plaintiff (the Dutch buyer) when the Soviet shipping company had agreed to arbitrate with a separate entity (the Swiss seller) under a charter-party contract. *Id.* (internal quotation marks and citation omitted). The Soviet defendant pleaded sovereign immunity under the FSIA, and the Dutch plaintiff invoked the "arbitration" exception at §1605(a)(6).

As the Second Circuit held, this question—whether the plaintiff possessed "third party beneficiary status" under the arbitration agreement—determined jurisdiction under the FSIA. "If the alleged arbitration agreement exists, it satisfies the requirements for subject matter jurisdiction under the ... FSIA." *Id.* at 1018. Accordingly, "the district court was required to weigh the contractual arguments before it could determine that no arbitration agreement existed" *between* the Soviet defendant and

the Dutch buyer. *Id.* at 1019. "Thus, to determine whether subject matter jurisdiction existed, the district court ought to have determined whether ... the arbitration agreement ... was *intended to benefit*" the Dutch buyer. *Id.* (emphasis added).

On that basis, the Second Circuit remanded "to the district court for a determination of whether" the Dutch buyer could "prove its *third party beneficiary status* and thus *establish subject matter jurisdiction*" under §1605(a)(6). *Id.* at 1015 (emphasis added). That is, the district court needed to determine whether the arbitration clause applied to *the plaintiff itself*.

3. Third, the Fifth Circuit followed the same approach in *Al-Qarqani*, 19 F.4th at 802. As explicitly described in the district court's opinion, the plaintiffs attempted to "enforce the arbitration provisions" of a purported concession contract "using the *third-party beneficiary* doctrine" among other contractual theories. *Al-Qarqani v. Arab Am. Oil Co.*, No. 18-cv-1807, 2020 WL 6748031, at *9 (S.D. Tex. Nov. 17, 2020) (reproduced here at App. 370a–389a (emphasis added)).

The lower court explicitly left open the question of whether the foreign sovereign defendant, Saudi Arabian Oil Company ("Saudi Aramco"), was "bound" to arbitrate—*i.e.*, with anybody or about anything—under the purported concession contract. Rather, the lower court rejected the petition for enforcement based on defects in the plaintiffs' arguments concerning their own alleged *rights* under the arbitration agreement. App. 383a ("[T]he petitioners here cannot enforce the arbitration provisions …, even assuming that Saudi Aramco is bound by those provisions."). Accordingly, the lower court

adjudicated and rejected the plaintiff's alleged status under "the third-party beneficiary doctrine." App. 388a.

The Fifth Circuit concluded that the lower court's analysis of the contractual issues—including the third-party beneficiary doctrine—was "quite accurate." *Al-Qarqani*, 19 F.4th at 802. The Fifth Circuit emphasized, however, that these arguments should have been analyzed as *jurisdictional questions* under the FSIA, rather than on the merits. Because "there exist[ed] no agreement *among these parties* to arbitrate," the case was "more properly dismissed for lack of jurisdiction" under the FSIA. *Id.* (emphasis added).

Arguing as *Amicus Curiae* in the *Blasket* appeal, the United States likewise interpreted the *Al-Qarqani* precedent in this way: "[W]hen a foreign state contests application of the FSIA's arbitration exception by arguing that no arbitration agreement exists *between that state and the party seeking to confirm an arbitral award*, the district court must engage in an independent review of that objection before exercising jurisdiction over the petition to confirm." U.S. *Amicus* Br. 13–14, *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 23-7031 (D.C. Cir. Feb. 2, 2024) (emphasis added) (citing *Al-Qarqani*, 19 F.4th at 802) (reproduced here at App. 404a).

Accordingly, the decisions of the D.C. Circuit in *Blasket* and the present case are irreconcilable with the decisions of the Second and Fifth Circuits and the United States' position. Whereas the D.C. Circuit concludes that "beneficiary" status does not implicate jurisdiction under §1605(a)(6), the Second and Fifth Circuits hold the opposite.

B. This Court's review is equally necessary to clarify three further interrelated issues and splits of authority.

The D.C. Circuit's holdings in *Blasket* and the present case also engage three other interrelated issues and splits of authority.

1. First, the *Blasket* paradigm—as applied here—begins from the wrong premise concerning ISDR clauses. Specifically, the D.C. Circuit held that "the Energy Charter Treaty *itself*" supposedly contains the "arbitration agreement" and thus purportedly satisfies §1605(a)(6) irrespective of whether the plaintiffs are qualifying investors. *NextEra*, 112 F.4th at 1102 (emphasis added).

That approach is contrary to decisions of this Court and the Second Circuit, which consistently hold that ISDR clauses express only the treaty parties' "*offer* to arbitrate," which must "be *accepted* ... through an investor's filing of a notice of arbitration." *BG Grp.*, 572 U.S. at 42 (emphasis added) (citation omitted); *id.* at 46 (Sotomayor, J., concurring in part) ("[T]he treaty is not an already agreed-upon arbitration provision between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors."); *id.* at 53 (Roberts, C.J., dissenting) (agreeing that the ISDR provision "constitutes only a unilateral standing *offer* ... to submit to arbitration").

Indeed, as emphasized in *ZF Automotive*, the ISDR tribunal did not have "authority to resolve the parties dispute" *until* the offeree "took Lithuania up on that offer by initiating … an arbitration." 596 U.S. at 636–37. Before that moment, there was no agreement to

arbitrate. *Id.* ("That authority exists because Lithuania and the [investor] consented to the arbitration, not because Russia and Lithuania clothed the panel with governmental authority." (citation omitted)). As the Second Circuit confirms, therefore, "agreements to arbitrate under bilateral investment treaties are *formed* when investors initiate arbitration." *Olin Holdings Ltd. v. State of Libya*, 73 F.4th 92, 102–03 (2d Cir. 2023) (emphasis added) (citing *ZF Auto.*, 596 U.S. at 636–37).

Accordingly, there cannot be any "agreement to arbitrate" satisfying §1605(a)(6) unless the plaintiff was a proper *offeree* capable of accepting the *offer* contained in the ISDR clause. As the European Union argues in *Blasket*, "an agreement to arbitrate a particular dispute is formed only if and when *a qualifying investor* accepts the standing offer." European Union, *Amicus Curiae* Br. 6, *Kingdom of Spain v. Blasket Renewable Investments, LLC,* No. 24-1130 (U.S. June 4, 2025) (emphasis added) (citation omitted). Similarly, the United States argued as *Amicus Curiae* in *Blasket* that "the ECT is *not itself* an agreement to arbitrate," but merely contains "a standing offer to arbitrate." Oral Arg. Tr. 60:7–16, *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 23-7031, 23-7032 (D.C. Cir. Feb. 28, 2024) (reproduced here at App. 412a) (emphasis added).

The D.C. Circuit's analysis is incompatible with that understanding, and thus irreconcilable with the decisions of this Court and the Second Circuit.

2. Second, even putting aside the D.C. Circuit's error in abandoning the "standing offer" paradigm,

the D.C. Circuit also applied its preferred framework—the "beneficiary" paradigm—incorrectly.

That is, the second premise of the D.C. Circuit's analysis was that a plaintiff's eligibility to arbitrate is a question of "the *scope* of ... the arbitration provision" and not its "existence or validity." *NextEra*, 112 F.4th at 1101–04. In other words, the D.C. Circuit asked whether the plaintiff fell within the "scope" of the arbitration agreement—without considering how such questions have been analyzed previously or in any other contexts.

According to the D.C. Circuit, only the "existence or validity of the arbitration agreement" can implicate jurisdiction under §1605(a)(6), whereas "the scope of an arbitration agreement" only concerns the arbitration award's "enforceability on the merits." *Id.* (characterizing "which investors are covered" as supposedly going to "the *scope* of ... the arbitration provision" (emphasis added)).

In contrast to the D.C. Circuit, however, many other circuits have framed a litigant's eligibility to arbitrate as a question of *existence* or *formation—i.e.*, whether the litigant's right to arbitrate "exists" or whether the arbitration agreement was "formed" as to that litigant. *E.g.*, *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 530–31, 537 (5th Cir. 2019) (analyzing "whether a non-signatory can compel arbitration pursuant to an arbitration clause" as a question of the "existence of a valid arbitration clause between specific parties," and not "whether a particular dispute falls within the scope of an arbitration provision" (internal quotation marks and citations omitted)); *Raymond James Fin.*

Servs., Inc. v. Cary, 709 F.3d 382, 383, 386 (4th Cir. 2013) (characterizing the question of whether "individual investors seeking to arbitrate claims" could proceed to arbitration as "relat[ing] to the *existence* of a contract to arbitrate, not the *scope* of that potential agreement" (internal quotation marks and citations omitted)); *Spear, Leeds & Kellogg v. Cent. Life Assur. Co.*, 85 F.3d 21, 25–28 (2d Cir. 1996) (analyzing "the third party beneficiary approach" explicitly as concerning whether "an agreement to arbitrate is found to exist," and not a question concerning "the scope of that agreement").

Accordingly, the D.C. Circuit's approach creates significant confusion by incorrectly categorizing a litigant's eligibility to arbitrate as a "scope" question—rather than a "formation" question, which is subject to different presumptions (at least for a domestic arbitration amongst U.S. parties). This independent circuit split also requires clarification from this Court, irrespective of whether it has jurisdictional significance under the FSIA.

3. Third, as Bulgaria's *Amicus Curiae* brief has correctly emphasized, the D.C. Circuit's approach creates further confusion as to the standard of proof applicable to jurisdictional facts under §1605(a)(6). Bulgaria, *Amicus Curiae* Br. 21–23, *Kingdom of Spain v. Blasket Renewable Investments, LLC,* No. 24-1130 (U.S. June 4, 2025).

Specifically, the D.C. Circuit suggested that at least some of the §1605(a)(6) requirements need not be satisfied "*in fact*," so long as these elements are at least "*arguably*" satisfied. *NextEra*, 112 F.4th at 1102 ("[W]e need not and do not resolve whether Spain

entered into separate arbitration agreements 'with' private parties because we conclude that [Spain] entered into an arbitration agreement ... that is *arguably* 'for th[eir] benefit.'" (emphasis added)); *see also id.* at 1104 ("For jurisdictional purposes, the FSIA's arbitration exception requires that the arbitral tribunal '*purported* to make an award pursuant to the ECT, not that it *in fact* did so.'" (emphasis added) (quoting *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877–78 (D.C. Cir. 2021)).

These suggestions, however, cannot be reconciled with *Helmerich*, 581 U.S. at 187. As explained by this Court, jurisdiction exists only where "the facts ... show (and *not just arguably* show)" that the FSIA's elements are satisfied. *Id.* (emphasis added).

II. The decision below is wrong.

A. To satisfy §1605(a)(6), the "agreement to arbitrate" must cover the plaintiff.

The correct analysis must begin with the text. As relevant here, §1605(a)(6) authorizes jurisdiction only where the plaintiff can invoke an "agreement to arbitrate," which [1] was "made by the foreign state with or for the benefit of a private party" and which [2] permitted arbitration of "differences ... between the parties with respect to a defined legal relationship."

Together and separately, these two clauses confirm that §1605(a)(6) is invocable only by an eligible plaintiff—*i.e.*, "a private party" who was among "the parties" contemplated under the foreign state's "agreement to arbitrate."

1. The first clause identifies two categories of eligible plaintiffs.

The most significant phrase used by Congress at §1605(a)(6) is "agreement to arbitrate."

Of course, it is blackletter law that all litigants determine "*with whom* they will arbitrate" in their agreements to arbitrate. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019) (emphasis added) (citation omitted); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (same); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (same).

Accordingly, as this Court has explained, a "written arbitration provision" may "be enforced by" only *two* categories of identifiable litigants. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629–31 (2009). These categories include [1] a "signatory" or "party" to the contract, as well as [2] "nonparties" entitled to "the benefit" of the contract under "traditional principles" of "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Id.* (citation omitted); *see also GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 438 (2020) (same).

Indeed, these same two eligible categories are directly acknowledged in the FSIA's text. Specifically, §1605(a)(6) can only be satisfied when "the action is brought to enforce an agreement" or "confirm an award made pursuant to such an agreement," where the arbitration agreement was "made by the foreign state" either [1] "*with* ... a private party" or [2] "*for the benefit* of a private party" (emphasis added).

The first preposition, "with," logically refers to signatories and counterparties—*i.e.*, those "with"

whom the foreign state directly concluded the arbitration agreement. The subsequent prepositional phrase, "for the benefit," refers to the second category of eligible litigants—*i.e.*, "nonparties" for whom the "written arbitration provision is made enforceable" under traditional principles of contract, agency, or equity. *Arthur Andersen*, 556 U.S. at 631. Indeed, §1605(a)(6) includes these phrases together with the specific verbs ("to enforce" and "to confirm") that are ordinarily only available to these same two categories of eligible litigants.

It would be completely anomalous for §1605(a)(6) to specifically identify these two eligible categories if this FSIA exception were invocable (enforceable) by *any conceivable plaintiff* who was *not* within *either* category.

This understanding is confirmed by the FSIA case law developed before §1605(a)(6) was enacted in 1988 under Public Law 100-669 (the "1988 Amendment"). *See, e.g.*, *United States v. Noland*, 517 U.S. 535, 539 (1996) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." (quotation marks and citation omitted)).

That is, even before the 1988 Amendment, it was well established that a foreign state's "agreement to arbitrate" satisfied the FSIA's "waiver" exception at 28 U.S.C. §1605(a)(1). *E.g.*, *Frolova*, 761 F.2d at 377 (collecting pre-1988 cases that found "*waiver* under §1605(a)(1)" where the sovereign "agreed to arbitrate" (emphasis added)); Restatement (Third) of Foreign Relations Law §456(2)(b) (1987) ("an agreement to arbitrate is a waiver of immunity from jurisdiction"); U.S. Amicus Br., *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya*, No. 80-1207 (D.C.

Cir. 1980) (reproduced here at App. 108a) ("U.S. *LIAMCO* Amicus") ("Congress manifestly intended that an arbitration agreement should constitute a waiver of foreign sovereign immunity.").

As a corollary, the pre-1988 case law further confirmed that contractual "waivers" of sovereign immunity were also invocable under §1605(a)(1) only by *two categories of identifiable plaintiffs*. These categories were [1] any "privy" to the contract waiving immunity—*i.e.*, signatories and counterparties—and [2] "third parties" who can adduce "strong evidence" that "the foreign state *intended*" to grant them the benefit of the waiver. *Frolova*, 761 F.2d at 377 (emphasis added) (collecting cases).

When the 1988 Amendment was enacted, therefore, this limitation on eligible plaintiffs had already been applied in many §1605(a)(1) cases. *See, e.g., Ohntrup v. Firearms Ctr., Inc.*, 516 F. Supp. 1281, 1285 (E.D. Pa. 1981) (holding under §1605(a)(1) that where a foreign sovereign "agreed only to the arbitration of disputes between the parties," the resulting "waiver cannot be interpreted to include ... a third-party" who lacked rights under the arbitration agreement); *Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela, S.A.*, 760 F.2d 390, 393–95 (2d Cir. 1985) (applying §1605(a)(1) because "the waiver" was intended for "the benefit of all of the parties"); *Zernicek v. Petroleos Mexicanos (Pemex)*, 614 F. Supp. 407, 411 (S.D. Tex. 1985) (holding that a specific plaintiff was not covered by a specific waiver under §1605(a)(1)); *Keller v. Transportes Aereos Militares Ecuadorianos*, 601 F. Supp. 787, 788–89 (D.D.C. 1985) (same); *Transamerican Steamship Corp. v. Somali Democratic Republic*, 590 F. Supp. 968, 974 (D.D.C. 1984) (same).

Accordingly, the only logical interpretation of the phrase, "with or for the benefit of a private party," is that Congress sought to codify these two eligible categories of plaintiff under §1605(a)(6). Congress would not have included this language if §1605(a)(6) could be invoked by *anybody*, irrespective of whether they fell within these two categories.

This interpretation accords with the understanding that the FSIA has frequently codified "pre-existing" case law, subject to incremental development. *E.g.*, *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 200 (2007) (explaining that the FSIA was "meant 'to codify ... the pre-existing ... exception[s] to sovereign immunity'" (citation omitted)).

2. The second clause is transplanted from the New York Convention.

The same understanding—*i.e.*, the FSIA's limitation on the categories of eligible plaintiffs—is confirmed by the second relevant clause under §1605(a)(6).

Specifically, §1605(a)(6) is satisfied only where the "agreement to arbitrate" is made "to submit to arbitration all or any differences which have arisen or which may arise *between the parties* with respect to a *defined legal relationship*, whether contractual or not" (emphasis added). Notably, Congress transplanted this second clause—almost verbatim—from Article II(1) of the 1958 New York Convention, 21 U.S.T. 2517. *See Hall v. Hall*, 584 U.S. 59, 72 (2018) (addressing "transplanted" statutory phrases with

"presumably" the "same meaning" as the original source of the text).[6]

Remarkably, the D.C. Circuit never addressed any part of this second clause in its §1605(a)(6) analysis. *See NextEra*, 112 F.4th at 1101–05. Indeed, this second clause includes multiple features that foreclose the D.C. Circuit's approach.

1. First, as Spain has correctly emphasized, the second clause of §1605(a)(6) requires that the "differences" to be arbitrated must "arise *between the parties*" to the litigation. *E.g.*, Spain's Pet. 18–21, *Kingdom of Spain v. Blasket Renewable Investments, LLC,* No. 24-1130 (U.S. May 1, 2025) (emphasis added).

Undoubtedly, Spain's interpretation is the most natural way of reading this part of the statute. That interpretation is further confirmed by comparing §1605(a)(6) to the source of this text in Article II(1) of the New York Convention. Specifically, the original text of the New York Convention freely and interchangeably uses the words "party" and "parties"

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[6] Indeed, the primary reason for the 1988 Amendment was to adopt the position of the Executive Branch that an arbitration agreement "constitutes a waiver" of immunity "not only" where U.S. territory is "the situs … but also where ... the arbitration ... takes place in any state which is party *to the New York Convention*." U.S. LIAMCO *Amicus*, App. 108a–110a (emphasis added). *Compare Frolova*, 761 F.2d at 377 (summarizing cases that "refused to find … waiver of immunity to suit in American courts" where arbitration was contemplated "in a country other than the United States") *with Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 126 (D.C. Cir. 1999) ("Section 1605(a)(6) reflects the decision of the Congress to deny a foreign state immunity from suit in the United States if that state has agreed to arbitrate in any country that is party to ... the New York Convention....").

to mean "the parties" to the arbitration agreement, "the parties" to the arbitration itself, and "the parties" to any litigation relating to the arbitration. *See* 21 U.S.T. 2517, Arts. II, IV, V, VI (referring to "an agreement … signed by *the parties*," "*the parties* to arbitration," "*the party* against whom" the award is invoked, and "*the party* claiming enforcement" (emphasis added)).

Indeed, the original text found at Article II(1) completely elides any distinction between these categories: "*the parties* undertake to submit to arbitration … differences which … may arise *between them*" (emphasis added). In other words, this part of §1605(a)(6) accords with the ordinary understanding that "the parties" to the arbitration agreement will be *the same* as the parties to the arbitration itself and any related litigation. To diverge from that ordinary situation, as the Second Circuit explained, any "third party" must "show that the parties to that contract intended to confer a benefit on it" when concluding the arbitration agreement. *Cargill*, 991 F.2d at 1019 (internal quotation marks and citation omitted); *see also Frolova*, 761 F.2d at 377 ("third parties" must adduce "strong evidence" that "the foreign state *intended*" to include them under any waiver (emphasis added) (citation omitted)).

Nothing in the text of §1605(a)(6) suggests any intention to diverge from this ordinary framework concerning which litigants can and cannot invoke an arbitration agreement.

2. Second, this part of §1605(a)(6) also explicitly requires that a "legal relationship" must exist amongst the litigants—and the "differences" to be arbitrated must arise "with respect to" that relationship. Although a variety of different

relationships will suffice ("contractual or not"), that "legal relationship" must be "defined" by the "agreement."

In this part, both §1605(a)(6) and the New York Convention comport—yet again—with a fundamental understanding concerning the parties who are eligible to arbitrate. "[T]here must be *a relationship* among the parties of a nature that justifies a conclusion that the party ... agreed to arbitrate with another entity... ." *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 359 (2d Cir. 2008) (emphasis added); *see also Burnett v. Nat'l Ass'n of Realtors*, 75 F.4th 975, 982 (8th Cir. 2023) ("One cannot be forced into arbitration by a contract to which one is a stranger." (cleaned up)); *IQ Prods. Co. v. WD-40 Co.*, 871 F.3d 344, 350 (5th Cir. 2017) ("[C]laims must 'have their roots in the relationship between the parties[.]'" (citation omitted)).

The D.C. Circuit's approach, however, completely disregards this explicit requirement. According to the *Blasket* panel, EU investors could invoke §1605(a)(6) merely because Spain had a relationship with *another category* of litigants—*i.e.*, "nationals of ECT signatories outside the European Union, like Japan." *NextEra*, 112 F.4th at 1102–03. Similarly, in Russia's case, this would allow the Russian Oligarchs behind HVY to invoke §1605(a)(6) based upon a purported relationship between Russia and other parties (*i.e.*, genuine foreign investors).

In other words, the D.C. Circuit's approach is irreconcilable with the text of the FSIA. Whereas §1605(a)(6) requires that the "differences" to be arbitrated must arise with respect to a "defined legal relationship," the D.C. Circuit dispenses with that

requirement entirely. This Court must grant review to correct this error.

B. Analogous jurisdictional statutes also limit the categories of eligible litigants.

The D.C. Circuit's approach also conflicts with how other similar jurisdictional statutes incorporate the eligibility of certain litigants as jurisdictional elements. There is nothing unusual about conditioning jurisdiction on the identity of the specific parties before the court.

1. First, as already mentioned above, the FSIA's "waiver" exception at §1605(a)(1) is invocable *only* by signatories and counterparties to the contract waiving immunity, or else "'third parties'" with "'strong evidence that this is what the foreign state intended.'" *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 670 (7th Cir. 2012) (quoting *Frolova,* 761 F.2d at 377); *see also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (same); *Cargill*, 991 F.2d at 1019 ("[I]t is rare for a court to find that a country's waiver of immunity extends to third parties not privy to the contract." (citation omitted)).

2. Second, the FSIA's "expropriation" exception at §1605(a)(3) likewise conditions the availability of jurisdiction on the nationality of the litigants. Specifically, this FSIA provision incorporates "the domestic takings rule," under which a foreign state defendant is not subject to claims by "its own nationals." *Philipp*, 592 U.S. at 181.

In other words, under §1605(a)(3), a German plaintiff cannot sustain a claim against Germany, a Venezuelan plaintiff cannot sustain a claim against

Venezuela, and a Honduran plaintiff cannot sustain a claim against Honduras. *See id.*; *see also Helmerich & Payne Int'l Drilling Co. v. Venezuela*, 153 F.4th 1316, 1324 (D.C. Cir. 2025) (rejecting "the Venezuelan subsidiary's expropriation claim under the domestic-takings rule, under which international law does not govern a state's taking of its own nationals' property" (citation omitted)); *Bock Holdings, LLC v. Republic of Honduras*, No. 23-13552, 2024 WL 3219889, at *2 (11th Cir. June 28, 2024) ("Because the property allegedly taken by Honduras belonged to … a Honduran company … there has been no violation of international law, and the FSIA's expropriation exception simply cannot apply." (citation omitted)).

3. Third, as emphasized by this Court in *Helmerich*, these requirements under the FSIA exceptions are analogous to the limitations on diversity jurisdiction at 28 U.S.C. §1332.

"Where jurisdiction depends on diversity of citizenship, for example, courts will look to see whether the parties are *in fact diverse*, *not* simply whether they are *arguably so*." *Helmerich*, 581 U.S. at 184 (emphasis added) (citation omitted); *see also Megalomedia Inc. v. Phila. Indem. Ins. Co.*, 115 F.4th 657, 659 (5th Cir. 2024) (remanding "for jurisdictional discovery" where "the citizenship of limited liability companies in a diversity case" was disputed under §1332); *Qin v. Deslongchamps*, 31 F.4th 576, 582 (7th Cir. 2022) (acknowledging that "jurisdictional discovery" may be "sometimes authoriz[ed]" as where "doubt emerges regarding whether, as alleged, the parties are in fact diverse" (citations omitted)); *Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc.*, 943 F.3d 613, 618–19 (2d Cir. 2019) (concluding that "the district court erred by

proceeding to the merits of this case" without determining whether "the parties were completely diverse," and remanding for determination of whether "further discovery" was warranted).

As these examples show, it is not uncommon for jurisdictional statutes—including the FSIA itself—to include the litigants' eligibility among the jurisdictional facts that must be established at the outset of litigation. In that regard, there is nothing strange about a court's evaluating whether a plaintiff actually was protected by an ISDR clause, where such ISDR clause is purportedly the basis for jurisdiction under §1605(a)(6).

III. The §1605(a)(6) question is important and recurring, and this case is an appropriate vehicle for this Court's review.

1. The question of whether §1605(a)(6) requires a judicial determination of the plaintiff's eligibility is important and recurring. Indeed, Russia's case demonstrates that the question has already *recurred*, inasmuch as Spain raised the same question earlier this year in *Blasket*.

The importance of the issue is further underscored by the amount in controversy here—*i.e.*, more than $50 billion—as well as by the participation of the European Union, Bulgaria, Poland, and Romania as *Amicus Curiae* in the *Blasket* case. Other sovereign defendants, such as India and Nigeria, have also emphasized the same split of authority between the D.C. Circuit and the Fifth Circuit in recent briefs. Opening Br. 18-19, *Deutsche Telekom, A.G. v. Republic of India*, No. 24-7081 (D.C. Cir. Sept. 16, 2024) (citing *Al-Qarqani*, 19 F.4th at 801–02); Final

Reply Br. 7, *Chiejina v. Federal Republic of Nigeria*, No. 22-7146 (D.C. Cir. July 3, 2023) (citing *Al-Qarqani*, 19 F.4th at 801–02).

2. It is thus critical for this Court to resolve whether this category of challenges—*i.e.*, as to the eligibility of the plaintiff—concerns immunity from jurisdiction, rather than the merits of the case. Jurisdictional immunity must be decided "at the outset of the case." *Helmerich*, 581 U.S. at 179.

This specifically implicates the reciprocal treatment of the United States. That is, properly identifying and interpreting the FSIA's jurisdictional elements is necessary to avoid "producing friction in our relations with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation." *Philipp*, 592 U.S. at 184 (internal quotation marks and citation omitted).

3. Indeed, although Russia and Spain are making the same statutory argument under §1605(a)(6), Russia's underlying argument—*i.e.*, about the proper interpretation of the ISDR clause under the 1994 ECT—illustrates why Russia's case is ultimately a superior vehicle for evaluating the reciprocal consequences for the United States.

That is, although Spain's argument about EU law may seem remote from American interests, Russia is making the same argument that the United States itself made in *Loewen*, when faced with an "alter ego" claimant—*i.e.*, a Canadian proxy for a U.S. investor—under NAFTA. *See* U.S. State Dep't, *Digest of United States Practice in International Law* (2002) (App. 276a–277a); Reply Br., *Loewen v. United States* (Apr. 26, 2002) (App. 291a–293a).

Moreover, the ECT and NAFTA are not the only ISDR treaties for which "lifting the corporate veil" is a relevant principle. Much like those two treaties,[7] many other treaties of the United States also define the appropriate category of claimants as including any "company" that is "duly organized under the applicable laws" of another treaty party.[8]

If the United States were to be sued—again—by a U.S. investor through a shell company in one of these foreign countries, then the United States would necessarily seek to ensure that analogous arguments (*i.e.*, excluding "alter ego" claimants) would be considered as part of the United States' sovereign immunity.

4. Finally, as with all FSIA cases, the "clarity" of "jurisdictional" rules at the outset of litigation is "doubly important … where foreign nations and foreign lawyers must understand our law." *Helmerich*, 581 U.S. at 183. Such clarity is particularly necessary here in view of the D.C. Circuit's instructions that the present case must be remanded for the determination of "numerous

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[7] NAFTA permitted arbitration between "[a]n investor of a Party" and "another Party," where the "investor" included any "enterprise constituted or organized under the law of a Party." NAFTA, Arts. 201, 1116, 1139 (App. 147a–148a, 168a, 186a–187a). The ECT terms are similar. ECT, Arts. 1(7), 26 (App. 203a–204a, 242a).

[8] *E.g.,* U.S.-Panama Treaty Concerning the Treatment and Protection of Investments, Art. I(c), Oct. 27, 1982, T.I.A.S. No. 91-530; U.S. Grenada Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Art. I(1)(a), May 2, 1986, T.I.A.S. No. 89-303; U.S.-Trinidad and Tobago Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Art. I(b), Sept. 26, 1994, T.I.A.S. No. 96-1226.1.

threshold issues" with a range of potential FSIA consequences. App. 15a.

In particular, the district court will be faced with analyzing the "novel question[s]" of [1] whether FSIA elements may be satisfied by "issue preclusion" either generally or [2] based upon the judgments of a Dutch court, in view of [3] the applicable Dutch law and [4] the specific facts of this case. *See* App. 14a–18a ("The parties dispute whether the elements of issue preclusion are met here, in particular whether the Dutch proceedings were 'full and fair.'").

The jurisdictional character of the parties' various arguments—or the potential lack of such jurisdictional character—is likely to play a significant role in the next phase of the case. For example, the International Court of Justice specifically concluded that the Italian courts violated Germany's sovereign immunity by enforcing a Greek judgment against Germany. *See Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening)*, 2012 I.C.J. 99, 152 ¶¶130–131. The Dutch judgments in the present case, therefore, may potentially trigger a different preclusion analysis with respect to jurisdictional issues under the FSIA, as compared to other non-jurisdictional issues.

Before embarking on this complex new phase, the district court must first receive this Court's clear and final determination as to which questions are jurisdictional under the FSIA (and which are not). The alternative would be multiple additional rounds of remand, *de novo* appeal under the FSIA, and further remand. That outcome cannot be squared with this Court's longstanding policy against "the debilitating effect" of "piecemeal appeal disposition."

Microsoft Corp. v. Baker, 582 U.S. 23, 28 (2017) (internal quotation marks and citation omitted).

CONCLUSION

For all these reasons, Russia's petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7174

HULLEY ENTERPRISES LTD., *et al.*,

Appellees,

v.

RUSSIAN FEDERATION,

Appellant.

Argued October 18, 2024
Decided August 5, 2025

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01996)

Before: SRINIVASAN, *Chief Judge*, WILKINS and RAO, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RAO.

Concurring opinion filed by *Circuit Judge* WILKINS.

Appendix A

RAO, *Circuit Judge*: From 2003 to 2004, Russia expropriated the most valuable assets of OAO Yukos Oil Company ("Yukos"), at the time the largest private oil company in the Russian Federation. Shareholders of Yukos challenged the expropriation in arbitration and secured a $50 billion award, which they seek to enforce in federal court. Russia asserts that sovereign immunity bars the suit and that the arbitration exception to the Foreign Sovereign Immunities Act ("FSIA") does not apply. The district court held it had jurisdiction under the FSIA, in part because it was bound by the arbitral tribunal's conclusion that an arbitration agreement existed between Russia and the Shareholders.

Whether an arbitration agreement exists is a jurisdictional fact under the FSIA that must be independently evaluated by the district court. Because the district court gave binding effect to the arbitral tribunal's determination of this jurisdictional fact, we vacate the judgment. On remand, the district court must independently consider whether the FSIA's arbitration exception to sovereign immunity applies.

I.

The Yukos Shareholders are several companies organized under the laws of Cyprus and the Isle of Man: Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd. In February 2005, the Shareholders initiated arbitration proceedings alleging that Russia expropriated Yukos's assets in violation of the Energy Charter Treaty ("Treaty").

Appendix A

Designed to promote international cooperation and investment in the energy sector, the Treaty generally prohibits signatory countries from expropriating investments held by investors from other signatories. *See* Energy Charter Treaty art. 13, Dec. 17, 1994, 2080 U.N.T.S. 95. If disagreements arise, investors may submit the dispute to arbitration. *Id.* art. 26(3)(a). The Treaty requires a country to comply with its terms from the moment of signature, even before the Treaty is ratified, "to the extent that such provisional application is not inconsistent with [the signatory's] constitution, laws or regulations." *Id.* art. 45(1). The Vice Prime Minister of Russia signed the Treaty on December 17, 1994, but the Russian Parliament never ratified it. Russia withdrew from the Treaty in 2009.

The arbitration proceedings between Russia and the Shareholders at The Hague lasted nearly a decade. Russia consented to the jurisdiction of the arbitral tribunal ("Tribunal") to determine arbitrability but maintained throughout the proceedings that the Tribunal lacked jurisdiction over the dispute. Russia argued it was not required to provisionally apply the arbitration clause of the Treaty because to do so would be inconsistent with Russian law. Russia also maintained the Shareholders were not investors within the meaning of the Treaty because the companies are controlled by Russian citizens and so do not qualify as investors from another state.

In November 2009, the Tribunal entered interim awards rejecting Russia's challenge to its jurisdiction. The Tribunal concluded that the Shareholders qualified

as investors under the Treaty and that Russia had agreed to arbitrate because the arbitration clause applied provisionally in Russia at the time of the expropriation. The Tribunal issued final awards in July 2014, finding that Russia had violated the Treaty and awarding the Shareholders over $50 billion in damages.

Following the Tribunal's decision, the dispute continued, this time in the courts. Russia asked the Hague District Court (a national Dutch court) to set aside both the interim and final awards. The Dutch Supreme Court ultimately held for the Shareholders on nearly all issues. It affirmed that the Tribunal had jurisdiction over the dispute, that provisional application of the arbitration clause was consistent with Russian law, and that the Shareholders were investors within the meaning of the Treaty.

While proceedings were pending in the Dutch courts, the Shareholders brought suit in the United States District Court for the District of Columbia to confirm and enforce the final awards. Russia moved to dismiss the Shareholders' enforcement suit for lack of subject matter jurisdiction. Russia asserted sovereign immunity and argued that none of the FSIA's exceptions to sovereign immunity applied. In particular, Russia maintained the arbitration exception did not apply because there was no valid arbitration agreement between Russia and the Shareholders. Russia offered the same arguments it raised before the Tribunal, namely that it was not required to provisionally apply the arbitration clause and that the Shareholders were not investors within the meaning of the

Treaty because they were "mere shell companies owned and controlled by . . . [Russian] nationals."

After the Dutch Supreme Court's decision, the district court denied Russia's motion to dismiss. The court concluded it had subject matter jurisdiction because the FSIA's arbitration exception applied. *See Hulley Enters. Ltd. v. Russian Fed'n*, No. 14-cv-1996, 2023 U.S. Dist. LEXIS 206199, 2023 WL 8005099, at *12 (D.D.C. Nov. 17, 2023). The district court explained the "terms of the [Treaty]" demonstrated "the existence of an agreement to arbitrate." *Id.* at *13. But if there were doubt as to this fact, the Tribunal's determination that an arbitration agreement existed between Russia and the Shareholders was "binding" on the court. *Id.* at *16. The district court likewise treated as binding the Tribunal's holding that Russia was required to apply the entire treaty provisionally. *Id.* at *21.

Russia timely appealed. We have jurisdiction under the collateral order doctrine to review the denial of Russia's claim of sovereign immunity. *See Process & Indus. Devs. Ltd. v. Federal Republic of Nigeria*, 962 F.3d 576, 581, 447 U.S. App. D.C. 316 (D.C. Cir. 2020). We review the district court's jurisdictional determination de novo. *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127, 363 U.S. App. D.C. 87 (D.C. Cir. 2004).

II.

For the Shareholders to enforce these arbitral awards in United States courts, Russia "must not enjoy sovereign

immunity from such an enforcement action."[1] *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 121, 337 U.S. App. D.C. 7 (D.C. Cir. 1999). Foreign sovereigns are "presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993). The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). Unless a plaintiff's case falls within one of the nine exceptions enumerated in the FSIA, the federal courts lack subject matter jurisdiction. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983).

The Shareholders maintain the FSIA's arbitration exception applies to this case. That exception provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of

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1. To enforce an arbitration award in federal court against a foreign sovereign, there must also "be a basis upon which a court in the United States may enforce a foreign arbitral award." *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 121, 337 U.S. App. D.C. 7 (D.C. Cir. 1999). Russia does not dispute that the New York Convention provides a basis for enforcing these arbitral awards. *See* 9 U.S.C. § 207; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 n.2, 450 U.S. App. D.C. 342 (D.C. Cir. 2021) (recognizing the New York Convention provides a basis for enforcing arbitral awards in the federal courts).

> the States in any case . . . in which the action is brought, either to enforce an [arbitration] agreement made by the foreign state with or for the benefit of a private party . . . or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6).

Before concluding the arbitration exception to sovereign immunity applies, a federal court must independently confirm three jurisdictional facts: (1) the existence of an arbitration agreement; (2) an arbitration award; and (3) a treaty that may govern the award. *See Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204, 417 U.S. App. D.C. 463 (D.C. Cir. 2015); *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877, 450 U.S. App. D.C. 342 (D.C. Cir. 2021). This Circuit applies a burden-shifting framework to evaluate whether jurisdiction has been established.[2] When asserting the arbitration

2. The United States has repeatedly argued that this framework is incompatible with the jurisdictional nature of the FSIA. *See* Brief for the United States as Amicus Curiae at 9 n.2, *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024) (arguing that because a foreign state is presumptively immune from suit, there is "no justification for placing the ultimate 'burden of persuasion' on the foreign state"); Brief for the United States as Amicus Curiae

exception applies, a plaintiff must initially satisfy "a burden of production" as to these facts. *Chevron*, 795 F.3d at 204 (cleaned up). The burden then shifts to the foreign sovereign to demonstrate "the absence of the factual basis by a preponderance of the evidence." *Id.* (cleaned up).

Jurisdictional questions must be independently analyzed by the court. *See generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (explaining "the court is bound to ask and answer for itself" the question of jurisdiction). Determining whether we have jurisdiction over a foreign sovereign under the FSIA is no exception. Accordingly, when faced with questions about sovereign immunity, we must independently "resolve any disputed issues of fact" relevant to jurisdiction. *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40, 342 U.S. App. D.C. 145 (D.C. Cir. 2000). Federal courts may not defer to an arbitral tribunal or otherwise outsource the obligation to determine jurisdictional facts that go to the waiver of sovereign immunity under the FSIA.

Supporting Petitioners at 10, *Republic of Hungary v. Simon*, 145 S. Ct. 480, 221 L. Ed. 2d 1 (2025) ("The FSIA's text makes clear that sovereign immunity is jurisdictional, and the burden of establishing subject-matter jurisdiction always rests with the party asserting jurisdiction."). In *Republic of Hungary v. Simon*, the Supreme Court explicitly declined to reach this issue, thereby leaving our framework undisturbed. 145 S. Ct. 480, 490 n.1, 221 L. Ed. 2d 1 (2025).

III.

On appeal, Russia maintains the district court erred in deferring to the Tribunal's conclusions about jurisdictional facts. Russia contends that it retains sovereign immunity because there was no valid arbitration agreement triggering a waiver of immunity under the FSIA.[3] Russia advances two primary arguments in support. First, Russia claims it did not make an offer to arbitrate because provisional application of the Treaty's arbitration clause would have been inconsistent with Russian law. Second, even if Russia were required to apply the arbitration clause provisionally such that it constituted a standing offer to arbitrate, the Shareholders were not investors within the meaning of the Treaty.

At the outset, we must evaluate whether Russia's arguments challenge the *existence* or *validity* of an arbitration agreement or instead merely challenge the *scope* of an arbitration agreement. When a party challenges the existence or validity of an arbitration agreement, that question goes to the applicability of an exception to sovereign immunity and therefore is jurisdictional. *See Belize Soc. Dev. Ltd. v. Government of Belize ("Belize")*, 794 F.3d 99, 102-03, 417 U.S. App. D.C. 257 (D.C. Cir. 2015) (treating as jurisdictional the question of whether a country's Prime Minister had authority to enter an arbitration agreement).

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3. The other jurisdictional prerequisites are easily satisfied, as the district court held and the parties do not contest. The Tribunal awarded the Shareholders $50 billion in damages, and the awards are governed by the New York Convention. *See Creighton*, 181 F.3d at 123-24.

By contrast, questions about whether an arbitration agreement covers a particular investment pertain to the scope of the agreement and are not jurisdictional. *See Chevron*, 795 F.3d at 205-06 (holding that whether certain lawsuits were "investments" within the meaning of an arbitration agreement was not a jurisdictional question); *Stileks*, 985 F.3d at 878 (holding that whether a foreign sovereign "agreed to arbitrate [a] *particular* dispute" was not jurisdictional). Arguments about scope are arguments about arbitrability. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 139 S. Ct. 524, 527, 202 L. Ed. 2d 480 (2019). And when parties delegate questions of arbitrability to an arbitral tribunal, this court is bound by the tribunal's determinations. *See id.* at 528; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (explaining "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration"); *Stileks*, 985 F.3d at 878 (applying *First Options* in the FSIA context).

A.

Russia first argues the Treaty was not an offer to arbitrate "with anybody or about anything." This argument challenges the existence of an arbitration agreement and therefore relates to the jurisdictional question of whether Russia has sovereign immunity for these claims. The district court was required to evaluate this argument independently and erred in giving binding effect to the determinations of the Tribunal on this question.

"[A]n arbitration provision in an investment treaty can . . . constitute an agreement for the benefit of a private party" that "operates as a unilateral offer to arbitrate" and may become an arbitration agreement with a private party when the private party accepts the offer. *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1101-02 (D.C. Cir. 2024) (cleaned up).

Russia maintains that it never made a standing offer to arbitrate. Because the Russian Parliament did not ratify the Treaty, Russia committed only to applying the Treaty provisionally. And the Treaty by its terms provides for provisional application only "to the extent that such provisional application is not inconsistent with [the signatory's] constitution, laws or regulations." Treaty art. 45(1). Russia contends that its law does not permit arbitration of "public law disputes," including "most disputes involving the government" and "government contracts." As a result, Russia was not provisionally bound to the Treaty's arbitration clause.[4]

This argument pertains to our jurisdiction under the FSIA's arbitration exception to sovereign immunity. In

4. Russia also claims the Vice Prime Minister who signed the Treaty "lacked authority to enter the agreement to arbitrate without Parliament's approval" because "the text, purpose, and context" of the Treaty and "a detailed analysis of Russian judicial practice" demonstrate that provisional application of the arbitration clause is inconsistent with Russian law. This "lack of authority" framing is not an independent argument but merely another way of saying that Russia did not make a standing offer to arbitrate because it was not bound to provisionally apply the Treaty's arbitration clause.

this context, an arbitration agreement between Russia and the Shareholders would exist only if Russia had made a standing offer to arbitrate through provisional application of the Treaty. *See NextEra*, 112 F.4th at 1101-02. Russia denies it extended any such offer, because it was not required to apply the Treaty's arbitration clause provisionally. Russia's argument therefore goes to the existence of an arbitration agreement and is jurisdictional.[5]

Because the existence of an arbitration agreement is a jurisdictional fact under the FSIA, the district court was required to decide Russia's claim de novo, without deferring to the Tribunal's conclusions about Russian law.

The district court declined to undertake this inquiry, concluding that it was bound to follow the Tribunal's determinations as to the existence of an arbitration agreement. In doing so, the district court mistakenly relied on the deferential standard applied to disputes over the *scope* of an arbitration agreement. *Hulley Enters.*, 2023 U.S. Dist. LEXIS 206199, 2023 WL 8005099, at *21 n.20, *16 (citing *First Options*, 514 U.S. at 942-43; *Stileks*, 985 F.3d at 878-79). But in *Stileks*, the parties did not contest the existence of an arbitration agreement. Rather, the dispute was over arbitrability, which may be conclusively determined by an arbitral tribunal when the parties so delegate. 985 F.3d at 878. In *First Options*, the

5. This is consistent with the general principle that when the formation of an arbitration agreement is contested, "the court must resolve the disagreement." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299-300, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (cleaned up).

Supreme Court likewise addressed arbitrability, not the existence of an arbitration agreement. 514 U.S. at 943.

We reiterate that the existence of an arbitration agreement is a jurisdictional question under the FSIA that must be independently determined by the court. On remand, the district court must decide whether provisional application of the Treaty's arbitration clause is consistent with Russian law.

B.

Russia also argues that even if it did make a standing offer to arbitrate by signing the Treaty, the Shareholders are not proper beneficiaries of the arbitration clause. The arbitration clause provides for settlement of disputes "between a Contracting Party and an Investor of another Contracting Party." Treaty art. 26. Russia contends that the Shareholder companies, although formally organized under the laws of Cyprus and the Isle of Man, are controlled by Russian citizens and therefore are not investors "of another Contracting Party."

Unlike Russia's other argument, this one is not jurisdictional. Whether the Shareholders are investors within the meaning of the arbitration clause "is an argument regarding the *scope* of the Energy Charter Treaty, not its *existence*." *NextEra*, 112 F.4th at 1103. Our decision in *NextEra* squarely forecloses Russia's argument. In *Chevron*, we similarly rejected Ecuador's attempt to recharacterize as jurisdictional questions about whether certain claims were arbitrable. 795

F.3d at 205. And in *Stileks*, we held that a claim about which investments were covered by the treaty went to arbitrability, not jurisdiction. 985 F.3d at 878. Like the sovereigns' arguments in *Chevron* and *Stileks*, Russia's argument that the Shareholders do not qualify as investors within the meaning of the Treaty pertains to arbitrability and so is not jurisdictional, as the district court correctly held.[6]

* * *

The district court was required to independently determine the jurisdictional facts regarding Russia's sovereign immunity and whether the FSIA's arbitration exception applies to allow the Shareholders' suit. On remand, the district court must assess whether provisional application of the Treaty's arbitration clause was consistent with Russian law.

IV.

The Shareholders also maintain this suit may go forward because the Dutch courts determined that Russia had agreed to arbitrate this dispute, and therefore issue preclusion bars Russia from relitigating the existence of an arbitration agreement. The district court declined to address this argument because it had already deferred to the Tribunal's determination of this jurisdictional question.

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6. Because this issue is not jurisdictional, the denial of jurisdictional discovery was not an abuse of discretion. *See Aljabri v. bin Salman*, 106 F.4th 1157, 1163, 466 U.S. App. D.C. 455 (D.C. Cir. 2024).

Even on the required independent review of jurisdictional facts, the decisions of the Dutch courts may control the factual questions that the district court must answer. Given the numerous threshold issues necessary to resolve before giving preclusive effect to foreign judgments, it is appropriate to remand for the district court to address this issue in the first instance. We will, however, provide "some guidance for the task to be tackled on remand." *Doraleh Container Terminal SA v. Republic of Djibouti*, 109 F.4th 608, 617 (D.C. Cir. 2024) (cleaned up).

The first question the district court must consider is whether issue preclusion applies to jurisdictional questions under the FSIA. Issue preclusion is a judicial doctrine providing that a prior judgment may "foreclos[e] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U.S. 742, 748-49, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). It is well established that, in general, "[i]ssue preclusion applies to threshold jurisdictional issues." *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41, 415 U.S. App. D.C. 191 (D.C Cir. 2015). And sovereign immunity is a jurisdictional issue. Other courts have given preclusive effect to jurisdictional determinations by domestic courts when analyzing subject matter jurisdiction under the FSIA.[7] This court has not previously addressed the issue

7. *See Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 765-67 (9th Cir. 2007) (giving preclusive effect to a previous state court decision that the court lacked subject matter jurisdiction under the FSIA); *Biton v. Palestinian Interim Self-Government Auth.*, 412 F. Supp. 2d 1, 4-5 (D.D.C. 2005) (holding that "collateral estoppel

and so the district court should evaluate whether issue preclusion applies in this context.

If the district court determines that issue preclusion applies to jurisdictional questions under the FSIA, it must also assess whether preclusion extends to *foreign* judgments. This, too, appears to be a novel question. We are aware of no case, and the parties point to no case, in which a court has given preclusive effect to a foreign judgment in order to exercise jurisdiction over a foreign sovereign under the FSIA. That said, United States courts have long accorded respect to, and often enforced, judgments of foreign courts. As Chief Justice Marshall explained, "[I]n the courts of England," the judgment "of a foreign court is conclusive with respect to what it professes to decide," so long as the court "has, in the given case, jurisdiction of the subject-matter." *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 270, 2 L. Ed. 608 (1808). The Supreme Court viewed the English approach "as the uniform practice of civilized nations" and adopted it. *Id.* at 271.

Later, in the seminal case *Hilton v. Guyot*, the Supreme Court explained that recognition of foreign

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preclude[d] re-litigation of the issue[]" of whether certain foreign organizations "[met] the definition of 'foreign state' under the [FSIA]," and were therefore immune from suit, because the issue had been "fully and carefully examined" by two other domestic courts); *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Germany*, No. 10-cv-11551, 2012 U.S. Dist. LEXIS 42993, 2012 WL 1067648, at *10-11 (D. Mass. Mar. 28, 2012) (giving preclusive effect to the Second Circuit's decision that the dispute did not fall within the commercial exception to the FSIA).

judgments is a matter of international comity. 159 U.S. 113, 163-67, 16 S. Ct. 139, 40 L. Ed. 95 (1895). And the Court set forth a series of factors for determining whether such recognition is appropriate in a particular case. *Id.* at 202-03. Since *Hilton*, the federal courts have extended comity to foreign judgments that comport with the standard expounded by the Court. *See Tahan v. Hodgson*, 662 F.2d 862, 864-68, 213 U.S. App. D.C. 306 (D.C. Cir. 1981) (applying the *Hilton* factors and concluding that enforcement of an Israeli judgment was required); *Donnelly v. FAA*, 411 F.3d 267, 270-71, 366 U.S. App. D.C. 291 (D.C. Cir. 2005) (upholding, as consistent with *Hilton*, a federal agency's use of a foreign criminal conviction as evidence in an adjudication)*; see also Phillips USA v. Allflex USA, Inc.*, 77 F.3d 354, 359-61 (10th Cir. 1996); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 456-60 (2d Cir. 1985); *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 34-36 (D.D.C. 2007).

If issue preclusion applies to jurisdictional facts under the FSIA, the district court must apply the *Hilton* factors to determine whether principles of comity counsel in favor of recognizing the Dutch judgments. *See Tahan*, 662 F.2d at 864 (explaining *Hilton*'s relevance for the enforcement of foreign judgments). The court should also consider how the *Hilton* factors intersect with the ordinary standard for assessing collateral estoppel. *See*, *e.g.*, *Hurst*, 474 F. Supp. 2d at 33-34 (analyzing whether a foreign judgment met the *Hilton* factors and the ordinary collateral estoppel standard); *Alfadda v. Fenn*, 966 F. Supp. 1317, 1325-32 (S.D.N.Y. 1997) (applying the *Hilton* comity factors and issue preclusion standards sequentially). The parties

dispute whether the elements of issue preclusion are met here, in particular whether the Dutch proceedings were "full and fair." *See Hilton*, 159 U.S. at 202. We leave these questions for the district court to consider in the first instance.

Whether to apply issue preclusion to foreign judgments with respect to determinations of foreign sovereign immunity is a novel question that may implicate foreign relations and international law. Accordingly, the district court should invite the United States to express the government's position on this issue, through a Statement of Interest pursuant to 28 U.S.C. § 517, or any other appropriate mechanism.

* * *

For the foregoing reasons, we vacate the judgment and remand for the district court to determine whether Russia is entitled to sovereign immunity or if the arbitration exception to the FSIA applies. In making this jurisdictional determination, the district court should also consider whether the Dutch courts' judgments on this question are entitled to preclusive effect.

So ordered.

Appendix A

WILKINS, *Circuit Judge*, concurring:

I join in full the Court's opinion. I write separately to emphasize the limits of our decision. We do not hold that every time a sovereign claims it lacked authority or capacity to agree to arbitrate, it necessarily raises a jurisdictional attack under the Foreign Sovereign Immunities Act. Not all such arguments are jurisdictional. *Compare* Brief for Appellant at 40, *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024) (Nos. 23-7031, 23-7032), Dkt. No. 2011894 (claiming a "lack[]" of "capacity" to agree to arbitrate), *with NextEra*, 112 F.4th at 1103 (determining the argument went to the agreement's scope and not its existence). Rather, Russia's specific argument here, given the text of Article 45 of the Treaty and the basis Russia identifies for limiting its provisional application of the Treaty, plainly goes to the existence of any arbitration agreement. District Courts should carefully consider the justification for any "lack of authority" claim, along with the details of the contested arbitration agreement, in resolving these jurisdictional disputes.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 14-1996

HULLEY ENTERPRISES LTD, *et al.*,

Petitioners,

v.

THE RUSSIAN FEDERATION,

Respondent.

Filed November 17, 2023

Judge Beryl A. Howell

MEMORANDUM OPINION

Petitioners Hulley Enterprises, Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd. (collectively, the "Shareholders") instituted this suit in 2014 against respondent, the Russian Federation, to enforce three arbitral awards (the "Final Awards") issued by an arbitral Tribunal (the "Tribunal") sitting in the Hague under the auspices of the Permanent Court of Arbitration. Petition

to Confirm Arbitration Awards ("Pet.") ¶ 1-2, ECF No. 1; *id.*, Ex. A to Decl. of Emmanuel Gaillard ("Gaillard Decl."), Hulley Final Award, ECF No. 2-1; *id.*, Ex. B to Gaillard Decl., Yukos Final Award, ECF No. 2-2; *id.*, Ex. C to Gaillard Decl., VPL Final Award, ECF No. 2-3 (collectively, the "Final Awards").[1] The Final Awards total over $50,000,000,000 in United States Dollars, which the Shareholders won after nearly ten years of arbitration proceedings that began in 2004 and concluded in 2014. *Id* ¶ 1, 34. In addition to filing this case, the Shareholders have sought to enforce these awards in multiple other countries, including Belgium, France, Germany, India, and the United Kingdom. *See* Resp't's Opp'n Mot. Stay, Ex. 2, Decl. Expert Op. Dr. Andrey Kondakov ¶ 26, ECF No. 127-2. In 2015, the Russian Federation moved, pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss the Shareholder's petition for lack of subject matter jurisdiction, on the grounds of sovereign immunity not exempted under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, and inapplicability of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("New York Convention") to support the exercise of jurisdiction. *See* Resp't's Mot. Dismiss for Lack of Jurisdiction ("Resp't's Mot."), ECF No. 24. The Russian Federation also separately moved to deny confirmation of the petition

1. On the same day the original Petition was filed, the Shareholders filed a Notice of Corrected Petition, ECF No. 4, without providing a redline version or otherwise identifying any "correct[ions]" made. The only apparent correction was to include the parties' addresses and the case number on the first page of the Petition.

under the New York Convention, *see* Resp't's Mot. to Deny Confirmation of Arbitration Awards Pursuant to the New York Convention ("Resp't's Mot. Deny Pet."), ECF No. 23, which motion is not resolved in this Memorandum Opinion, since the enforceability of an arbitral award is separate from, and need not be decided as part of, the question of whether a court has jurisdiction to entertain a petition for such enforcement, *see*, *infra*, Part II.[2]

Before resolution of the Russian Federation's dismissal motions, the Shareholders moved to stay this case pending their appeal of a 2016 lower court ruling in the Dutch District Court that set aside the arbitration awards. Pet'rs' Mot. Stay, ECF No. 105. Shortly after, the Russian Federation filed a Supplemental Motion to Dismiss, based predominantly on the Dutch District Court's ruling. Resp't's Suppl. Mot. Dismiss at 1, ECF No. 108.[3] As the appeal of that judgment progressed

2. The Russian Federation's pending Motion to Deny Confirmation of the Awards raises several defenses to confirmation of the Final Awards, including that the awards are a "nullity" because the parties' never had an agreement to arbitrate. Resp't's Mot. Deny Pet. at 13. While that particular challenge is resolved—and rejected—in this Memorandum Opinion, the Russian Federation also argues against confirmation of the awards as contrary to United States public policy, *id.* at 13-26, and due to various challenges to the arbitral Tribunal's procedures and composition, *id.* at 26-39.

3. The Russian Federation twice moved to amend its Supplemental Motion to Dismiss, see Resp't's Mots. Amend Suppl. Mot. to Dismiss, ECF Nos. 139 and 142, which motions were granted over the Shareholders' objection, *see Hulley Enters. Ltd. v. Russian Fed'n* ("*Hulley I*, 211 F. Supp. 3d 269, 275 n.4

through the appellate courts in the Netherlands, this case was stayed for six years, until November 2021, at the request of both or only one of the parties, depending on which party prevailed in the most recent decision by a Dutch appellate court. *See Hulley Enters. Ltd. v. Russian Fed'n* ("*Hulley II*, 502 F. Supp. 3d 144, 150 (D.D.C. 2020) (recounting history of motions to stay by parties). After the Dutch Supreme Court sided with the Shareholders and remanded the case to the Amsterdam Court of Appeal, the Russian Federation moved to continue the stay of these proceedings. *See* Resp't's Second Mot. to Stay at 1, ECF No. 201. This latest request for a stay was denied, given the substantial years-long delays in resolving this case, when the Dutch proceedings had "no evident resolution in the horizon." *Hulley Enters. Ltd. v. Russian Fed'n* ("*Hulley III*"), No. 14-cv-1996, 2022 U.S. Dist. LEXIS 68521, 2022 WL 1102200, at *9-10 (April 13, 2022).

This case has now consumed judicial resources in the District of Columbia for almost a decade, and related proceedings have likewise demanded judicial attention in multiple jurisdictions abroad, including the Netherlands, Belgium, France, Germany, India, and the United Kingdom. The Russian Federation has repeatedly advanced permutations of the same arguments in attempts to avoid enforcement of the Final Awards in these different fora around the world, and though succeeding in delaying

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(D.D.C. 2016). Yet, having obtained the Court's authorization, the Russian Federation did not file its amended motions on the docket, an oversight corrected by the Court by docketing the amended motions at ECF Nos. 271 and 272. Those amended motions have been fully considered.

enforcement of the Final Awards, these efforts have achieved little success on the merits. *See id.* at *1.

The Russian Federation seeks dismissal of this enforcement action, claiming foreign sovereign immunity that precludes this Court's exercise of subject matter jurisdiction to resolve the Petition and a lack of jurisdictional basis to enforce the award under the New York Convention. Resp't's Mot. at 4-5. The Shareholders counter that jurisdiction may be exercised, pursuant to the New York Convention and the arbitration exception to foreign sovereign immunity set out in the FSIA. *See* Pet'rs' Mem. Opp'n Resp't's Mot. Dismiss ("Pet'rs' Opp'n"), ECF No. 63.

Despite explicit findings to the contrary by the arbitral Tribunal, after extensive evidentiary hearings and proceedings lasting almost ten years, as well as set-aside proceedings in appellate courts in the Netherlands that resulted in a favorable decision for the Shareholders at the Dutch Supreme Court, the Russian Federation continues to insist that no arbitration agreement covering the underlying dispute at issue was agreed-to or entered by the Russian Federation and, further, demands that this Court exercise *de novo* review to revisit the existence of such an agreement, which is key here to exercising jurisdiction as an exception to foreign sovereign immunity.

In urging this Court to eschew exercising jurisdiction over this arbitration enforcement action, the Russian Federation asserts arguments that cannot be squared with binding precedent and that risk upending the global

community's predominant mechanism for international commercial dispute resolution and decreasing international accountability of states and private parties conducting business abroad, with concomitant adverse repercussions for international investments and transactions. For reasons explained more fully below, the Russian Federation's original and supplemental motions to dismiss the Shareholders' Petition on foreign sovereign immunity and subject matter jurisdiction grounds are denied, and this case may proceed to the merits to determine enforcement of the Final Awards under the New York Convention.

I. BACKGROUND

Summarized below is the factual background and procedural history relevant to resolving the pending motions to dismiss.

A. Factual Background

The Shareholders were the controlling shareholders of Yukos, Russia's largest and first fully privatized oil company following the dissolution of the Soviet Union. Pet. ¶ 11. According to the Shareholders, in 2003, the Russian Federation "began a campaign devised to bankrupt Yukos, appropriate the company's assets, and silence the company's head, Mikhail Khodorkovsky," out of concern about Khodorkovsky's support for political parties not aligned with President Vladimir Putin and Yukos's plans to merge with Western oil interests. *Id.* ¶ 12. "[A]lleging that Yukos had engaged in a series of tax-

avoidance schemes," the Russian Federation aggressively investigated Yukos, conducting raids of its offices and the homes of Yukos employees. *Id.* ¶¶ 14-15. Ultimately, the Russian Federation arrested, charged, and tried high-ranking Yukos officers, including Khodorkovsky, resulting in lengthy sentences of incarceration. *Id.* ¶ 16. Following Khodorkovsky's arrest in October 2003, numerous Yukos personnel left Russia fearing the possibility of continued harassment or prosecution; the Russian Federation's extradition requests to their countries of flight were "uniformly rejected." *Id.* ¶ 18.

While its investigation and charging of Yukos and its employees was ongoing, the Russian Federation also began "levying a series of tax reassessment judgments against [the company]." *Id.* ¶ 24. From December 2003 to December 2004, the Russian Federation ordered Yukos to pay a total of over $20,000,000,000 in United States Dollars for tax liabilities between the years 2000 and 2003, and then, to satisfy those alleged debts, auctioned off Yukos's "core asset," YNG, for a "fraction of [its] value." *Id.* ¶¶ 25-30. Shortly after the auction, the entity that acquired YNG was itself acquired by the state-owned oil company, Rosneft, *id.* ¶ 30, described as a "creature of President Putin's entourage," *id.* ¶ 59. "Gutt[ed] . . . of its most profitable asset," and after a series of transactions also involving Rosneft, Yukos was placed under supervision for bankruptcy proceedings. *Id.* ¶¶ 31-32. In July 2006, its creditors voted to declare Yukos bankrupt. *Id.* ¶ 32. As the actions against Yukos were occurring, the Shareholders initiated steps to recoup the massive losses they suffered, leading, as described below, to arbitration proceedings and litigation around the world.

Appendix B

1. Shareholders' Initiation of Arbitration Under the Energy Charter Treaty

In November 2004, the Shareholders notified the Russian Federation of alleged violations of the Energy Charter Treaty (the "ECT"), to which the Russian Federation was at the relevant time, indisputably, a signatory. Pet. ¶ 34.[4] The ECT requires every "Contracting Party" to "accord . . . fair and equitable treatment" to "Investors of other Contracting Parties," Pet., Ex. G to Gaillard Decl., ECT art. 10(1), ECF No. 2-7, and prohibits "nationalization or expropriation" of "Investments of Investors," except where such nationalization is in the public interest, nondiscriminatory, carried out under due process of law, and accompanied by appropriate compensation, ECT art. 13(1). After failing to settle the dispute amicably within the three-month period required by the ECT, the Shareholders initiated arbitration proceedings, pursuant to Article 26 of the ECT. Hulley Final Award ¶ 10.

2. Selection of, and Unanimous Determinations by, the Arbitral Tribunal

In accordance with Article 26 of the ECT, a three-member arbitral Tribunal was assembled, composed of Judge Stephen M. Schwebel, appointed by the Russian

4. The Russian Federation does not contest being a signatory to the ECT from December 1994 to October 2009, Pet. ¶¶ 34, 40; *see* Resp't's Mot. at 28-30, and the arbitral Tribunal, which issued the Awards at issue, determined that investments made during that time period are subject to the ECT's protection, Pet. ¶ 40.

Federation; Dr. Charles Poncet, appointed as a replacement arbitrator by the Shareholders in September 2007; and The Honorable L. Yves Fortier, appointed by the Permanent Court of Arbitration. *Id.* ¶ 12.[5] On August 1, 2005, the parties agreed that The Hague would be the seat of the arbitration. *Id.* ¶ 13. During the arbitration proceedings, the Russian Federation challenged the Tribunal's jurisdiction over the dispute on multiple grounds, each of which the Tribunal exhaustively addressed first before turning to the merits of the Shareholders' claims. *See*, *e.g.*, *id.* ¶¶ 14-21; 1272; 1373; 1446; 1888. After hundreds of pages of filings and a ten-day hearing on the question of jurisdiction, in November 2009, the Tribunal rendered "Interim Awards" dismissing or deferring decision on each of the Russian Federation's jurisdictional challenges. *See* Pet., Ex. D to Gaillard Decl., Hulley Interim Award, ECF No. 2-4; *id.*, Ex. E to Gaillard Decl., Yukos Interim Award, ECF No. 2-5; *id.*, Ex. F to Gaillard Decl., VPL Interim Award, ECF No. 2-6. Relevant here, the Tribunal unanimously rejected the Russian Federation's argument that it never accepted the ECT's arbitration provision and thus never agreed to the arbitration proceedings before the Tribunal. Pet. ¶ 40; *see* Hulley Final Award ¶ 21.

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5. The Russian Federation's appointee to the Tribunal, Judge Schwebel, served three terms on the International Court of Justice, and as President of that Court, has been a member of the United Nation's ("UN") International Law Commission and other UN committees, and taught international law at Johns Hopkins University, Cambridge University, the Australian National University, and the Graduate Institute of International Studies in Geneva.

Proceeding to the merits stage, the Tribunal then considered thousands of pages of filings, evidence, and arguments presented at a twenty-one day hearing, post-hearing briefing, and the parties' commentary on developments in other legal proceedings relating to Yukos. Hulley Final Award ¶¶ 41-62. After nearly ten years of "mammoth" proceedings, *id.* ¶ 4, on July 18, 2014, the Tribunal rendered three substantially similar "Final Awards," consisting of over 600 pages each. Pet. ¶ 55. Notably, these Awards were unanimous and joined by Judge Schwebel, the Russian Federation's appointee to the Tribunal. *See id.* ¶ 64. The Tribunal determined that while Yukos "was vulnerable on some aspects of its tax optimization scheme," the Russian Federation had "taken advantage of that vulnerability by launching a full assault on Yukos and its beneficial owners in order to bankrupt Yukos and appropriate its assets while, at the same time, removing Mr. Khodorkovsky from the political arena." Hulley Final Award ¶ 515. Consequently, the Tribunal concluded that the Russian Federation had violated the ECT, *see id.* ¶ 1580, and awarded the Shareholders a combined $50,020,867,798 USD in damages, plus interest, as well as $60,000,000 USD in attorneys' fees and €4,240,000 in arbitration costs, plus interest. Pet. ¶¶ 62-63.

B. Procedural History

Following the issuance of the Final Awards, the Shareholders began efforts to collect by initiating confirmation and enforcement proceedings in Belgium, France, Germany, India, the United Kingdom, and the United States. *See* Resp't's Opp'n Mot. Stay, Ex. 2, Decl.

Expert Op. Dr. Andrey Kondakov ¶ 26, ECF No. 127-2. The Shareholders initiated the instant proceeding on November 25, 2014, pursuant to the Federal Arbitration Act (the "FAA"), which provides for confirmation and enforcement of arbitral awards falling under the New York Convention. *See* 9 U.S.C. §§ 201-207; Pet. ¶ 3.[6]

Meanwhile, the Russian Federation began efforts to set aside the Final Awards. On November 10, 2014—fifteen days before the initiation of the instant confirmation proceedings—the Russian Federation submitted a request to set aside the Final Awards to the District Court of The Hague. *See* Resp't's Mot., Ex. R-328, Writ of Summons at 2, ECF No. 43-8. By the terms of the New York Convention, confirmation and enforcement of the Final Awards "may be refused" if the Awards have been set aside by courts at the seat of the arbitration. New York Convention, art. V(1)(e). In support of its request, the Russian Federation advanced several arguments, including repeating the argument previously rejected by the Tribunal that the Tribunal did not have jurisdiction to issue the Final Awards because the Russian Federation had never agreed

6. Under the FAA, a district court "shall confirm" an award "falling under the [New York] Convention . . . unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. An award "fall[s] under" the New York Convention if it is "rendered within the jurisdiction of a signatory country." *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123, 337 U.S. App. D.C. 7 (D.C. Cir. 1999). The Netherlands, the Russian Federation, and the United States are members of the New York Convention. *See* New York Arbitration Convention, Contracting States, http://www.newyorkconvention.org/countries (last visited Nov. 16, 2023).

to arbitrate its dispute with the Shareholders. Writ of Summons at 46-93. Specifically, the Russian Federation contended that because the ECT was never ratified by the Russian State Duma, only certain ECT provisions applied to the Russian Federation, and the ECT's arbitration provision, which constitutes a standing offer by parties to the ECT to arbitrate disputes arising under the treaty, was not among those that applied. *Id.*

While the set aside proceedings were pending, on October 20, 2015, the Russian Federation moved in this Court to deny the Shareholders' request for confirmation of the Final Awards, Resp't's Mot. Deny Pet., and to dismiss the Petition for lack of subject matter jurisdiction, invoking the Russian Federation's entitlement to sovereign immunity under the FSIA, 28 U.S.C. §§ 1330, 1602-1611, and challenging the applicability of the New York Convention, Resp't's Mot. at 25-43. In those filings, the Russian Federation also suggested that the Final Awards were rendered improperly on the merits, characterizing the Shareholders as "shell companies that are owned, controlled and operated by . . . criminal oligarchs," including Khodorkovsky, Resp't's Mot. at 1; *see also* Resp't's Mot. Deny Pet. at 2, and, further, that the Shareholders "were not candid with the arbitration tribunal," *i.e.*, "did not disclose . . . their participation in . . . fraud" or "correct [certain] misimpression[s] of the Tribunal" about the companies, Resp't's Mot. at 2. Not surprisingly, the Shareholders oppose dismissal. *See* Pet'rs' Opp'n.

Appendix B

Before the Russian Federation's pending motion to dismiss was resolved, the District Court of The Hague granted, on April 20, 2016, the Russian Federation's request to set aside the Awards. *See* Resp't's Notice Suppl. Auth., Ex. 2, Dist. Ct. The Hague Judgment April 20, 2016 (Eng. Trans.) ("Dutch District Court Judgment"), ECF No. 102-2. That court concluded the arbitral Tribunal lacked jurisdiction to issue the Final Awards because the Russian Federation had never agreed to arbitrate its disputes under the ECT. Dutch District Court Judgment at 62; *see also Hulley II*, 502 F. Supp. 3d at 149.[7] The Russian Federation notified this Court of the decision, arguing that the Dutch District Court Judgment supports its position that this Court lacks subject matter jurisdiction over the action, and submitting a Supplemental Motion to

7. The Dutch District Court found that no arbitration agreement existed between the parties, agreeing with the Russian Federation that the ECT's Article 45(1) allowed the Russian Federation, as a signatory, to apply the ECT in a piecemeal fashion and not apply the ECT's arbitration provision because of a conflict with domestic law, with the result that the ECT's arbitration provision was inapplicable to the Russian Federation. Dutch District Court Judgment at 36-37, 50, 62-63. In reaching this conclusion, the Dutch District Court not only construed the ECT and Russian domestic law differently than the Tribunal, *see* Hulley Interim Award ¶ 301—and, ultimately, also differently than appellate Dutch courts—but also seemingly failed to consider or credit the Russian Federation's letter submitted to the Tribunal in July 2005, affirmatively accepting the Tribunal's authority to determine its jurisdiction, *see*, *generally*, Dutch District Court Judgment; *see also* Pet'rs' Opp'n, Decl. of Yas Banifatemi ("Banifatemi Decl."), Ex. 3, Letter, dated July 29, 2005, from Russian Federation to Tribunal ("2005 Letter") at 1-2, ECF No. 63-5.

Dismiss the Shareholders' Petition. *See* Resp't's Notice Suppl. Auth., ECF No. 102; Resp't's Suppl. Mot. Dismiss. The Shareholders appealed the April 2016 Dutch District Court Judgment setting aside the awards to the Court of Appeal of The Hague and also requested that this Court stay the instant proceedings pending that appeal. *Hulley Enters. Ltd. v. Russian Fed'n* ("*Hulley I*, 211 F. Supp. 3d 269, 272 (D.D.C. 2016). Over the Russian Federation's objections, the Shareholders' stay request was granted and these proceedings paused "until January 21, 2019, or until resolution of proceedings in the Netherlands to set aside [the Final Awards], whichever date occurs earlier." Order (Sept. 30, 2016) ("2016 Stay Order"), ECF No. 153; *see Hulley I*, 211 F. Supp. 3d at 288.

More than two years later, on December 27, 2018, the parties jointly moved to extend the 2016 Stay Order until January 21, 2020, due to the anticipated date for the Court of Appeal of The Hague to issue its decision on the Shareholders' appeal of the set-aside judgment in "either late 2019 or early 2020." Parties' Joint Mot. to Extend Stay at 3, ECF No. 171. This motion was granted that same day. Minute Order (Dec. 27, 2018). Again, on October 10, 2019, the parties jointly moved to extend the 2016 Stay Order until May 20, 2020, upon being notified that the Court of Appeal of The Hague would be rendering its decision regarding the Shareholders' appeal of the set-aside judgment on February 18, 2020. *See* Joint Status Report, ECF No. 175. This second joint extension request was also granted. Minute Order (Oct. 10, 2019).

Appendix B

On February 18, 2020, almost four years after the original 2016 Stay Order took effect, the Court of Appeal of The Hague issued, in a 145-page decision, a judgment reversing the 2016 Dutch District Court Judgment and rejecting additional arguments by the Russian Federation seeking to invalidate the awards. *Hulley II*, 502 F. Supp. 3d at 150.[8] Following the lifting of the 2016 Stay Order in May 2020, the Russian Federation promptly moved, on June 15, 2020, to impose a second stay in this action pending its appeal to the Dutch Supreme Court of the February 2020 Court of Appeal of The Hague decision. *Id.* at 150-151. After extensive briefing on this motion was completed, the Russian Federation's motion was granted, over the Shareholders' objection, on November 20, 2020, and this case was stayed "until the earlier of November 18, 2022 or the conclusion of the proceedings to set aside the Awards in the Dutch Supreme Court." *Id.* at 164; *see also* Order (Nov. 20, 2020) ("2020 Stay Order"), ECF No. 193. In so doing, this Court concluded, *inter alia*, "that the enforceability of the arbitral award [was] in flux to such a degree that a stay is warranted," *Hulley II*, 502 F. Supp. 3d at 157, and expressed concern that "any conclusion reached [in this Court] may be upended by contrary findings by the Dutch Supreme Court," *id.* at 155.

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8. Before issuing this judgment, the Court of Appeal of The Hague conducted a full *de novo* review of each of the Russian Federation's grounds for attacking the Final Awards. Pet'rs' Suppl. Submission in Opp'n to Resp't's Mot. to Dismiss Under the Foreign Sovereign Immunities Act ("Pet'rs' Suppl. Submission."), Decl. of Steven M. Shepard, Esq. ("Shephard Decl."), Ex. 2, First Decl. of Tobias Cohen Jehoram ("First Cohen Jehoram Decl.") at ¶¶ 22, 30, ECF No. 240-2.

Dissatisfied with the continued pause in their efforts to confirm the Final Awards in the United States now that developments in the Dutch courts had turned to their favor, the Shareholders appealed the 2020 Stay Order to the D.C. Circuit, *see* Notice of Appeal, ECF No. 195, which heard oral argument on October 15, 2021. Three weeks later, however, on November 5, 2021, the Dutch Supreme Court rendered a decision on the Russian Federation's appeal that automatically lifted the 2020 Stay Order. *See* 2020 Stay Order at 1; Pet'rs' Status Report, Ex. 1, Dutch Supreme Court Judgment, ECF No. 198-1.[9] This lapse of the 2020 Stay Order prompted the Shareholders to seek dismissal of their appeal, *see* Consent Mot. to Dismiss, Case No. 20-7113 (D.C. Cir. Nov. 17, 2021), which was

9. The Dutch Supreme Court's judgment, which was issued upon review of almost 950 pages of briefing, pleading notes, and post-hearing submissions and after a day-long oral hearing, affirmed the holdings of the Court of Appeal of The Hague rejecting the Russian Federation's arguments that the country was not bound provisionally to apply the ECT's arbitration provision, that the Shareholders were not "investors," that the transactions at issue were not "investments" under the definitions in the ECT, and that the Tribunal's failure to refer tax-related questions to Russian tax authorities invalidated the Awards. Pet'rs' Suppl. Submission at 6-7. Notwithstanding the exhaustive and considered appellate review provided by both the Court of Appeal of The Hague, which reversed the Dutch District Court's Judgment setting-aside the Final Awards, and the Dutch Supreme Court, which affirmed this reversal, the Russian Federation urges that this Court rely instead on the Dutch District Court Judgment as authority to find that subject matter jurisdiction is lacking in this Court. *See* Resp't's Suppl. Mot. Dismiss at 6-44. For obvious reasons put bluntly, the Dutch District Court Judgment is simply not good law in its own local forum and therefore not persuasive authority in this one.

granted by the D.C. Circuit, with the mandate remanding the case to this Court issued on December 1, 2021, *see* Mandate, ECF No. 200.

The next day, on December 2, 2021, after noting "that the stay imposed on November 20, 2020 is now lifted with 'resolution of proceedings in the Dutch Supreme Court,'" this Court directed the parties to brief whether this case should be subject to a stay "pending resolution of proceedings on remand from the Dutch Supreme Court." Minute Order (Dec. 2, 2021) (quoting 2020 Stay Order) (internal citations omitted). In addition to responding to this order, the Russian Federation moved to stay this litigation for the duration of the current remand proceedings before the Amsterdam Court of Appeal, *see* Resp't's Second Mot. to Stay at 1, which was the third opposed motion for a stay to be considered by this Court since 2016, *see* Pet'rs' Opp'n to Resp't's Mot. to Extend Stay ("Pet'rs' Stay Opp'n") at 4, ECF No. 204.

In March, 2022, based on the Russian Federation's characterization as "baseless" of the Shareholders' expressed concern that armed conflict between the Russian Federation and Ukraine may lead to the unavailability of Russian Federation assets in the United States, Resp't's Reply in Supp. Mot. to Stay ("Resp't's Stay Reply") at 6, ECF No. 208, the Court directed the Russian Federation to advise of any "material developments affecting arguments it previously presented regarding the propriety of a stay or prejudgment security in this case following the Russian Federation's invasion of Ukraine beginning on February 24, 2022," Minute Order (March 16, 2022). In response, the

Russian Federation explained that its invasion of Ukraine is an "evolving situation provid[ing] yet another reason to stay these proceedings during the ongoing parallel set-aside litigation in Amsterdam and while steps are taken to locate available and acceptable substitute Counsel for the Russian Federation." Resp't's Status Report at 1, ECF No. 224. In any event, the Russian Federation represented that it is "not aware of any foreseeable risk of [Russian Federation] assets leaving the United States" as the result of sanctions or other economic measures flowing from the war. *Id.* at 2. The Shareholders disagreed with these representations, stating that the "unprecedented sanctions" being imposed on the Russian Federation "almost daily" will make "[f]inding and executing on assets . . . far more difficult," Pet'rs' Resp. to Status Report at 1-2, ECF No. 225, such that further delay in this litigation "would in effect reward the Russian Federation for invading Ukraine in violation of international law," *id.* at 2 (citing March 16, 2022 International Court of Justice ruling ordering the Russian Federation to "suspend the military operations commenced on 24 February 2022 in the territory of Ukraine").[10]

After considering these concerns raised by the Shareholders and the factors identified as relevant to a stay inquiry by the D.C. Circuit, the Russian Federation's motion to stay was denied. *Hulley III*, 2022 U.S. Dist. LEXIS 68521, 2022 WL 1102200, at *10. Relying on recent D.C. Circuit precedent requiring consideration of "'(1)

10. The International Court of Justice's ruling is available at https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf.

the general objective of arbitration [in] the expeditious resolution of disputes and the avoidance of protracted and expensive litigation' [and] '(2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved,'" in determining whether to further extend a stay of enforcement of a foreign arbitration award, *Hulley III*, 2022 U.S. Dist. LEXIS 68521, 2022 WL 1102200, at *6 (quoting *LLC SPC Stileks v. Republic of Moldova* ("*Stileks*"), 985 F.3d 871, 880-81, 450 U.S. App. D.C. 342 (D.C. Cir. 2021)), this Court found both factors "firmly militate[d] against entry of another stay," *id.* This Court also cited recent binding precedent that "a foreign court's order ostensibly setting aside an arbitral award has *no* bearing on the district court's jurisdiction and is instead an affirmative defense properly suited for consideration at the merits stage." 2022 U.S. Dist. LEXIS 68521, [WL] at *8 (quoting *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria* ("*P&ID*"), 27 F.4th 771, 772, 456 U.S. App. D.C. 154 (D.C. Cir. 2022)) (emphasis in original).

Since this most recent motion to stay the case was denied, the Russian Federation and the Shareholders have filed supplemental briefing. *See* Resp't's Suppl. Submission in Supp. of Resp't's Mot. to Dismiss Under the Foreign Sovereign Immunities Act ("Resp't's Suppl. Submission"), ECF No. 232; Pet'rs' Suppl. Submission in Opp'n to Resp't's Mot. to Dismiss Under the Foreign Sovereign Immunities Act ("Pet'rs' Suppl. Submission"), ECF No. 239; Resp't's Proposed Suppl. Reply ("Resp't's Suppl. Reply), ECF No. 246-1.[11] The Russian Federation

11. The Russian Federation filed a Motion for Leave to File a Proposed Supplemental Reply, at ECF No. 246. That motion is

has also requested an evidentiary hearing to provide an opportunity to cross-examine four witnesses, two of whom previously testified and were extensively cross-examined in the proceedings before the arbitral Tribunal, and all four of whom submitted sworn declarations in support of the Shareholders' position in this case. *See* Resp't's Mot. for Evidentiary Hearing to Cross-Examine Pet'rs' Witnesses ("Discovery Mot."), ECF No. 244; Pet'rs' Opp'n to Resp't's Mot. for Evidentiary Hearing ("Discovery Opp'n") at 6, ECF No. 251. The parties have also submitted several notices of supplemental authority. *See*, *e.g.*, Pet'rs' Not. Suppl. Auth. of Sept. 14, 2022, ECF No. 252; Pet'rs' Not. Suppl. Auth. of Oct. 18, 2022, ECF No. 257; Resp't's Not. Suppl. Auth. of May 12, 2023, ECF No. 265; Resp't's Not. Suppl. Auth. of Aug. 9, 2023, ECF No. 267; Pet'rs' Not. Suppl. Auth. of Oct. 2, 2023, ECF No. 269; Pet'rs' Not. Suppl. Auth of Nov. 8, 2023, ECF No. 273. In total the parties have submitted over 400 pages of briefing related to the instant motion, more than 1,000 pages of supplemental authorities, and in excess of 100,000 pages of exhibits, including declarations, affidavits, and other documents, all of which have been considered.

After almost eight years of delay at the request of the parties—with litigation still underway before Dutch courts, the seat of the arbitral Awards, on the enforceability of the Final Awards—the Russian Federation's original and supplemental motions to dismiss for lack of subject matter jurisdiction are ripe for decision.

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granted, and the Proposed Supplemental Reply attached to that motion has been considered.

II. LEGAL STANDARD

"Federal courts are courts of limited jurisdiction," *Gunn v. Minton*, 568 U.S. 251, 256, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)), and "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto," *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 980, 432 U.S. App. D.C. 392 (D.C. Cir. 2017) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986)). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), plaintiff thus "bears the burden of invoking the court's subject matter jurisdiction." *Arpaio v. Obama*, 797 F.3d 11, 19, 418 U.S. App. D.C. 163 (D.C. Cir. 2015) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). "It is settled law that [t]he FSIA is the sole basis for obtaining jurisdiction over a foreign state in our courts in civil cases." *P&ID*, 27 F.4th at 775 (quoting *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 121, 337 U.S. App. D.C. 7 (D.C. Cir. 1999)) (internal quotation marks omitted). A foreign state is presumptively immune from suit in United States courts, and to exercise jurisdiction over a foreign sovereign, a district court must determine that one of the FSIA's exceptions to sovereign immunity applies. *Id.*

"Where a plaintiff has asserted jurisdiction under the FSIA and the defendant foreign state has asserted 'the jurisdictional defense of immunity,' the defendant state

'bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity.'" *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102, 417 U.S. App. D.C. 257 (D.C. Cir. 2015) (quoting *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40, 342 U.S. App. D.C. 145 (D.C. Cir. 2000)). Further, in deciding a motion to dismiss on the basis of the FSIA, courts' subject-matter and personal jurisdictional inquiries often collapse into the same question: "If none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983); *see also Schubarth v. Federal Republic of Germany*, 891 F.3d 392, 397 n.1, 436 U.S. App. D.C. 16 (D.C. Cir. 2018) ("Under the FSIA, personal jurisdiction exists where (1) subject matter jurisdiction has been satisfied, and (2) proper service has been effected." (citing 28 U.S.C. § 1330(b))).

"The district court's task in assessing jurisdiction under the FSIA varies depending on whether the defendant presents a legal or a factual challenge." *Simon v. Republic of Hungary*, 77 F.4th 1077, 1116 (D.C. Cir. 2023) (citing *Phoenix Consulting*, 216 F.3d at 40). Where a jurisdictional dispute challenges only the "legal sufficiency" of the jurisdictional basis, the court should take the petitioner's factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Id.* When a respondent "seeks at the jurisdictional threshold to challenge the factual basis of the court's jurisdiction . . . the court must go beyond the pleadings and resolve"

any dispute necessary to the disposition of the motion to dismiss. *Id.* (quoting *Phoenix Consulting*, 216 F.3d at 40) (internal quotations marks omitted); *see also Feldman v. F.D.I.C.*, 879 F.3d 347, 351, 434 U.S. App. D.C. 9 (D.C. Cir. 2018). In such situations, the "court may properly consider allegations in the complaint and evidentiary material in the record," affording plaintiff "the benefit of all reasonable inferences." *Feldman*, 879 F.3d at 351; *see also Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49, 422 U.S. App. D.C. 227 (D.C. Cir. 2016) ("In considering a motion to dismiss for lack of subject matter jurisdiction . . . we 'may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.'" (quoting *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253, 365 U.S. App. D.C. 270 (D.C. Cir. 2005))).

In conducting this inquiry, "[t]he district court retains 'considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,' but it must give the plaintiff 'ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Simon*, 77 F.4th at 1116 (quoting *Phoenix Consulting*, 216 F.3d at 40). Regardless of the procedures, however, "the sovereign 'defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity.'" *Id.* (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197, 363 U.S. App. D.C. 404 (D.C. Cir. 2004)). The "burden of proof in establishing the inapplicability of [the FSIA's] exceptions is upon the party claiming immunity," because sovereign immunity is an affirmative defense. *Transam.*

S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1002, 247 U.S. App. D.C. 208 (D.C. Cir. 1985).

The FAA authorizes a party to seek several kinds of action from a federal court, such as the confirmation or vacatur of an arbitral award, but "the federal courts . . . may or may not have jurisdiction to decide such a request." *Badgerow v. Walters*, 596 U.S. 1, 142 S. Ct. 1310, 1314, 212 L. Ed. 2d 355 (2022). The federal courts must have an "independent jurisdictional basis" to resolve such requests. *Id.* (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)). In the context of an action brought under the FAA's Sections 9 or 10 to confirm or vacate an arbitral award, a court "may look only to the application actually submitted to it in assessing its jurisdiction." *Id.* An applicant seeking to vacate an arbitral award must identify a grant of jurisdiction, apart from the FAA itself, authorizing "access to a federal forum." *Id.* at 1316 (citing *Vaden v. Discover Bank*, 556 U.S. 49, 59, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009)).

Whether a court has jurisdiction to entertain a petition brought under the FAA is a separate question from the merits question concerning the validity or enforceability of an arbitral award. *P&ID*, 27 F.4th at 772; *see Diag Human v. Czech Rep.—Ministry of Health*, 824 F.3d 131, 137-38, 422 U.S. App. D.C. 413 (D.C. Cir. 2016). Thus, "the district court need not determine the validity of the arbitral award as part of its jurisdictional inquiry." *P&ID*, 27 F.4th at 776.

III. DISCUSSION

To exercise subject matter jurisdiction over a petition to enforce a foreign arbitral award against a foreign sovereign, two inter-related requirements must be satisfied: (1) "there must be a basis upon which a court in the United States may enforce a foreign arbitral award," and (2) the foreign state "must not enjoy sovereign immunity from such an enforcement action." *Creighton Ltd.*, 181 F.3d at 121.[12] Here, the parties' dispute whether the Russian Federation enjoys sovereign immunity arises principally from the latter's challenge to the existence of an arbitration agreement, which is therefore a threshold question also critical to determining a basis upon which the Final Awards may be enforced. The second prong of the *Creighton* inquiry will thus be considered first, after brief review of the FSIA.

A. FSIA's Arbitration Exception and Applicable Legal Principles

The FSIA is "a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of*

12. The Russian Federation raises no dispute as to proper service and the exercise of personal jurisdiction in this case, *see, generally*, Resp't's Mot., and thus this prerequisite for exercise of jurisdiction is met, *see GSS Group Ltd v. Nat'l Port Authority*, 680 F.3d 805, 811-12, 401 U.S. App. D.C. 1 (D.C. Cir. 2012) (requiring both subject matter jurisdiction and personal jurisdiction in FSIA case).

Austria v. Altmann, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004) (quoting *Verlinden*, 461 U.S. at 488). The FSIA "provides, with specified exceptions, that a 'foreign state shall be immune from the jurisdiction of the courts of the United States. . . .'" *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 173, 137 S. Ct. 1312, 197 L. Ed. 2d 663 (2017) (quoting 28 U.S.C. § 1604). Consequently, "subject matter jurisdiction in any [FSIA] action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden*, 461 U.S. at 493.

At issue here is the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), which permits U.S. courts to confirm an arbitration award rendered outside of the United States in certain instances.[13] Congress amended the FSIA in 1988 to include the arbitration exception, ensuring that foreign agreements to arbitrate and arbitral awards governed by certain treaties would be enforceable in U.S. courts, even

13. The Shareholders also assert, in a footnote to their opposition to the Russian Federation's Motion to Dismiss, that subject matter jurisdiction may also be exercised under the FSIA's waiver exception, 28 U.S.C. § 1605(a)(1), because "the Russian Federation's agreement to arbitrate constitutes an implied waiver of immunity with respect to award enforcement." Pet'rs' Opp'n at 10 n.4. This footnote-worthy only assertion, as well as the Russian Federation's counterarguments, *see*, *e.g.*, Resp't's Suppl. Submission at 27-31; Resp't's Suppl. Reply at 2-7, need not be addressed since the subject matter jurisdiction issue is resolved on different grounds that the FSIA's arbitration exception applies given the parties' clear and unambiguous intent to delegate the determination of whether an arbitration agreement existed to the Tribunal.

against sovereigns. *See Process & Indus. Devs. Ltd. v. Fed. Republic of Nig.*, 506 F. Supp. 3d 1, 10 (D.D.C. 2020), *aff'd*, 27 F.4th 771, 456 U.S. App. D.C. 154 (D.C. Cir. 2022). This exception has authorized the participation of U.S. federal courts in upholding the international arbitration system that has flourished since the post-World War II era to facilitate cross-border investments and business dealings.

The conventional wisdom undergirding the international arbitration system is that promising foreign investors an efficient and fair alternative dispute-resolution mechanism outside of potentially biased local courts would encourage foreign direct investment, insulated from the uncertainties created by the host country's domestic politics and law. *See generally* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L. J. 67, 68-79 (2005) (arguing that arbitration provisions in bilateral international treaties ("BITs") are a "mechanism that gives important, practical significance to BITs, a mechanism that truly enables these bilateral treaties to afford protection to foreign investment," and that BITs have promoted foreign direct investment in developing countries and the United States); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L. J. 1049 (June 1961) (detailing the reasons for the United States' ratification of the New York Convention).

Appendix B

The Supreme Court has recognized the importance of international dispute resolution through arbitration and the need to respect and preserve parties' agreements to resolve disputes through arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629, 631, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (highlighting "that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement" to arbitrate disputes, and noting "the emphatic federal policy in favor of arbitral dispute resolution . . . [a] federal policy [that] applies with special force in the field of international commerce."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974) ("A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes [to achieve orderliness and predictability essential to any international business transaction], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."). International arbitration enables "contending states under appropriate conditions to settle significant international conflicts" without turning to war or other means of resolving conflicts by force. *See generally* Jeswald W. Salacuse, *Interstate Arbitration*: " . . . Settling Disputes Which Diplomacy Has Failed to Settle," 38 Harv. Negotiation

J. 179, 180-96 (Spring 2022) (describing the history of sovereign states using international arbitration to resolve disputes in place of war).

The FSIA's arbitration exception provides, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force . . . calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6).

For the Court's jurisdiction to attach against a foreign sovereign under the arbitration exception, "the existence of an arbitration agreement, an arbitration award and a treaty governing the award are all jurisdictional facts that must be established." *Stileks*, 985 F.3d at 877 (citing *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204, 417 U.S. App. D.C. 463 (D.C. Cir. 2015)). As to all three requirements, petitioner bears "a burden of production" to support a claim that the arbitration exception applies. *Chevron*, 795 F.3d at 204. This burden as to the existence of an arbitration agreement may be satisfied by a straightforward production of a foreign sovereign's agreement to arbitrate, with the burden then shifting to the foreign

sovereign to demonstrate that the *prima facie* evidence presented by the petitioner "did not constitute a valid arbitration agreement between the parties." *Id* at 205. "The burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Id.* at 204 (quoting *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940, 381 U.S. App. D.C. 316 (D.C. Cir. 2008)). After "the party challenging immunity has presented prima facie evidence of an agreement between the parties and [] the sovereign asserting immunity has" had an opportunity to rebut that evidence, the "jurisdictional task before the District Court [is] to determine whether [the foreign sovereign] had sufficiently rebutted the presumption that the [treaty and] notice of arbitration constituted an agreement to arbitrate." *Id.* at 205 & n.3.

This "jurisdictional task"—namely, determining whether the foreign sovereign has rebutted the presumption that the treaty and notice of arbitration constitute an arbitration agreement between the parties—is simplified in cases where the parties have agreed to delegate the determination of the existence of an arbitration agreement applicable to the dispute to the arbitral tribunal. Notably, where the parties have chosen to delegate this threshold question, the arbitral tribunal's determination as to the parties' agreement to arbitrate the dispute is binding on the enforcing court. *See Stileks*, 985 F.3d at 878 (recognizing "the background understanding [] that courts, not arbitrators, decide questions of arbitrability," but "[t]hat understanding is overcome, however, if the

parties clearly and unmistakably provide otherwise" such that "[i]f arbitrability itself is delegated to the arbitrators, 'the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate.'" (quoting *First Options of Chi., Inc. v. Kaplan* ("*First Options*"), 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995))).

B. The Russian Federation Is Not Immune Under the FSIA

The shareholders have met their burden of production to establish that jurisdiction attaches to this case under the arbitration exception. The parties do not dispute that the Shareholders have met their burden as to the second requirement for application of the FSIA's arbitration exception—establishing "an arbitration award," *Stileks*, 985 F.3d at 877—by producing the Final Awards, *see* Final Awards; Pet. ¶¶ 1-3, and to the extent the Russian Federation raises challenges to the applicability of the New York Convention, those challenges are considered, and rejected, *infra*, in Part III.C, *see Creighton Ltd.*, 181 F.3d at 123-24 (describing the "New York Convention [as] 'exactly the sort of treaty Congress intended to include in the arbitration exception'" (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993))). As to the first prerequisite to meet the FSIA's arbitration exception—*i.e.*, establishing "the existence of an arbitration agreement," *Stileks*, 985 F.3d at 877—the Russian Federation falls short of persuasively rebutting the record evidence produced by the Shareholders

showing that an arbitration agreement existed between the parties. *See* Resp't's Mot. at 28-39; *see generally* Resp't's Suppl. Mot. Dismiss; Resp't's Suppl. Submission; Resp't's Suppl. Reply.

The record in this matter plainly establishes that the parties had an arbitration agreement sufficient to satisfy this prerequisite for application of the FSIA arbitration exception for several reasons, including that, first, the ECT, to which the Russian Federation was a signatory, provided for the arbitration proceeding in which both parties vigorously participated for a decade; second, the parties' chose to delegate questions related to jurisdiction under the ECT to the Tribunal; and, finally, the Tribunal's determination that an arbitration agreement existed here is binding on this Court. Each of these reasons are addressed below, followed by examination of the Russian Federation's objections, which generally go to the arbitrability of this dispute and are misplaced when directed to the jurisdictional inquiry and, in any event, fail to meet the burden of persuasion that would be necessary to negate the factual basis as to the existence of an arbitration agreement here.

1. The ECT is an Arbitration Agreement Applying to this Dispute

The ECT, to which the Russian Federation was indisputably a signatory at the time this dispute arose, combined with the Shareholders' invocation, and the Russian Federation's acceptance, of this treaty's arbitration process, establishes the existence of an

arbitration agreement. *See* Pet. ¶ 34. The ECT requires signatories to "accord . . . fair and equitable treatment" to investors of other signatory countries and prohibits undue "nationalization or expropriation" of their investments. ECT art. 10(1). The Shareholders complied with the procedural requirements of the ECT by notifying the Russian Federation of the country's alleged violations and seeking to settle the dispute amicably, and then initiating arbitration proceedings pursuant to Article 26 of the ECT. *See* Hulley Final Award ¶ 10; *BG Group, PLC v. Republic of Argentina* ("*BG Group*"), 572 U.S. 25, 42, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014) (noting that investors may accept an offer to arbitrate under an investment treaty by filing a notice of arbitration); *see also* Resp't's Suppl. Submission at 7 (acknowledging that an investor may accept an offer to arbitrate by submitting a notice of arbitration, "concluding the arbitration agreement at the same moment that the arbitration commences") (citing *BG Group*, 572 U.S. at 42). The Shareholders and the Russian Federation then participated in arbitration proceedings that spanned an entire decade, after which the Tribunal detailed its findings in the Final Awards, which the Shareholders submitted along with their Petition for confirmation of those Awards under the New York Convention. *See generally* Final Awards. None of those factual matters are disputed by the Russian Federation.

Further bolstering the parties' agreement to arbitrate is the fact that the Shareholders and the Russian Federation affirmatively agreed to resolve the underlying dispute through arbitration and executed a Terms of Appointment memorializing this agreement and its terms. *See* Pet'rs'

Opp'n, Banifatemi Decl., Ex. 5, Terms of Appointment, ECF 63-7. Each party appointed their own arbitrator, with expertise in the field of international arbitration and in the rules of international law. *See* Hulley Final Award ¶ 12. Both parties actively participated in ten days of hearings related to the question of jurisdiction, after submitting hundreds of pages of filings and documentary evidence. *Id.* ¶¶ 20-21. They then continued to the merits stage, again actively participating by submitting *thousands* of pages of filings and presenting arguments and evidence at a twenty-one day hearing.

The terms of the ECT, to which the Russian Federation was a signatory, combined with the parties' invocation of its procedures and active participation in the decades-long arbitration proceedings, go a long way to establishing the existence of an agreement to arbitrate for the purposes of jurisdiction under the FSIA.

2. The Parties Delegated Jurisdictional Determinations to the Tribunal

At the outset of the arbitration proceedings, the parties affirmatively delegated authority to decide jurisdictional questions to the Tribunal. Specifically, a two-page letter, dated July 29, 2005, from counsel, "[o]n behalf of the Russian Federation," to the arbitral Tribunal, stated that "we accept The Hague as an appropriate venue" and "accept" that a preliminary hearing "be held in the premises of the Permanent Court of Arbitration," and "propose[d] that The Hague be selected for the venue for the [] arbitrations" and "that the arbitrations

be administered by the Permanent Court of Arbitration." Pet'rs' Opp'n, Banifatemi Decl., Ex. 3, Letter, dated July 29, 2005, from Russian Federation to Tribunal ("2005 Letter") at 1-2, ECF No. 63-5. The Russian Federation made scheduling suggestions, "pursuant to Article 19 of the UNCITRAL Arbitration Rules," requesting that any deadlines set by the Tribunal "take into account the unprecedented size and scope of the claims asserted, and that they call into question the actions and policies of each of" an enumerated list of Russian Federation government entities, requiring "[c]oordination of submissions on behalf of the Russian Federation" that "is thus necessarily a time-consuming process," as well as "take into account [] the normal vacation period in Russia. . . ." *Id.* at 2.

In addition to these clear statements of "accept[ing]" The Hague as the venue for the arbitrations, the Permanent Court of Arbitration as the administer of the arbitrations, and the authority of the Tribunal to set a schedule of deadlines to govern the arbitration proceedings, the Russian Federation also addressed the crucial jurisdictional question of whether it agreed to the arbitrations. After acknowledging "[i]t is true that the requests for arbitration in the above-referenced arbitrations have been in the possession of the Russian Federation for some time," the Russian Federation's letter goes on to explain that it had used the time to reach a critical determination. Most significantly, the letter states: "The Russian Federation during that time has reached the determination to accept the jurisdiction of this Arbitral Tribunal to determine its own jurisdiction and has participated fully in the process of constitution

of the Arbitral Tribunal." *Id.* This crucial statement has no caveats or reservations.

Seemingly to impress the Tribunal with the weightiness of its agreement to arbitrate and delegate the arbitrability question to the Tribunal, while simultaneously exploiting the opportunity presented by the letter to preview the thrust of its jurisdictional challenge, the Russian Federation then observes that the Shareholders' arbitration requests "represent the first and unprecedented attempt by any claimant against any State to submit the latter to international dispute settlement procedures on the basis of a consent allegedly expressed in a treaty subject to ratification that the State in question has not ratified." *Id.* In an upbeat closing, affirmatively embracing the upcoming arbitration proceedings, the Russian Federation states "[w]e welcome the constitution of the Arbitral Tribunal and look forward to working with the Tribunal." *Id.*

This explicit statement of a "determination to accept the jurisdiction of this Arbitral Tribunal to determine its own jurisdiction," *id.*, provides clear evidence that the Russian Federation agreed to have the Tribunal decide arbitrability, including the inherent predicate issue of the existence of an arbitration agreement. *See First Options*, 514 U.S. at 994 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." (internal quotations omitted; cleaned up)); *see also* Resp't's Suppl. Reply at 2-6 (explaining that "a foreign State's consent to any decision-maker's jurisdiction . . .

must be *clear and unambiguous*) (emphasis in original). As the Shareholders point out, the Russian Federation specifically acknowledged in this letter the concern reiterated by the Russian Federation here about the existence of an arbitration agreement when the Russian Federation, though a signatory, did not ratify the ECT. Pet'rs' Opp'n at 16. Nonetheless, the Russian Federation expressly accepted the jurisdiction of the Tribunal to resolve jurisdictional issues. The Russian Federation then vigorously participated in the arbitration proceeding for almost a decade, *see* Pet. ¶¶ 1-2, including independently selecting one of the three members of the Tribunal, Judge Schwebel, *id.* ¶ 12, raising dozens of challenges to both jurisdiction and the merits of the underlying dispute, as well as offering experts and additional evidence to advance their arguments, *see id.* ¶ 2; Pet'rs' Opp'n, Banifatemi Decl., Ex. 4, Oct. 15, 2005 Statements of Defense, ECF No. 63-6.

The Russian Federation argues that its 2005 Letter demonstrated "nothing more than an acknowledgment of the principle of Competence-Competence—the principle that an international arbitral tribunal inherently possesses 'jurisdiction . . . to determine its own jurisdiction' *at the outset of arbitration*." Resp't's Reply at 9, ECF No. 64 (citing Aff. to Resp't's Reply, Second Expert Opinion of Professor George A. Bermann ¶¶ 14-30, ECF No. 65-1) (emphasis in original); *see* Resp't's Suppl. Mot. Dismiss at 10-11; Resp't's Suppl. Submission at 9-10. Downplaying the express words in the 2005 Letter, the Russian Federation denies that its statement indicates any agreement to waive post-arbitration judicial review

as to the existence of an arbitration agreement. Resp't's Reply at 9. The Russian Federation's reliance on the principle of Competence-Competence, however, is merely a deflection of the import of its explicit agreement to have the Tribunal decide its own jurisdiction to resolve the arbitration claims brought by the Shareholders. To do this, the Tribunal necessarily had to determine the existence of an arbitration agreement between the parties under the ECT and, further, that the claims were covered by, or subject to arbitration per, that agreement. To be sure, the Russian Federation is correct that the 2005 Letter does not mention forgoing challenge to the Tribunal's exercise of jurisdiction in a judicial forum, Resp't's Reply at 9 ("The Russian Federation therefore did not agree . . . in the letter dated July 29, 2005, to exclude post-arbitration judicial review of arbitrability by this Court."), but that silence does not operate to relieve the Russian Federation of the legal repercussions in this Circuit from its agreement to delegate the jurisdictional question to the Tribunal. Having expressly agreed in the 2005 Letter to have the Tribunal determine its jurisdiction, rather than contesting any right of the tribunal to do so, the Russian Federation is bound by the Tribunal's determination. *Cf. First Options*, 514 U.S. at 945-46 (declining to defer to an arbitration panel's jurisdictional determination where respondents in arbitration never signed contract with arbitration clause nor otherwise indicated any agreement to submit any issue to arbitration and, while participating in arbitral proceedings, never stopped contesting the arbitration panel's jurisdiction).

The Russian Federation insists that "numerous authorities" support its reading of the 2005 Letter, including the Third Circuit's decision in *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.* ("*China Minmetals*"), 334 F.3d 274 (3d Cir. 2003). Resp't's Reply at 9-10.[14] This Third Circuit decision only undercuts rather than helps the Russian Federation's position, however. In *China Minmetals*, the Third Circuit first describes competencecompetence as "the principle that gives arbitrators the power to decide their own jurisdiction—**more than American arbitration rules**." *Id.* at 287 (emphasis added). The court then explained that "[c]ompetence-competence is applied in slightly different ways around the world," noting that "[i]n its simplest form, competence-competence simply means that the arbitrators can examine their own jurisdiction without waiting for a court to do so; if one side says the arbitration clause is invalid, there is no need to adjourn arbitration proceedings to refer the matter to a judge." *Id.* at 288. In this "simplest form," the principle serves a procedural purpose to move along arbitration proceedings, without awaiting a judicial determination on jurisdiction, and does not foreclose "judicial review of an arbitral tribunal's decision that it

14. The Russian Federation also cites to "the ALI's Draft Restatement (Third), the U.K. Supreme Court, the French Supreme Court, the Netherlands Supreme Court, and the published views of ***Petitioners' own arbitration lawyers***," Resp't's Reply at 9 (emphasis in original), as well as the UNCITRAL Model Law, Resp't's Suppl. Reply at 11, but none of these authorities can overcome the binding principle that where parties have made a clear agreement to delegate an issue to arbitration, deference to the tribunal's determination of that issue is required.

has jurisdiction over a dispute." *Id.* at 289. The Russian Federation urges that its 2005 Letter be construed as reflecting this "simplest form" of a jurisdictional finding by the arbitral Tribunal and, under the Third Circuit's reasoning, "judicial review of the arbitrator's jurisdictional decision" should be allowed "where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed." *Id.* at 288; *see also id.* at 289 (observing "[i]nternational norms of competence-competence are therefore not inconsistent with the Supreme Court's holding in *First Options*, at least insofar as the holding is applied in a case where, as here, the party resisting enforcement alleges that the contract on which arbitral jurisdiction was founded is and always has been void."). Applying the holding in *First Options*, the Third Circuit concluded that the district court should "make an independent determination of the agreement's validity and therefore the arbitrability of the dispute," *id.* at 289, without deference to the arbitrator's determination, where the challenging party "repeatedly objected to CIETAC's jurisdiction but, nevertheless, appeared before it, submitting evidence that the contracts which contained the arbitration clause on which Minmetals relied were forged," *id.* at 278.

The critical flaw in the Russian Federation's reliance on *China Minmetals* is that the challenging party in that case (as in *First Options*) never clearly and unambiguously agreed to let the arbitration panel decide whether they were able to exercise jurisdiction over the dispute. By contrast, here, this is what the Russian Federation agreed to do in the 2005 Letter. The Russian Federation's belated

gloss to an agreement plainly and clearly expressed eighteen years ago amounts to a *post hoc* revision that is simply unpersuasive, particularly when the D.C. Circuit's precedents in *Stileks* and *Chevron* require that this Court defer to the Tribunal's determinations on questions that the parties agreed to arbitrate, as further discussed *infra*, in Part III.B.3.

The parties' agreement to arbitrate the jurisdictional question as to the existence of an arbitration agreement is also evidenced by their agreement to arbitrate in accordance with the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"). *See* Parties' Terms of Appointment ¶ 4(a) ("Pursuant to Article 26(4)(b) of the Treaty and paragraph 14 of Claimant's Notice of Arbitration and Statement of Claim, the proceedings shall be conducted in accordance with the UNCITRAL Rules."); *see also id.* ¶ 9 ("Pursuant to Article 26(6) of the Treaty, the Tribunal shall decide the issues in dispute in accordance with the Treaty and applicable rules and principles of international law."). Article 21 of those Rules provides that the "tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause." UNCITRAL Rules, art. 21, ¶ 1. Such "[i]ncorporation of the UNCITRAL arbitration rules . . . constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability," and is further reason not to conduct a renewed inquiry into the existence of an arbitration agreement. *Chevron*, 795 F.3d at 208 (quoting *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d

1069, 1077 (9th Cir. 2013)). The D.C. Circuit has confirmed as recently as 2021 that, under the UNCITRAL Rules, the "arbitral tribunal shall have the power to rule on its own jurisdiction," *Stileks*, 985 F.3d at 878, which is consistent with and confirmation of the Russian Federation's explicit agreement in the 2005 Letter that the Tribunal had such power at the outset of the arbitration proceedings.

The Russian Federation argues strenuously that the parties' Terms of Appointment incorporating the UNCITRAL Rules applied "only to the then-ongoing 'proceedings' before the arbitral tribunal, and thus have no legal effect on post-arbitration proceedings." Resp't's Reply at 10; *see also* Resp't's Suppl. Mot. Dismiss at 9.[15] The Russian Federation makes no effort to square that contention with the D.C. Circuit's holding in *Stileks* that an agreement to arbitrate under the UNCITRAL Rules requires an enforcing court to respect the parties' contract to arbitrate under those rules and defer to the

15. The Russian Federation also briefly offers the convoluted argument that "[s]ince the ECT and Petitioners' Notices of Arbitration did not constitute an agreement, therefore, the UNCITRAL Arbitration Rules were not incorporated into any instrument binding on the Russian Federation." Resp't's Reply at 10. Based on the incorrect predicate of no arbitration agreement existing, the Russian Federation reasons that "the Russian Federation never offered to abide by" the ECT provision incorporating the UNCITRAL Rules, and that the Shareholders were not eligible to accept an offer to abide by those terms. Resp't's Suppl. Mot. Dismiss at 9. The key point this argument elides, however, is that the agreement to arbitrate under the UNCITRAL Rules was in the Terms of Appointment, which both parties specifically signed and agreed to.

jurisdictional determinations of the tribunal. *Stileks*, 985 F.2d at 878-79.

In sum, the record demonstrates that the Russian Federation agreed to arbitrate the Shareholders' claims and further agreed to delegate the determination of the existence of an arbitration agreement to the Tribunal. The Tribunal undertook the time-consuming burden of resolving that question, with the Russian Federation's full participation. To be sure, merely litigating before an arbitration panel issues regarding the existence of an arbitration agreement, the scope of the agreement and applicability to the dispute, does not mean the party raising such challenges "agreed to have the arbitrators decide (*i.e.*, to arbitrate) the question of arbitrability." *First Options*, 514 U.S. at 946; *id.* (observing that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point."). The Supreme Court's observations in *First Options* were prompted by circumstances where the respondents objecting to confirmation of an arbitration award had not personally signed the key document containing an arbitration clause and, consequently, had not clearly agreed either to submit to arbitration or to submit the question of arbitrability to arbitration, and thus could not be bound by the arbitrators' decision as to jurisdiction or arbitrability, leaving the arbitrability of the dispute "subject to independent review by the courts." *Id.* at 947.

By contrast, here, the Russian Federation did clearly agree, through being a signatory to the ECT,

its 2005 Letter, and agreeing to comply with the 1976 UNCITRAL Rules, to submit to the Tribunal authority to resolve jurisdiction and arbitrability challenges, including, as pertinent here, the issue of the existence of an agreement to arbitrate. To find otherwise would mean that the Russian Federation, despite its clear and express agreement to arbitrate, reserved the right to relitigate every issue presented to the Tribunal anew in courts in this and other countries, even after consuming the time and resources of the Shareholders and the Arbitral Tribunal for ten years, undercutting the "basic objective" of arbitration "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties[.]" *Id.* (internal quotations and citations omitted).

3. The Tribunal's Jurisdictional Determinations Bind this Court

The Tribunal's determination that an arbitration agreement existed between the parties is well founded, as the Russian Federation is a signatory to the ECT, agreed to comply with the 1976 UNCITRAL Rules, and expressly agreed to arbitration and to have the Tribunal determine jurisdiction in its 2005 Letter. This determination is also binding on this Court, not only blunting but effectively precluding the Russian Federation from rebutting the presumption to which the Shareholders are entitled on this issue after production of the notice of arbitration and ECT, to which the Russian Federation is a signatory. *See Chevron*, 795 F.3d at 205 & n.3. As explained *supra*, in Part III.A, parties to an arbitration may enter into

a binding agreement to allow arbitrators to determine threshold questions, such as the existence of an arbitration agreement. "[W]here a party has agreed to arbitrate, he or she, in effect, has relinquished much of" the right to a court's independent review of the dispute. *First Options*, 514 U.S. at 942. When the parties have agreed to submit the question of arbitrability to the arbitration tribunal, "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances," because "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.* at 943.

The D.C. Circuit has applied the Supreme Court's instructions in *First Options* to arbitration disputes with foreign sovereigns, noting that "[a] recent, unanimous opinion of the Supreme Court drove . . . home" that the standard of review "is more than mere deference." *Stileks*, 985 F.3d at 878.[16] "If an agreement assigns the arbitrability

16. The Russian Federation asserts in its supplemental reply that *Stileks* is inapplicable because, in that case, the foreign sovereign raised "only a non-jurisdictional challenge to 'the scope of the submission' under the New York Convention's Article V(1)(c)." Resp't's Suppl. Reply at 6 (quoting *Stileks*, 985 F.3d at 878); *see* Resp't's Suppl. Reply at 15-16. The Russian Federation's reading of *Stileks* is simply incorrect, since the *Stileks* Court specifically described the foreign sovereign's challenges as jurisdictional. *Stileks*, 985 F.3d at 877 (noting that "one jurisdictional fact is in dispute: whether Energoalliance's award was made pursuant to the ECT" and that "Moldova counters that the ECT did not give the arbitral tribunal jurisdiction of the dispute and thus the resulting award was not 'made pursuant to such an agreement to arbitrate.'" (quoting 28 U.S.C. § 1605(a)(6))).

determinations to an arbitrator, 'a court possesses no power to decide the arbitrability issue,' even if it thinks the argument for arbitrability is 'wholly groundless.'" *Id.* (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019)). "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein*, 139 S. Ct. at 529. Applying this holding to the jurisdictional question of whether an arbitration agreement existed here, this Court may not second guess the Tribunal's determination as to that question. "The conjunction of *Chevron* and *Henry Schein* means that [a court] must accept the arbitral tribunal's determination" as to issues the parties agreed to arbitrate. *Stileks*, 985 F.3d at 879.[17]

4. The Russian Federation Fails to Sustain Its Burden to Rebut the Existence of an Arbitration Agreement

The Russian Federation's challenges to the existence of an arbitration agreement—and thereby the Court's subject matter jurisdiction under the arbitration exception

17. The Shareholders additionally contend that "this Court should accord issue-preclusive effect to the decisions of the Dutch courts" rejecting the Russian Federation's attempts to set aside the Final Awards, *see* Pet'rs' Suppl. Submission at 9-13, but this contention, and the Russian Federation's counterarguments, *see e.g.*, Resp't's Suppl. Reply at 7-10, need not be addressed since the jurisdictional question is resolved on alternative grounds, including the deference afforded to the arbitral Tribunal's determinations as to the existence of an arbitration agreement and arbitrability of the instant dispute.

to the FSIA—can be distilled into five distinct arguments. First, the Russian Federation insists that *de novo* review of whether an arbitration agreement existed between the parties is required here. Next, the Russian Federation presents four arguments as to why no arbitration agreement may be found to exist due to the ECT's Russian ratification history, procedural concerns with the arbitration proceedings, and alleged fraud committed by the Shareholders prior to the arbitration proceedings. Each of these four arguments was litigated before, and rejected as lacking merit by, the arbitral Tribunal. *See*, *e.g.*, Hulley Interim Award ¶¶ 301-29, 411. Each argument is addressed *seriatim*.

(a) *De Novo* Determination of the Existence of an Arbitration Agreement Is Not Required

The parties dispute whether the arbitral Tribunal's determination as to the existence of an arbitration agreement authorizing the Tribunal to make arbitrability determinations is dispositive, as the Shareholders posit, *see* Pet'rs' Opp'n at 15-16, or whether this Court must conduct a *de novo* review to determine the existence of an arbitration agreement, as the Russian Federation insists, *see* Resp't's Mot. at 27-28; Resp't's Reply at 3-9; Resp't's Suppl. Submission at 6-11; Resp't's Suppl. Reply at 7-22. Essentially, the Russian Federation wants to scrap the decade of litigation presided over by the arbitral Tribunal and repeat those evidentiary proceedings in some manner here in order for this Court to make *de novo* assessments of its challenges to the arbitrability of the dispute. *See* Resp't's Mot. at 27-28.

De novo review is unnecessary and, in fact, improper in this case. The D.C. Circuit in *Chevron* rejected precisely the argument that the Russian Federation makes here, holding that asking a district court "to make a *de novo* determination of whether" a treaty encompassed the claims at issue in order to satisfy itself of jurisdiction would improperly "conflate[] the jurisdictional standard of the FSIA with the standard for review under the New York Convention." *Chevron*, 795 F.3d at 205. In reaching that holding, the D.C. Circuit relied on Supreme Court precedent instructing district courts to consider a treaty "as if it were an ordinary contract between private parties" and where "the parties had intended to allow the arbitrator" to determine the jurisdictional question at issue, that was sufficient, under the FSIA, for federal courts to exercise jurisdiction to consider an action to confirm or enforce the award. *Id.* at 205-06 (discussing *BG Group*, 572 U.S. 25, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014)). Any dispute as to whether the claims were subject to the treaty was "properly considered as part of review under the New York Convention." *Id.* at 206.

Here, where the Shareholders have met the burden of production for each of the jurisdictional elements of the arbitration exception to the FSIA, the burden of persuasion has shifted to the Russian Federation to establish the absence of a factual basis supporting jurisdiction. *Id.* at 204. In determining whether the Russian Federation has sustained its burden of persuasion, this Court is bound by the Tribunal's decisions as to the existence of an arbitration agreement, given that the Russian Federation is an ECT signatory, the Russian Federation agreed to the

UNCITRAL Rules, and the Russian Federation expressly agreed to the Tribunal determining jurisdiction over the dispute in its 2005 Letter. *See*, *supra*, Part III.B.1-3.

The Russian Federation fails to grapple with this binding precedent and instead switches tack to reframe the issue, insisting that the Court is under "*an independent obligation* to determine whether subject-matter jurisdiction exists," Resp't's Reply at 7 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)) (emphasis in original), stressing that "'*no action of the parties* can confer subject-matter jurisdiction upon a federal court,' where it does not otherwise exist," *id.* (quoting *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 120, 383 U.S. App. D.C. 310 (D.C. Cir. 2008)) (emphasis in original), and that "this Court cannot abdicate this responsibility or delegate it to the arbitrators," *id.* at 8. While this outline of legal principles is entirely correct, the Russian Federation takes a wrong turn in concluding that legal analysis of subject matter jurisdiction under the FSIA's arbitration exception is compromised by anything less than *de novo* review of the factual question whether an arbitration agreement existed between the parties. When this precise factual question is a matter that the parties *agreed* to arbitrate and *delegated* to an arbitral panel to resolve, the arbitral Tribunal's determination of this factual question may be relied upon in the court's legal analysis of whether subject matter jurisdiction is properly exercised.

The law is well settled that "parties can agree to arbitrate gateway questions of arbitrability, such as

whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (internal quotations omitted). Moreover, the Supreme Court has made clear that "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration." *First Options*, 514 U.S. at 943. Where, as here, "clear and unmistakable" evidence is presented that the parties agreed to delegate determinations about arbitrability to the Tribunal, that agreement will be enforced. *See First Options*, 514 U.S. at 943-44. As noted by the Shareholders, this agreement was established here by the Russian Federation's express "determination to accept the jurisdiction of [the] Tribunal," Pet'rs' Opp'n at 19 (quoting 2005 Letter), and its adoption of the UNCITRAL Rules.

The cases cited by the Russian Federation purporting to hold that a *de novo* determination of the existence of an arbitration agreement is required are inapposite for two reasons. First, several of these cases do not address circumstances, as here, where the parties clearly and affirmatively agreed to submit an issue to arbitration. *See* Resp't's Mot. at 27-28 (citing *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 296-304, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (recognizing that "a court may submit to arbitration only those disputes . . . that the parties have agreed to submit" and holding that the court cannot refer questions to arbitration "[w]here there is no provision validly committing them to an arbitrator" and the party seeking arbitration failed to establish through

clear and unmistakable evidence that an agreement to arbitrate questions of arbitrability was in force on the date of the dispute); *Phoenix Consulting*, 216 F.3d at 40 (D.C. Cir. 2000) (holding that "the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss" in the context of foreign sovereign immunity in a breach of contract suit with no arbitration agreement); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449, 284 U.S. App. D.C. 333 (D.C. Cir. 1990) (remanding to the district court for further development of the record as to whether the FSIA applies in a case where the underlying dispute was not brought pursuant to an arbitration agreement or award); *China Minmetals*, 334 F.3d 291-92 (holding that respondent had not agreed to delegate questions of jurisdiction to the arbitrators when respondent's only participation in the arbitration proceedings was to argue that the arbitration agreement was tainted by forgery)); Resp't's Suppl. Submission at 8 (citing *KenAmerican Resources v. International Union, UMW*, 99 F.3d 1161, 1163, 321 U.S. App. D.C. 310 (D.C. Cir. 1996) (holding that agreement of a company's President to submit disputes with that company to arbitration and allow the arbitrators to decide questions of arbitrability does not clearly bind the President's other companies, who were not parties to that agreement)). Second, some of these cases actually support settled caselaw that where parties have clearly agreed to arbitrate an issue, courts should enforce that agreement and defer to the arbitrators. *See* Resp't's Mot. at 27-28 (citing *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 764, 271 U.S. App. D.C. 63 (D.C. Cir. 1988) (holding that

"[b]ecause the agreement contains a broad arbitration clause, requiring arbitration of all disputes concerning the meaning of the contract, we presume that the parties intended to arbitrate questions about its expiration or termination.")); Resp't's Suppl. Submission at 6-7 (citing *BG Group*, 572 U.S. at 29-36 (holding that Argentina was not entitled to *de novo* review of whether the petitioners complied with a procedural provision of an arbitration treaty, and deferring to the arbitrators on that question)). In sum, none of these cases relied on by the Russian Federation overcome the binding holdings in *Stileks* and *First Options* requiring that the Tribunal's determination of the existence of an arbitration agreement be considered and granted dispositive deference when considering whether the Russian Federation has sustained its burden of persuasion.

The Russian Federation also cites a non-binding Second Circuit opinion to argue that this Court must consider the context of any agreement to arbitrate questions of jurisdiction under uniform rules of arbitration, such as the UNCITRAL Rules, when evaluating whether to defer to the Tribunal on such questions. *See* Resp't's Suppl. Submission at 9-10 (citing *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308, 318-19 (2d Cir. 2021) ("Incorporation of [the AAA Commercial Arbitration Rules] into an arbitration agreement does not, *per se*, demonstrate clear and unmistakeable evidence of a parties' intent to delegate threshold questions of arbitrability" and "in evaluating the import of incorporation of the AAA Rules (or analogous rules) into an arbitration agreement, context matters.")); Resp't's Suppl. Reply at 10-12. Describing the "context"

of the arbitration proceedings, the Russian Federation asserts that the parties never intended the incorporation of the UNCITRAL Rules to preclude judicial review and that the Shareholders never suggested an agreement to delegate questions of arbitrability to the Tribunal, among other arguments. Resp't's Suppl. Submission at 10-11. These arguments fail, however, because, contrary to the Russian Federation's representations that the Shareholders have never presented the argument that the parties delegated questions of jurisdiction, such as the existence of an arbitration agreement, to the Tribunal, the Shareholders raised *precisely* this point in their opposition to the Russian Federation's initial motion to dismiss, and have consistently asserted this argument throughout the course of this litigation. *See* Pet'rs' Opp'n at 15-21. Moreover, review of the "context" of the parties' conduct does not help the Russian Federation; its 2005 Letter delegating to the arbitral Tribunal jurisdictional issues, followed by its full participation in litigating questions of jurisdiction before the arbitral Tribunal over many years, provide probative context demonstrating the Russian Federation's clear intention to agree that the Tribunal may decide disputes as to jurisdiction. *See*, *e.g.*, Hulley Final Award ¶¶ 244-398, 399-435, 1273-1374, 1385-1428.

As further support for conducting *de novo* review, the Russian Federation points to a recent decision declining to defer to the arbitral tribunal's determination that an arbitration agreement existed covering the disputed claim. Resp't's Not. of Suppl. Authority of May 12, 2023 at 1-5, ECF No. 265 (discussing *Blasket Renewable Investments, LLC v. Kingdom of Spain*, No. 21-cv-3249

(RJL), 2023 U.S. Dist. LEXIS 54502, 2023 WL 2682013 (Mar. 29, 2023)). *Blasket* is inapposite here, however, as the Shareholders correctly explain, *see* Pet'rs' Resp. to Not. of Suppl. Authority at 3, ECF No. 268, because the *Blasket* court determined that the parties could not agree to defer to the arbitral tribunal's determination of jurisdiction because the European Union ("EU") Treaties, which are the ultimate sources of EU law governing EU Member States, forbade arbitration between an EU national and an EU Member State, thereby obviating the state's authority to enter into such an arbitration agreement as well as restricting the tribunal's own powers to determine jurisdiction over the case. *Blasket*, 665 F. Supp. 3d 1, 2023 U.S. Dist. LEXIS 54502, 2023 WL 2682013, at *5-6. Relevant here, the *Blasket* court acknowledged that this holding diverged from the D.C. Circuit's reasoning in *Chevron* and *Stileks* but explained that, in those cases, "neither challenge was predicated on an argument that, under the law applicable to them, the parties were *incapable* of entering into an agreement to arbitrate anything at all." 2023 U.S. Dist. LEXIS 54502, [WL] at *5 (emphasis in original).[18]

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18. Not only is the *Blasket* decision inapposite on its facts and non-binding on this Court, but also its reasoning has been rejected in two other decisions that followed the D.C. Circuit's decisions in *Stileks* and *Chevron*. *See*, *e.g.*, *Nextera Energy Global Holdings B.V. v. Kingdom of Spain*, No. 19-cv-1618 (TSC), 2023 U.S. Dist. LEXIS 25862, 2023 WL 2016932, at *7, 12-13 (D.D.C. Feb. 15, 2023) (relying on *Stileks* to find that Spain and a global energy investment company delegated the authority to determine whether the underlying disputes were arbitrable to an arbitral tribunal, and determining that the foreign nation's denial of any legal basis for an arbitration agreement was "not a challenge to

By contrast to the specific circumstances in *Blasket*, the Russian Federation is not a member of the EU and asserts no similar treaty or legal limitation either on its ability to enter into an arbitration agreement with the Shareholders, or on an arbitral tribunal's authority to determine jurisdiction over an arbitration with the Russian Federation. Indeed, the Russian Federation does not even assert here that the Tribunal lacked the authority to determine its own jurisdiction at the outset of the arbitration proceeding and merely asks for *de novo* review of this issue.

In determining whether the Tribunal had jurisdiction to issue the Awards, the Tribunal considered each of the challenges to the existence of an arbitration agreement that the Russian Federation asserts anew here. *See* Hulley Final Award, ¶ 21; *see generally* Final Awards. Under the binding precedent of the Supreme Court and the D.C. Circuit, including those Courts' holdings in *First Options, Henry Schein*, and *Stileks*, the unanimous decision of the arbitral Tribunal that the parties had an arbitration agreement covering the claims at issue resolves this factual question, which need not be considered *de novo. See Stileks*, 985 F.3d at 878-879.

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the jurisdictional fact of that agreement's existence but rather a challenge to that agreement's arbitrability."); *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-cv-1871 (TSC), 2023 U.S. Dist. LEXIS 25860, 2023 WL 2016933, at *6 (D.D.C. Feb. 15, 2023) (relying on *Stileks* to hold that arguments about a party's ability to enter an arbitration agreement are reserved for consideration during enforcement, and not a matter of jurisdiction under the FSIA).

Even if "the FSIA required a *de novo* determination of arbitrability, however, . . . [i]n order to prevail on its jurisdictional argument, [the Russian Federation] would have to demonstrate by a preponderance of the evidence that [the Shareholders'] suits were" not subject to the ECT, and this [the Russian Federation] has failed to do," *Chevron*, 795 F.3d at 206, as is clear from consideration of the next four of its arguments.[19]

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19. The Russian Federation attempts to distinguish its challenges from those in *Chevron* and *Stileks*, arguing that its disputes are to the *formation* of the arbitration agreement, rather than to its *scope*, Resp't's Reply at 4, 6, and noting that those cases "considered exclusively whether admittedly proper offerees had attempted to arbitrate improper disputes under valid, existing arbitration agreements," Resp't's Suppl. Reply at 15 (emphasis in original). Although the Russian Federation's distinction between formation and scope is not merely semantic, the problem for the Russian Federation is that the respondents in *Chevron* and *Stileks* contested the existence of an arbitration agreement covering the investments at issue, similarly to the Russian Federation here, and the D.C. Circuit rejected consideration of such challenges during the jurisdictional inquiry. *Chevron*, 795 F.3d at 204-06; *Stileks*, 985 F.3d at 878. In an effort to side-step the holdings in *Chevron* and *Stileks*, the Russian Federation urges reliance on two nonbinding decisions of other circuits, Resp't's Mot. at 16-17 (citing *Al-Waleed v. Saudi Arabian Oil Co.*, 19 F.4th 794, 802 (5th Cir. 2021) and *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018, 1026 (9th Cir. 2021)), but neither decision involved a facially applicable arbitration agreement, as here presented with the ECT, to which the Russian Federation is a signatory, and thus neither case would counsel a different outcome here. *See Al-Waleed v. Saudi Arabian Oil Co.*, 19 F.4th at 801-02 (explaining that the district court lacked jurisdiction where the arbitration agreement was not signed by the petitioners or the respondent, and that the arbitration agreement signed by third-parties did not apply to the parties in the case); *Al-Qarqani v. Chevron Corp.*, 8 F.4th at 1021 (same).

(b) The Russian Federation was Required to Apply the Entire ECT Provisionally

The Russian Federation complains that no arbitration agreement existed because its provisional application of the ECT did not include application of the Arbitration Provision, included in Article 26. Resp't's Mot. at 28-31; Resp't's Suppl. Mot. Dismiss at 12-22; Resp't's Suppl. Submission at 11-16; Resp't's Suppl. Reply at 12-15. Another ECT provision, Article 45(1), governs the operation of the treaty after provisional adoption by the country. Specifically, ECT's Article 45(1) states, in full, that "[e]ach signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." "[S]uch provisional application," in this context, refers to the application of the treaty between the time when a foreign sovereign is a signatory and the time when the treaty is ratified following any domestic law procedural requirements. *See* Resp't's Mot. at 29. The arbitral Tribunal found, and the Shareholders concur, that provisional application requires that, even when not fully ratified, signatories must apply and fulfill all obligations created by the ECT under international law. Hulley Interim Award ¶ 301.

The Russian Federation would read Article 45(1) differently to permit, while the ECT is pending provisionally, cherry-picking of specific provisions of the treaty to apply or not to apply, depending on a signatory's view that application of the specific provision would

violate its domestic laws. Resp't's Mot. at 28-29; Resp't's Suppl. Submission at 11-16. The Shareholders dispute this reading based on the plain text of Article 45(1). Pet'rs' Opp'n at 23 ("the plain language establishes that it is the principle of provisionally applying a treaty that is subject to consistency with a signatory's laws"). In the Shareholders' reading, the ECT must be applied in its entirety during a provisional period (after signing but before ratification), unless "such provisional application" is deemed to violate domestic law; if provisional application is inconsistent with domestic law, then the ECT may not be applied, in whole or in part. The arbitral Tribunal agreed with the Shareholders' reading and, further, concluded that provisional application of the ECT was not contrary to domestic law of the Russian Federation. *See* Hulley Interim Award ¶¶ 301-70.

This issue was considered in great detail by the Tribunal, after the Russian Federation submitted over 200 pages of briefing and sixteen expert opinions and witness statements, and argument and testimony pertaining to this issue was presented to the Tribunal for over five days. Pet'rs' Opp'n at 23 n.11. The Tribunal found that Russian law expressly states that a treaty "may, prior to its entry into force, be applied by the Russian Federation provisionally if the treaty itself so provides." Hulley Interim Award ¶ 332 (quoting Russian Federal Law on International Treaties, art. 23(1) (1995)). The Tribunal thus concluded that the ECT applies provisionally to the Russian Federation in its entirety, including the agreement in Article 26 to arbitrate disputes that arise under the treaty. *Id.* ¶ 301.

Under the binding precedent of the Supreme Court and the D.C. Circuit, *see* Part III.B.3, *supra*, this Court may not revisit the Tribunal's determination as to the textual meaning of Article 45(1) and the requirements of provisional application of the ECT. In any event, the Russian Federation's arguments that the arbitration clause of the ECT is inconsistent with Russian law would be more properly raised at the enforcement stage of this proceeding and, on their merits, are dubious at best. For example, the Russian Federation claims that "Russian law prohibits the arbitration of public law disputes, which encompasses most disputes involving the government." Resp't's Mot. at 29. As discussed in more detail *infra*, in Part C, however, the dispute submitted to arbitration by the Shareholders had a *commercial* nature, and was not purely regulatory or related to administration of government tax regimes as the Russian Federation claims. The Tribunal thus reasonably found that the instant dispute was an investor-state investment dispute, and not a public law dispute, *see* Hulley Interim Award ¶¶ 370-97, relying on its interpretation of Russian law, which allows for resolution of investment disputes in arbitration, *id.* at ¶ 370 (quoting Russian Federation's *Law on Foreign Investment*, art. 9 (1991) and art. 10 (1999)).[20]

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20. In supplemental briefing, the Russian Federation presented a 2009 decision of the Supreme Court of the Russian Federation purportedly holding that treaties entered into by the Executive Branch of the Russian Federation cannot supersede acts of the Russian Parliament and remain subordinate to statutes enacted by the Parliament, and a 2020 decision of the Constitutional Court of the Russian Federation purportedly rejecting "the assertion that the ECT's Article 26 obligates Respondent to arbitrate in contravention of Respondent's applicable statutory

This challenge thus fails to alter this Court's conclusion that the FSIA's arbitration exception applies to allow the exercise of subject matter jurisdiction.[21]

(c) The Russian Federation's Fraud Allegations Do Not Strip Jurisdiction from this Court

The Russian Federation next asserts that any agreement to arbitrate under the ECT is inapplicable

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law." Resp't's Suppl. Submission at 13-14; *see* Resp't's Suppl. Reply at 14-15. With those decisions in hand, the Russian Federation relies on *dicta* in a U.S. Supreme Court case addressing the evaluation of foreign law under Federal Rule of Civil Procedure 44.1, stating that "[i]f the relevant state law is established by a decision of 'the State's highest court,' that decision is '*binding on the federal courts*.'" Resp't's Suppl. Submission at 12 (quoting *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 585 U.S. 33, 138 S. Ct. 1865, 1874, 201 L. Ed. 2d 225 (2018)) (emphasis in original); Resp't's Suppl. Reply at 14. None of these cases, either from the U.S. Supreme Court or the Russian Federation, addresses the issue here, however, of whether determinations by an arbitral tribunal, to which the parties delegated issues of jurisdiction, are binding on an enforcing court. The decisions in *First Options* and *Stileks* require that the Tribunal's jurisdictional determinations be given binding deference, and the cases provided by the Russian Federation at this late stage do not overcome those holdings.

21. The Russian Federation also asserts that its agreement to arbitrate could not be "clear[] and unambiguous[]" because of the dispute as to interpretation of ECT Article 45(1), *see* Resp't's Suppl. Submission at 14-15; Resp't's Suppl. Reply at 12-13, but such an argument fails in the face of the clear and unmistakable agreement to arbitrate issues of jurisdiction in the 2005 Letter and incorporation of the UNCITRAL Rules.

as to the Shareholders because of purported fraudulent behavior committed prior to the arbitration proceedings by the Shareholders and their predecessor investors in Yukos. Resp't's Mot. at 31-36; Resp't's Reply at 17-19; Resp't's Suppl. Mot. Dismiss at 23-39; Resp't's Suppl. Submission at 16-27. This argument was also exhaustively considered and rejected by the Tribunal when issuing the Final Awards, Pet'rs' Opp'n at 27-28 (citing Hulley Interim Award ¶ 71; Hulley Final Award ¶ 201), and that determination must be afforded deference to the extent the issue is raised here as a jurisdictional challenge. In any event, any purported fraud would not be relevant to the jurisdictional question of whether the ECT qualified as the parties' agreement to arbitrate in this case. The FAA provides grounds for a party to ask a court to review and to set aside an arbitral decision "in very unusual circumstances." *First Options*, 514 U.S. at 942 (citing, *e.g.*, FAA, 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers)). Consequently, this challenge may be relevant to enforcement of the Final Awards, but cannot strip this Court of jurisdiction to hear this case.

This point is well illustrated by the D.C. Circuit's decision in *P&ID*, where the Court evaluated challenges to jurisdiction under the arbitration exception when the foreign sovereign alleged that the petitioner had engaged in fraud before and during the arbitration proceedings. 27 F.4th at 773. In that case, an arbitration panel in England issued an arbitration award to P&ID based on Nigeria's breach of a natural gas pipeline construction agreement. *Id.* at 772. Nigeria first sought to set aside the relief in

English courts, but when the English courts denied that application as untimely, Nigeria sought a set-aside order in its own courts and the Federal High Court of Nigeria issued an order, with no reasoning or explanation, simply setting aside the award in May 2016. *Id.* at 772-73.

P&ID brought suit in this Court to enforce the arbitration award, *id.* at 773, while, in a parallel proceeding in England, Nigeria petitioned the High Court of Justice of England to extend its deadline to challenge the award based on "new evidence of fraud in the arbitration and underlying contract negotiations." *Id.* The English court determined that Nigeria had "established a strong prima facie case" of P&ID's fraud and bribery in procuring the contract agreement and throughout the arbitration proceedings, and granted Nigeria's request to extend the deadline to challenge the award. *Id.* Even as Nigeria presented in the High Court of Justice of England a potentially meritorious defense based on alleged fraud by the petitioners, the D.C. Circuit held that "the application of the arbitration exception here is straightforward, as all of the jurisdictional facts required by the statute exist." *Id.* at 776 (citing the arbitration exception to the FSIA at 28 U.S.C. § 1605(a)(6)). The D.C. Circuit found dispositive that the contract between P&ID and Nigeria "included an agreement to arbitrate[]; [t]he arbitral tribunal issued an award to P&ID[]; [a]nd the New York Convention governs the award, as Nigeria, the United States and the United Kingdom are all member states." *Id.* Nigeria argued that the arbitration exception did not apply, asserting that P&ID lacked a "valid and enforceable arbitral award" because "in its view, the Federal High Court of Nigeria

set aside the arbitral tribunal's liability award." *Id.* The D.C. Circuit, however, concluded that consideration of such challenges "is a merits question," and that the district court did not need to consider the validity of the arbitral award, or allegations of fraud, as part of the jurisdictional inquiry. *Id.*

P&ID's holding has full force here. Consequently, the Russian Federation's allegations of fraud on the part of the Shareholders need not and, indeed, should not be addressed as part of the jurisdictional inquiry.

(d) The Russian Federation's Allegations that the Shareholders are Russian Nationals Cannot Negate Jurisdiction

Next, the Russian Federation argues that an arbitration agreement could not be formed because any agreement to arbitrate under the ECT did not apply to arbitration with Russian nationals. Resp't's Mot. at 34-36; Resp't's Suppl. Mot. Dismiss at 23-39; Resp't's Suppl. Submission at 16-27; Resp't's Suppl. Reply at 17-22. This argument fails for the same reasons as the Russian Federation's allegations of fraud. The arbitral Tribunal already squarely addressed and rejected the Russian Federation's claim as to the nationality of the Shareholders, Hulley Interim Award ¶¶ 406-435, a finding that is entitled to deference in considering jurisdiction, even if the Russian Federation would prefer to relitigate this issue now with new evidence that it claims was unavailable to the Tribunal. *See*, *e.g.*, Resp't's Suppl. Mot. Dismiss at 23-39. In any event, however, this challenge is

better evaluated as a defense to enforcement of the Final Awards, rather than an issue to confront during a subject matter jurisdiction inquiry.

The Russian Federation requests an evidentiary hearing and the opportunity to cross-examine four witnesses, who submitted witness statements to this Court in support of the Shareholders, in order to pose questions related to whether the Shareholders were genuinely "foreign" investors under the ECT's Article 26, whether the Shareholders were genuinely "investors," under the ordinary meaning of that term, and whether the Shareholders abused their corporate formalities in a way that would require their corporate status to be disregarded "when applying the ECT's Article 26 in accordance with principles of piercing the corporate veil," among other questions. Discovery Mot. at 4, 7-10, ECF No. 244; *see* Resp't's Suppl. Reply at 22-25. More specifically, the Russian Federation asserts that, although the three Shareholders present themselves as companies based in Cyprus and the Isle of Man, they are actually shell companies that do not engage in any business and instead are wholly owned and controlled by six Russian Oligarchs: Mikhail Khodorkovsky, Leonid Nevzlin, Platon Lebedev, Mikhail Brudno, Vassili Shakhnovsky, and Vladimir Dubov. Resp't's Mot. at 5; Resp't's Suppl. Submission at 16-27. In requesting a hearing and cross-examination of the Shareholders' four witnesses, the Russian Federation asserts that this discovery is critical to evaluating these allegations and possible findings that Russian nationals exercised control in fact over the Shareholders and that the Shareholders' corporate veils should be pierced, all to

reach the conclusion, urged by the Russian Federation, that the Shareholders should be deemed Russian nationals and ineligible to qualify as investors under the ECT. Discovery Mot. at 2; Resp't's Suppl. Reply at 22-25.

The Shareholders strongly dispute each of the Russian Federation's allegations, asserting that, as a legal matter, the Russian Federation's attempts to disqualify them as investors would subject them to additional definitional requirements simply not included in the ECT, or even ECT drafts. Pet'rs' Suppl. Submission at 30-31 (explaining that the ECT defines "Investors" to "include 'a company or other organization organized in accordance with the law applicable in [a] Contracting Party.'" (internal citation omitted)). The Shareholders also strongly contest, as a factual matter, the Russian Federation's allegations that they are shell companies or were otherwise wholly owned or controlled by Russian nationals at the time of the arbitration proceedings. *Id.* at 31-35. They point to witness statements from the four witnesses whom the Russian Federation seeks to cross-examine, and filings submitted to the Court of Appeal of The Hague, describing in "painstaking detail" their prior denial of these allegations. *Id.* at 35.

Two of the witnesses named by the Russian Federation, Leonid Borisovich Nevzlin and Vladimir Matveevich Dubov, submitted written witness statements and appeared as witnesses in the arbitration proceedings, where they were extensively cross-examined by the Russian Federation. Pet'r's Suppl. Submission, Decl. of Michael Cotlick ("Cotlick Decl."), Ex. 8, First Witness

Statement of Leonid Borisovich Nevzlin, at 1, 5-6, ECF No. 241-8; Cotlick Decl., Ex. 28, First Witness Statement of Vladimir Matveevich Dubov, at 1, ECF No. 241-28. The Shareholders offered to present a third witness identified by the Russian Federation, Kelvin Mark Hudson, for testimony during the arbitration proceedings, but the Russian Federation declined to exercise that opportunity. Discovery Opp'n at 6. As noted, written testimony from each of these witnesses was also presented during the *de novo* proceedings held before the Court of Appeal of The Hague. Discovery Opp'n at 7.

Further testimony and a hearing with cross-examination of these witnesses is unnecessary to resolve the issue of subject matter jurisdiction in this case because, first, the Tribunal's determination as to the existence of an arbitration agreement is binding on this Court and nothing presented in such a hearing could overcome the Tribunal's finding, and, second, because much like the allegations of fraud considered in Part III.B.4.c, *supra*, consideration of such challenges "is a merits question," and further inquiry into the Russian Federation's allegations that Russian nationals exercised control in fact over the Shareholders and the corporate veil of the Shareholders should be pierced to treat them as Russian nationals may only be addressed at the enforcement stage of these proceedings. *See P&ID*, 27 F.4th at 776; *see also Chevron*, 795 F.3d at 206 (deeming "dispute over whether the lawsuits were 'investments' for purposes of the treaty [as] properly considered as part of review under the New York Convention" rather than FSIA jurisdictional questions). The Russian Federation's detailed arguments as to the

Shareholders' corporate ownership and structure, *see*, *e.g.*, Resp't's Suppl. Submission at 16-27; Discovery Mot. at 3-10, therefore need not be addressed in this Memorandum Opinion. Additionally, an evidentiary hearing with cross-examination of the Shareholders' witnesses is unnecessary, if not improper, at this procedural stage of this case.[22]

(e) The Tax-Dispute Precondition to Enforcement Also Cannot Overcome the Jurisdictional Grant of the Arbitration Exception

Finally, the Russian Federation challenges the arbitration agreement on the grounds that neither the Shareholders nor the Tribunal followed the "mandatory tax-dispute referral mechanism under Article 21(5) of the ECT, which is a precondition to the formation of consent with respect to tax disputes under the treaty." Resp't's Mot. at 36-38; Resp't's Suppl. Submission at 21-22. Once again, this argument was thoroughly considered and rejected by the Tribunal. *See* Hulley Final Award ¶¶ 1421, 1426.

As the Shareholders point out, the Supreme Court has held that questions about adherence to pre-conditions of arbitrability are a matter "for the arbitrators, and courts must review their determinations with deference." *BG Group*, 572 U.S. at 29 (holding that the court owed

22. For this reason, the Russian Federation's Motion for an Evidentiary Hearing to Cross-Examine Petitioners' Witnesses is denied, without prejudice.

deference to the arbitrators in determining whether an investor's failure to follow a local litigation requirement of a treaty stripped the arbitrators of jurisdiction). In *BG Group*, "the local litigation requirement [was] highly analogous to procedural provisions that both this Court and other have found are for arbitrators, not courts." *Id.* at 36. The Russian Federation argues that the tax-dispute referral mechanism differs from the pre-condition in *BG Group* because it is "substantive," rather than a "procedural claims-processing rule," as it describes the local litigation requirement considered in *BG Group*. *See* Resp't's Reply at 21. This argument fails, however, because the holdings in *First Options* and *Stileks* apply just as strongly here as in *BG Group*, no matter how the Russian Federation characterizes its specific challenge, and, because the parties agreed to arbitrate questions of jurisdiction, the Tribunal's decision of whether the Shareholders and Tribunal needed to comply with the tax-dispute referral mechanism before the issuance of the Final Awards is entitled to deference. Additionally, any review of this decision is a merits, rather than a jurisdictional, question.

In sum, none of the challenges brought by the Russian Federation succeed in sustaining its burden of persuasion to rebut the Shareholders' *prima facie* showing that the arbitration exception to the FSIA applies here.

C. Jurisdiction Under the New York Convention

Upon determination that an arbitration agreement exists, and that the FSIA's arbitration exception to

sovereign immunity applies, the next issue to assess is whether this matter presents a "basis upon which a court in the United States may enforce a foreign arbitral award." *Creighton Ltd.*, 181 F.3d at 121. The Shareholders correctly point to the New York Convention as providing the requisite treaty basis for the exercise of jurisdiction.[23]

The New York Convention is an international treaty ratified by the United States that provides for signatory states' recognition of arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." *P&ID*, 27 F.4th at 774 (quoting New York Convention, art. I(1)). "It further provides that signatory states 'shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the . . . articles [of the Convention].'" *Id.* at 774-75 (quoting New York Convention, art. III). The FAA codified the New York Convention into law, providing that "[a]n action . . . falling under the Convention shall be deemed to arise under the laws and treaties of the United States," and granted district courts original jurisdiction over such actions. 9 U.S.C. § 203.

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23. Though the FAA authorizes parties to arbitration agreements "to file specified actions in Federal court," this statute does not itself "support federal jurisdiction," *Badgerow*, 142 S. Ct. at 1316, and thus "[a] federal court may entertain an action brought under the FAA only if the action has an 'independent jurisdictional basis.'" *Id.* (quoting *Hall Street Assoc, LLC*, 552 U. S. at 582).

Appendix B

For an arbitral award to "fall[] under the Convention," two requirements—both optional elements of the New York Convention that the United States adopted at ratification—must be satisfied. *See* Restatement (Third) of the Foreign Relations Law of the United States § 487 cmts. b, f (Am. L. Inst. 1987). First, the arbitral award must be "rendered within the jurisdiction of a signatory country," pursuant to the reciprocity reservation of the Convention. *Creighton Ltd.*, 181 F.3d at 123 (New York Convention, art. III). Neither party contests that the awards here were rendered within the jurisdiction of a signatory country of the New York Convention, namely, the Netherlands.

Second, pursuant to the Convention's commercial reservation, which the United States adopted along with a minority of the Convention's signatories, the award must "aris[e] out of a legal relationship, whether contractual or not, which is considered as commercial." 9 U.S.C. § 202; *Belize Social Dev.*, 794 F.3d at 103 (explaining that "[f]or most signatories, the New York Convention applies to all private arbitral agreements, regardless of the subject matter. The United States, however, made a declaration, authorized by Article I(3) of the Convention, that the Convention would be applicable 'only to differences arising out of legal relationships whether contractual or not, which are considered commercial under the national law of the State making such declaration.'") (internal citations omitted). In the context of international arbitration, commercial "refers to matters which have a connection to commerce." *Belize Social. Dev.*, 794 F.3d at 105. The D.C. Circuit invites a broad interpretation

of the meaning of commercial in this context, explaining that "[a] matter or relationship may be commercial even though it does not arise out of or relate to a contract, so long as it has a connection with commerce, whether or not that commerce has a nexus with the United States." *Id.* at 104 (quoting Restatement (Third) of U.S. Law of Int'l Comm. Arbitration § 1-1 cmt. e).

Contrary to the Russian Federation's position, the Final Awards arose out of a commercial relationship between the parties based on the Russian Federation's own admitted and undisputed facts as to the history of the parties' relationship and applicable caselaw, as reviewed in more detail below.

1. The Parties' Commercial Relationship

As the Russian Federation detailed in its initial motion to dismiss, the parties' dispute leading to the arbitral Awards arose from a complicated commercial investment relationship that the Russian Federation entered into with the Shareholders, dating back to the 1990s. Resp't's Mot. at 7-8. This relationship began when the Shareholders took ownership of Yukos through a Loan-for-Shares ("LFS") auction held by the Russian Federation in 1995. *Id.* at 1. The LFS program was established by Russian Federation President Boris Yeltsin the same year the auction was held. *See* Resp.'t's Mot., Ex. R-261, Presidential Decree No. 889, ECF No. 40-1. "The purpose of the LFS program was to use highly valuable state-owned assets as collateral for the Government of the Russian Federation to borrow funds 'for covering the federal budget deficit.'" Resp't's

Mot. at 8 (citing Presidential Decree No. 889). Under the program, private bidders were allowed to submit proposals to loan funds to the Government, and those loans were secured by pledges of shares of large, state-owned enterprises as collateral. *Id.* at 8. If the government of the Russian Federation defaulted on any of these loans, the private persons or entities who held the loans would be allowed to sell the shares to a third party to recoup their investment. *Id.* At the highest level, this overall program is inherently commercial in nature, and involves significant entanglement between the government of the Russian Federation and private investors who participate in the program.

The winning bidder in the LFS auction paid $159 million for the shares of Yukos. *Id.* at 11. While the Russian Federation claims that the Shareholders and their predecessor owners of Yukos committed fraud in the course of this auction to obtain shares of the state-owned company, that alleged fraud does not actually alter the fact that this was an inherently *commercial* transaction. The Shareholders' claims arose out of their investment in Yukos, a company "engag[ed] in exploration, production, refining, marketing and distribution of crude oil, natural gas and petroleum products" that employed thousands of people and was a competitor of the Russian Federation's state-owned oil company. Hulley Final Award ¶¶ 71-73.

When the Shareholders' suffered massive losses as a result of the series of tax assessments leveled by the Russian Federation, forcing the sale of Yukos' key asset and ultimately bankruptcy, the Shareholders, in

2004, sought arbitration under the ECT. *See id.* at ¶ 10. In July, 2005, the Russian Federation agreed to submit the dispute to arbitration under the ECT, stating that "[t]he Russian Federation during that time has reached the determination to accept the jurisdiction of this Arbitral Tribunal to determine its own jurisdiction and has participated fully in the process of constitution of the Arbitral Tribunal." 2005 Letter. As already noted, the Russian Federation also effectuated this arbitration by participating in the selection of the arbitral Tribunal, with the specific appointment of Judge Schwebel. Pet. ¶ 12.

These facts proffered and otherwise undisputed by the Russian Federation demonstrate conclusively that the relationship underlying the arbitration proceedings in this case was commercial in nature. By choosing to auction off state-owned assets to private persons and organizations, in order to raise funds to cover the state's national debt, the Russian Federation chose to involve itself in commercial investment transactions with the Shareholders.

Further, by choosing to submit the dispute to arbitration under the ECT, as expressly stated in its 2005 Letter, the Russian Federation at least impliedly acknowledged the commercial nature of the dispute. The ECT is aimed solely at governing how signatories treat *commercial* investments, *see* Pet. ¶ 34, as confirmed by the ECT's Article 26(5)(b), which provides that any claims submitted to arbitration on the basis of that treaty "shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the [New York]

Convention."[24] Although the Russian Federation denies that this ECT article applies because the treaty was not ratified by the country in its entirety, and because "the national law of the State where enforcement is sought, which is U.S. law in the present case," should be used to determine whether the dispute is "commercial" under the New York Convention, Resp't's Reply at 25, Article 26(5)(b) nonetheless supports the conclusion that the underlying relationship submitted to arbitration was commercial in nature.

Finally, the actions by the Russian Federation found to be unlawful by the arbitral Tribunal, including the malicious tax prosecution and seizure of the Shareholders' asserts, were also undoubtedly commercial in nature because they were aimed at increasing the market share of the state-owned oil company and reducing the share held by a competitor, Yukos. *See* Pet. ¶¶ 33, 59-60.

In sum, the history of the parties' dealings, the nature of the assets involved, and reliance on the ECT for the convening of the arbitration between the parties all confirm the commercial relationship underlying the dispute leading to the Final Awards.

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24. The Shareholders indicate that the text of ECT Article 26(5) is often used in international treaties, including the North American Free Trade Agreement ("NAFTA"), to encourage parties to submit disputes to arbitration, and a decision undermining the force of this language could have widespread implications for the international dispute resolution regime. Pet'rs' Opp'n at 39-40.

2. Caselaw Confirms the Parties' Commercial Relationship

The conclusion that the parties' dispute arose from a commercial relationship subject to the New York Convention is further bolstered by review of binding caselaw. For its part, the Russian Federation contests that the relationship underlying the Final Awards falls within the New York Convention's commercial reservation, characterizing "[p]etitioners' claims [as] concern[ing] public law matters because they are in connection with the exercise of Russia's sovereign authority: its police, taxation, procurement, and enforcement powers." Resp't's Mot. at 43; *see* Resp't's Reply at 22-25. In this vein, the Russian Federation says its relationship with the Shareholders is purely regulatory, arising from "imposition of tax penalties, conduct of bankruptcy proceedings, tendering of State-owned property, and regulation of natural resources." Resp't's Reply at 24. In making this argument, the Russian Federation conveniently ignores the commercial nature of the transaction that created the relationship at issue with the Shareholders, as well as the fact that the series of tax reassessments imposed by the Russian Federation, culminating in auctioning off key Yukos assets to pay punitive tax debts and drive Yukos out of competition in the oil market, *see* Pet. ¶¶ 24-30, does nothing to negate the clear commercial relationship between the parties, as binding precedent amply illustrates.

For example, in *BG Group*, the Supreme Court approved the exercise of jurisdiction to enforce investment

treaty awards under the New York Convention, where the underlying dispute submitted to arbitration involved the tariff treatment of an investment made in the energy sector of a foreign state, similar to the dispute submitted to arbitration here. 572 U.S. at 44-45. Although the application of the Convention's commercial reservation was not directly addressed in that case, the Supreme Court rejected other challenges to the enforcement of the arbitration award and the D.C. Circuit affirmed the district court's confirmation of the award on remand. *Republic of Argentina v. BG Group PLC*, 555 F. App'x 2, 3 (D.C. Cir. 2014).

Likewise, the D.C. Circuit has previously held that the imposition of taxes on a company creates the requisite connection to commerce under the New York Convention. *See Belize Social Dev.*, 794 F.3d at 104. In *Belize Social Development*, Belize's largest private telecommunications company, Telemedia, purchased state-owned properties in exchange for "relief from tax and regulatory burdens," along with "other significant benefits." *Id.* at 100. When a new Prime Minister took office, Belize ceased to honor its contractual obligations to Telemedia. *Id.* at 101. Telemedia submitted the dispute to arbitration and was awarded over 38 million Belize dollars in damages, and Telemedia's successor in interest sued in this court seeking confirmation of the award. *Id.*

The government of Belize argued that its relationship with Telemedia failed to meet the requisite connection to commerce under the New York Convention, "because the award [did] not arise from a commercial transaction,

as required by the treaty, but from a government transaction." *Id.* at 103. The D.C. Circuit rejected that argument, holding that the arbitration "involve[d] the sale of real property in exchange for certain accommodations, a transaction with a connection to commerce," and that "[t]he taxes Belize levies against a company also have a connection with commerce, as do the duties Belize charges (or foregoes charging)." *Id.* at 104 (internal citation omitted). The D.C. Circuit thus concluded that the arbitration at issue was commercial and "governed by the New York Convention." *Id.*

The Russian Federation tries to avoid the holding in *Belize Social Development* by distinguishing the underlying dispute in that case as involving breach-of-contract claims by investors, and not commercial investments, *see* Resp't's Reply at 24, but the D.C. Circuit's recognition of the commercial connection applies just as strongly in this case. The facts at issue here enjoy key similarities to those in *Belize Social Development*, as both cases involve investments or purchases of state-owned assets, which the foreign sovereign chose to transfer to, in financial transactions with, a private party. In both cases, a taxation dispute arose related to those investments, and the taxation dispute was submitted to arbitration. The D.C. Circuit relied on both the commercial nature of the underlying state-owned property sales and the taxes levied by Belize to find the requisite connection to commerce. *Id.* at 104. Both of these elements in the relationship between the Shareholders and the Russian Federation support finding that this dispute satisfies the commercial requirement of the New York Convention.

Appendix B

The D.C. Circuit's recent decision in *Simon* addressing the meaning of "commercial activity" in the context of a separate FSIA exception for expropriations also counsels in favor of finding that the relationship at the core of this dispute was commercial. *Simon*, 77 F.4th at 1121. In *Simon*, the Court concluded that "the commercial-activity prong is met based on [the foreign sovereign]'s issuance of bonds," after relying on the interpretation of the word "commercial" in the FSIA's commercial activity exception and thereby applying a consistent interpretation of this term across FSIA exceptions. *See id* at 1122. In evaluating the applicability of the commercial activity exception, the Court explained that "a foreign state's actions are 'commercial' under the FSIA when the state 'acts, not as regulator of a market, but in the manner of a private player within it.'" *Id.* at 1122 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)). The Court found dispositive that "private parties regularly issue [such] bonds," and described the bonds as "garden-variety debt instruments," noting that "private parties could hold them, trade them on the international market, and use them to secure a future stream of income." *Id.* (citing *Weltover*, 504 U.S. at 615).

By participating in commercial investment transactions and accepting loans from private entities the Russian Federation was similarly participating in commercial transactions in a manner indistinguishable from a private party. The shares issued in exchange for loans through the LFS program were standard debt instruments, much like the bonds issued by the Hungarian Government in *Simon*. The Russian Federation promised in issuing these shares

that "the winner of the LFS auction was entitled to receive 30%" of any "proceeds in excess of the loan amount," if the underlying state-owned assets were sold, Resp't's Mot. at 8, just as the bonds issued by Hungary promised a return-on-investment of 6.250% per year, *see Simon*, 77 F.4th at 1122. In issuing these shares, the Russian Federation transacted as any private party offering stock or shares in a business or property would. The issuance of shares in state-owned entities and acceptance of loans from private parties in return thus undoubtedly qualifies as "commercial" under the D.C. Circuit's consistent interpretation of that term in the context of the FSIA. *See id.* The Russian Federation's blinkered focus only on the subsequent tax enforcement and bankruptcy actions cannot erase the facts of its involvement in commercial investment agreements through the LFS program.

* * *

The Shareholders have fully demonstrated a "basis upon which a court in the United States may enforce a foreign arbitral award," *Creighton Ltd*, 181 F. 3d at 121, since the Final Awards were rendered within the jurisdiction of a signatory country to the New York Convention and arise from a commercial relationship between the parties, satisfying the prerequisites for the exercise of jurisdiction under the New York Convention.

D. NEXT STEPS

In addition to the pending motions to dismiss this action for lack of subject matter jurisdiction, the Russian Federation has moved to deny confirmation of the Final Awards pursuant to the New York Convention. Resp't's Mot. Deny Pet. Due to the timing of the multiple stays imposed over the course of this litigation, the Shareholders have not yet responded to that motion to deny confirmation of the Awards. *See* Minute Order (Oct. 22, 2015).[25] The relief sought in the Shareholders' original Petition to confirm the Final Awards, countered by the Russian Federation's pending motion to deny such confirmation, are now front and center as the final issue to address in this long-standing litigation. To the extent that the Russian Federation's challenges to the existence of an arbitration agreement between the parties and to the arbitrability of the underlying dispute are resolved in this Memorandum Opinion, those objections need not and should not be repeated or relitigated in connection with the

25. This Minute Order, which was entered by another Judge of this Court before this matter was randomly reassigned to the undersigned, directs the Shareholders to "respond in part to the motion to dismiss, focusing their opposition solely on the legal issues raised in pages 25-44 of respondent's [] memorandum in support of its motion to dismiss, and in particular, the issues raised on pages 38-44," and notes that "[o]nce the Court has ruled on the question of its subject matter jurisdiction, it will, if necessary, provide petitioners with an opportunity to respond to the factual allegations raised in the first 23 pages of the memorandum in support of the motion to dismiss and set a schedule for further briefing on the [] motion to deny confirmation of the arbitration award."

pending motion to deny confirmation of the Awards. The parties will be directed to confer and propose a briefing schedule for the final stage of this litigation before this Court.[26]

IV. CONCLUSION

The Russian Federation has failed to discharge its burden of persuasion to establish that the FSIA's arbitration exception is inapplicable here. As a result, the FSIA arbitration exception applies, and the Russian Federation's general sovereign immunity provides no protection in this action to enforce the Final Awards issued by the arbitral Tribunal. Moreover, the New York Convention provides a treaty basis upon which this Court may enforce those Final Awards, thereby establishing this Court's subject matter jurisdiction to resolve the Shareholders' Petition. Accordingly, the Russian Federation's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Supplemental Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF Nos. 24 and 108 (as amended by ECF Nos. 271 and 272), are **DENIED**. The Russian Federation's Motion for Leave to File a Proposed

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26. Both the Russian Federation's Sealed Motion for Leave to File Document Under Seal, at ECF No. 259, and the Shareholders' responding Sealed Motion for Leave to File Document Under Seal, ECF No. 260, are granted. The Russian Federation's Sealed Motion, ECF No. 259-3, with Memorandum in Support at ECF No. 259-4, is denied, without prejudice, given the complex procedural history of this case, the extensive record, including over 100,000 pages of filings, and the significant delays that have already impacted the progression of this case.

Supplemental Reply, ECF No. 246, is **GRANTED**; the Russian Federation's Motion for an Evidentiary Hearing to Cross-Examine Petitioners' Witnesses, ECF No. 244, is **DENIED WITHOUT PREJUDICE**; the Shareholders' Motion to Strike the Third Avtonomov Declaration, ECF No. 250, is **DENIED AS MOOT**; the Russian Federation's Sealed Motion for Leave to File Document Under Seal, ECF No. 259, and the Shareholders' responding Sealed Motion for Leave to File Document Under Seal, ECF No. 260, are **GRANTED**; and the Russian Federation's Sealed Motion, ECF No. 259-3, is **DENIED WITHOUT PREJUDICE**.

This case will progress to consideration of the relief sought in the Petition to confirm the Final Awards and the Russian Federation's Motion to Deny Confirmation of the Arbitration Awards Pursuant to the New York Convention. The parties are directed to submit a Joint Status Report by December 5, 2023, proposing a schedule to resolve the final issues in this matter.

An order consistent with the Memorandum Opinion will be entered contemporaneously.

Date: November 17, 2023

/s/ Beryl A. Howell
BERYL A. HOWELL
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 14-1996

HULLEY ENTERPRISES LTD, *et al.*,

Petitioners,

v.

THE RUSSIAN FEDERATION,

Respondent.

Filed November 17, 2023

Judge Beryl A. Howell

ORDER

Upon consideration of respondent the Russian Federation's Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 24, and Supplemental Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 108, as amended at ECF Nos. 271 and 272, the related legal memoranda in support and in opposition, the exhibits and declarations attached thereto, and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 24, is **DENIED**; and it is further

ORDERED that respondent's Supplemental Motion to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 108, as amended at ECF Nos. 271 and 272, is **DENIED**; and it is further

ORDERED that respondent's Motion for an Evidentiary Hearing to Cross-Examine Petitioners' Witnesses, ECF No. 244, is **DENIED WITHOUT PREJUDICE**; and it is further

ORDERED that respondent's Motion for Leave to File a Supplemental Reply, ECF No. 246, is **GRANTED**; and it is further

ORDERED that the petitioners' Motion to Strike the Third Avtonomov Declaration, ECF No. 250, is **DENIED AS MOOT**; and it is further

ORDERED that respondent's Sealed Motion for Leave to File a Document Under Seal, ECF No. 259, is **GRANTED**; and it is further

ORDERED that the petitioners' responding Sealed Motion for Leave to File a Document Under Seal, ECF No. 260, is **GRANTED**; and it is further

ORDERED that respondent's Sealed Motion, ECF No. 259-3, is **DENIED WITHOUT PREJUDICE**; and it is further

ORDERED that, by December 5, 2023, the parties shall confer and submit a proposed schedule governing future proceedings in this matter, including proposed dates to complete the briefing necessary for the Court to consider the Russian Federation's Motion to Deny Confirmation of the Arbitration Awards Pursuant to the New York Convention, ECF No. 23.

SO ORDERED.

Date: November 17, 2023

/s/ Beryl A. Howell
BERYL A. HOWELL
United States District Judge

APPENDIX D

28 USCS § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

* * *

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or

award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607 [28 USCS § 1607], or (D) paragraph (1) of this subsection is otherwise applicable.

* * * *

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-1207 and 80-1252

LIBYAN AMERICAN OIL COMPANY,

Plaintiff-Appellant-Crossappellee,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRYA,

Defendant-Appellee-Crossappellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE [*]

. . . .

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* [The excerpts have been reproduced from the Brief for the United States as *Amicus Curiae*, pp. 32-37, and the entire Supplemental Memorandum for the United States, filed with the U.S. Court of Appeals for the District of Columbia Circuit on June 16, 1980, and November 7, 1980, respectively.]

Appendix E

In enacting section 1605(a)(1) of the FSIA, Congress manifestly intended that an arbitration agreement should constitute a waiver of foreign sovereign immunity. The legislative history expressly mentions as examples of implicit waivers "cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular [33]country should govern a contract." H. Rep. No. 94-1487 at 18.[30] To date, only one other court has had occasion to interpret and apply the waiver provision of section 1605(a)(1) with respect to the enforcement of foreign judgments, and it reached the same result as the court below, *viz.*, that an agreement to arbitrate in a third country constitutes a waiver of foreign sovereign immunity. *Ipitrade International, A.S. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978).[30a]

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30. It is now established international practice that by entering into an agreement to arbitrate a dispute, a state waives its immunity from suit. For example, Section 9 of the United Kingdom State Immunity Act 1978, c. 33, reads as follows:

> (1) Where a State has agreed in writing to submit a dispute which has arise, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.
>
> (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

30a. In *Verlinden B.V. v. Central Bank of Nigeria*, __ F. Supp. __ (S.D.N.Y., No. 79 Civ 1150, Apr. 21, 1980), a Dutch corporation brought an action to for anticipatory breach and repudiation of an irrevocable letter of credit established in its favor by the suit,

[34]Furthermore, Congress clearly provided that any attempted withdrawal of the waiver of immunity shall be ineffective unless the withdrawal is in accordance with the terms of the original waiver. The House Report explains section 1605(a)(1)'s limitation on revocations of waivers of immunity by stating that "a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally." H. Rep. No. 94-1487 at 18.

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plaintiff urged that the Central Bank had implicitly waived its immunity because the contract between the *State of Nigeria* and the plaintiff – which gave rise to the letter of credit – contained an arbitration clause. The district court held that that jurisdictional basis was unavailing, saying (slip op. 39)

> [P]laintiff * * * has decided not to sue upon its cement agreement with Nigeria. Instead it bases its claim upon the Verlinden letter of credit. But that instrument, unlike the contract, is devoid of any provision accepting foreign law for its interpretation, nor does it name any foreign tribunal for arbitration.

By dictum, the district court questioned whether "a sovereign state which agrees to be governed by the laws of a *third-party* country – such as the Netherlands – is thereby precluded from asserting its immunity in an American court" (emphasis in original; slip. op. 41-42) citing *Ipitrade, supra*. – As we submit below, there is a distinction between a waiver of sovereign immunity for purposes of adjudicating a dispute *ab initio*, and a waiver of sovereign immunity for purposes of enforcing a judgment rendered by a foreign tribunal chosen by the parties. The *Ipitrade* decision, we submit, is clearly correct.

Section 1605(a)(1) must be applied by the courts not only where the arbitration agreement explicitly stipulates the United States as the situs of the arbitration, but also where, as here, the arbitration properly takes place in any state which is party to the New York Convention. This is so because the United States has undertaken a treaty commitment in the Convention to recognize and enforce in United States courts foreign arbitral awards made in the territory of states who are members of the Convention. Switzerland is such a state.

[35] It is of no moment that the arbitration agreement here involved did not expressly provide for arbitration in the territory of a state which is a party to the New York Convention. Libya should not be heard to contend that it did not foresee that the Convention's enforcement process might be triggered in the United States and that, therefore, it did not waive its immunity from enforcement jurisdiction within the meaning of section 1605(a)(1). Though Libya may not have expressly agreed to a specific situs of arbitration, it manifestly agreed to a clear procedure for determining that situs: failing agreement between the parties, the situs would be chosen by the tribunal. Libya must have foreseen that the tribunal might designate as the situs one of the countries that are parties to the Convention,[31] and thus must have foreseen

31. The Convention was adopted at New York on June 10, 1958 and entered into force June 7, 1959, well before the renegotiation of the arbitration clause of the concession agreements. Switzerland became a party effective August 30, 1965 and the United States effective December 29, 1970. Today over 50 states are parties.

the possibility of enforcement in any state that either was or might become a party, including [36]the United States. Having consented to this method of choosing the situs, Libya cannot now avoid the application of the Convention.[32]

There is no constitutional infirmity in enforcing the arbitral award under these circumstances. "Contacts" between the defendant and the United States are not required where the judgment sought is not an adjudication *ab initio* on the merits but rather the enforcement of an award rendered in a foreign jurisdiction where the defendant had the opportunity to appear and contest the entry of judgment. *Shaffer v. Heitner*, 433 U.S. 186 (1977), specifically distinguishes between the jurisdictional "contacts" threshold applicable to an adjudication on the

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32. The tribunal itself consisted of a sole arbitrator chosen By the President of the International Court of Justice. It is reasonable to assume that the President of the Court – himself an official in the United Nations system and charged with responsibility for neutral dispute settlement – would select an arbitrator experienced in the workings of that system. It cannot have surprised Libya that the arbitrator so selected chose as the situs of the arbitration one of the world's principal centers for arbitral activities, in a state party to the Convention.

33. The Court stated (433 U.S. at 210-11, n. 36): "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."

merits and a lesser jurisdictional threshold for enforcement [37]of another tribunal's judgment.[33] Although the *Shaffer* discussion concerned the enforcebility of a sister-state judgment under the Full Faith and Credit Clause of the Constitution, there is no reason not to consider it equally applicable to recognition and enforcement of an arbitral award within a treaty framework.

In sum, Libya's implicit consent to suit in the United States to enforce the arbitral award removes any possible constitutional objection, and there is no obstacle to the exercise of jurisdiction pursuant to the FSIA.

APPENDIX F

Section of International Law and Practice.[38] The Section's recommendation concerning the Foreign Sovereign Immunities Act was approved by voice vote, as a part of the Consent Calendar, as follows:

> *Be It Resolved,* That the American Bar Association recommends amendment of the Foreign Sovereign Immunities Act, 28 U.S.C. Sections 1330, 1332, 1391, 1441, 1602 *et seq.* ("the Act") in accordance with the following principles:
>
> (1) Amend Section 1603 to clarify that the issuance of debt securities and guarantees thereof by a foreign state constitutes a commercial activity, as specified in Section 3(3) (b) of the British State Immunity Act.
>
> (2) Amend Section 1605(a) to clarify that an agreement to arbitrate constitutes a waiver of immunity in an action to enforce that agreement or the resultant award for all purposes under the Act.
>
> (3) Amend Section 1605(b) to provide that if a vessel or cargo is arrested pursuant to process obtained on behalf of a party who was aware that the vessel or cargo of a foreign state was involved, the foreign state may recover any damages it sustained for detention of the vessel or cargo from said party, but said service will be deemed

38. The full report of the Section appears at page 859.

to constitute valid delivery of notice of the suit, and plaintiff will not lose his claim.

(4) Amend Section 1605(b) to provide that the procedure followed in suits under it shall be in accordance with the principles of law and rules of practice of *in rem* suits.

(5) Add a new Section 1606(b) which excludes application of the act of state doctrine by a foreign state in cases where the Act confers jurisdiction upon the federal courts to adjudicate claims for expropriation or breach of contract.

(6) Revise Section 1610(a) and (b) to provide for execution of judgment against any property of a foreign state which is used or intended to be used for a commercial activity in the United States.

(7) Revise Section 1610(d) to authorize pre-judgment attachment or injunction to secure satisfaction of a judgment against an agency or instrumentaility of a foreign state engaged in commercial activity in the United States.

(8) Amend Sections 1605 and 1610 of the Act by adding new Sections 1605(c) and 1610(e) to permit foreclosure of preferred mortgages on vessels *in rem* and arrest of vessels in accordance with the Ship Mortgage Act of 1920.

* * *

Appendix F

REPORT NO. 1 OF THE SECTION OF INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION*

Be It Resolved, That the American Bar Association recommends amendment of the Foreign Sovereign Immunities Act, 28 U.S.C. Sections 1330, 1332, 1391, 1441, 1602 *et seq.* ("the Act") in accordance with the following principles:

(l) Amend Section 1603 to clarify that the issuance of debt securities and guarantees thereof by a foreign state constitutes a commercial activity, as specified in Section 3(3) (b) of the British State Immunity Act.

(2) Amend Section 1605(a) to clarify that an agreement to arbitrate constitutes a waiver of immunity in an action to enforce that agreement or the resultant award for all purposes under the Act.

(3) Amend Section 1605(b) to provide that if a vessel or cargo is arrested pursuant to process obtained on behalf of a party who was aware that the vessel or cargo of a foreign state may recover any damages it sustained for detention of the vessel or cargo from said party, but said service will be deemed to constitute valid delivery of notice of the suit, and plaintiff will not lose his claim.

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* The Recommendation was approved. See page 612.

(4) Amend Section 1605(b) to provide that the procedure followed in suits under it shall be in accordance with the principles of law and rules of practice of *in rem* suits.

(5) Add a new Section 1606(b) which excludes application of the act of state doctrine by a foreign state in cases where the Act confers jurisdiction upon the federal courts to adjudicate claims for expropriation or breach of contract.

(6) Revise Section 1610(a) and (b) to provide for execution of judgment against any property of a foreign state which is used or intended to be used for a commercial activity in the United States.

(7) Revise Section 1610(d) to authorize pre-judgment attachment or injunction to secure satisfaction of a judgment against an agency or instrumentality of a foreign state engaged in commercial activity in the United States.

(8) Amend Sections 1605 and 1610 of the Act by adding new Sections 1605(c) and 1610(e) to permit foreclosure of preferred mortgages on vessels *in rem* and arrest of vessels in accordance with the Ship Mortgage Act of 1920.

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REPORT

The Recommendations accompanying this report received the final approval of the Section of International Law and Practice on February 10, 1984. The substance of the Report and Recommendations has also been approved by the Sections on Corporation, Banking and Business Law; Litigation; and Tort and Insurance Practices.

The Foreign Sovereign Immunities Act has now been in force for seven years. The Act has been successful in serving its major purpose of transferring determinations of the immunity of foreign sovereign parties from the Department of State to the courts, and it has been successful in implementing the modern, restrictive theory of immunity. A number of significant problems have arisen under the Act as currently drafted, however, which require further action by Congress.

The amendments proposed would affect both the general jurisdictional provisions of the Act and its admiralty provisions. The following provides a brief background to each of the recommendations:

* * *

(3) Act of State

Experience has demonstrated that the Act's current provisions for adjudication of expropriation claims against foreign states principally in Sections 1605(a)(3) and 1607, fail to provide an adequate remedy for many Americans who are the victims of foreign expropriations. This is

true, *inter alia,* because many courts have continued to apply the act of state doctrine as a bar to adjudication of expropriation claims even in the narrow circumstances in which jurisdiction is expressly prescribed by law. *See, e.g., Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn &* Co., *Inc.,* 652 F.2d 231 (2d Cir. 1981). The Section recommends a new Section 1606(b) to remedy this anomalous situation.

(4) Agreements to Arbitrate

In view of the repeated litigation of the legal effect of an agreement to arbitrate as a waiver of immunity for purposes of Sections 1605(a)(l), 1610(a)(l) and 1610(d) of the Act, and the uncertainties remaining in this area, *see Ipitrade International, S.A. v. Federal Republic of Nigeria,* 465 F. Supp. 824 (D.D.C. 1978); *Libyan American Oil Co. v. Libya,* 482 F. Supp. 1175 (D.D.C. 1980) *vacated* 684 F.2d 1032 (D.C. Cir. 1981); *Verlinden B. V. v. Central Bank of Nigeria,* 488 F. Supp. 1284 (S.D.N.Y. 1980), *affirmed,* 641 F.2d 320 (2d Cir. 1981), *reversed,* 51 U.S.L.W. 4567 (May 23, 1983); *MINE v. Republic of Guinea,* 693 F.2d 1094 (D.C. Cir. 1982), the Section believes the Act should be amended to clarify that an agreement to arbitrate constitutes a waiver of immunity in an action to enforce that agreement or to enforce the resultant award for all purposes under the Act.

* * *

Appendix F

EXHIBIT

TEXT OF PROPOSED REVISIONS TO FOREIGN SOVEREIGN IMMUNITIES ACT

What follows is the full text of the proposed revised Foreign Sovereign Immunities Act, 28 U.S.C. sections 1330, 1332, 1391, 1441, 1602 *et seq.* ("the Act"), including both the current language of the Act and all proposed amendments:*

* * *

§ 1605. GENERAL EXCEPTIONS TO THE JURISDICTIONAL IMMUNITY OF A FOREIGN STATE

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

* * *

(6) *which is brought to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences*

which have arisen or which may arise between the parties in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States or which is brought to confirm, recognize or enforce an award made pursuant to such an agreement to arbitrate, if (i) the arbitration takes place in the United States, (ii) the agreement or award is governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, or (iii) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under Section 1605 or 1607 of this chapter.[*]

* * *

§ 1606. EXTENT OF LIABILITY

(a) As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been constructed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

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(b) *The federal act of state doctrine shall not be applied on behalf of a foreign state with respect to any claim or counter-claim asserted pursuant to the provisions of this chapter which is based upon an expropriation or other taking of property (including contract rights) without the payment of prompt, adequate and effective compensation or otherwise in violation of international law or which is based upon a breach of contract.*

* * * *

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION

April 29, 1986

Hon. Dan Glickman
Chairman
Subcommittee on Administrative Law
and Governmental Relations Federal Express
Rayburn House Office Building – Room B-351
Independence Ave. & South Capitol St., S.W.
Washington, DC. 20515

Dear Representative Glickman:

This letter is the Association's statement for the record of your subcommittee's consideration of H.R. 3137 - Enforcement of Foreign Arbitral Awards against Foreign Sovereigns which would amend the Foreign Sovereign Immunities Act of 1976. This expression of our views is limited to the arbitration aspects of the proposed legislation.

The American Arbitration Association, an educational membership organization was founded in 1926 and incorporated under the Not-For-Profit Corporation Law of the State of New York. Its purposes, among others, are to promote the knowledge and effective use of international commercial arbitration throughout the world. The AAA has accumulated much knowledge and experience in the administration of international commercial arbitration and the enforcement of foreign arbitral awards. Its leadership role in the field of private dispute settlement and its position in the arbitration field is acknowledged

both in this country and abroad. The AAA has a strong and fundamental interest in furthering the generally accepted principles of international arbitration, a process which facilitates international trade and investment, in which U.S. business is heavily engaged and seeks expansion.

The Association supports the enactment of Section 2 of H.R. 3137, which would add paragraph (6) to Section 1605(a) of the FSIA. This support derives from careful consideration of the concepts embodied in the proposed section by the Association's advisory bodies on international commercial arbitration and the approval of its Law Committee.

Our support and endorsement of Section 2 is based on an existing concern for the proper interaction between the enforceability of an international arbitration agreement or award with or against a foreign state or its instrumentalities and the FSIA, as interpreted by United States courts, because the Act now contains no explicit provision for jurisdiction to enforce arbitration agreements or awards. The legislative history of the Act indicates Congress' intent that actions to enforce arbitral agreements and awards be brought under Section 1605(a)(1), which provides for jurisdiction in any case "in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of waiver (28 U.S.C. § 1605(a)(1)).

The House Report notes that "the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where the foreign state

has agreed that the law of a particular country should govern a contract."

Implied consent to United States jurisdiction is found where the agreement to arbitrate provides for arbitration in the United States, the arbitration takes place in this country, or the underlying claim is one that could have been brought in the federal district courts for adjudication in the first instance. But when the arbitration takes place in the territory of a foreign state or in a third state, the lack of statutory clarity is troublesome. The confusion in decisions of the United States courts was recently reviewed by the Seventh Circuit of Appeals in Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (1985), where the court stated in dictum that U.S. courts have generally restricted their findings of implied waiver of sovereign immunity to the specific instances cited in the legislative history of FSIA.

Enactment of Section 2 would go far to strengthen international commercial arbitration by enlarging the scope of waiver of sovereign immunity under FSIA to explicitly include any agreement to arbitrate matters capable of settlement under U.S. law, where there is a freely negotiated future disputes arbitration clause in a contract with a foreign nation or its instrumentality. Under the proposed section, sovereign immunity could not be asserted in any case brought to enforce an arbitration agreement with a foreign state or an award rendered against the foreign state under such agreement, where the arbitration takes place in the United States; where the underlying claim against the foreign state could have been brought in a United States court under the FSIA; or where the agreement or award is governed by a treaty

or other international agreement in force for the United States which calls for the recognition and enforcement of arbitral agreements and awards.

Enactment of the section would reinforce these clauses which are especially valuable because they provide an important method of submitting a whole complex of relations between states and foreign private parties to the rule of law and because they accommodate to the disposition of some states and governmental agencies to accept binding arbitration rather than submission to the jurisdiction of the courts and laws of another country.

Section 3 of the bill would amend FSIA with respect to the federal Act of State doctrine by providing that it shall not bar enforcement of an arbitration agreement or award rendered against a foreign state. Adoption of this concept would have a positive effect on international commercial arbitration since it would address a concern posed by a recent case, Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F.Supp., 1175 (D.D.C. 1980). Here, the trial court refused to confirm an arbitration award rendered against Libya in Switzerland pursuant to the United Nation (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The award determined which the parties had agreed would be settled by arbitration. On the appeal, the American Arbitration Association appeared as Amicus Curiae and urged the court to hold that under federal law an arbitral award rendered abroad in a Convention country, may not be refused enforcement here because the state party to the decision attempted to nullify its contract commitment to arbitration and, that a state's general right to nationalize assets in its own territory

cannot override the treaty obligation of the United States to another country to enforce arbitral award rendered in that country pursuant to the New York Convention.

The case was settled before the appeal was heard and the decision below vacated but the result -- denial of enforcement by reason of an act of state of an international commercial arbitration award rendered in a country to which the U.S. had a treaty obligation under the New York Convention -- cast a shadow on the effectiveness of the international arbitral process. That process could be frustrated if awards against foreign states cannot be recognized and enforced in U.S. courts when a state unilaterally determines that it is in its best interest to repudiate its arbitral commitment. Section 3, if enacted, could serve to resolve this situation.

Sincerely,

/s/ Michael F. Hoellering
Michael F. Hoellering
General Counsel

MFH:id

Duplicate original to:

Senator Charles Mathias
Russell Senate Office Building
Room 387-A
Delaware Ave. & Constitution Ave., N.E.
Washington, DC 20510

APPENDIX H

PUBLIC LAW 100-669
100TH CONGRESS

AN ACT

To implement the Inter-American Convention on International Commercial Arbitration.

Nov. 16, 1988

(§. 2204)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Chapter 1 of title 9, United States Code, is amended by adding at the end thereof the following new section:

"§ 15. Inapplicability of the Act of State doctrine

"Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.".

SEC. 2. Section 1605(a) of title 28, United States Code, is amended by—

(1) striking out "or" at the end of paragraph (4);

(2) striking out the period at the end of paragraph (5) and inserting in lieu thereof "; or"; and

(3) adding at the end thereof the following:

> "(6) in which the action is brought, either to enforce an agreement made by the foreign State with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.".

SEC. 3. Section 1610(a) of title 28, United States Code, is amended by—

(1) striking out the period at the end of paragraph (5) and inserting in lieu thereof ", or"; and

(2) adding at the end thereof the following:

> "(6) the judgment is based on an order confirming an arbitral award rendered against the foreign State, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.".

Approved November 16, 1988.

LEGISLATIVE HISTORY-S. 2204:

CONGRESSIONAL RECORD, Vol. 134 (1988):

Sept. 30, considered and passed Senate.

Oct. 20, considered in House.

Oct. 21, considered and passed House, amended. Senate concurred in House amendment.

APPENDIX I

EUROPEAN ENERGY CHARTER

The representatives of the signatories meeting in The Hague on 16 and 17 December 1991,

Having regard to the Charter of Paris for a New Europe, signed in Paris on 21 November 1990 at the summit meeting of the Conference on Security and Co-operation in Europe (CSCE);

Having regard to the document adopted in Bonn on 11 April 1990 by the CSCE Conference on Economic Co-operation in Europe;

Having regard to the declaration of the London Economic Summit adopted on 17 July 1991;

Having regard to the report on the conclusions and recommendations of the CSCE meeting in Sofia on 3 November 1989, on the protection of the environment, as well as its follow-up;

Having regard to the Agreement establishing the European Bank for Reconstruction and Development signed in Paris on 29 May 1990;

Anxious to give formal expression to this new desire for a European-wide and global cooperation based on mutual respect and confidence;

Resolved to promote a new model for energy cooperation in the long term in Europe and globally within

the framework of a market economy and based on mutual assistance and the principle of non-discrimination;

Aware that account must be taken of the problems of reconstruction and restructuring in the countries of Central and Eastern Europe and in the USSR and that it is desirable for the signatories to participate in joint efforts aimed at facilitating and promoting market-oriented reforms and modernisation of energy sectors in these countries;

Certain that taking advantage of the complementary features of energy sectors within Europe will benefit the world economy; persuaded that broader energy cooperation among signatories is essential for economic progress and more generally for social development and a better quality of life;

Convinced of the signatories' common interest in problems of energy supply, safety of industrial plants, particularly nuclear facilities, and environmental protection;

Willing to do more to attain the objectives of security of supply and efficient management and use of resources, and to utilise fully the potential for environmental improvement, in moving towards sustainable development;

Convinced of the essential importance of efficient energy systems in the production, conversion, transport, distribution and use of energy for security of supply and for the protection of the environment;

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Recognising State sovereignty and sovereign rights over energy resources;

Assured of support from the European Community, particularly through completion of its internal energy market;

Aware of the obligations under major relevant multilateral agreements, of the wide range of international energy cooperation, and of the extensive activities by existing international organisations in the energy field and willing to take full advantage of the expertise of these organisations in furthering the objectives of the Charter;

Recognising the role of entrepreneurs, operating within a transparent and equitable legal framework, in promoting cooperation under the Charter;

Determined to establish closer, mutually beneficial commercial relations and promote energy investments;

Convinced of the importance of promoting free movement of energy products and of developing an efficient international energy infrastructure in order to facilitate the development of market-based trade in energy;

Aware of the need to promote technological cooperation among signatories;

Affirming that the energy policies of signatories are linked by interests common to all their countries and that they should be implemented in accordance with the principles set out below:

Affirming, finally, their desire to take the consequent action and apply the principles set out below:

HAVE ADOPTED THE FOLLOWING DECLARATION CONSTITUTING THE "EUROPEAN ENERGY CHARTER"

TITLE I: OBJECTIVES

The signatories are desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis.

Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, they undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.

To this end, and in accordance with these principles, they will take action in the following fields:

1. Development of trade in energy consistent with major relevant multilateral agreements such as

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GATT, its related instruments, and nuclear non-proliferation obligations and undertakings, which will be achieved by means of:

- an open and competitive market for energy products, materials, equipment and services;

- access to energy resources, and exploration and development thereof on a commercial basis;

- access to local and international markets;

- removal of technical, administrative and other barriers to trade in energy and associated equipment, technologies and energy-related services;

- modernisation, renewal and rationalisation by industry of services and installations for the production, conversion, transport, distribution and use of energy;

- promoting the development and interconnection of energy transport infrastructure;

- promoting best possible access to capital, particularly through appropriate existing financial institutions;

- facilitating access to transport infrastructure, for international transit purposes in accordance with the objectives of the Charter expressed in the first paragraph of this Title;

- access on commercial terms to technologies for the exploration, development and use of energy resources;

2. Cooperation in the energy field, which will entail:

   - coordination of energy policies, as necessary for promoting the objectives of the Charter;

   - mutual access to technical and economic data, consistent with proprietary rights;

   - formulation of stable and transparent legal frameworks creating conditions for the development of energy resources;

   - coordination and, where appropriate, harmonisation of safety principles and guidelines for energy products and their transport, as well as for energy installations, at a high level;

   - facilitating the exchange of technology information and know-how in the energy and environment fields, including training activities;

   - research, technological development and demonstration projects.

3. Energy efficiency and environmental protection, which will imply:

   - creating mechanisms and conditions for using energy as economically and efficiently as

possible, including, as appropriate, regulatory and market-based instruments;

- promotion of an energy mix designed to minimise negative environmental consequences in a cost-effective way through:

  (i) market-oriented energy prices which more fully reflect environmental costs and benefits;

  (ii) efficient and coordinated policy measures related to energy;

  (iii) use of new and renewable energies and clean technologies;

- achieving and maintaining a high level of nuclear safety and ensuring effective cooperation in this field.

TITLE II: IMPLEMENTATION

In order to attain the objectives set out above, the signatories will, within the framework of State sovereignty and sovereign rights over energy resources, take coordinated action to achieve greater coherence of energy policies, which should be based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns.

They underline that practical steps to define energy policies are necessary in order to intensify cooperation in

this sector and further stress the importance of regular exchanges of views on action taken, taking full advantage of the experience of existing international organisations and institutions in this field.

The signatories recognise that commercial forms of cooperation may need to be complemented by intergovernmental cooperation, particularly in the area of energy policy formulation and analysis as well as in areas which are essential and not suitable to private capital funding.

They undertake to pursue the objectives of creating a broader European energy market and enhancing the efficient functioning of the global energy market by joint or coordinated action under the Charter in the following fields:

- access to and development of energy resources;
- access to markets;
- liberalisation of trade in energy;
- promotion and protection of investments;
- safety principles and guidelines;
- research, technological development, innovation and dissemination;
- energy efficiency and environmental protection;
- education and training.

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In implementing this joint or coordinated action, they undertake to foster private initiative, to make full use of the potential of enterprises, institutions and all available financial sources, and to facilitate cooperation between such enterprises or institutions from different countries, acting on the basis of market principles.

The signatories will ensure that the international rules on the protection of industrial, commercial and intellectual property are respected.

1. Access to and development of energy resources

   Considering that efficient development of energy resources is a sine qua non for attaining the objectives of the Charter, the signatories undertake to facilitate access to and development of resources by the interested operators.

   To this end, they will ensure that rules on the exploration, development and acquisition of resources are publicly available and transparent; they recognise the need to formulate such rules wherever this has not yet been done and to take all necessary measures to coordinate their actions in this area.

   With a view to facilitating the development and diversification of resources, the signatories undertake to avoid imposing discriminatory rules on operators, notably rules governing the

ownership of resources, internal operation of companies and taxation.

2. Access to Markets

The signatories will strongly promote access to local and international markets for energy products for the implementation of the objectives of the Charter. Such access to markets should take account of the need to facilitate the operation of market forces, and promote competition.

3. Liberalisation of trade in energy

In order to develop and diversify trade in energy, the signatories undertake progressively to remove the barriers to such trade with each other in energy products, equipment and services in a manner consistent with the provisions of GATT, its related instruments, and nuclear non-proliferation obligations and undertakings.

The signatories recognise that transit of energy products through their territories is essential for the liberalisation of trade in energy products. Transit should take place in economic and environmentally sound conditions.

They stress the importance of the development of commercial international energy transmission networks and their interconnection, with particular reference to electricity and natural

gas and with recognition of the relevance of long-term commercial commitments. To this end, they will ensure the compatibility of technical specifications governing the installation and operation of such networks, notably as regards the stability of electricity systems.

4. Promotion and protection of investments

In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade.

They affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes.

Moreover, the signatories will guarantee the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed.

They also recognise the importance of the avoidance of double taxation to foster private investment.

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5. Safety principles and guidelines

Consistent with relevant major multilateral agreements, the signatories will:

- implement safety principles and guidelines, designed to achieve and/or maintain high levels of safety, in particular nuclear safety and the protection of health and the environment;

- develop such common safety principles and guidelines as are appropriate and/or agree to the mutual recognition of their safety principles and guidelines.

6. Research, technological development, innovation and dissemination

The signatories undertake to promote exchanges of technology and Cooperation on their technological development and innovation activities in the fields of energy production, conversion, transport, distribution and the efficient and clean use of energy, in a manner consistent with nuclear non-proliferation obligations and undertakings.

To this end, they will encourage cooperative efforts on:

- research and development activities;

- pilot or demonstration projects;

- the application of technological innovations;

- the dissemination and exchange of know-how and information on technologies.

7. Energy efficiency and environmental protection

The signatories agree that cooperation is necessary in the field of efficient use of energy and energy-related environmental protection.

This should include:

- ensuring, in a cost-effective manner, consistency between relevant energy policies and environmental agreements and conventions;

- ensuring market-oriented price formation, including a fuller reflection of environmental costs and benefits;

- the use of transparent and equitable market-based instruments designed to achieve energy objectives and reduce environmental problems;

- the creation of framework conditions for the exchange of know-how regarding environmentally sound energy technologies and efficient use of energy;

- the creation of framework conditions for profitable investment in energy efficiency projects.

8. Education and training

   The signatories, recognising industry's role in promoting vocational education and training in the energy field, undertake to cooperate in such activities, including:

   - professional education;
   - occupational training;
   - public information in the energy efficiency field.

TITLE III: SPECIFIC AGREEMENTS

The signatories undertake to pursue the objectives and principles of the Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith a Basic Agreement and Protocols.

Areas of cooperation could include:

- horizontal and organisational issues;
- energy efficiency, including environmental protection;
- prospecting, production, transportation and use of oil and oil products and modernisation of refineries;
- prospecting, production and use of natural gas, interconnection of gas networks and transmission via high-pressure gas pipelines;

- all aspects of the nuclear fuel cycle including improvements in safety in that sector;

- modernisation of power stations, interconnection of power networks and transmission of electricity via high-voltage power lines;

- all aspects of the coal cycle, including clean coal technologies;

- development of renewable energy sources;

- transfers of technology and encouragement of innovation;

- cooperation in dealing with the effects of major accidents, or of other events in the energy sector with transfrontier consequences.

The signatories will, in exceptional cases, consider transitional arrangements. They, in particular, take into account the specific circumstances facing some states of Central and Eastern Europe and the USSR as well as their need to adapt their economies to the market system, and accept the possibility of a stage-by- stage transition in those countries for the implementation of those particular provisions of the Charter, Basic Agreement and related Protocols that they are, for objective reasons, unable to implement immediately and in full.

Specific arrangements for coming into full compliance with Charter provisions as elaborated in the Basic

Agreement and Protocols will be negotiated by each Party requesting transitional status, and progress towards full compliance will be subject to periodic review.

TITLE IV: FINAL PROVISIONS

The signatories request the Government of The Netherlands, President-in-office of the Council of the European Communities, to transmit to the Secretary General of the United Nations the text of the European Energy Charter which is not eligible for registration under Article 102 of the Charter of the United Nations.

In adopting the European Energy Charter Ministers or their representatives record that the following understanding has been reached:

The representatives of the Signatories understand that in the context of the European Energy Charter, the principle of non-discrimination means Most-Favoured-Nation Treatment as a minimum standard. National Treatment may be agreed to in provisions of the Basic Agreement and/or Protocols.

The original of this Concluding Document, drawn up in English, French, German, Italian, Russian and Spanish texts, will be transmitted to the Government of the Kingdom of The Netherlands, which will retain it in its archives. Each of the Signatories will receive from the Government of the Kingdom of The Netherlands a true copy of the Concluding Document.

Appendix I

Done at The Hague on the seventeenth day of December in the year one thousand nine hundred and ninety-one.

APPENDIX J

NORTH AMERICAN FREE TRADE AGREEMENT

32 I.L.M. 289 (1993)

December 8, 1992 and December 17, 1992, Done at Washington; December 11, 1992 and December 17, 1992, at Ottawa; December 14, 1992 and December 17, 1992, at Mexico City

Issue Date: March, 1993
Length: 39339 words

TREATIES AND AGREEMENTS CANADA-MEXICO-UNITED STATES: NORTH AMERICAN FREE TRADE AGREEMENT* (PART 1 OF 4)

[TABLE OF CONTENTS OMITTED]

* * *

General Definitions

Article 201: Definitions of General Application

1. For purposes of this Agreement, unless otherwise specified:

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* * *

enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;

enterprise of a Party means an enterprise constituted or organized under the law of a Party; existing means in effect on the date of entry into force of this Agreement;

* * *

measure includes any law, regulation, procedure, requirement or practice;

national means a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1;

originating means qualifying under the rules of origin set out in Chapter Four (Rules of Origin);

person means a natural person or an enterprise;

person of a Party means a national, or an enterprise of a Party;

Secretariat means the Secretariat established under Article 2002(1) (The Secretariat);

state enterprise means an enterprise that is owned, or controlled through ownership interests, by a Party; and

territory means for a Party the territory of that Party as set out in Annex 201.1.

2. For purposes of this Agreement, unless otherwise specified, a reference to a state or province includes local governments of that state or province.

Annex 201.1

Country-Specific Definitions

For purposes of this Agreement, unless otherwise specified:

national also includes:

(a) with respect to Mexico, a national or a citizen according to Articles 30 and 34, respectively, of the Mexican Constitution; and

(b) with respect to the United States, "national of the United States" as defined in the existing provisions of the Immigration and Nationality Act;

territory means:

(a) with respect to Canada, the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may

exercise rights with respect to the seabed and subsoil and their natural resources;

(b) with respect to Mexico,

(i) the states of the Federation and the Federal District,

(ii) the islands, including the reefs and keys, in adjacent seas,

(iii) the islands of Guadalupe and Revillagigedo situated in the Pacific Ocean,

(iv) the continental shelf and the submarine shelf of such islands, keys and reefs,

(v) the waters of the territorial seas, in accordance with international law, and its interior maritime waters,

(vi) the space located above the national territory, in accordance with international law, and

(vii) any areas beyond the territorial seas of Mexico within which, in accordance with international law, including the United Nations Convention on the Law of the Sea, and its domestic law, Mexico may exercise rights with respect to the seabed and subsoil and their natural resources; and

(c) with respect to the United States,

(i) the customs territory of the United States, which includes the 50 states, the District of Columbia and Puerto Rico,

(ii) the foreign trade zones located in the United States and Puerto Rico, and

(iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.

* * *

32 I.L.M. 605

December 8, 1992; December 17, 1992, Done at Washington; December 11, 1992; December 17, 1992, at Ottawa; December 14, 1992; December 17, 1992, at Mexico City

Issue Date: May, 1993

TREATIES AND AGREEMENTS CANADA-MEXICO-UNITED STATES: NORTH AMERICAN FREE TRADE AGREEMENT*

PART FIVE

INVESTMENT, SERVICES AND RELATED MATTERS

Chapter Eleven

Investment

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Section A - Investment

Article 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party; and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

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Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1104: Standard of Treatment

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Article 1106: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) necessary for the conservation of living or non-living exhaustible natural resources.

Article 1107: Senior Management and Boards of Directors

1. No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions individuals of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is an investment of an investor of another Party, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 1108: Reservations and Exceptions

1. Articles 1102, 1103, 1106 and 1107 do not apply to:

(a) any existing non-conforming measure that is maintained by

(i) a Party at the federal level, as set out in its Schedule to Annex I or III,

(ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set

out by a Party in its Schedule to Annex I in accordance with paragraph 2, or

(iii) a local government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.

2. Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing non-conforming measure maintained by a state or province, not including a local government.

3. Articles 1102, 1103, 1106 and 1107 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

4. No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

5. Articles 1102 and 1103 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 1703 (Intellectual Property - National Treatment) as specifically provided for in that Article.

6. Article 1103 does not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its Schedule to Annex IV.

7. Articles 1102, 1103 and 1107 do not apply to:

(a) procurement by a Party or a state enterprise; or

(b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.

8. The provisions of:

(a) Article 1106(1)(a), (b) and (c), and (3)(a) and (b) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;

(b) Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a Party or a state enterprise; and

(c) Article 1106(3)(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

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Article 1109: Transfers

1. Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:

(a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;

(b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

(c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;

(d) payments made pursuant to Article 1110; and

(e) payments arising under Section B.

2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

3. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or

attributable to, investments in the territory of another Party.

4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal or penal offenses;

(d) reports of transfers of currency or other monetary instruments; or

(e) ensuring the satisfaction of judgments in adjudicatory proceedings.

5. Paragraph 3 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph 4.

6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

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Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

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Article 1111: Special Formalities and Information Requirements

1. Nothing in Article 1102 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and investments of investors of another Party pursuant to this Chapter.

2. Notwithstanding Articles 1102 or 1103, a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 1112: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement by a Party that a service provider of another Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service. This Chapter applies to that Party's treatment of the posted bond or financial security.

Article 1113: Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no

substantial business activities in the territory of the Party under whose law it is constituted or organized.

Article 1114: Environmental Measures

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Section B - Settlement of Disputes between a Party and an Investor of Another Party

Article 1115: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this

Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor

owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

Article 1118: Settlement of a Claim through Consultation and Negotiation

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The disputing parties should first attempt to settle a claim through consultation or negotiation.

Article 1119: Notice of Intent to Submit a Claim to Arbitration

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

(a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;

(b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;

(c) the issues and the factual basis for the claim; and

(d) the relief sought and the approximate amount of damages claimed.

Article 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or

(c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a judicial person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:

(a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and

(b) Annex 1120.1(A)(b) shall not apply.

Article 1122: Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;

(b) Article II of the New York Convention for an agreement in writing; and

(c) Article I of the Inter-American Convention for an agreement. Article 1123: Number of Arbitrators and Method of Appointment

Except in respect of a Tribunal established under Article 1126, and unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

Article 1124: Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator

1. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

2. If a Tribunal, other than a Tribunal established under Article 1126, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, on the request of either disputing

party, shall appoint, in his discretion, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall be appointed in accordance with paragraph 3.

3. The Secretary-General shall appoint presiding arbitrator from the roster of presiding arbitrators referred to in paragraph 4, provided that the presiding arbitrator shall not be a national of the disputing Party or a national of the Party of the disputing investor. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties.

4. On the date of entry into force of this Agreement, the Parties shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The roster members shall be appointed by consensus and without regard to nationality.

Article 1125: Agreement to Appointment of Arbitrators

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on Article 1124(3) or on a ground other than nationality:

(a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a disputing investor referred to in Article 1116 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal; and

(c) a disputing investor referred to in Article 1117(1) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.

Article 1126: Consolidation

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:

(a) the name of the disputing Party or disputing investors against which the order is sought;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article 1124(4), and to the

extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

(a) the name and address of the disputing investor;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. On application of a disputing party, a Tribunal established under this Article, pending its decision under

paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings.

10. A disputing Party shall deliver to the Secretariat, within 15 days of receipt by the disputing Party, a copy of

(a) a request for arbitration made under paragraph (1) of Article 36 of the ICSID Convention;

(b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules; or

(c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 3:

(a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;

(b) within 15 days of making the request, in the case of a request made by the disputing Party.

12. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 6 within 15 days of receipt of the request.

13. The Secretariat shall maintain a public register of the documents referred to in paragraphs 10, 11 and 12.

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Article 1127: Notice

A disputing Party shall deliver to the other Parties:

(a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and

(b) copies of all pleadings filed in the arbitration.

Article 1128: Participation by a Party

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

Article 1129: Documents

1. A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party a copy of:

(a) the evidence that has been tendered to the Tribunal; and

(b) the written argument of the disputing parties.

2. A Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.

Article 1130: Place of Arbitration

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a

party to the New York Convention, selected in accordance with:

(a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or

(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

Article 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

Article 1132: Interpretation of Annexes

1. Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.

2. Further to Article 1131(2), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an

interpretation within 60 days, the Tribunal shall decide the issue.

Article 1133: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 1134: Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

Article 1135: Final Award

1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution,

A tribunal may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is made under Article 1117(1):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A Tribunal may not order a Party to pay punitive damages.

Article 1136: Finality and Enforcement of an Award

1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

3. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules

(i) three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

4. Each Party shall provide for the enforcement of an award in its territory.

5. If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) a recommendation that the Party abide by or comply with the final award.

6. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 5.

7. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

Article 1137: General

Time when a Claim is Submitted to Arbitration

1. A claim is submitted to arbitration under this Section when:

(a) the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention has been received by the Secretary-General;

(b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General; or

(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

Service of Documents

2. Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 1137.2.

Receipts under Insurance or Guarantee Contracts

3. In an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

Publication of an Award

4. Annex 1137.4 applies to the Parties specified in that Annex with respect to publication of an award.

Article 1138: Exclusions

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1. Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that Article shall not be subject to such provisions.

2. The dispute settlement provisions of this Section and of Chapter Twenty shall not apply to the matters referred to in Annex 1138.2.

Section C - Definitions

Article 1139: Definitions

For purposes of this Chapter:

disputing investor means an investor that makes a claim under Section B;

disputing parties means the disputing investor and the disputing Party;

disputing party means the disputing investor or the disputing Party;

disputing Party means a Party against which a claim is made under Section B;

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants;

G7 Currency means the currency of Canada, France, Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland or the United States;

ICSID means the International Centre for Settlement of Investment Disputes;

ICSID Convention means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;

Inter-American Convention means the Inter-American Convention on International Commercial Arbitration, done at Panama, January 30, 1975;

investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

investor of a non-Party means an investor other than an investor of a Party, that seeks to make, is making or has made an investment;

New York Convention means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;

Secretary-General means the Secretary-General of ICSID;

transfers means transfers and international payments;

Tribunal means an arbitration tribunal established under Article 1120 or 1126; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976.

Annex 1120.1

Submission of a Claim to Arbitration

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Mexico

With respect to the submission of a claim to arbitration:

(a) an investor of another Party may not allege that Mexico has breached an obligation under:

(i) Section A or Article 1503(2) (State Enterprises), or

(ii) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal; and

(b) where an enterprise of Mexico that is a juridical person that an investor of another Party owns or controls directly or indirectly alleges in proceedings before a Mexican court or administrative tribunal that Mexico has breached an obligation under:

(i) Section A or Article 1503(2) (State Enterprises), or

(ii) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

the investor may not allege the breach in an arbitration under this Section.

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Annex 1137.2

Service of Documents on a Party Under Section B

Each Party shall set out in this Annex and publish in its official journal by January 1, 1994, the place for delivery of notice and other documents under this Section.

Annex 1137.4

Publication of an Award

Canada

Where Canada is the disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public.

Mexico

Where Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award.

United States

Where the United States is the disputing Party, either the United States or a disputing investor that is a party to the arbitration may make an award public.

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Annex 1138.2

Exclusions from Dispute Settlement

Canada

A decision by Canada following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

Mexico

A decision by the National Commission on Foreign Investment ("Comision Nacional de Inversiones Extranjeras") following a review pursuant to Annex I, page I-M-4, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

* * *

APPENDIX K

THE ENERGY CHARTER TREATY

(Annex 1 to the Final Act of the European Energy Charter Conference)

[UNDERSTANDING With respect to the Treaty as a whole

(a) The representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term cooperation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations.

(b) The provisions of the Treaty do not:

(i) oblige any Contracting Party to introduce mandatory third party access; or

(ii) prevent the use of pricing systems which, within a particular category of consumers, apply identical prices to customers in different locations.

(c) Derogations from most favoured nation treatment are not intended to cover measures which are

specific to an Investor or group of Investors, rather than applying generally.][8]

[DECISION With respect to the Treaty as a whole

In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.][9]

PREAMBLE

The Contracting Parties to this Treaty,

Having regard to the Charter of Paris for a New Europe signed on 21 November 1990;

Having regard to the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991;

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8. Final Act of the European Energy Charter Conference, Understanding 1.

9. Decision 1 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

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Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith an Energy Charter Treaty and Protocols, and desiring to place the commitments contained in that Charter on a secure and binding international legal basis;

Desiring also to establish the structural framework required to implement the principles enunciated in the European Energy Charter;

Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalise investment and trade in energy;

Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the Making of Investments pursuant to a supplementary treaty;

Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the Agreement Establishing the World Trade Organization[10] and as otherwise provided for in this Treaty;

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10. Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

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Determined progressively to remove technical, administrative and other barriers to trade in Energy Materials and Products and Energy-Related Equipment,[11] technologies and services;

Looking to the eventual membership in the World Trade Organization[12] of those Contracting Parties which are not currently members thereof[13] and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation for such membership;

Mindful of the rights and obligations of certain Contracting Parties which are also members of the World Trade Organization;[14]

Having regard to competition rules concerning mergers, monopolies, anticompetitive practices and abuse of dominant position;

Having regard also to the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and other international nuclear nonproliferation obligations or understandings;

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11. Id.

12. Id.

13. Id.

14. Id.

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Recognising the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy;

Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and

Recognising the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes,

HAVE AGREED AS FOLLOWS:

Part I: Definitions and Purpose

Article 1: Definitions

As used in this Treaty:

(1) "Charter" means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter.

(2) "Contracting Party" means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force.

(3) "Regional Economic Integration Organisation" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.

(4) "Energy Materials and Products", based on the Harmonised System of the World Customs Organization and the Combined Nomenclature of the European Communities, means the items included in Annexes EM I or EM II.[15]

(4[bis]) "Energy-Related Equipment", based on the Harmonised System of the World Customs Organization, means the items included in Annexes EQ I or EQ II.[16]

(5) "Economic Activity in the Energy Sector" means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products

15. Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

16. Id.

except those included in Annex NI, or concerning the distribution of heat to multiple premises.

[UNDERSTANDING With respect to Article 1(5)

(a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.

(b) The following activities are illustrative of Economic Activity in the Energy Sector:

(i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;

(ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;

(iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;

(iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;

(v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;

(vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and

(vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.][17]

(6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

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17. Final Act of the European Energy Charter Conference, Understanding 2.

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

[UNDERSTANDING With respect to Article 1(6)

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the

actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

(a) financial interest, including equity interest, in the Investment;

(b) ability to exercise substantial influence over the management and operation of the Investment; and

(c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.][18]

[DECLARATION With respect to Article 1(6)

The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).][19]

(7) "Investor" means:

(a) with respect to a Contracting Party:

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18. Final Act of the European Energy Charter Conference, Understanding 3.

19. Id, Declaration 1.

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state", a natural person, company or other organisation which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.

(8) "Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.

[UNDERSTANDING With respect to Article 1(8)

Consistent with Australia's foreign investment policy, the establishment of a new mining or raw materials processing project in Australia with total investment of $A 10 million or more by a foreign interest, even where that foreign interest is already operating a similar business in Australia, is considered as the making of a new investment.][20]

(9) "Returns" means the amounts derived from or associated with an Investment, irrespective of

20. Id, Understanding 4.

the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.

(10) "Area" means with respect to a state that is a Contracting Party:

(a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and

(b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation.

(11) (a) "WTO" means the World Trade Organization established by the Agreement Establishing the World Trade Organization.[21]

(b) "WTO Agreement" means the Agreement Establishing the World Trade Organization,

21. Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

its Annexes and the decisions, declarations and understandings related thereto, as subsequently rectified, amended and modified from time to time.[22]

(c) "GATT 1994" means the General Agreement on Tariffs and Trade as specified in Annex 1A to the Agreement Establishing the World Trade Organization, as subsequently rectified, amended or modified from time to time.[23]

(12) "Intellectual Property" includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.

[UNDERSTANDING With respect to Article 1(12)

The representatives recognise the necessity for adequate and effective protection of Intellectual Property rights according to the highest internationally-accepted standards.][24]

(13) (a) "Energy Charter Protocol" or "Protocol" means a treaty, the negotiation of which is authorised and the text of which is adopted

22. Id.

23. Id.

24. Final Act of the European Energy Charter Conference, Understanding 5.

by the Charter Conference, which is entered into by two or more Contracting Parties in order to complement, supplement, extend or amplify the provisions of this Treaty with respect to any specific sector or category of activity within the scope of this Treaty, or to areas of cooperation pursuant to Title III of the Charter.

(b) "Energy Charter Declaration" or "Declaration" means a nonbinding instrument, the negotiation of which is authorised and the text of which is approved by the Charter Conference, which is entered into by two or more Contracting Parties to complement or supplement the provisions of this Treaty.

(14) "Freely Convertible Currency" means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

Article 2: Purpose of the Treaty

This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.

Appendix K

Part II: Commerce

Article 3: International Markets

The Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products and Energy-Related Equipment.[25]

Article 4: Non-Derogation from WTO Agreement[26]

Nothing in this Treaty shall derogate, as between particular Contracting Parties which are members of the WTO,[27] from the provisions of the WTO Agreement[28] as they are applied between those Contracting Parties.

Article 5: Trade-Related Investment Measures[29]

[DECLARATION With respect to Articles 5 and 10(11)

Australia notes that the provisions of Articles 5 and 10(11) do not diminish its rights and obligations under the GATT, including as elaborated in the Uruguay Round

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25. Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

26. Id.

27. Id.

28. Id.

29. See also Article 28 and Annex D.

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Agreement on Trade-Related Investment Measures, particularly with respect to the list of exceptions in Article 5(3), which it considers incomplete.

Australia further notes that it would not be appropriate for dispute settlement bodies established under the Treaty to give interpretations of GATT articles III and XI in the context of disputes between parties to the GATT or between an Investor of a party to the GATT and another party to the GATT. It considers that with respect to the application of Article 10(11) between an Investor and a party to the GATT, the only issue that can be considered under Article 26 is the issue of the awards of arbitration in the event that a GATT panel or the WTO dispute settlement body first establishes that a trade-related investment measure maintained by the Contracting Party is inconsistent with its obligations under the GATT or the Agreement on Trade-Related Investment Measures.][30]

(1) A Contracting Party shall not apply any trade-related investment measure that is inconsistent with the provisions of article III or XI of the GATT 1994;[31] this shall be without prejudice to the Contracting Party's rights and obligations under the WTO Agreement[32] and Article 29.

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30. Final Act of the European Energy Charter Conference, Declaration 2.

31. Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

32. Id.

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[UNDERSTANDING With respect to Article 5(1)

The representatives' agreement to Article 5 is not meant to imply any position on whether or to what extent the provisions of the "Agreement on Trade-Related Investment Measures" annexed to the Final Act of the Uruguay Round of Multilateral Trade Negotiations are implicit in articles III and XI of the GATT.][33]

(2) Such measures include any investment measure which is mandatory or enforceable under domestic law or under any administrative ruling, or compliance with which is necessary to obtain an advantage, and which requires:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports;

or which restricts:

(c) the importation by an enterprise of products used in or related to its local production,

33. Final Act of the European Energy Charter Conference, Understanding 6.

generally or to an amount related to the volume or value of local production that it exports;

(d) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(e) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

(3) Nothing in paragraph (1) shall be construed to prevent a Contracting Party from applying the trade-related investment measures described in subparagraphs (2)(a) and (c) as a condition of eligibility for export promotion, foreign aid, government procurement or preferential tariff or quota programmes.

(4) Notwithstanding paragraph (1), a Contracting Party may temporarily continue to maintain trade-related investment measures which were in effect more than 180 days before its signature of this Treaty, subject to the notification and phase-out provisions set out in Annex TRM.

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Article 6: Competition

[UNDERSTANDING With respect to Article 6

(a) The unilateral and concerted anti-competitive conduct referred to in Article 6(2) are to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.

b) "Enforcement" and "enforces" include action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further law granting or continuing an authorisation.][34]

(1) Each Contracting Party shall work to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector.

(2) Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector.

(3) Contracting Parties with experience in applying competition rules shall give full consideration to providing, upon request and within available

34. Final Act of the European Energy Charter Conference, Understanding 7.

resources, technical assistance on the development and implementation of competition rules to other Contracting Parties.

(4) Contracting Parties may cooperate in the enforcement of their competition rules by consulting and exchanging information.

(5) If a Contracting Party considers that any specified anti-competitive conduct carried out within the Area of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other Contracting Party and may request that its competition authorities initiate appropriate enforcement action. The notifying Contracting Party shall include in such notification sufficient information to permit the notified Contracting Party to identify the anti-competitive conduct that is the subject of the notification and shall include an offer of such further information and cooperation as the notifying Contracting Party is able to provide. The notified Contracting Party or, as the case may be, the relevant competition authorities may consult with the competition authorities of the notifying Contracting Party and shall accord full consideration to the request of the notifying Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive conduct identified in the notification. The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of

the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, to the extent possible, of any significant interim development.

(6) Nothing in this Article shall require the provision of information by a Contracting Party contrary to its laws regarding disclosure of information, confidentiality or business secrecy.

(7) The procedures set forth in paragraph (5) and Article 27(1) shall be the exclusive means within this Treaty of resolving any disputes that may arise over the implementation or interpretation of this Article.

Article 7: Transit

[DECLARATION With respect to Article 7

The European Communities and their Member States and Austria, Norway, Sweden and Finland declare that the provisions of Article 7 are subject to the conventional rules of international law on jurisdiction over submarine cables and pipelines or, where there are no such rules, to general international law.

They further declare that Article 7 is not intended to affect the interpretation of existing international law on jurisdiction over submarine cables and pipelines, and cannot be considered as doing so.][35]

35. Final Act of the European Energy Charter Conference, Declaration 3.

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(1) Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.

(2) Contracting Parties shall encourage relevant entities to cooperate in:

(a) modernising Energy Transport Facilities necessary to the Transit of Energy Materials and Products;

(b) the development and operation of Energy Transport Facilities serving the Areas of more than one Contracting Party;

(c) measures to mitigate the effects of interruptions in the supply of Energy Materials and Products;

(d) facilitating the interconnection of Energy Transport Facilities.

(3) Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and

Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise.

(4) In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1).

[UNDERSTANDING With respect to Article 7(4)

The applicable legislation would include provisions on environmental protection, land use, safety, or technical standards.][36]

(5) A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to

(a) permit the construction or modification of Energy Transport Facilities; or

(b) permit new or additional Transit through existing Energy Transport Facilities,

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36. Final Act of the European Energy Charter Conference, Understanding 8.

which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply.

Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties.

(6) A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision.

(7) The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute:

(a) A Contracting Party party to the dispute may refer it to the Secretary General by a notification summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral.

(b) Within 30 days of receipt of such a notification, the Secretary General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned.

(c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved.

(d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim

decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier.

(e) Notwithstanding subparagraph (b) the Secretary General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute.

(f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.

(8) Nothing in this Article shall derogate from a Contracting Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines.

(9) This Article shall not be so interpreted as to oblige any Contracting Party which does not have a certain type of Energy Transport Facilities used for Transit to take any measure under this Article with respect to that type of Energy Transport Facilities. Such a Contracting Party is, however, obliged to comply with paragraph (4).

(10) For the purposes of this Article:

(a) "Transit" means

(i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party; or

(ii) the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in Annex N by delivering a joint written notification of their intentions to the Secretariat, which shall transmit that notification to all other Contracting Parties. The deletion shall take effect four weeks after such former notification.

(b) "Energy Transport Facilities" consist of high-pressure gas transmission pipelines, high-

voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products.

Article 8: Transfer of Technology

(1) The Contracting Parties agree to promote access to and transfer of energy technology on a commercial and non-discriminatory basis to assist effective trade in Energy Materials and Products and Investment and to implement the objectives of the Charter subject to their laws and regulations, and to the protection of Intellectual Property rights.

(2) Accordingly, to the extent necessary to give effect to paragraph (1) the Contracting Parties shall eliminate existing and create no new obstacles to the transfer of technology in the field of Energy Materials and Products and related equipment and services, subject to non-proliferation and other international obligations.

Article 9: Access to Capital

[UNDERSTANDING With respect to Articles 9, 10 and Part V

As a Contracting Party's programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not Connected with Investment or related activities of Investors from

other Contracting Parties in its Area, such programmes may be subject to constraints with respect to participation in them.][37]

(1) The Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and for the making of and assisting with regard to Investments in Economic Activity in the Energy Sector in the Areas of other Contracting Parties, particularly those with economies in transition. Each Contracting Party shall accordingly endeavour to promote conditions for access to its capital market by companies and nationals of other Contracting Parties, for the purpose of financing trade in Energy Materials and Products and for the purpose of Investment in Economic Activity in the Energy Sector in the Areas of those other Contracting Parties, on a basis no less favourable than that which it accords in like circumstances to its own companies and nationals or companies and nationals of any other Contracting Party or any third state, whichever is the most favourable.

(2) A Contracting Party may adopt and maintain programmes providing for access to public loans, grants, guarantees or insurance for facilitating trade or Investment abroad. It shall make such facilities available, consistent with the objectives,

37. Final Act of the European Energy Charter Conference, Understanding 9.

constraints and criteria of such programmes (including any objectives, constraints or criteria relating to the place of business of an applicant for any such facility or the place of delivery of goods or services supplied with the support of any such facility) for Investments in the Economic Activity in the Energy Sector of other Contracting Parties or for financing trade in Energy Materials and Products with other Contracting Parties.

(3) Contracting Parties shall, in implementing programmes in Economic Activity in the Energy Sector to improve the economic stability and investment climates of the Contracting Parties, seek as appropriate to encourage the operations and take advantage of the expertise of relevant international financial institutions.

(4) Nothing in this Article shall prevent:

(a) financial institutions from applying their own lending or underwriting practices based on market principles and prudential considerations; or

(b) a Contracting Party from taking measures:

(i) for prudential reasons, including the protection of Investors, consumers, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; or

(ii) to ensure the integrity and stability of its financial system and capital markets.

Part III: Investment Promotion and Protection

Article 10: Promotion, Protection and Treatment of Investments

[UNDERSTANDING With respect to Articles 9, 10 and Part V

As a Contracting Party's programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not connected with Investment or related activities of Investors from other Contracting Parties in its Area, such programmes may be subject to constraints with respect to participation in them.][38]

[DECLARATION With respect to Article 10

Canada and the United States each affirm that they will apply the provisions of Article 10 in accordance with the following considerations:

For the purposes of assessing the treatment which must be accorded to Investors of other Contracting Parties and their Investments, the circumstances will need to be considered on a case-by-case basis. A comparison between

38. Final Act of the European Energy Charter Conference, Understanding 9.

the treatment accorded to Investors of one Contracting Party, or the Investments of Investors of one Contracting Party, and the Investments or Investors of another Contracting Party, is only valid if it is made between Investors and Investments in similar circumstances. In determining whether differential treatment of Investors or Investments is consistent with Article 10, two basic factors must be taken into account.

The first factor is the policy objectives of Contracting Parties in various fields insofar as they are consistent with the principles of non-discrimination set out in Article 10. Legitimate policy objectives may justify differential treatment of foreign Investors or their Investments in order to reflect a dissimilarity of relevant circumstances between those Investors and Investments and their domestic counterparts. For example, the objective of ensuring the integrity of a country's financial system would justify reasonable prudential measures with respect to foreign Investors or Investments, where such measures would be unnecessary to ensure the attainment of the same objectives insofar as domestic Investors or Investments are concerned. Those foreign Investors or their Investments would thus not be "in similar circumstances" to domestic Investors or their Investments. Thus, even if such a measure accorded differential treatment, it would not be contrary to Article 10.

The second factor is the extent to which the measure is motivated by the fact that the relevant Investor or Investment is subject to foreign ownership or under

foreign control. A measure aimed specifically at Investors because they are foreign, without sufficient countervailing policy reasons consistent with the preceding paragraph, would be contrary to the principles of Article 10. The foreign Investor or Investment would be "in similar circumstances" to domestic Investors and their Investments, and the measure would be contrary to Article 10.][39]

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.[40]

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39. Final Act of the European Energy Charter Conference, Declaration 4.

40. See Article 26(3)(c), Article 27(2), and Annex IA.

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[UNDERSTANDING With respect to Articles 26 and 27

The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organisations, even if they are legally binding, or treaties which entered into force before 1 January 1970.][41]

[CHAIRMAN'S STATEMENT I would like to note that the Russian Federation believes that the reference to international law in Article 10(1) is not intended to impose most favoured nation obligations with regard to Making of Investments. This is clearly in accordance with the intent of the negotiators who decided not to include in this first Treaty MFN obligations for the pre-investment stage.][42]

(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).

(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.

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41. Final Act of the European Energy Charter Conference, Understanding 17.

42. Chairman's Statement at Adoption Session on 17 December 1994.

(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organisations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.

[UNDERSTANDING With respect to Article 10(4)

The supplementary treaty will specify conditions for applying the Treatment described in Article 10(3). Those conditions will include, inter alia, provisions relating to the sale or other divestment of state assets (privatisation) and to the dismantling of monopolies (demonopolisation).

UNDERSTANDING With respect to Articles 10(4) and 29(6)

Contracting Parties may consider any connection between the provisions of Article 10(4) and Article 29(6).][43]

[DECLARATION With respect to Article 1(6)

The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty

43. Final Act of the European Energy Charter Conference, Understanding 10 and 11.

referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).][44]

[CHAIRMAN'S STATEMENT In addition, the Russian Federation has expressed the view that the consideration of appropriate amendments to the Treaty pursuant to Article 30 affecting sectors of services within the scope of this Treaty to which measures of the GATS apply, and the negotiations towards the supplementary investment treaty provided for in Article 10(4), should be conducted in such a manner as to assure mutual consistency of the Treaty provisions arrived at. Here again, I am sure that all delegations would fully endorse the need to achieve such consistency in the future incorporation in the Treaty of the results of the Uruguay Round, and in negotiation of the second Treaty for the pre-investment stage.][45]

(5) Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:

(a) limit to the minimum the exceptions to the Treatment described in paragraph (3);

(b) progressively remove existing restrictions affecting Investors of other Contracting Parties.

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44. Id, Declaration 1.

45. Chairman's Statement at Adoption Session on 17 December 1994.

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(6) (a) A Contracting Party may, as regards the Making of Investments in its Area, at any time declare voluntarily to the Charter Conference, through the Secretariat, its intention not to introduce new exceptions to the Treatment described in paragraph (3).

(b) A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph (3). Such commitments shall be notified to the Secretariat and listed in Annex VC and shall be binding under this Treaty.

(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

[DECISION With respect to Article 10(7)

The Russian Federation may require that companies with foreign participation obtain legislative approval for

the leasing of federally-owned property, provided that the Russian Federation shall ensure without exception that this process is not applied in a manner which discriminates among Investments of Investors of other Contracting Parties.][46]

(8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.

(9) Each state or Regional Economic Integration Organisation which signs or accedes to this Treaty shall, on the date it signs the Treaty or deposits its instrument of accession, submit to the Secretariat a report summarising all laws, regulations or other measures relevant to:

(a) exceptions to paragraph (2); or

(b) the programmes referred to in paragraph (8).

A Contracting Party shall keep its report up to date by promptly submitting amendments to the

46. Decision 2 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

Secretariat. The Charter Conference shall review these reports periodically.

In respect of subparagraph (a) the report may designate parts of the energy sector in which a Contracting Party accords to Investors of other Contracting Parties the Treatment described in paragraph (3).

In respect of subparagraph (b) the review by the Charter Conference may consider the effects of such programmes on competition and Investments.

(10) Notwithstanding any other provision of this Article, the treatment described in paragraphs (3) and (7) shall not apply to the protection of Intellectual Property; instead, the treatment shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties.

(11) For the purposes of Article 26, the application by a Contracting Party of a trade-related investment measure as described in Article 5(1) and (2) to an Investment of an Investor of another Contracting Party existing at the time of such application shall, subject to Article 5(3) and (4), be considered a breach of an obligation of the former Contracting Party under this Part.

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[DECLARATION With respect to Articles 5 and 10(11)

Australia notes that the provisions of Articles 5 and 10(11) do not diminish its rights and obligations under the GATT, including as elaborated in the Uruguay Round Agreement on Trade-Related Investment Measures, particularly with respect to the list of exceptions in Article 5(3), which it considers incomplete.

Australia further notes that it would not be appropriate for dispute settlement bodies established under the Treaty to give interpretations of GATT articles III and XI in the context of disputes between parties to the GATT or between an Investor of a party to the GATT and another party to the GATT. It considers that with respect to the application of Article 10(11) between an Investor and a party to the GATT, the only issue that can be considered under Article 26 is the issue of the awards of arbitration in the event that a GATT panel or the WTO dispute settlement body first establishes that a trade-related investment measure maintained by the Contracting Party is inconsistent with its obligations under the GATT or the Agreement on Trade- Related Investment Measures.][47]

(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations.

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47. Final Act of the European Energy Charter Conference, Declaration 2.

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Article 11: Key Personnel

(1) A Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of natural persons, examine in good faith requests by Investors of another Contracting Party, and key personnel who are employed by such Investors or by Investments of such Investors, to enter and remain temporarily in its Area to engage in activities connected with the making or the development, management, maintenance, use, enjoyment or disposal of relevant Investments, including the provision of advice or key technical services.

(2) A Contracting Party shall permit Investors of another Contracting Party which have Investments in its Area, and Investments of such Investors, to employ any key person of the Investor's or the Investment's choice regardless of nationality and citizenship provided that such key person has been permitted to enter, stay and work in the Area of the former Contracting Party and that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such key person.

Article 12: Compensation for Losses

(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state

of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.

(2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from

(a) requisitioning of its Investment or part thereof by the latter's forces or authorities; or

(b) destruction of its Investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective.

Article 13: Expropriation

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to

a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other

competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

Article 14: Transfers Related to Investments

[DECISION With respect to Article 14

(1) The term "freedom of transfer" in Article 14(1) does not preclude a Contracting Party (hereinafter referred to as the "Limiting Party") from applying restrictions on movement of capital by its own Investors, provided that:

* * *

[Letter from the European Communities to Russia

The purpose of this letter is to confirm that with regard to Decision No 3 of the Energy Charter Treaty (ECT) concerning transfer of payments and especially to the footnote[51] to this Decision, Article 105 in our Partnership

51. Editor's note: This footnote which was deleted from the final text reads: "This Decision has been drafted on the understanding that Contracting Parties which intend to avail themselves of it and which have also entered into Partnership and

and Cooperation Agreement (PCA), signed at Corfu, 24 June 1994, shall not have the effect of disapplying Article 16 of the ECT in relation to Decision No 3.

I propose that this letter and your reply will establish a formal agreement between us.[52]

Letter from the Russian Federation

I took note of your letter of 17 December 1994, the purpose of which is the confirmation that with regard to Decision N° 3 of the Energy Charter Treaty (ECT) concerning transfer of payments, and especially to the footnote[52] to this Decision, Article 105 of the Agreement on Partnership and Cooperation establishing a partnership between the Russian Federation, of the one part, and the European Communities and their Member States, of the other part (PCA), signed at Corfu on 24 June 1994, shall not have the effect of disapplying Article 16 of the ECT in relation to Decision N° 3.

I agree that your letter and this reply will establish a formal agreement between us.][53]

Cooperation Agreements with the European Union and its member states containing an article disapplying those Agreements in favour of this Treaty will exchange letters of understanding which have the legal effect of making Article 16 of this Treaty applicable between them in relation to this Decision. The exchange of letters shall be completed in good time prior to signature."

52. Id.

53. Exchange of Letters with the European Communities on Decision No 3 of the Energy Charter Treaty.

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(1) Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer into and out of its Area, including the transfer of:

(a) the initial capital plus any additional capital for the maintenance and development of an Investment;

(b) Returns;

(c) payments under a contract, including amortisation of principal and accrued interest payments pursuant to a loan agreement;

(d) unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment;

(e) proceeds from the sale or liquidation of all or any part of an Investment;

(f) payments arising out of the settlement of a dispute;

(g) payments of compensation pursuant to Articles 12 and 13.

(2) Transfers under paragraph (1) shall be effected without delay and (except in case of a Return in kind) in a Freely Convertible Currency.

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[DECISION With respect to Article 14(2)][54]

(3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor.

(4) Notwithstanding paragraphs (1) to (3), a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgements in civil, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its laws and regulations.

(5) Notwithstanding paragraph (2), Contracting Parties which are states that were constituent parts of the former Union of Soviet Socialist Republics may provide in agreements concluded between them that transfers of payments shall be made in the currencies of such Contracting Parties, provided

54. Decision 4 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference): http://www.energycharter.org/. Editor's note: The applicability of this Decision terminated since Romania introduced full convertibility of its currency.

that such agreements do not treat Investments in their Areas of Investors of other Contracting Parties less favourably than either Investments of Investors of the Contracting Parties which have entered into such agreements or Investments of Investors of any third state.

[UNDERSTANDING With respect to Article 14(5)

It is intended that a Contracting Party which enters into an agreement referred to in Article 14(5) ensure that the conditions of such an agreement are not in contradiction

* * *

Parties in its Area, such programmes may be subject to constraints with respect to participation in them.][71]

[DECISION With respect to the Treaty as a whole

In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.][72]

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71. Final Act of the European Energy Charter Conference, Understanding 9.

72. Decision 1 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

Appendix K

Article 26: Settlement of Disputes between an Investor and a Contracting Party

[UNDERSTANDING With respect to Articles 26 and 27

The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organisations, even if they are legally binding, or treaties which entered into force before 1 January 1970.][73]

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

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73. Final Act of the European Energy Charter Conference, Understanding 17.

Appendix K

[UNDERSTANDING With respect to Article 26(2)(a)

Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law.][74]

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its

74. Id., Understanding 16.

instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules

governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

Article 27: Settlement of Disputes between Contracting Parties

[UNDERSTANDING With respect to Articles 26 and 27

The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organisations, even if they are legally binding, or treaties which entered into force before 1 January 1970.][75]

(1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.

(2) If a dispute has not been settled in accordance with paragraph (1) within a reasonable period of

75. Final Act of the European Energy Charter Conference, Understanding 17.

time, either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, and except as concerns the application or interpretation of Article 6 or Article 19 or, for Contracting Parties listed in Annex IA, the last sentence of Article 10(1), upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.

(3) Such an ad hoc arbitral tribunal shall be constituted as follows:

(a) The Contracting Party instituting the proceedings shall appoint one member of the tribunal and inform the other Contracting Party to the dispute of its appointment within 30 days of receipt of the notice referred to in paragraph (2) by the other Contracting Party;

(b) Within 60 days of the receipt of the written notice referred to in paragraph (2), the other Contracting Party party to the dispute shall appoint one member. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within 90 days of the receipt of the written notice referred to in paragraph (2), request that the appointment be made in accordance with subparagraph (d);

APPENDIX L

[Portugal]

Art. 22 AUTHENTIC TEXTS -I.L.M. Page 453

[English, French, German, Italian, Russian and Spanish]

ANNEX: ILLUSTRATIVE AND NON-EXHAUSTIVE LIST OF POSSIBLE AREAS OF COOPERATION PURSUANT TO ARTICLE 9 -I.L.M. Page 453

FINAL ACT OF THE EUROPEAN ENERGY CHARTER CONFERENCE

I. The final Plenary Session of the European Energy Charter Conference was held at Lisbon on 16-17 December 1994. Representatives of the Republic of Albania, the Republic of Armenia, Australia, the Republic of Austria, the Azerbaijani Republic, the Kingdom of Belgium, the Republic of Belarus, the Republic of Bulgaria, Canada, the Republic of Croatia, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the European Communities, the Republic of Finland, the French Republic, the Republic of Georgia, the Federal Republic of Germany, the Hellenic Republic, the Republic of Hungary, the Republic of Iceland, Ireland, the Italian Republic, Japan, the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Latvia, the Principality of Liechtenstein, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Moldova, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of Poland, the

Portuguese Republic, Romania, the Russian Federation, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of Sweden, the Swiss Confederation, the Republic of Tajikistan, the Republic of Turkey, Turkmenistan, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America and the Republic of Uzbekistan (hereinafter referred to as "the representatives") participated in the Conference, as did invited observers from certain countries and international organizations.

BACKGROUND

II. During the meeting of the European Council in Dublin in June 1990, the Prime Minister of the Netherlands suggested that economic recovery in Eastern Europe and the then Union of Soviet Socialist Republics could be catalysed and accelerated by cooperation in the energy sector. This suggestion was welcomed by the Council, which invited the Commission of the European Communities to study how best to implement such cooperation. In February 1991 the Commission proposed the concept of a European Energy Charter.

Following discussion of the Commission's proposal in the Council of the European Communities, the European Communities invited the other countries of Western and Eastern Europe, of the Union of Soviet Socialist Republics and the non-European members of the Organization for Economic Cooperation and Development to attend a conference in Brussels in July 1991 to launch negotiations on the European Energy Charter. A number of other

countries and international organizations were invited to attend the European Energy Charter Conference as observers.

Negotiations on the European Energy Charter were completed in 1991 and the Charter was adopted by signature of a Concluding Document at a conference held at The Hague on 16- 17 December 1991. Signatories of the Charter, then or subsequently, include all those listed in Section I above, other than observers.

The signatories of the European Energy Charter undertook:

- To pursue the objectives and principles of the Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith a Basic Agreement and Protocols.

The European Energy Charter Conference accordingly began negotiations on a Basic Agreement - later called the Energy Charter Treaty - designed to promote East-West industrial cooperation by providing legal safeguards in areas such as investment, transit and trade. It also began negotiations on Protocols in the fields of energy efficiency, nuclear safety and hydrocarbons, although in the last case negotiations were later suspended until completion of the Energy Charter Treaty.

Negotiations on the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were successfully completed in 1994.

Appendix L

THE ENERGY CHARTER TREATY

III. As a result of its deliberations the European Energy Charter Conference has adopted the text of the Energy Charter Treaty (hereinafter referred to as the "Treaty") which is set out in Annex 1 and Decisions with respect thereto which are set out in Annex 2, and agreed that the Treaty would be open for signature at Lisbon from 17 December 1994 to 16 June 1995.

UNDERSTANDINGS

IV. By signing the Final Act, the representatives agreed to adopt the following Understandings with respect to the Treaty:

* * *

3. With respect to Article 1(6)

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

(a) financial interest, including equity interest, in the Investment;

(b) ability to exercise substantial influence over the management and operation of the Investment; and

(c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.

* * *

APPENDIX M

DIGEST OF UNITED STATES PRACTICE
IN INTERNATIONAL LAW

2002

Sally J. Cummins
David P. Stewart
Editors

Office of the Legal Adviser
United States Department of State

INTERNATIONAL LAW INSTITUTE

INTRODUCTION

Calendar year 2002 gave rise to a broad range of significant and sometimes novel issues of international law. Many developments again highlighted the need to protect our national security against a different kind of enemy through the use of force in self-defense, non-proliferation and arms control efforts, the detention of unlawful enemy combatants and establishment of military commissions, continued counter-terrorism efforts, the imposition of sanctions, and the freezing of governmental assets, sometimes made available for payment of claims by individuals against terrorist states. At the same time, there were notable developments in non-confrontational contexts, including the fields of human rights, trade and investment, law of the sea, international claims and state responsibility, treaty practice, and international crime.

Appendix M

This volume continues the commitment of the Office of the Legal Adviser to make readily available some of the most significant documents reflecting the practice of the United States in the fields of public and private international law. We believe that there is considerable benefit to the continued development of international law in annually collecting and publishing representative briefs, statements, judicial decisions and similar documents relating to the relevant positions, practices, and procedures of the United States.

This volume is the fourth to be published since the *Digest* project was resurrected a short three years ago. While moving ahead with current-year volumes, our co-editors have also reached back to fill in the years since publication of the *Digest* was suspended following completion of the 1981–88 volumes, produced by our colleague Marion Nash Leich in 1995. The 1989–90 *Digest* volume has already been published this year, and we expect to complete and publish a multi-volume set covering the years 1991–99 sometime in 2004, along with the annual volume for calendar year 2003.

In the current volume, both the content and the organization of the *Digest* have undergone continued refinement. Additional efforts have been made to identify and include documents prepared by other departments and agencies of the U.S. Government, as well as other changes. Most importantly, we continue to welcome feedback from readers in order to make this publication even more useful in the future.

Appendix M

The *Digest* is a collective undertaking involving the sustained effort of many members of the Office of the Legal Adviser. Among the volunteers whose significant contributions to the current volume deserve to be acknowledged are Gilda Brancato, Harold Burman, Ashley Deeks, Carol Epstein, Monica Gaw, Katherine Gorove, Steven Hill, Duncan Hollis, Andrew Keller, Melanie Khanna, Jeff Klein, Richard Lahne, Mary Catherine Malin, Denise Manning, Michael Mattler, Mary McLeod, Steve McCreary, Eric Pelofsky, Ash Roach, Heather Schildge, John Schnitker, Walt Sulzynsky, Wynne Teel, and Kathleen Wilson. Once again, a special note of thanks goes to the Office's assistant law librarian, Joan Sherer. Contributions by interns Anna Conley and Ryika Hooshangi, and support from Tricia Smeltzer have been invaluable. The co-editors of the *Digest*, Sally Cummins and David Stewart, also deserve special recognition for the leadership, guidance, and stamina they bring to this monumental project.

Our collaboration with the International Law Institute continues to be the cornerstone of this effort. The Institute's director of publishing, Peter Whitten, and its chairman, Prof. Don Wallace, Jr., again have our sincere thanks for their superb support and guidance.

William H. Taft, IV
The Legal Adviser
Department of State

* * *

c. The Loewen Group, Inc. and Raymond L. Loewen v. United States of America

The Loewen Group, Inc. ("TLGI"), a Canadian corporation involved in the death-care industry, and Raymond L. Loewen, TGLI's chairman and CEO at the time of the events at issue, filed claims under the ICSID Arbitration (Additional Facility) Rules in their individual capacities and on behalf of Loewen Group International, Inc., TLGI's U.S. subsidiary (collectively "Loewen"). Loewen sought damages for alleged injuries arising out of litigation in which the company was involved in Mississippi state courts in 1995-96. Loewen alleged violations of three provisions of NAFTA—the anti-discrimination principles set forth in Article 1102, the minimum standard of treatment required under Article 1105, and the prohibition against uncompensated expropriation set forth in Article 1110. Loewen requested damages in excess of $600 million. *See* discussion in *Digest 2001* at 623-642.

In January 2002 the United States objected to the continuing competence of the tribunal over the claims of Loewen following a corporate reorganization. The United States argued that as a result of the reorganization, Loewen could no longer satisfy the international law requirement of continuous nationality from the time of injury through the date of the final award, fully applicable to NAFTA Chapter Eleven proceedings.

Appendix M

Excerpts below from the U.S. Memorial on Matters of Jurisdiction and Competence Arising from the Restructuring of Loewen, filed March 1, 2002, provide the U.S. arguments with respect to Loewen's loss of continuous nationality and the requirement for such continuity under international law. The U.S. Reply to the Loewen Counter-Memorial, April 26, 2002, elaborated on the argument that NAFTA does not contain language derogating from the continuous nationality rule under customary international law.

The full text of the pleadings is available at www.state.gov/ s/l/c3439.htm.

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(1) U.S. Memorial on Matters of Jurisdiction and Competence Arising from the Restructuring of the Loewen Group, Inc., March 7, 2002

For well more than a year, claimant The Loewen Group, Inc. ("TLGI") has been proposing to reorganize all of its business operations under the umbrella of a United States, rather than Canadian, corporate parent in order to reap certain benefits of U.S. corporate citizenship. At the same time, TLGI has been warning its creditors and investors that such a reorganization could result in the loss of the Tribunal's jurisdiction over TLGI's NAFTA claims. On January 2, 2002, TLGI's plan of reorganization became effective and, as a result, the risk of which TLGI warned has finally come to pass.

Appendix M

As part of its reorganization, TLGI ceased to exist as an ongoing business entity and transferred all of its business operations to its former United States subsidiary, The Loewen Group International, Inc. ("LGII"), which is now called the "Alderwoods Group, Inc." Fully aware that a complete transformation of TLGI into a United States corporation would destroy its NAFTA claims, TLGI has engaged in an elaborate corporate shell-game in an effort to create a dual illusion: (1) that Loewen remains a viable Canadian enterprise, and (2) that the NAFTA claims are still owned by a Canadian national. Neither, however, is true. As a result, this Tribunal now lacks jurisdiction over TLGI's claims.

* * * *

I. THE TRIBUNAL IS WITHOUT JURISDICTION TO AWARD ANY RELIEF TO TLGI BECAUSE TLGI IS NO LONGER A "DISPUTING PARTY" TO THIS ARBITRATION

Arbitration under NAFTA Chapter Eleven, like other forms of arbitration, requires the parties to remain in existence during the pendency of their dispute. . . .

To be a "disputing party" under NAFTA Chapter Eleven, a claimant must be a "disputing investor" which, in turn, requires (inter alia) that the claimant be a national of a foreign Party or "an enterprise constituted or organized under the law" of that foreign Party.[18] As a consequence

18. NAFTA Articles 201, 1139.

* * * *

of the Loewen Group's restructuring, TLGI has ceased to exist as an entity properly constituted or organized under the relevant Canadian law and, therefore, is no longer a "disputing party" to this arbitration.

* * * *

In short, despite Loewen's efforts to maintain the illusion of TLGI's continued existence, TLGI is, in reality, completely defunct as a matter of both fact and applicable law.[21] It has divested itself of all meaningful assets, carries on no business operations and, indeed, has no officers, directors or employees who could do so. Because TLGI is thus no longer in good standing as a corporation duly organized under Canadian law, it is no longer a "disputing party" to this arbitration and, therefore, can assert no claim over which this Tribunal ha jurisdiction.

* * * *

II. TLGI's CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE NOW OWNED BY A NATIONAL OF THE UNITED STATES

Under the terms of the NAFTA and well-established principles of international law, no person or entity can

21. See L. Sohn & R. Baxter, Convention on the Responsibility of States for Injuries to Aliens (Draft No. 12 with Explanatory Notes, Apr. 15, 1961) ("Harvard Draft Convention"), Explanatory note to art. 21(3)(d) at 181 ("A juristic person, unlike a natural one, requires the operation of some legal system to endow it with existence.").

maintain an international claim against its own State. TLGI concedes as much by having gone to great lengths to conceal Alderwood's ownership of the NAFTA claims behind a Canadian facade. Despite this elaborate (albeit transparent) gamesmanship, TLGI cannot disguise the fact that the true ownership of its NAFTA claims, along with all of its other assets, has devolved to the Alderwoods Group, a U.S. national with no rights to assert any NAFTA claims against the United States.

A. The NAFTA Claims Must Be Continuously Owned by a Non-U.S. National Through the Date of the Final Award

As this Tribunal has acknowledged, Article 1131(1) of the NAFTA requires it to "decide the issues in accordance with the provisions of the NAFTA and applicable rules of international law." Decision on Jurisdiction ¶ 50. Among the applicable customary international law rules is the well-established principle of "continuous nationality," which provides that,

> from the time of the occurrence of the injury *until the making of the award*, the claim must continuously and without interruption have belonged to a person or to a series of persons . . . not having the nationality of the state against whom it is put forward.

I *Oppenheim's International Law* (R. Jennings & A. Watts eds., 9th ed. 1992) 512-513 (emphasis added). See also, Ian Brownlie, *Principles of Public International*

Law 482-83 (5th ed. 1998).[22] The rule establishes a time frame for assessing a claimant's nationality starting with the date of injury *(dies a quo)* and ending with the date of the award *(dies ad quem).* To recover, a claimant cannot become a national of the respondent State, or transfer beneficial ownership of the claim to a national of that State, at any time during this period. If such a change in nationality does occur, the "right to press [that] claim is cut off completely, whether the individual has not yet acted or is actively pressing his claim." Sohn & Baxter, Harvard Draft Convention, art. 22(8) & note, at 187, 197.

Application of this rule in State practice is well-documented.[23] Consistent with this State practice, the

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22. According to these and a number of other authorities, any change in nationality, even to a State other than the respondent State, will result in the denial of the claim. See Oppenheim's International Law at 512-13 ("the claim must continuously and without interruption have belonged to a person or to a series of persons . . . having the nationality of the state by whom it is put forward"); Brownlie, Principles of Public International Law at 482 (quoting same). The Tribunal need not address whether this broader principle applies to NAFTA Chapter Eleven claims, because Loewen's reorganization has resulted in a transfer of TLGI's claims to a national of the respondent State. Moreover, this is not a case of a coerced or involuntary change in nationality, such as one brought about by State succession. See Brownlie, Principles of Public International Law at 482. In the present case, Loewen voluntarily chose to become a U.S. national.

23. See, e.g., Bases of Discussion for the Conference Drawn up by the Preparatory Committee, League of Nations Doc. C.75.M.69.1929.V. at 140-45 (1929), reprinted in 2 S. Rosenne, League of Nations Conference for the Codification of International Law [1930] 423, 562-67 (1975) (observing that many States—

rule has also been applied repeatedly by international tribunals to deny claims that have changed nationality during the course of proceedings. See e.g., Joseph Kren v. Yugoslavia (U.S. Int'l Cl. Comm'n), [1953] I.L.R. 233, 236 (1957) ("there is ample authority under the decisions of international tribunals that a claim must have a continuous national character from the date of its origin to the date

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including Australia, Egypt, Germany, Great Britain, India, Japan, New Zealand and South Africa—agree that the injured person must retain the nationality of the claimant State through the date of the award); id. at 567 ("[a]ccording to the opinion of the majority [of States that responded to the Committee's request for information], and to international jurisprudence, the claim requires to have the national character at the moment when the damage was suffered, and to retain that character down to the moment at which it is decided"); 5 G. Hackworth, Digest of International Law 805 (1943) (where an American claimant Ebenezer Barstow died after his claim was presented to the Japanese government, the U.S. declined to continue to espouse the claim because the decedent's wife, who was the new owner of the claim, was Japanese); F. Nielsen, American and British Claims Arbitration 30 (1926) (in the Hawaiian Claims case before the American and British Claims Tribunal, the British Government voluntarily withdrew the claims of three claimants, "the claimants having acquired American nationality" during the 14 years between the date the claims were first filed and the date the memorial was filed); U.S. Dep't of State, Claims Circular: General Instructions for Claimants, reprinted in S. Doc. No. 6667, at 8 (1919) ("the Government of the United States, as a rule, declines to support claims that have not belonged to [American citizens] from the date the claim arose to the date of its settlement."); 60 French and American Claims Commission, 1880-1884, Records of Claims (Gibson Bros., Washington, D.C., undated) (reproducing arguments of the U.S. and France in Chopin case) (the French and U.S. Governments agreed that the continuous nationality requirement extends to the date of award).

of settlement.").[24] As the U.S. Foreign Claims Settlement Commission explained in American Security and Trust Co. v. Hungary (U.S. For. Cl. Settlement Comm'n 1957), reprinted in 26 [1958-11] I.L.R. 322 (1963), there is "a long list of authorities who have expressed" the view that, "'up to the last moment of its activities, [a Tribunal] remains concerned with the question on whose behalf the claim is prosecuted and to whom the proceeds of an award will flow . . . .'" (quoting Administrative Decision No. V.

24. See also, e.g., Eschauzier, (Gr. Brit.-Mex. Cl. Comm'n of 1931) 5 R.I.A.A. 207 (dismissing a claim by a former British national who became a U.S. citizen by marriage after filing the claim); Guadalupe (unpublished) (Fr.-Mex. Reorganized Cl. Comm'n 1931), discussed in A. Feller, The Mexican Claims Commissions: 1923-1934 at 97 (1935) (denying claim where French nationality was lost "not only subsequent to the filing but also after the specific claim had been listed as receivable in the Supplementary French-Mexican Convention of 1930"); Chopin (Fr.-U.S. Mixed Cl. Comm'n of 1880), reprinted in 2 J. Moore, International Arbitrations 1150 (1898) ("The commission, holding that the treaty requirement as to the claimant's citizenship applied as well to the time when the claim was sought to be collected as to the time when it arose, uniformly decided that it had no jurisdiction to award anything against the United States in favor of a person who was not at the time of the award a citizen of France[.]"); Gribble (Brit.-Am. Mixed Cl. Comm'n, 1872), Report of Robert S. Hale, Esq., Agent and Counsel of United States, [1873, Part II, Vol. III] U.S. Foreign Relations 14 (1874) (commission was unanimous that the claimant's naturalization as a U.S. citizen after the filing of his memorial deprived him of standing); see also Biens Britanniques au Maroc Espagnol—Benchiton (Gr. Brit. v. Spain), 2 R.I.A.A. 615, 706 (1924) ("the claim must remain national up to the time of the judgment, or at least up to the time of the termination of the argument relating thereto").

Decisions and Opinions 145, 164 (U.S.-Germany Mixed Claims Commission)).

Leading commentators also agree that the continuous nationality requirement extends throughout the proceedings to the date of the final award. As Professor Brownlie observes, "the majority of governments and of writers take the date of the award or judgment as the critical date."[25] See also F.V. Garcia-Amador, et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens 82 (1974) ("[T]he predominant opinion both in diplomatic practice and in international case-law is unquestionably" that the continuous nationality rule applies through the date of the award.).[26] Professor Christopher Greenwood, whose third written opinion in this proceeding is attached hereto at Tab B, also agrees that, "from the date of the original injury to the date on which the award or judgment is given," an international claim "must be owned continuously by a national or nationals of the claimant State and must not be owned at any part of this period by a national of the respondent State." Greenwood Third Op. at ¶ 21.

NAFTA Chapter Eleven does not derogate from this established principle.[27] To the contrary, the requirement

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25. Brownlie, Principles of Public International Law at 484.

26. See also, M. Shaw, International Law 565 (4th ed. 1997); Sohn & Baxter, Harvard Draft Convention, art. 23(7) at 200.

27. See Greenwood Third Op. at ¶ 27 (observing that, while "States are, of course, free to waive or vary the [continuous nationality] doctrine by treaty should they so wish[,] [t]here is no indication that the parties to NAFTA intended to do anything of the kind").

of continuous nationality is consistent with various of the Agreement's provisions. Indeed, the dispute resolution provisions of Chapter Eleven, on their face, pertain to "Disputes between a Party and an Investor of *Another* Party" (NAFTA Section B) (emphasis added), thus expressly incorporating the basic requirement that a claimant have a nationality other than that of the respondent State. See Feldman v. United Mexican States, Interim Decision on Preliminary Jurisdictional Issues, 40 I.L.M. 615, 620 at ¶ 34 (2001) ("the definition in Article 1139 of the 'investor of a Party' . . . , in the scope of application of Article 1117(1), refers to an investor of a Party *other than the one in which the investment is made")* (emphasis added). This basic requirement is similarly reflected in Article 1117(4), which specifies that an "investment" cannot assert a claim under the Chapter, but must instead rely upon an investor of *another* Party to bring a claim on its behalf.

The award enforcement provisions of Chapter Eleven also accord with a continuous nationality requirement through the time of the award. For example, Article 1136(5) provides that a "Party whose investor was a party to the arbitration" can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the "disputing Party." The procedure established by this provision, which is analogous to a traditional espousal claim, assumes a continuing connection between the investor and the non-disputing Party through the time of the award, so as to allow that Party to pursue a State-to-State arbitration on behalf of the investor. Without such

a requisite connection, no Party would have an interest in seeking enforcement on the investor's behalf.[28] Similarly, a "disputing investor" may seek enforcement of an award on its own under the ICSID Convention, the New York Convention or the Inter-American Convention. See NAFTA Article 1136(6). The term "disputing investor," however, is specifically defined in Article 1139 to mean "an investor that makes a claim under [Chapter Eleven] Section B." As discussed above, Articles 1116 and 1117 prohibit a claimant investor from possessing the same nationality as the respondent Party. Article 1136(6) carries this requirement forward through the enforcement stage. Thus, each NAFTA Party contemplated enforcement of Chapter Eleven awards against itself only by investors of *another* NAFTA Party.

Even in the absence of these provisions, the continuous nationality rule would continue to apply to Chapter Eleven claims. As this Tribunal has recognized, "an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear an intention to do so." Decision on Jurisdiction ¶ 73 (citing Elettronica Sicula SpA (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 at 42); see also Sambiaggio Case (Italy-Venez. Mixed Cl. Comm'n of 1903), 10 R.I.A.A. 499, 521 ("something in derogation of the

28. See also NAFTA Articles 1116 & 1117 (allowing for claims only by an "investor of a Party" against "another Party."); NAFTA, Article 1115 (purpose of Section B is to establish "a mechanism for the settlement of investment disputes that assures . . . equal treatment among investors of the Parties in accordance with the principle of *international reciprocity*. . . .") (emphasis added).

general principles of international law . . . would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation").[29] If the Parties to the NAFTA had intended to derogate from the longstanding requirement of continuous nationality through the date of award, they could easily have included language to that effect. It is significant that they did not.

Indeed, other international agreements have contained express provisions modifying the requirements of the continuous nationality rule. For example, the Claims Settlement Declaration between the United States and Iran under the Algiers Accords, which establishes the jurisdiction of the Iran-United States Claims Tribunal in disputes outstanding as of January 19, 1981, requires a claim to be "owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state."[30] The Claims

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29. Likewise, the NAFTA Chapter Eleven tribunal in Feldman v. Mexico considered the effect of the claimant's dual nationality on the claim, a matter on which Chapter Eleven is silent. The tribunal not only "deem[ed] it appropriate to recall" international law principles "in matters of standing in international adjudication or arbitration or other form of diplomatic protection," 40 I.L.M. at 619 ¶ 30, but it also checked the result "obtained under general principles of international law . . . against the NAFTA legal framework," id. at 620 ¶ 33, and found that the NAFTA could be interpreted consistently with such principles. Id. at 621 ¶ 36.

30. Article VII(2), Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"), entered into Jan. 19, 1981, reprinted in 20 I.L.M. 230, 233 (1981).

Settlement Declaration thus specifically modifies the end point *(dies ad quem)* of the continuous nationality rule. See Development Resources Corp. v. Iran, 25 Iran-U.S. Cl. Trib. Rep. 20, 28 (1990). Similarly, the Agreement of 1964 between the United States and Yugoslavia, which resolved disputes arising between July 19, 1948 and November 5, 1964, defines "claims of nationals of the United States" as "claims which were owned by nationals of the United States on the date on which the property . . . was nationalized . . . and on the date of the Agreement."[31] Thus, in addition to specifically modifying the *dies ad quem*, the Yugoslav Agreement appears to abandon the requirement of continuity of ownership throughout the relevant period. In another example, the Agreement of 1963 between the United States and Bulgaria modified both the starting and ending dates for the continuous nationality rule. The Bulgaria Agreement contains three different definitions of the term "claims of nationals of the United States." Depending on the type of claim, the term refers to claims owned by U.S. nationals from a certain starting date "and continuously thereafter until filed with the Government of the United States of America."[32] The NAFTA, in contrast, contains no such provisions.

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31. Article I, Agreement Between the Government of the United States of American and the Government of the Socialist Federal Republic of Yugoslavia Regarding Claims of United States Nationals, dated November 5, 1964, entered into January 20, 1965, reprinted in 16 U.S.T. 1 [TIAS 5750] (1965).

32. Article I(2), Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Regarding Claims of United States Nationals and Related Financial Matters, dated July 2, 1963, entered into July 2, 1963, reprinted in 14 U.S.T. 969, 970 [TIAS 5387] (1963).

Moreover, permitting claims to proceed even after the holder of the claim has become a national of the respondent State would contravene principles of international reciprocity and the sovereignty of each of the Parties to the Agreement, which are fully recognized in the NAFTA's investor-State dispute resolution provisions.[33] It would be a significant affront to the intentions of the Parties—and, indeed, the sovereignty of each of those Parties—for a Chapter Eleven tribunal to require a NAFTA Party to pay an award to an enterprise that is owned or controlled by its own nationals. As the United States Supreme Court has explained, [i]ndependently of the express provisions of the treaty, it could not reasonably be urged that the award should inure to the benefit of citizens of the United States. It would be a remarkable thing, and we think without precedent in the history of diplomacy, for the government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers. Burthe v. Denis, 133 U.S. 514, 520-21 (1890) (holding that claimants claiming against the United States before the French-American Claims Commission needed to be citizens of France both at time of presentment of the claim and "of judgment thereon").

B. Alderwoods, a U.S. National, Is Now the Owner of the NAFTA Claims

The purpose and effect of Loewen's reorganization is clear: to transform Loewen into a U.S. corporate family

33. See, e.g., NAFTA Articles 1101(4), 1115; 1117(4); see generally NAFTA Chapter Twenty.

* * * *

led by the Alderwoods Group, via the dissolution of TLGI and the transfer of its assets to Alderwoods. . . .

* * * *

1. TLGI Has Assigned Away its NAFTA Claims

* * * *

Although TLGI purports to retain legal title to the NAFTA claims, it is the equitable, not the nominal, owner that determines the nationality of the claim in circumstances like those present here. Indeed, it is well-established that an international claim "terminates if the *holder of the beneficial interest* in the claim becomes a national of the . . . [respondent] State", even if the allegedly "injured alien" remains a foreign national. Sohn & Baxter, Harvard Draft Convention, art. 22(8) (emphasis added).[35] For this reason, international tribunals generally determine the nationality of claims by "look[ing] to the citizenship of the real claimant and equitable owner rather than of the nominal claimant and ostensible owner." Edwin M. Borchard, Diplomatic Protection of Citizens Abroad 666 (1915).

Numerous international authorities support the principle that "the national character of a claim must

35. See also Oppenheim's International Law at 514 ("it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim").

be tested by the nationality of individuals holding a beneficial interest therein rather than by the nationality of the nominal or record holders of the claim." American Security and Trust Co. v. Hungary (U.S. For. Cl. Settlement Comm'n 1957), reprinted in 26 [1958-II] I.L.R. 322-23 (1963) (where the trustee presenting the claim was a U.S. citizen, but its beneficiaries were not, the commission rejected the claim, noting that "[p]recedents for the foregoing well-settled proposition are so numerous that it is not deemed necessary to document it with a long list of authorities"); Binder-Haas v. Yugoslavia (U.S. Int'l Cl. Comm'n 1953), reprinted in [1953] I.L.R. 236-38 (1957) (holding that "ostensible owner" of shares was not entitled to bring a claim on his own behalf and looking to the nationality of the beneficial owners). Contemporary commentators have confirmed the continuing validity of this proposition. See Brownlie, Principles of Public International Law, at 482-83 (following American Security and Trust Co.). As Professor Greenwood explains, "[t]here is a general consensus that, in determining the nationality of a claim, international law looks to the substance, not the form." Greenwood Third Op. at ¶ 5.

For example, in the Coleman case, the British-American Mixed Claims Commission disallowed a claim against the United States where the nominal British claimant had assigned the beneficial interests in his claim to an American company.[36] "The claim was prosecuted

36. Charles Coleman v. United States (Am.-Brit. Mixed Cl. Comm'n 1872), reprinted in Report of Robert S. Hale, Esq., Agent and Counsel of United States, [1873, Part II, Vol. III] U.S. Foreign Relations 98-100 (1874). See also J. Ralston, The Law and Procedure of International Tribunals (1926) (1973 ed.) at 175

before the commission by [the American assignees] at their own cost and for their own benefit, though in the name of Charles Coleman."[37] The Commission accepted the United States' contention that the Commission had lost jurisdiction over the claim because "the case was in substance one between the United States and its own now citizens . . . and was not . . . a bona-fide controversy between a subject of Great Britain and the government of the United States as the treaty contemplated."[38]

In the Lederer case, the Great Britain-Germany Mixed Arbitral Tribunal refused a claim, originally notified by a British national against Germany but pursued by executors of his estate after his death, to the extent that "compensation would be ultimately awarded to a German beneficiary" of the decedent's estate.[39] The tribunal reasoned that to allow such relief would "be inconsistent with the meaning of the Treaty, for it would

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(explaining that the Commission "in the Coleman case refused an award to American assignees of a claim against the United States which was originally British, apparently considering with propriety that the commission lost jurisdiction, such a transfer to citizens of the respondent nation being made").

37. Coleman at 99.

38. Id. at 100.

39. Exors. of F. Lederer v. German Government (Interlocutory Decision) (Gr. Brit.-Germ. Mixed Arbitral Tribunal 1923) in Recueil des Decisions des Tribunaux Arbitraux Mixtes 762, 765 (1924) (the tribunal did not consider itself "empowered by the Treaty to go in [its] award further than is necessary to ensure the compensation due to the British beneficiaries").

lead in effect to payments . . . by Germany to German nationals."[40]

Similarly, in Parrot's Case, 3 Moore's, International Arbitrations 3009 (1898), the U.S.-Mexico Claims Commission denied a claim brought by a U.S. citizen against Mexico based upon the action of Mexican courts in disposing of a lawsuit filed by Parrot. The Commission found that Parrot had assigned all of his property and "all his credits and claims, except such claims as he might have against the Government of Mexico" to his Mexican creditors. Despite his specific reservation of claims against Mexico, the Commission decided that Parrot had "no valid claim" relating to the lawsuit after the assignment. Id. The Iran-U.S Claims Tribunal, as well, regularly considers the beneficial owner, rather than the record owner, of property in certain matters of jurisdiction where evidence indicates that the beneficial owner is "in reality the true owner of the property." Reza Nemazee, Award 575-4-3 at 7 54; see also Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 111 (1998) ("Consistent with historical claims practice, the Tribunal has favored beneficial over nominal ownership for the purposes of [Article VII of the Claims Settlement Declaration].") (footnote omitted).

* * * *

40. Lederer (Decision on an Application under the Provisions of Rule 40) in id. at 766, 770.

2. Alderwoods Is the Real Owner of the NAFTA Claims Because Nafcanco Is Not an Independent Entity

* * * *

International tribunals have cast a particularly wary eye on transfers of claims to corporate entities, like Nafcanco, that appear to have been created solely for the purpose of establishing or maintaining the requisite nationality for pursuing the claim. *See* 8 Marjorie M. Whiteman, Digest of International Law 1270-1272 (1967) (collecting cases). As Professor Brownlie has explained, "international law has a reserve power to guard against giving effect to ephemeral, abusive and simulated creations." Brownlie, *Principles of Public International Law* at 489; see also Restatement (Third) of the Foreign Relations Law of the United States § 213 n. 2 (1986) ("[A] respondent state is entitled to reject representation by the state of incorporation where that state was chosen solely for legal convenience, for example as a tax haven, and the corporation has no substantial links with that state, such as property, an office or commercial or industrial establishment, substantial business activity, or residence of substantial shareholders."). In such circumstances, customary international law recognizes a limitation to the general principle that a corporation has a legal identity separate from that of its shareholders. As the International Court of Justice acknowledged in *Barcelona Traction,*

> the law has recognized that the independent existence of the legal entity cannot be treated as

> an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, *to prevent the misuse of the privileges of legal personality*, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or obligations. . . . [T]he process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.

Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 39 (Judgment Feb. 5) (emphasis added); *see also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, (Decision on Jurisdiction Sept. 27, 2001) at 116, 122 (where, in determining the "foreign control" required for jurisdictional purposes under the Convention, the tribunal found it had "to review the concrete circumstances of the case without being limited by formalities" to ascertain whether "the purposes of the Convention have [] been abused," e.g., whether a "corporation of convenience exerted] a purely fictional control for jurisdictional purposes").

In addition, international authorities fully support the rejection of international claims "of foreign juristic

persons in which nationals of the *respondent State* hold the controlling interest," particularly in "the case of a juristic person whose [foreign] nationality is more fictitious or nominal than real." F.V. GarciaAmador, et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 83 (1974) (emphasis added); *see also* Revised Draft Articles on International Responsibility of the State for Injuries Caused in it Territory to the Person or Property of Aliens, art. 23(4), in id. at 132 ("A State may likewise not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interest."). While the Harvard Draft Convention on State Responsibility, like NAFTA Chapter Eleven, generally bases the nationality of a juridical entity on the law under which it is incorporated, it nevertheless would preclude a corporation from presenting a claim "if the controlling interest in that [juridical] person is in nationals of a State alleged to be responsible or in an organ or agency of that State." Sohn & Baxter, Harvard Draft Convention, art. 22(7) at 187; *see also* id. art. 23(4) at 199.[43]

Consistent with this authority, the U.S.-Mexican Claims Commission in the claim of *Monte Blanco Real Estate Corp. (U.S. v. Mexico)* denied the claim of Monte Blanco because it found that Mexican nationals had formed the claimant corporation for the sole purpose of seeking diplomatic protection from the United States against Mexico. The Commission explained:

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43. As an explanatory note to the Harvard Draft Convention makes clear, "[t]he test to be applied is one of control, not of ownership." Sohn & Baxter, Harvard Draft Convention, Explanatory note to art. 22(7) at 196.

> Claimant urges that it is an American national; that a corporation is a distinct personality apart from its stockholders, and that it is recognized as a separate entity in American law. However, even if the stock of the claimant company were owned by American nationals, such ownership would not be sufficient to justify the claim's espousal by the American Government if it were merely a colorable ownership concocted for the purpose of protecting non-American interests.

Monte Blanco Real Estate Corp., Decision No. 37-B (Am.-Mex. Cl. Comm'n of 1942), *reprinted in* Report to the Secretary of State 191, 195 (1948).

A similar result was obtained in a case involving the sinking of the "I'm Alone" (a British Ship of Canadian registry) by the United States. *S.S. "I'm Alone" (Can. v. U.S.)*, (Special Agreement, Convention of Jan. 23, 1924) 3 R.I.A.A. 1610, 1617-18 (1935). At the time of sinking, the "I'm Alone" was formally registered in Nova Scotia and owned by a Canadian company, all of whose shareholders were nominally British. However, despite the ostensible Canadian and British ownership of the "I'm Alone," the United States argued that the ultimate American owners of the shipping company "abused the privilege of both Canadian registry and Canadian incorporation."[44]

44. Answer of the Government of the United States of America to the Claim of His Majesty's Government in Canada in Respect of the Ship "I'm Alone," Publications of the Department of State, Arbitration Series No. 2(3), at 1-2 (1931).

* * * *

The Commission agreed, finding that the ship was "*de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the [illicit] purposes mentioned." *Id.* at 1617-18. Accordingly, the Commission denied the claim even though the relevant convention merely required that the ship be a British flag vessel in order for a claim to be presented. See Convention of January 23, 1924 Between the United States and Great Britain to Aid in the Prevention of Smuggling of Intoxicating Liquors into the United States, art. 4, reprinted in, 3 R.I.A.A. 1611-13.

Like the purportedly Mexican corporation in *Monte Blanco* and the Canadian-registered *I'm Alone*, Nafcanco was "concocted" for the sole purpose of masking an American interest behind "colorable" foreign ownership. For all practical purposes, Nafcanco is a part of Alderwoods and Alderwoods is in *de facto* ownership and control of the NAFTA Claims.

* * * *

III. TLGI'S ARTICLE 1117 CLAIM SHOULD BE DISMISSED BECAUSE TLGI NO LONGER "OWNS OR CONTROLS" LGII

NAFTA Article 1117 allows "[a]n investor of a Party" to make a claim "on behalf of an enterprise of another Party . . . that the investor owns or controls directly or indirectly" for damages suffered by the investment

enterprise. TLGI has brought such a claim against the United States on behalf of its former subsidiary, LGII. However, as a result of the reorganization, TLGI no longer "owns or controls" that enterprise. Indeed, it has no connection at all to Alderwoods or the rest of the Alderwoods Group.[46] Therefore, TLGI cannot maintain a claim on behalf of LGII.

As the United States explained during the jurisdictional phase of this proceeding, Article 1117 makes clear the intention of the NAFTA Parties that ownership or control of an investment enterprise must be ongoing in order for an investor to maintain a claim on behalf of that enterprise.[47] Without such ongoing ownership or control, a claimant has no authority to speak on behalf of the enterprise (e.g., for purposes of settlement of the claim, or otherwise in the course of the proceedings), to consult with the enterprise, or obtain documents or other information from the enterprise. Indeed, it would be nothing short of

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46. See, e.g., Disclosure Statement at 75-76 (U.S. App. at 1455-56) ("Immediately following the consummation of the Restructuring Transactions, TLGI will have . . . no relationship to Reorganized LGII or any of its subsidiaries other than as a result of the transactions relating to the NAFTA Claims.").

47. See U.S. Jurisdictional Mem. at 91-92; U.S. Response on Jurisdiction at 92-94; see also NAFTA Article 1117 (allowing investors to make claims on behalf of an enterprise that "the investor owns or controls directly or indirectly"); Article 1135(2) (directing payment, for Article 1117 claims, to the enterprise); Article 1136 (providing for enforcement of any award under Article 1117 only by a disputing party, not by an investment).

absurd to allow an investor to advance an international claim on behalf of an enterprise owned or controlled by someone else. As Chapter Eleven makes clear, the NAFTA Parties contemplated claims on behalf of investments only by those investors who maintained such authority throughout the entire proceedings. Thus, by voluntarily surrendering its ownership of LGII/Alderwoods, TLGI has also surrendered its right to assert a claim on that enterprise's behalf.

* * * *

APPENDIX N

ICSID Case No. ARB(AF)/98/3

IN THE MATTER OF:

THE LOEWEN GROUP, INC. AND
RAYMOND L. LOEWEN,

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent/Party.

REPLY OF THE UNITED STATES OF AMERICA TO THE COUNTER-MEMORIAL OF THE LOEWEN GROUP, INC. ON MATTERS OF JURISDICTION AND COMPETENCE

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Appendix N

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* * *

[57]**III. TLGI'S CLAIMS MUST BE DISMISSED BECAUSE THEY ARE NOW OWNED BY A UNITED STATES NATIONAL**

Recognizing that any direct assignment of the NAFTA claims from TLGI to Alderwoods would run afoul of the continuous nationality rule, Loewen contrived a complex series of corporate transactions intended to maintain the illusion that the claims are still Canadian-owned. Although Loewen, in its Counter-Memorial, provides a detailed step-by-step recounting of these complex transactions, the result is perfectly clear and is precisely as the United States stated in its Memorial: (1) TLGI has assigned to Nafcanco the right to receive the proceeds of the Article 1116 claim coupled with an irrevocable power of attorney to prosecute the NAFTA claims; (2) TLGI has assigned to Alderwoods (formerly LGII) all of its other assets and liabilities, including the contingency fee agreement with counsel and the joint arbitration agreement with Mr. Loewen; and (3) TLGI, a mere shell of a company, retains "bare legal title" to the NAFTA claims. (Mem. at 7-9; Counter-Mem. at 56-57 & Tab G).

In the end, no amount of corporate complexity can hide the fact that Alderwoods is now prosecuting the NAFTA

claims for its own benefit. This conclusion is reached by analyzing the reorganization transactions in two parts. First, TLGI has effectively assigned its NAFTA claims to Nafcanco and is thus no longer the real claimant in this arbitration. Second, Nafcanco is wholly under the domination and control of Alderwoods and, therefore, does not have an independent corporate existence. Thus, the NAFTA claims are now owned by Alderwoods, a U.S. national, and must therefore be dismissed.

A. TLGI No Longer Owns The NAFTA Claims As Matter Of International Law, Having Assigned Such Ownership To Nafcanco

Despite Loewen's insistence, TLGI's retention of "bare legal title" to the NAFTA claims [58]is irrelevant as a matter of international law. (Mem at 22-24). As Professor Greenwood explains, "[t]here is a general consensus that, in determining the nationality of a claim, international law looks to the substance, not the form." (Greenwood Third Op. ¶ 5). In assessing the nationality of a claim, international tribunals routinely ignore the "nominal," "record" or "ostensible" claim holder in favor of the "real," "beneficial" or "equitable" claimant. *See, e.g.,* Brownlie, *Principles of Public International Law,* at 484-85; Borchard, *Diplomatic Protection* at 666. As between TLGI and Nafcanco, only the latter could now be considered the "real" owner of the claim. TLGI has no expectation of benefit from the NAFTA claims nor any right or power to direct the prosecution or settlement of the claims, having assigned both to Nafcanco.

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Loewen cites to no contrary international authority to support its contention that TLGI's nationality continues to matter. Instead, Loewen raises a straw-man argument concerning the ability of a claimant to assign proceeds from an international claim to a third party. Relying entirely on cases from municipal law, Loewen contends that a claimant may validly assign either "a claim itself" or just "the proceeds" from the claim. (Counter-Mem at 62). The United States, however, does not take issue with the ability of a NAFTA Chapter Eleven claimant to assign proceeds from its claim. To the contrary, the United States assumes for present purposes that TLGI has validly assigned the proceeds of its claim to Nafcanco. Indeed, the United States contends that TLGI has transferred not only the proceeds of its NAFTA Article 1116 claim, but full ownership of the NAFTA claims themselves.

TLGI has irrevocably transferred all of the rights and obligations attendant to the NAFTA claims to Nafcanco and Alderwoods, and thus can no longer be considered the real claimant. *See* (Mem. at 25-26):

> [59]Ownership is always . . . ownership of a group of rights in and to some object of these rights. The owner may accordingly transfer to others some or many of these rights but he remains owner so long as he retains the radical or reversionary right of getting the thing back when the other party's right has terminated; he ceases to be owner if he alienates the reversionary right and can no longer recover the thing.

Appendix N

David M. Walker, *The Oxford Companion to Law* 910 (1980). TLGI has assigned its right to the Article 1116 proceeds to Nafcanco and has "irrevocably delegate[d]" to Nafcanco "all powers and responsibilities . . . in respect of the pursuit of the NAFTA claims." (U. S. App. at 1826). Accordingly, it has relinquished its right to direct the litigation and has no expectation of benefit from any award or settlement. Similarly, TLGI no longer has any obligations or liabilities in connection with the claims. Alderwoods has assumed TLGI's contingency fee agreement with counsel and TLGI's obligations under the joint defense agreement with Ray Loewen. TLGI has no possibility of ever recovering these rights and duties, and thus has relinquished ownership of the claims. These facts are undisputed.

Indeed, Loewen's own expert, former Justice Cory, characterizes TLGI's assignment to Nafcanco as an assignment of a cause of action and defends it as such. (Cory Report ¶¶ 69-71). The U.S. and Canadian cases cited by Loewen and Mr. Cory recognize that an assignment of the proceeds of a claim coupled with an irrevocable power of attorney constitutes an assignment of the claim itself. (Counter-Mem. at 62).[46] As the court explained in *In re Musser*, 24 B.R. 913, 920 (W.D. Va. 1982) (cited by Loewen

46. Under Anglo-American common law, and the laws of several U.S. states and Canadian provinces, assignments of personal injury causes of action are generally prohibited by the rules against champerty and maintenance. A plaintiff can, however, assign the proceeds of a personal injury claim. Thus, these cases distinguish between the assignment of a claim and the assignment of the proceeds alone.

at page 62 of the Counter-Memorial), an assignment of proceeds alone can be distinguished from the assignment of a cause of action, "because the . . . [60]assignor retain[s] exclusive control over his lawsuit and any settlement thereof." Thus, under United States law, a claimant is considered to have assigned an entire cause of action when he, like TLGI, has been "divest[ed] . . . of all control over" the action. *Id.* at 919. Similarly, in *Frederickson v. Insurance Corp.* [1986] 28 D.L.R. (4th) 414, 421 (B.C.C.A.), affirmed 49 D.L.R. (4th) 160 (S.C.C.) (cited by Loewen's expert Mr. Cory at ¶ 69 of his report), the British Columbia Court of Appeal considered the validity of an assignment of a *cause of action*. Although the Court ultimately upheld the assignment, the Court refused to characterize it as a mere conveyance of "the fruits of the action," because the assignee would be "prosecuting the action as well." *Id.*

The fact that TLGI is now a moribund corporation further supports the view that it is no longer the real claimant. TLGI owns no assets and has no officers, directors, or employees. Thus, as both a legal and a practical matter, it cannot play any role in the continued pursuit of the NAFTA claims.

Somewhat contradictorily, Loewen contends that TLGI's "death" preserves the Canadian nationality of the NAFTA claims, because international law purportedly ignores the nationality of a deceased claimant's heirs. (Counter-Mem. at 58). To the contrary, "the nationality of an heir must be that of the state of which the decedent on whose behalf the claim would have been made was a national: in other words *the principle of continuous*

nationality is applied to the beneficial interest in the property." Brownlie, *Principles of Public International Law* at 484 (emphasis added). *See also Minnie Stevens Eschauzier,* (Gr. Brit.-Mex Cl. Comm'n of 1931) 5 R.I.A.A. 207, 211 (quoting Basis of Discussion No 28. for the Conference Drawn up by the Preparatory Committee, League of Nations Doc. C.75.M.69.1929.V. (1929)). Thus, even if TLGI were analogized to a dead claimant (its death being more akin to a "suicide" in any event), the [61] Tribunal's continued jurisdiction would depend upon the nationality of TLGI's "heir," which is Alderwoods.

The authorities cited by Loewen do not support its contention that the continuous nationality rule does not apply to the heirs of a deceased claimant. (Counter-Mem. at 75). For example, In *Halley, Administrator (Gr. Brit.) v. United States,* 3 J. Moore, *International Arbitrations* 2241 (1898), the commissioners considered the nationality of both the deceased claimant and his beneficiaries. Indeed, in order to determine whether the commission retained jurisdiction over the claims, the commissioners ultimately had to address the dual nationality of the heirs. Similarly, Borchard, in a passage omitted by Loewen, notes that,

> under the general form of protocol for the adjudication of claims of the citizens of one country against the other, international tribunals have generally held that not only the deceased but the actual beneficiary must come within the jurisdiction of the commission in the matter of citizenship. Heirs, therefore, have

> been required to establish their jurisdictional citizenship independently of their ancestor, failing which their claims have been rejected.

Borchard, *Diplomatic Protection* at 628.[47]

Thus, in the *Lederer* case, the Great Britain-Germany Mixed Arbitral Tribunal refused to award compensation to the German beneficiaries of a British claimant who had died submitting his claim. *Lederer in* Recueil des Décisions des Tribunaux Arbitraux Mixtes at 765. The tribunal did not consider the claim to have "vested" in any way. In addition, contrary to Loewen's assertion (Counter-Mem. at 74), the *Lederer* case did not involve any special considerations [62]concerning trading with the enemy in wartime.

Neither is Loewen aided by the practice of the Iran-United States Claim Tribunal. "Consistent with historical claims practice, the Tribunal has favored beneficial over nominal ownership for the purposes of [Article VII of the Claims Settlement Declaration]." C. Brower & J. Brueschke, *The Iran-United States Claims Tribunal* 111 (1998) (footnote omitted). The Tribunal's decision

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47. To the extent that Borchard acknowledges "several cases where . . . rights were considered to have vested in [a claimant's] heirs regardless of nationality," these cases are exceptions to the general principle quoted above. Notably, of the two sources Borchard cites for support, one is Moore's misinterpretation of *Chopin*. *See Borchard* § 285, p. 629 n. 3, § 308, p. 666 n.1. *See supra* at 29-31 (explaining that *Chopin* tribunal did not hold that the claim had "vested").

in *Foremost Tehran, Inc. v. Iran,* 10 Iran-U.S. Cl. Trib. Rep. 228 (1986), was not to the contrary. Foremost had split its claim into two parts—it filed one claim to recover a portion of its losses which were insured, and another claim to recover the uninsured portion. Iran argued that Foremost could not pursue the insured portion because, by private agreement, it had assigned the "entire beneficial interest" in that claim, retaining only legal title for itself. The Tribunal, however, held that Foremost could pursue both claims. First, the Tribunal noted that in addition to "legal title" to the insured portion, Foremost retained "the right and duty to institute proceedings for recovery in its own name" and guaranteed to "use its best efforts to maintain the legal title in and to all the aforesaid items for the benefit of and in trust for [the insurer]" *Id.* at 238-39. Second, the tribunal was guided by a general rule of common law that "an insured party who assigns a *limited* beneficial interest to its insurer is the proper party to bring a claim for compensation for the *entire* loss." *Id.* at 239. Thus, unlike TLGI, Foremost retained more than just "bare legal title" to the assigned portion of its claim, and ultimately expected to receive a portion of the total proceeds.

Loewen similarly misinterprets the decision in the *I'm Alone* case.[48] (Counter-Mem. at [63]72-73). The Commissioners in *I'm Alone* refused to award compensation to Canadian claimants for the loss of a ship and its cargo because the ship "was *de facto* owned,

48. *"I'm Alone" Case (Can. v. U.S.),* (Special Agreement, Convention of Jan. 23, 1924) 3 R.I.A.A. 1610, 1617-18 (1935).

controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of," by nationals of the respondent state, the United States. The Commission, however, retained jurisdiction and issued compensation for the lives lost when the ship was sunk. Unlike the vessel they sailed, the captain and the crew were indisputably Canadian nationals, and the claim brought for their benefit could be maintained. *Id.* Furthermore, as the above quoted passage shows, the "facts" which the Commission found determinative concerned the ownership and control of the ship and not, as Loewen suggests, the "illegal conspiracy" for which it had been used. (CounterMem. at 73).

B. Alderwoods Is The True Owner Of The NAFTA Claims Because Nafcanco Is Not An Independent Entity

Article 1117(4) of the NAFTA provides that "[a]n investment may not make a claim" under Section B of Chapter Eleven. (NAFTA art. 1117(4)). It is readily apparent, however, that Loewen's NAFTA claims are, in truth, now being made by such an "investment"—the Alderwoods Group (formerly LGII).

Although, as discussed above, Nafcanco is superficially the beneficial owner of the NAFTA claims, Nafcanco is nothing more than a corporation of convenience created for the sole purpose of maintaining the appearance that TLGI's NAFTA claims still belong to a Canadian national. In reality, it is completely controlled and dominated by Alderwoods, as demonstrated by the facts identified in

the United States' opening Memorial. (Mem. at 30-32). Loewen has not disputed any of those facts. Significantly, Loewen does not dispute, *inter alia,* that: (1) Nafcanco conducts no business operations of its own and has no assets other than the right to [64]receive the proceeds of the Article 1116 claim; (2) Nafcanco is merely a "flow-through" entity such that any award received by Nafcanco will ultimately pass to Alderwoods; and (3) Alderwoods, not Nafcanco, is the ultimate-decision maker and driving force behind the prosecution of the NAFTA claims. These concessions by Loewen are fatal to its case.

Under these circumstances, international law does not recognize Nafcanco as a separate and independent entity from Alderwoods. *See, e.g., Barcelona Traction (Belg. v. Sp.),* 1970 I.C.J. 39 (Feb. 5) (Judgment) (recognizing the "process of lifting the veil" in international law); *Restatement (Third) Foreign Relations Law* § 213 n.2. In general, claimants cannot avoid the requirements of the continuous nationality rule by creating corporate entities like Nafcanco. *See* 8 Marjorie M. Whiteman, *Digest of International Law,* 1270-1272 (1967); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, (Decision on Jurisdiction Sept. 27, 2001) ¶¶ 116, 122. Such corporate gamesmanship is particularly disfavored when the incorporator, like Alderwoods, is a national of the respondent State. *Cf.* F.V. Garcia-Amador, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* at 83; Sohn & Baxter, Harvard Draft Convention, art. 22(7) at 187, art. 23(4) at 199. Loewen is simply mistaken when it asserts that the only international

authority cited by the United States for this proposition is the Harvard Draft Convention. (*Compare* Mem. at 26-30 *with* Counter-Mem. at 65).

Loewen, on the other hand, offers no international support for recognizing Nafcanco's independence. Its entire argument rests on its understanding of Canadian law and the opinion of its expert, Mr. Cory. (Counter-Mem. at 63-65). The tribunal, however, must apply the rule of continuous nationality in accordance with applicable principles of international, not municipal, [65]law. But even under Canadian law, Nafcanco would be considered the alter ego of Alderwoods. (*See* Statement of Gerard La Forest, Q.C. at ¶¶ 32-35; La Forest Reply at ¶ 15). Both Loewen and Mr. Cory effectively concede that Nafcanco is under the domination and control of Alderwoods. Nevertheless, they contend that it would not be fair or equitable to ignore the corporate formalities in this case. As explained in the Reply Opinion of former Justice LaForest, however, such considerations are not relevant to the inquiry under Canadian law. (La Forest Reply at ¶¶ 8-16). Moreover, as explained below, the relevant equities weigh heavily in favor of looking through the obvious facade of Alderwoods' corporate formalities in this case. *See infra* at 72-80.

Loewen's attempts at distinguishing the international authorities cited by the United States are equally unconvincing. Loewen contends that the tribunals in *I'm*

Alone, Monte Blanco,[49] and *Coleman*[50] disregarded "sham" corporations that were used to create jurisdiction where none existed, rather than corporations, like Nafcanco, which are intended to maintain jurisdiction where it no longer exists. (Counter-Mem. at 73-74). Whether a "sham" corporation is created in anticipation of an injury, before a claim is submitted, or before an award is rendered, should not matter so long as it was created to subvert the requirements of the continuous nationality rule. [66] Furthermore, the holding in *Coleman* had nothing to do with the creation of jurisdiction. The Commission initially allowed the administrator of Coleman's estate to bring a claim in Coleman's name, but later refused to grant an award because the claim had been assigned to U.S. nationals who were prosecuting the claim for their own benefit. *See Coleman,* [1873, Part II, vol. III] *U.S. Foreign Relations* at 99.

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49. *Monte Blanco Real Estate Corp.,* Decision No. 37-B (Am.-Mex. Cl. Comm'n of 1942), *reprinted in* Report to the Secretary of State 191, 195 (1948)

50. *Charles Coleman v. United States* (Am.-Brit. Mixed Cl. Comm'n 1872), *reprinted in* Report of Robert S. Hale, Esq., Agent and Counsel of United States, [1873, Part II, Vol. III] U.S. *Foreign Relations* 98-100 (1874). *See also* J. Ralston, *The Law and Procedure of International Tribunals* (1926) (1973 ed.) at 175 (explaining that the Commission "in the Coleman case refused an award to American assignees of a claim against the United States which was originally British, apparently considering with propriety that the commission lost jurisdiction, such a transfer to citizens of the respondent nation being made").

Appendix N

Loewen's reliance on the decisions of the ICSID tribunals in *CSOB* and *Autopista* (Counter-Mem. at 76-77) is similarly misplaced. Both *CSOB* and *Autopista* were contract cases where, unlike in NAFTA Chapter Eleven disputes, international law did not supply the rule of decision. Thus, the tribunals in those cases were not bound to consider the nationality of the beneficial rather than the nominal owner of the claim in accordance with customary international law. In any event, *Autopista* assumed that a finding that the claimant was a "corporation of convenience" would compel dismissal but merely found that the claimant, unlike Nafcanco, was not such a creature of convenience. *Autopista,* ICSID Case No. ARB/00/5, ¶¶ 122-126.

Finally, Loewen misunderstands the United States' argument and international law by suggesting that the Tribunal will also have to look behind Alderwoods to examine the nationality of its shareholders. (Counter-Mem. at 78). As the International Court of Justice made clear in the *Barcelona Traction* case, international law respects the independent legal personality of corporations such that the place of incorporation is normally determinative of the company's nationality. *Barcelona Traction,* 1970 I.C.J. at 42, ¶¶ 70-71. Only under special circumstances, such as those presented by Nafcanco, is it appropriate for a tribunal to disregard the corporate form. The United States is not aware of any circumstances that would warrant lifting the corporate veil of Alderwoods. Neither is it relevant that Alderwoods continues to have [67] significant contacts with Canada. (Counter-Mem. at 77).

Alderwoods is a Delaware corporation and is, therefore, considered to be a U.S. national both for purposes of international law and for the NAFTA in particular. *See* NAFTA art. 1139 (defining "enterprise of a party"); *Barcelona Traction,* 1970 I.C.J. at 42, ¶¶ 70-71 (criticizing *siège social* test). Loewen elsewhere admits that "LGII was renamed 'Alderwoods Group, Inc.' (AGI) and became a stand-alone U.S. company." (Counter- Mem. at 58-59). It cannot, therefore, be heard to argue that Alderwoods is really a Canadian company.

The fact that Nafcanco has assigned twenty-five percent of its right to any net proceeds from the Article 1116 claim to Trans Canada Credit Corporation, does not alter the analysis. (*See* Counter-Mem. at 78). Trans Canada, like Nafcanco, is a Nova Scotia unlimited liability company and serves merely as a "flow through" for the U.S. bank, Wells Fargo. (U.S. App. at 1858). Trans Canada received the partial assignment of Article 1116 proceeds from Nafcanco solely as "*nominee* of Wells Fargo Bank . . . in its [Wells Fargo's] capacity as trustee under the Loewen Creditor Liquidating Trust Agreement." *Id.* (emphasis added). Even if the Tribunal were to consider the nationality of the Liquidating Trust, therefore, the same result would obtain.[51]

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51. This would also be so even if the Tribunal were to look to the nationality of Loewen's creditors, who are the ultimate beneficiaries of both of Loewen's NAFTA claims. As Loewen's witness acknowledges, "[m]ost of Loewen's creditors were U.S. investors. . . ." Affidavit of Jonathan B. Cleveland ("Cleveland Aff.") at ¶14. Indeed, the United States believes that the great majority of Loewen's creditors, who are now the owners of Alderwoods,

The Tribunal similarly need not consider the nationality of the Liquidating Trust's beneficiaries. (Counter-Mem. at 78). Unlike the assignment from TLGI to Nafcanco, Nafcanco [68]and Alderwoods have transferred to the trust only a limited interest in the proceeds of the NAFTA claims. The trust has no control over the prosecution of the claims, and therefore cannot be considered the owner of even a portion of the claims for nationality purposes.

More fundamentally, because the transfers of these limited interests to the liquidating trust occurred *after* the ownership of the NAFTA claims had already devolved to Alderwoods, those transfers cannot alter the fact that the NAFTA claims have not been *continuously* held by non-U.S. nationals, as international law requires. *See* Borchard, *Diplomatic Protection* at 666 ("if at any time after its origin [the claim] has passed out of national hands or lost its national character, its nationality is not merely suspended but is completely destroyed, so that its reassignment to a citizen cannot revive its original nationality").

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are U.S. investors. For reasons already explained, however, international law would not look beyond Alderwoods (absent grounds for lifting the corporate veil) for purposes of nationality.

C. Loewen's Decision To Restructure Its Business In A Manner That Transferred Ownership Of The NAFTA Claims To Alderwoods Was Not "Involuntary"

Loewen implicitly acknowledges, as it must, that the decision to restructure The Loewen Group into a United States corporate family was purely a business decision that involved weighing the various commercial benefits of United States citizenship against the costs of such a restructuring, including the risk of losing Loewen's NAFTA claims. (*See* Counter-Mem. at 53- 54). As Loewen's witness explains, the move to the United States was intended to "maximize the trading prices" of the company's stock "by avoiding the perceived disadvantages of *not* being incorporated in the U.S." (emphasis in original), by "eliminating the tax inefficiencies" that existed in Loewen's earlier corporate structure, and by obtaining other economic advantages of U.S. corporate citizenship. (Cleveland Aff. at ¶¶ 14-15). Loewen optimistically predicted (misguidedly, as it turns out) that the restructuring "should not affect the NAFTA Claims" (U.S. App. at 1521) and, on that basis, Loewen and its creditors agreed that the benefits of U.S. . . . .

* * *

Appendix N

[83]**CONCLUSION**

For the foregoing reasons, and for the reasons set forth in the United States' previous submissions, the claims of TLGI should be dismissed in their entirety.

Respectfully submitted,

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Dated: April 26, 2002

APPENDIX O

International Centre for
Settlement of Investment Disputes
Washington, D.C.

In the proceeding between

THE LOEWEN GROUP, INC.
AND RAYMOND L. LOEWEN,

(Claimants),

and

UNITED STATES OF AMERICA,

(Respondent).

Case No. ARB(AF)/98/3

Award

Members of the Tribunal
Sir Anthony Mason
Judge Abner J. Mikva
Lord Mustill

Secretary of the Tribunal
Mrs Margrete Stevens

Appendix O

I. INTRODUCTION

1. This is an important and extremely difficult case. Ultimately it turns on a question of jurisdiction arising from (a) the NAFTA requirement of diversity of nationality as between a claimant and the respondent government, and (b) the assignment by the Loewen Group, Inc. of its NAFTA claims to a Canadian corporation owned and controlled by a United States corporation. This question was raised by Respondent's motion to dismiss for lack of jurisdiction filed after the oral hearing on the merits. In this Award we uphold the motion and dismiss Claimants' NAFTA claims.

2. As our consideration of the merits of the case was well advanced when Respondent filed this motion to dismiss and as we reached the conclusion that Claimants' NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion. As will appear, the conclusion rests on the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA.

3. This dispute arises out of litigation brought against first Claimant, the Loewen Group, Inc ("TLGI") and the Loewen Group International,

Inc ("LGII") (collectively called "Loewen"), its principal United States subsidiary, in Mississippi State Court by Jeremiah O'Keefe Sr. (Jerry O'Keefe), his son and various companies owned by the O'Keefe family (collectively called "O'Keefe"). The litigation arose out of a commercial dispute between O'Keefe and Loewen which were competitors in the funeral home and funeral insurance business in Mississippi. The dispute concerned three contracts between O'Keefe and Loewen said to be valued by O'Keefe at $980,000 and an exchange of two O'Keefe funeral homes said to be worth $2.5 million for a Loewen insurance company worth $4 million approximately. The action was heard by Judge Graves (an African-American judge) and a jury. Of the twelve jurors, eight were African-American.

4. The Mississippi jury awarded O'Keefe $500 million damages, including $75 million damages for emotional distress and $400 million punitive damages. The verdict was the outcome of a seven-week trial in which, according to Claimants, the trial judge repeatedly allowed O'Keefe's attorneys to make extensive irrelevant and highly prejudicial references (i) to Claimants' foreign nationality (which was contrasted to O'Keefe's Mississippi roots); (ii) race-based distinctions between O'Keefe and Loewen; and (iii) class-based distinctions between Loewen (which O'Keefe counsel portrayed as large wealthy

corporations) and O'Keefe (who was portrayed as running family-owned businesses). Further, according to Claimants, after permitting those references, the trial judge refused to give an instruction to the jury stating clearly that nationality-based, racial and class-based discrimination was impermissible.

5. Loewen sought to appeal the $500 million verdict and judgment but were confronted with the application of an appellate bond requirement. Mississippi law requires an appeal bond for 125% of the judgment as a condition of staying execution on the judgment, but allows the bond to be reduced or dispensed with for "good cause".

6. Despite Claimants' claim that there was good cause to reduce the appeal bond, both the trial court and the Mississippi Supreme Court refused to reduce the appeal bond at all and required Loewen to post a $625 million bond within seven days in order to pursue its appeal without facing immediate execution of the judgment. According to Claimants, that decision effectively foreclosed Loewen's appeal rights.

7. Claimants allege that Loewen was then forced to settle the case "under extreme duress". Other alternatives to settlement were said to be catastrophic and/or unavailable. On January 29, 1996, with execution against their Mississippi assets scheduled to start the next day, Loewen

entered into a settlement with O'Keefe under which they agreed to pay $175 million.

8. In this claim Claimants seek compensation for damage inflicted upon TLGI and LGII and for damage to second Claimant's interests as a direct result of alleged violations of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") committed primarily by the State of Mississippi in the course of the litigation.

* * *

XXIX. THE JURISDICTIONAL OBJECTION TO MR RAYMOND LOEWEN'S CLAIMS

219. This objection is dealt with together with the Respondent's additional objection to competence and jurisdiction.

XXX. RESPONDENT'S ADDITIONAL OBJECTION TO COMPETENCE AND JURISDICTION

220. Subsequent to the October 2001 hearings on the merits, events occurred which raised questions about TLGI's capacity to pursue its NAFTA claims and gave rise to Respondent filing a further objection to competence and jurisdiction on January 25, 2002. TLGI had filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, and a reorganization plan was approved by the bankruptcy courts of the United

States and Canada. Under that plan, TLGI ceased to exist as a business entity. All of its business operations were reorganized as a United States corporation. In apparent recognition of the obvious problem that would be caused by a United States entity pursuing a claim against the United States under NAFTA, TLGI, immediately prior to its going out of business, assigned all of its right, title and interest to the NAFTA claim to a newly created corporation (discreetly called Nafcanco - a play on the words NAFTA and Canada). It would appear that the NAFTA claim is the only asset of Nafcanco, and the pursuit of the claim its only business.

221. Following the filing of Respondent's objection, appropriate pleadings were filed by both sides and on June 6, 2002, the Tribunal held a hearing on the objection. Canada and Mexico again submitted their views on the issues that were raised at the hearing.

222. NAFTA is a treaty intending to promote trade and investment between Canada, Mexico and the United States. Since most international investment occurs in the private sector, investment treaties frequently seek to provide some kind of protection for persons engaging in such investment. Until fairly recently, such protection was implemented and pursued by the States themselves. When Mexico expropriated the investment of some American oil companies many years ago, the claims of the American companies were pursued by American diplomatic authorities. When the United States seized the assets of Iranian

nationals during the hostage crisis of the 1970s, Iran and the United States worked out a settlement as sovereign nations.

223. Chapter Eleven of NAFTA represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration, as TLGI has done in the instant case. The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law and it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents. Such a collateral effect on the domestic laws of the NAFTA Parties was clearly not within their contemplation when the treaty was negotiated.

224. If NAFTA could be used to assert the rights of an American investor in the instant case, it would in effect create a collateral appeal from the decision of the Mississippi courts, by definition a unit of the United States government. As was pointed out earlier, the object of NAFTA is to protect outsiders who do not have access to the political or other avenues by which to seek relief from nefarious practices of governmental units.

225. Claimant TLGI urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest - the beneficiary of the claim - is an American citizen. Both as a matter of historical and current international precedent, this argument must fail. In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.

226. Claimants' first argument strand is that NAFTA itself, in Articles 1116 and 1117, require nationality only to the date of submission. However, those articles deal only with nationality requirements at the *dies a quo*, the beginning date of the claim. There is no language in those articles, or anywhere else in the treaty, which deals with the question of whether nationality must continue to the time of resolution of the claim. It is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity.

227. Nor does the recent arbitral decision in the *Mondev case* help Claimants in any way. In that case, the Tribunal dealt with the issue of whether the investment itself had to remain of the claimant's identity. Significantly, the reasoning of the Tribunal implicated other sections of NAFTA, namely

Articles 1105 and 1110. The investment in *Mondev*, some Boston real estate, had been foreclosed on by an American mortgage holder. Even though it denied Mondev's claim on the merits, the Tribunal appropriately found that the loss of the investment through foreclosure of the mortgage could not be the basis for denying Mondev's right to pursue its remedies under NAFTA. It pointed out that such a set of events could occur quite often to indenters and that the whole purpose of NAFTA's protection would be frustrated if such disputes could not be pursued. It said:

> "Secondly the Tribunal would again observe that Article 1105, and even more so Article 1110, will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its "sale or other disposition" (Article 1101(2)). On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment

> as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of. Otherwise issues of the effective protection of investment at the international level will be overshadowed by technical questions of the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment."

228. In sum, neither the language of the Treaty, nor any of the cases decided under it answers the question as to whether continuous nationality is required until the resolution of the claim. Respondent correctly contends that Article 1131 requires the Tribunal to decide the issues in dispute in accordance with "applicable rules of international law".

229. There is only limited dispute as to the history of the requirement of continuous nationality to the end of any international proceeding. When investment claims were negotiated and resolved only at a governmental level, any change in nationality of the claimant defeated the only reason for the negotiations to continue. The claiming government no longer had a citizen to protect. This history has changed as the nature of the claim process has changed. As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality. But

those provisions have been specifically spelled out in the various treaties that TLGI cites as proof that international law has changed. Thus, in the claims settlement agreement between Iran and the United States arising out of the hostage crisis, the requirement of continuous nationality was specifically altered in the agreement. Many of the bilateral investment treaties, the so-called "BITs", contain specific modifications of the requirement. But such specific provisions in other treaties and agreements only hinder TLGI's contentions, since NAFTA has no such specific provision.

230. As with most hoary international rules of law, the requirement of continuous nationality was grounded in comity. It was not normally the business of one nation to be interfering into the manner in which another nation handled its internal commerce. Such interference would be justified only to protect the interests of one of its own nationals. If that tie were ended, so was the justification. As international law relaxed to allow aggrieved parties to pursue remedies directly, rather than through diplomatic channels, the need for a rigid rule of *dies ad quem* also was relaxed. But as was previously noted, such relaxations came about specifically in the language of the treaties. There is no such language in the NAFTA document and there are substantial reasons why the Tribunal should not stretch the existing language to affect such a change.

231. We address at this stage an aspect of the problem which might well puzzle a private lawyer. Such

a lawyer would of course be familiar with the inhibitions which can stand in the way of the enforcement of liabilities when changes in corporate status, or in the proprietorship of the claims, intervene after the proceedings to enforce the claim have commenced. Insolvency or judicial administration or a moratorium may affect one of the parties so that under the relevant domestic law the liability ceases to be enforceable for a while, or is compulsorily transferred to a third party, or entirely changes its juristic character, or may become a right to share in the proceedings of a winding up. Equally, the lawyer would recognise the potential for difficulties in enforcing a liability after a voluntary transfer to a third party, when the right to pursue the complaint may be enforceable only by the transferee, or only in the name of the transferor for the benefit of the transferee; and he could well foresee that particular difficulties could arise when, under an arbitration agreement between A and B, the former begins an arbitration, and afterwards transfers the right to C, a stranger to the arbitration agreement. These are no more than examples. These procedural difficulties are of a kind which many domestic systems of law have confronted.

232. The same lawyer might well, however, have much more difficulty in visualising the outcome in the quite different situation where, through subsequent events of the kind indicated above, a vested claim, already the subject of valid proceedings, simply

ceases to exist, together with the breach of obligation or delict which have brought it into being. True, it is possible to imagine that a change of identity with a consequent change of nationality by the enforcing party might deprive a tribunal of territorial jurisdiction under its domestic rules of procedure. This is not the present case. If the submissions of the United States are right, the fatal objection to success by the Claimants is that a NAFTA claim cannot exist or cannot any longer exist, once the diversity of nationality has come to an end, so that the Tribunal cannot continue with the resolution of the original dispute, there being no dispute left to resolve. The private lawyer might well exclaim that the uncovenanted benefit to the defendant would produce a result so unjust that it could be sustained only by irrefutable logic or compelling precedent, and neither exists. The spontaneous disappearance of a vested cause of action must be the rarest of incidents, and no warrant has been shown for it in the present context.

233. Such a reaction, though understandable, in our opinion, would be, wholly misplaced. Rights of action under private law arise from personal obligations (albeit they may be owed by or to a State) brought into existence by domestic law and enforceable through domestic tribunals and courts. NAFTA claims have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of

wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation. These means are both distinct from and exclusive of the remedies for wrongful acts under private law: see Articles 1121, 1131, 2021 and 2022. It is true that some aspects of the resolution of disputes arising in relation to private international commerce are imported into the NAFTA system via Article 1120.1(c), and that the handling of disputes within that system by professionals experienced in the handling of major international arbitrations has tended in practice to make a NAFTA arbitration look like the more familiar kind of process. But this apparent resemblance is misleading. The two forms of process, and the rights which they enforce, have nothing in common. There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. If the effects of a change of ownership are to be ascertained we must do so, not by inapt analogies with private law rules, but from the words of Chapter Eleven, read in the context of the Treaty as a whole, and of the purpose which it sets out to achieve.

234. TLGI urges some equitable consideration be given because it was the underlying Mississippi litigation which brought about the need for it to file bankruptcy in the first place. We have already rehearsed our view of the inequities that befell

TLGI in that litigation, and a chancery court would certainly take such claims into account in assessing damages. But this is an international tribunal whose jurisdiction stems from and is limited to the words of the NAFTA treaty. Whatever the reasons for TLGI's decision to follow the bankruptcy route it chose, the consequences broke the chain of nationality that the Treaty requires.

235. Claimants also seek to rely on provisions of the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID). It claims that under ICSID, there are different nationality rules that should be applied in this case. First, it must be noted that neither Canada nor Mexico are signatories of ICSID and it would be most strange to apply provisions of that Convention to a NAFTA dispute. The only relevance of ICSID to this proceeding is that the Parties have elected to function under its structure. That election cannot be used to change or supplement the substance of the Treaty that the three nations have entered into. Whatever specificity ICSID has on the requirement of continuous nationality through the resolution of the dispute only points up the absence of such provisions in NAFTA. Claimants have not shown that international law has evolved to the position where continuous nationality to the time of resolution is no longer required.

236. TLGI further contends that the International Law Commission issued a report which proposed

eliminating the continuous nationality rule even in cases of diplomatic protection, a field that would seem more nationality oriented than the protection of investors. The report itself met with criticism in many quarters and from many points of view. In any event, the ILC is far from approving any recodification based on the report.

237. Article 1109 fully authorizes transfers of property by an investor. TLGI contends that such provision for free assignment somehow strengthens its position. The assignment from TLGI to Nafcanco is not being challenged, except as to what is being assigned. By the terms of the assignment, the only item being assigned was this NAFTA claim. All of the assets and business of TLGI have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation. Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding. Claimants also urge that TLGI remains in existence, since its charter remains in existence. The Tribunal is being asked to look at form rather than substance to resolve a complicated claim under an international treaty. Even if TLGI has some kind of ethereal existence, it sought to place any remaining NAFTA marbles in the Nafcanco ring. Claimants insist that Respondent is asking the Tribunal to "pierce" the corporate veil of Nafcanco and point out the legal complications involved in such a piercing. The Tribunal sees no

need to enter into that thicket. The question is whether there is any remaining Canadian entity capable of pursuing the NAFTA claim.

238. Claimants state that there were good and sufficient business reasons for reorganizing under an American corporate character including pressure from TLGI's creditors. The Tribunal has no reasons to doubt the legitimacy of those reasons but the choices made clearly had consequences under the Treaty. There might have been equally compelling reasons for the Loewen interests to choose a United States mantle when it first commenced doing business. NAFTA does not recognize such business choices as a substitute for its jurisdictional requirements under its provisions and under international law.

239. Raymond Loewen argues that his claims under NAFTA survive the reorganization. Respondent originally objected to Raymond Loewen's claims on the ground that he no longer had control over his stock at the commencement of the proceeding. The Tribunal allowed Raymond Loewen to continue in the proceeding to determine whether he in fact continued any stock holding in the company. No evidence was adduced to establish his interest and he certainly was not a party in interest at the time of the reorganization of TLGI.

240. In regard to the question of costs the Tribunal is of the view that the dispute raised difficult and novel

questions of far-reaching importance for each party, and the Tribunal therefore makes no award of costs.

ORDERS

For the foregoing reasons the Tribunal unanimously decides -

(1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.

(2) That it lacks jurisdiction to determine Raymond L. Loewen's claims under NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.

(3) TLGI's claims and Raymond L. Loewen's are hereby dismissed in their entirety.

(4) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.

Appendix O

XXXI. CONCLUSION

241. We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi proceedings in the strongest terms. There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

242. This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation

of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.

Done at Washington, D.C.

(signed)

……..

Sir Anthony Mason
President of the Tribunal
Date: 19.06.03

Appendix O

(signed)	*(signed)*
.....	.....
Judge Abner J. Mikva	*Lord Mustill*
Arbitrator	*Arbitrator*
Date: June 25, 2003	Date: 17.06.03

APPENDIX P

ARBITRATION PURSUANT TO THE RULES
OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW

PERMANENT COURT OF ARBITRATION
CASE No. AA226

HULLEY ENTERPRISES LIMITED,

Claimant,

V.

THE RUSSIAN FEDERATION,

Respondent.

CLAIMANT'S REJOINDER
ON JURISDICTION AND ADMISSIBILITY

June 1, 2007

Counsel for the Claimant:

SHEARMAN & STERLING LLP

* * *

3. In any event, the Claimant is not owned or controlled by Russian nationals

360. The Respondent cannot satisfy Article 17 in any event, because it has failed to establish that the Claimant is owned or controlled by Russian nationals.

361. As already noted, the Respondent has employed the first limb of Article 17(1) of the ECT, namely the question of ownership or control of the Claimant, as a cloak for various arguments all of which appear to be geared toward demonstrating that this arbitration is nothing more than a "domestic" dispute. The majority of these arguments appear in Section X of the Respondent's Reply, entitled "Claimant is the barest of shell company owned and controlled by Russians". However, the same or similar arguments are repeated in Section XI(A) ("Claimant, beneficially owned and controlled by Russians, is not a protected investor"), Section XI(B) ("Shell companies, particularly those with the nominal attributes of Claimant, are not protected investors"), and Section XII ("The Tribunal lacks jurisdiction *ratione materiae").* Saying it—even repeatedly and in numerous guises—does not make it so. As discussed above, the dispute before this Arbitral Tribunal is not a "domestic" dispute. Further, ownership and control of the Claimant for the purposes of Article 17(1) of the ECT does not reside with Russian nationals.

362. It bears repeating that the relevant inquiry for the purposes of Article 17(1) of the ECT is whether

the Claimant is owned or controlled by citizens or nationals of a third state. Even if the Tribunal were to determine that Russia is a "third state"—which the Claimant denies—and that it properly exercised its right to deny benefits, Russian nationals do not own or control the Claimant.

363. As the Tribunal is aware, the Claimant was incorporated and registered in Cyprus on September 17, 1997.[550]

364. The Claimant was established as an investment company, with its principal activity being the holding of the majority stake in Yukos, a very substantial asset by any measure. Since March 2000, the Claimant has held over 1 billion shares in Yukos.[551]

365. Since its incorporation, the Claimant's board of directors has been composed of a majority of non-Russian independent directors with no personal interest in the company.[552] The board of directors is responsible for the day-to-day management of

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550. *See* Certificate of Incorporation dated September 17, 1997, **Annex C 189**; Certificate of Registration dated November 14, 2005, **Annex C 190**.

551. *See* Brunswick UBS Nominees Customer Account Statements of Hulley, **Annex C 1198**; Russian Investors custody account statements of Hulley, **Annex C 1199**; Trust Investment Bank custody account statements of Hulley, **Annex C 1200**.

552. *See* Certificates of Directors and Secretaries, **Annex C 1161**.

the company, including the recommendation of dividends and payment of interim dividends, the appointment of directors, and the keeping of proper accounts.[553] Pursuant to Regulation 87 of its Articles of Association, however, certain matters require the consent of the company in general meeting.[554] In those circumstances, the Claimant's board of directors, acting in accordance with its Articles of Association, seeks the consent of its shareholder, Yukos Universal.

366. Yukos Universal was incorporated and registered in the Isle of Man on September 24, 1997.[555] The

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553. *See* Memorandum and Articles of Association, **Annex C 188.** The Respondent seeks to make much of the fact that Vladimir Gulin, "who was neither a director nor an employee of the Claimant", "usurped" the role of the Claimant's directors by signing certain documents on behalf of Hulley (Reply, ¶¶257, 279) However, Mr. Gulin was acting pursuant to a Power of Attorney issued to him by the Claimant (and executed by Hulley's two Cypriot directors) authorising him to sign agreements on the company's behalf, and was thus merely acting at the direction and with the approval of the Claimant. *See* Power of Attorney granted by Hulley to V. Gulin dated January 18, 2000, **Annex C 1162**. Moreover, Mr. Gulin has not signed any documents on behalf of Hulley since 2000—years before the events at issue in this arbitration. *See* **Exhibit R-439**.

554. As of December 27, 2002, the threshold value according to which the board of directors must seek the consent of the company in general meeting to dispose of the assets of the company was raised from US$ 1,000 to US$ 1 million. *See* Memorandum and Articles of Association, **Annex C 188**.

555. *See* Certificate of Incorporation dated September 24, 1997, **Annex C 189**; Certificate of Change of Name dated January

principal activity of Yukos Universal consists of the holding of shares in Yukos, as well as acting as the holding company of Hulley.

367. Yukos Universal's board of directors has been composed of a majority of non-Russian independent directors with no personal interest in the company since October 2003, and has been entirely composed of outside, non-Russian independent directors since January 2004.[556] The board of directors is responsible for the day-to-day management of the company, including the recommendation of dividends and payment of interim dividends, the appointment of directors, and the keeping of proper accounts.[557]

368. Yukos Universal's Articles of Association used to reserve certain matters as requiring the consent of its shareholders. In those circumstances, Yukos Universal's board of directors, acting in accordance with its Articles of Association, sought the consent of its sole shareholder, GML Limited ("GML"), a

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9, 1998, **Annex C 190**; Certificate of Registration dated November 4, 1999, **Annex C 191**.

556. *See* Statement of First Directors and Notices of Change of Directors, **Annex C 1161**. Platon Lebedev was removed from Yukos Universal's board as of January 5, 2004; however, he ceased acting as a director when he was arrested by the Russian Federation in July 2003.

557. *See* Memorandum and Articles of Association as amended on October 24, 2003, **Annex C 188**.

company registered in Gibraltar.[558] Yukos Universal's Articles of Association were amended on October 24, 2003 to remove this list of reserved matters.[559]

369. GML is a private company organized and existing under the laws of Gibraltar. It was incorporated on September 5, 1997, and has its registered office in Gibraltar.[560] As the ultimate parent of Hulley and Yukos Universal, GML is a large, international diversified holding company and strategic and portfolio investor in international financial and capital markets, which conducts its activities through the use of direct and indirect subsidiaries. GML's subsidiaries own majority equity holdings of certain enterprises in various industries, in addition to portfolio investing in global financial and capital markets. The key areas

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558. As noted in Hulley's Counter-Memorial (¶298 and footnote 254), Gibraltar is a Contracting Party to the ECT, the United Kingdom having confirmed that the ECT applies to Gibraltar on a provisional basis. *See* United Kingdom's Letter of notification to Portugal (as Depository of the ECT) of December 17, 1994, **Annex C 4**; *see also Petrobart Limited v. The Kyrgyz Republic,* Award of March 29, 2005, pp. 62-63, available on http://ita.law.uvic.ca, **Annex C 249**.

559. *See* Memorandum and Articles of Association dated September 19, 1997, as amended on February 20, 1998, **Annex C 1160**; Memorandum and Articles of Association as amended on October 24, 2003, **Annex C 188**.

560. *See* GML Memorandum and Articles of Association, **Annexes C 1213** and **C 1214**; GML Certificates of Incorporation, **Annex C 1216**; GML Notices of Situation of Registered Office, **Annex C 1218**; GML Certificate of lncumbancy dated February 2, 2005, **Annex C 1228**.

of GML's investing activity have been oil and gas, mineral fertilizers, banking and financial services, telecommunications and information technologies, and other diversified portfolio investments. Yukos Universal and its own subsidiary, Hulley, therefore represent but one, albeit significant, area of activity for GML.

370. Both prior to and during the events giving rise to this arbitration, GML's subsidiaries in its key areas of activity included (among others):

- Yukos Universal Limited (Isle of Man) (Oil and gas);
- Chemical & Mining Universal Limited (Isle of Man) (Mineral fertilizers);
- Pecunia Universal Limited (Isle of Man) (Money market operations and financial instruments);
- Antel Holdings Limited (Gibraltar) (Telecommunications and information technology);
- Menatep Limited (Gibraltar) (Banking and financial services);
- GM Investment & Co. Limited (Gibraltar) (Diversified portfolio investments); and
- Parringrove Limited (Ireland) (Real estate).[561]

561. *See* GML Limited (formerly Group MENATEP Ltd) Financial Statements for the year ended 31 December 2001, **Annex**

Appendix P

371. While GML's strategic investments have historically focused on Russia, including in a range of different sectors[562], GML has owned holdings and investments

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C 1229; GML Website pages – Company Profile, Our Focus, Our Investments (previously available at http://www.groupmenatep.com until 2005; website removed to avoid potential misuse of GML information by Russian Federation), **Annex C 1234**; GML Website pages – Company News, **Annex C 1235**; GML Website pages – Press Room, **Annex C 1236**; Various articles related to GML in English-language publications and newswires (2001-2005), **Annex C 1238**.

562. For example, GM Investment & Co. in early 2003 launched a project to develop economy and mid-market hotels throughout Russia, operated by international hotel management company Marriott. Menatep Limited was a substantial shareholder in Progress Insurance Company, a Russian insurance company, while Antel Holdings Limited was a majority shareholder in Sibintek, a Siberian information technology company, and owned a group of Russian telecommunications companies. *See* GML Website pages – Company Profile, Our Focus, Our Investments, **Annex C 1234**; GML Website pages – Press Room, **Annex C 1236**; Various articles related to GML in English-language publications and newswires (2001-2005), **Annex C 1238**. GML has since disposed of a significant portion of its Russia-based assets (including those mentioned above as well as the mineral fertilizer assets held by Chemical & Mining Universal Limited) beginning in 2004 in the wake of the Russian Federation's destruction of Yukos. *See* GML Limited (formerly Group MENATEP Ltd) Financial Statements for the year ended 31 December 2001, **Annex C 1229,** pp. 2-3, 9, 15; Antel Holdings (Cyprus) Limited Annual Report and Consolidated Financial Statements for the Years Ended 31 December 2003 and 2004, **Annex C 1232**, pp. 1, 17, 22; *Menatep looks to get out of all Russian assets but Yukos,* Interfax, January 26, 2005, in Various articles related to GML in English-language publications and newswires (2001-2005), **Annex C 1238**.

outside Russia for many years. For example, as early as 2001, GML wholly-owned subsidiary Antel Holdings Limited acquired a wholly-owned subsidiary in the United States, Antel Telecom, Inc., which provided international communications services in the United States and Latin America. In 2002, Antel Holdings Limited acquired KPNQwest Ebone Central Europe B.V. (now called GTS Central Europe), a group of companies which are leading alternative providers of integrated telecommunications services to businesses, corporate and international carriers in the Central European region, including the Czech Republic, Slovakia, Poland, Hungary and Romania. These Central European telecommunications companies are now held by GTS Global Limited, a majority-owned direct subsidiary of GML.[563]

372. These international holdings are coupled with GML's long history of investment in financial and capital markets worldwide. For example, in 200 l and 2002, GM Investment & Co. Limited acquired shares in AIG Capital Partners to invest in an emerging markets investment fund, and also made commitments to

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563. *See* Antel Holdings (Cyprus) Limited Annual Report and Consolidated Financial Statements for the Years Ended 31 December 2003 and 2004, **Annex C 1232**; GTS Central European Holdings Limited Annual Report and Preliminary Consolidated International Financial Reporting Standards Financial Information for the Period from 22 October 2004 to 31 December 2005, **Annex C 1233**; GML Website pages – Press Room, **Annex C 1236**; Various articles related to GML in English-language publications and newswires (2001-2005), **Annex C 1238**; GML Website pages – Company News, **Annex C 1235**.

invest in The Carlyle Group and in The Blackstone Group, renowned American private equity investment funds. GM Investment & Co. Limited has continued to make investments in various companies, funds and portfolios.[564]

373. The board of directors of GML is responsible for the management of the company and has been composed entirely of non-Russians since November 2003. From March 2004 onwards, the board of directors has comprised of Mr. Tim Osborne (a British national), Mr. Kevin Bromley (a British national) and Arton Consult Limited (a British Virgin Islands company represented by Mr. Nicholas Keeling, a British national).[565] The Articles of Association endow the directors with general managerial power over the operations of

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564. *See* GML Limited (formerly Group MENATEP Ltd) Financial Statements for the year ended 31 December 2001, **Annex C 1229**; GM Investment & Co Limited Annual Report and Consolidated Financial Statements for the Year Ended 31 December 2003, **Annex C 1230**; GM Investment & Co Limited Annual Report and Consolidated Financial Statements for the Year Ended 31 December 2004, **Annex C 1231**; GML Website pages – Press Room, **Annex C 1236**; Various articles related to GML in English-language publications and newswires (2001-2005), **Annex C 1238**; GML Website pages – Company News, **Annex C 1235**.

565. *See* GML Particulars of Directors, Managers and Secretaries, **Annex C 1224**; GML Forms of Annual Return, **Annex C 1226**; GML Certificate of Directors, Secretaries, Registered Office, Share Capital, and Shareholders dated April 27, 2004, **Annex C 1227**.

GML.[566] Prior to a recent amendment of the Articles of Association, Article 42 of GML's Articles of Association provided that there were certain exceptional matters which required the consent of members of GML holding a majority of the issued shares carrying a right to vote at general meetings. On these issues, the board of directors consulted with and obtained the requisite consent of the trustees of the Guernsey Trusts who (either directly or through their nominees) are the shareholders of GML: Palmus Trust Company Limited (Guernsey) (as trustee for the Palmus Trust) and Rysaffe Trustee Company (C.I.) Limited (as trustees for the remaining Guernsey Trusts). On March 16, 2007, GML's Articles of Association were amended to delete Article 42, thus removing the list of matters reserved for consent of GML's shareholders.[567]

374. Along with its board of directors, GML has an International Advisory Board formed in April 2003 to advise the Company on the vision and direction of GML and the pursuit of its business goals. The International Advisory Board is composed of distinguished and respected experts and leaders in international business, whose responsibilities include providing advice and recommendations to GML's board of directors to assist the Company in establishing and maintaining the highest quality policies and practices, fostering the Company's

566. *See* GML Articles of Association, **Annex C 1214**.

567. *See* GML Articles of Association as amended on March 16, 2007, **Annex C 1214**.

strategic growth and expanding shareholder value, and protecting the Company's remaining assets. The International Advisory Board consists of former member of the Dutch Parliament and the European Commission in charge of the Internal Market and Taxation Frits Bolkestein, former United States Deputy Treasury Secretary Stuart E. Eizenstat, former Editor of The Economist and former member of the British Parliament J. Dudley Fishburn, APCO Worldwide President and Chief Executive Officer Margery Kraus, and former member of the German Bundestag and former German Minister of Economics Dr. Otto GrafLambsdorff.[568]

375. Thus, GML is a large, international diversified investment holding company with investments in multiple industries held by direct and indirect subsidiaries located in various countries. Further, its board of directors is directly responsible for the administration, management and conduct of the business and affairs of GML.

376. The Respondent's attempt to use the inquiry under Article 17 of the ECT regarding the "ownership or control of the Claimant" as a thinly-veiled excuse to impugn the Claimant itself and "the entirety of the holding structure of Yukos", including Hulley, Yukos Universal and their parent company, GML, is therefore entirely misplaced. The Respondent variously accuses the Claimant and the entire shareholding structure

568. *See* GML Website pages – Press releases regarding International Advisory Board, **Annex C 1237**.

of Yukos as being a "mere shell" or a "sham" arrangement. Neither of these characterizations of the Claimant or the Yukos shareholding structure is factually correct, as shown above.

377. Nor do the Respondent's pejorative characterizations of the Claimant and the Yukos shareholding structure advance its case as a legal matter. As the *Aguas del Tunari* Tribunal recently stated in an ICSID arbitration, in response to a similar argument that certain subsidiary holding companies "are mere shells":

> "Holding companies [...] owning substantial assets [are] both a *common and legal device for corporate organization* and face the same legal obligations of corporations generally." (Emphasis added).[569]

378. The *Aguas del Tunari* Tribunal further noted with approval the holding of the *Aucoven* Tribunal which, "when faced with a similar argument concerning the substance of the entity said to 'control' the claimant in that dispute, wrote: 'Although [respondent] views [the holding company said to control the claimant] as a mere formality, this formality is *the fundamental building block of the global economy.*'"[570]

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569. ICSID Case No. ARB/02/3, *Aguas del Tunari, S.A. v. Republic of Bolivia,* Decision on Respondent's Objections to Jurisdiction of October 21, 2005, ¶245, **Annex C 1321**.

570. *Ibid.,* footnote 218 (emphasis added).

379. Similarly, in *Saluka Investments*, in which the respondent made an almost identical argument regarding a parent company's use of a wholly-owned subsidiary holding company whose sole purpose was to hold shares in another company, the Tribunal noted that it "accepts [...] the closeness of the relationship between [the parent company and subsidiary holding company]. In that respect, the *companies concerned have simply acted in a manner which is commonplace in the world of commerce.*"[571] Thus, it is not only common and proper for corporations to structure their affairs in this way via the use of holding companies, but arbitral tribunals have found that holding companies such as the Claimant must be respected and may pursue investment treaty arbitration.

380. The Respondent's only direct effort to show that the Claimant is owned or controlled by Russian nationals is to argue that the Guernsey Trusts that hold the shares of GML are themselves "incompletely constituted and ineffective". Based solely on the Expert Opinion of Mr. Mann QC, the Respondent concludes that:

> *"The trustees of the Trusts have at most only illusory powers over the GML shares* because such as they were notionally given were so

571. *Saluka Investments B.V. (the Netherlands) v. The Czech Republic,* Partial Award of March 17, 2006, UNCITRAL, available on the website of Investment Treaty Arbitration – ITA, iJ228 (emphasis added), **Annex C 253**.

> thoroughly circumscribed by the draftsman that the settlors (whether as such or as protectors or beneficiaries) were left directly or indirectly with the ability to exercise total control over GML and the conduct of its affairs.
>
> The legal consequence of the foregoing is that the beneficial ownerships in the GML shares never changed hands, despite the transfers. *The trusts in respect of these shares were incompletely constituted and ineffective.* All that each transfer, when registered in GML's register of members, achieved was the transfer of legal ownership. *The trustees did not become beneficial owners.*"[572]

381. The Respondent's argument is entirely baseless. At the outset, the Claimant notes that the Palmus Trust was created on March 5, 2003, well before the relevant events commenced.[573] The remaining Guernsey Trusts followed substantially the same form, and were created on October 20, 2003.[574] Given

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572. Reply, ¶304, citing Mann's Opinion, ¶¶4.1-4.2.

573. *See* Settlement intended to be known as "The Palmus Trust" made on March 5, 2003, **Annex C 1262**.

574. *See* Settlement intended to be known as "The Auriga Trust" made on October 20, 2003, **Annex C 1244**; Settlement intended to be known as "The Draco Trust" made on October 20, 2003, **Annex C 1250**; Settlement intended to be known as "The Mensa Trust" made on October 20, 2003, **Annex C 1257**; Settlement intended to be known as "The Pictor Trust" made

the length of time necessary to draft and review such documentation (which was prepared by Herbert Smith LLP, a leading firm of lawyers in London) and to arrange for the implementation of the Trusts, it is evident that the creation of the Trusts was envisaged and well under way long before the events giving rise to this arbitration began. This is confirmed by reference letters from UBS AG to each of the settlors dated December 2002, which expressly note that they are being provided because the settlor was "in the process of establishing a trust on the Isle of Guernsey".[575]

382. Thus, contrary to the Respondent's suggestion, the creation of the Trusts was not a reaction to the events surrounding Yukos, nor a hasty attempt to "qualify [the] Claimant under the Treaty" or "to provide insulation against the enforcement of Russian tax deficiency notices and claims brought by minority shareholders of Yukos".[576] Rather, it is clear that the

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on October 20, 2003, **Annex C 1278**; Settlement intended to be known as "The Tucana Trust" made on October 20, 2003, **Annex C 1291**. The Southern Cross Trust was constituted on April 26, 2005 by appointment of assets from the Pavo Trust. *See* Declaration of Discretionary Trust (The Southern Cross Trust) by Rysaffe Trustee Company (C.I.) Limited dated April 26, 2005, **Annex C 1285**.

575. Reference letters from UBS AG to M. Brudno, V. Dubov, M. Khodorkovsky, P. Lebedev, L. Nevzlin and V. Shakhnovsky of December 6, 2002, **Annex C 1242**.

576. Reply, ¶294.

creation of the Trusts had long been planned and their formation bears no connection whatsoever with the events that occurred in late 2003 concerning Yukos.

383. As for the Respondent's argument (on the basis of Mr. Mann's opinion) that the Trusts themselves were "invalidly constituted and ineffective", and left the settlors with "total control over GML", this is equally meritless.[577] In his thorough rebuttal of Mr. Mann's opinion, Brian Green QC establishes in his Expert Opinion that the Guernsey Trusts (which together hold all the shares of GML) were not only properly constituted and valid, but that as a result the Trustees own and control the GML shares:

> "(1) [T]he Trusts are routine examples of offshore trusts including protector consent provisions, and were neither invalid, nor were the interests of the Beneficiaries thereunder illusory, as of their constitution (or subsequently).
>
> (2) In particular, Mr Mann overlooks the fact that clause 4 of each of the Trusts provided for perfectly coherent trust interests during the

577. The Respondent baldly asserts (contrary to its own expert, Mann Opinion, ¶5.l(f)) that "the trusts are not discretionary". Reply, ¶304. This is plainly wrong, and a complete mischaracterization of the Guernsey Trusts. Each of the Guernsey Trusts is undeniably a discretionary trust, whereby the Trustee has complete discretion (without protector consent) regarding whether and to what extent (if at all) to distribute trust capital or income to the beneficiaries. *See* Green Opinion, ¶¶56(3)-(4), 63(3)-(6), 73(4).

up to 100 year 'trust period', which were not subject to any Protector 'consent' requirements, and that the clause 4 powers are supplemented by quasi-beneficial powers to lend, etc., which were also not subject to Protector consent requirements.

(3) *It is simply incorrect to say that the Protector/Settlor of any of such Trusts was as of the constitution of such Trusts left with 'total control over GML and the conduct of its affairs'.*

(4) The Protector has limited consent powers vested in him, which are no different than those contained in countless offshore trusts in practice. Such consent powers do not cause the Protector to enjoy 'total control over' trust assets, so as to be able (where such assets comprise shares in a company) *totally to control* such company's affairs. [...]

(5) *[T]he Trusts confer no consent power on the Protector/Settlor as regards the Trustees' exercise of voting rights attaching to their respective GML shareholdings.* This point, nowhere acknowledged in Mr Mann's Opinion, gives the lie to the proposition that the Protector/Settlor retained 'total control over GML and the conduct of its affairs'."[578]

578. Green Opinion, ¶176, citing ¶¶34-80, 56-57 and 166-

384. Because the Guernsey Trusts were properly constituted, placing ownership of the GML shares with the Trustees, and confer the power to exercise voting rights with respect to the GML shares to the Trustees absolutely, Mr. Green concludes that both "ownership" and "control" of the GML shares lie not with the settlors or beneficiaries of the Guernsey Trusts *(i.e.* not with Russian individuals) but with the Trustees of the Guernsey Trusts:

> "In short, if the question is asked who 'owns' the GML shares, and who has the right to 'control' the GML shares in such 'ownership', the answer is in my opinion the Trustees of the respective Trusts holding such shares, given that:
>
> (a) the Trusts are real and valid,
>
> (b) the restrictions on the sale or other disposition of such shares do not affect the 'ownership' of them,
>
> (c) the Protector's express consent powers do not relate to, or otherwise affect, the power of the Trustees to exercise voting

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167 (internal citations omitted; underlined emphasis added). *See also* Green Opinion, ¶48: "The Trusts [...] are perfectly valid notwithstanding their constitution in Protector consent form. I have dealt with trusts constituted along such lines [...] on many occasions over the last 25 years. It would come as the greatest sutprise to those who practice in the present field to hear it suggested that such trusts are invalid."

rights attaching to their respective GML shareholdings; and

(d) the proceeds of the GML shares, any intervening growth in the value of GML, and any dividends or other distributions receivable out of GML in right of such shareholdings will belong to the Trustees (to be dealt with under the Trusts in accordance with their discretion)."[579]

385. The Respondent has therefore wholly failed to establish that the Claimant is owned or controlled by Russian nationals.[580] As demonstrated by Mr.

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579. Green Opinion, ¶33.

580. The Respondent also relies on a statement made by Mikhail Khodorkovsky before the Meshchansky Court in Moscow in support of its argument that the Claimant is owned or controlled by Russian nationals. *See* Reply, ¶309. As Mr. Green notes in his Expert Opinion: "I have to say that, try as I might, I am unable to find in MK's statement to the Russian court anything of significance as regards the present questions, and certainly nothing which would enable a Guernsey court to treat the Palmus Trust documentation as anything other than valid in accordance with its terms, or to treat MK as 'beneficial owner' of the GML shares subject thereto notwithstanding the terms of such trusts". *See* Green Opinion, ¶192.

The Respondent falsely claims that GML director Tim Osborne publicly stated that the Guernsey Trustees were "proxies for Mr. Khodorkovsky and his partners", when in fact the article referenced does *not* quote Mr. Osborne to this effect (though it quotes Mr. Osborne several other times); the language referring

> Green in his Expert Opinion, the Trusts were validly constituted. Thus, ownership and control properly transferred to the Trustees. As Mr. Green has concluded, ownership and control of the GML shares lies with the Trustees of the Guernsey Trusts, not Russian nationals.[581]

386. Finally, Prof. Dr. Stef van Weeghel's Expert Opinion is of no assistance whatsoever to the Respondent's argument on the issue of ownership or control of the Claimant by citizens or nationals of a third State—which is the only relevant inquiry for this Tribunal constituted under the auspices of the ECT.

387. *First,* Dr. van Weeghel is a tax professor and tax lawyer, and provides an opinion that is solely on issues of tax law. The scope of his retainer is described as follows:

> "The central issue in this matter is whether Hulley Enterprises Limited and Veteran Petroleum Limited have rightfully relied on the

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to "proxies" is plainly editorial commentary by the article's author, and is not a statement by Mr. Osborne. *See* Reply, ¶311 and **Exhibit R-5**.

581. Indeed, whether the control of the Claimant is vested with the Trustees of the Guernsey Trusts (Guernsey companies) as opined by Mr. Green or with the board of directors of GML (a Gibraltar company) who manage the company on a day-to-day basis, both are nationals of a Contracting Party, since both Gibraltar and Guernsey are covered territories by the effect of the United Kingdom's declaration under the ECT.

> [double taxation agreement between Cyprus and the Russian Federation of 5 December 1998]. [...]
>
> In addition, the issue will be addressed whether under generally accepted international tax law principles, the ownership scheme with respect to Yukos Oil Company and its operation, as described herein, in practice were tantamount to a sham or otherwise abusive."[582]

388. Dr. van Weeghel's opinion that the Yukos shareholding structure "could be regarded as a sham or otherwise abusive" is provided solely as an issue of international taxation, and his conclusion is that "one could reasonably deny the [double taxation] treaty benefits claimed by the companies at issue".[583] In other words, Dr. van Weeghel's opinion addresses only whether the Claimant was permitted to accept the benefits of a Cyprus double taxation treaty. It is not an opinion regarding the nationality of the Claimant, nor is it an opinion regarding who owns or controls the Claimant.

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582. van Weeghel Opinion, p. 2.

583. *Ibid.*; *see also ibid.,* p. 33 (concluding "[w]ith reference to anti-abuse principles expressed and applied in international tax law and the international approach towards the use of tax havens. the conclusion is justified [...] that the Yukos holding structure and its operation amounted to an artificial legal construction, susceptible to an anti-abuse approach, which, if applied, could lead to denial of tax (treaty) benefits and that the structure and its operation would normally also fall within the scope of international efforts to counter harmful use of tax havens").

The question addressed by Dr. van Weeghel is an issue of international tax law regarding application of a double taxation treaty that is plainly not before this Tribunal. It is therefore irrelevant and should be disregarded in its entirety.

389. *Second,* Dr. van Weeghel defines the "Relevant Period" for purposes of his Expert Opinion as the years 2000 to 2003.[584] This is wholly inappropriate, as the relevant events giving rise to this arbitration did not even begin until October 2003. Thus, Dr. van Weeghel's opinion should be disregarded for the simple reason that it fails to address the relevant time period.

390. For the same reason, whether or not the Claimant is a tax resident of Cyprus for purposes of the Russia-Cyprus Double Taxation Agreement ("DTA") is equally irrelevant. The Respondent goes to great pains to prove that the Claimant does not meet Cyprus' definition of a "tax resident" because its "management and control" is allegedly not centered in Cyprus, or because of the existence of a supposed "permanent establishment" in Russia. The Respondent's analysis of the DTA is misleading and incorrect on many levels, and it is also riddled with factual inaccuracies.[585] However, even if the

584. *See ibid.,* p. 3.

585. The most glaring example is that the "management and control" tax residence test referred to by the Respondent for alleged facts dating back to 2000-2002 was not adopted until

Respondent were correct—which the Claimant denies—it is of no relevance for this Tribunal, whose task is not to determine the Claimant's tax status or amount of tax liability, but to determine whether the Claimant is a qualified "Investor" under the ECT, which looks to the country under whose laws a company is organized *(i.e.* its nationality), and not where that company claims residency for tax purposes. This is a separate and distinct question, which is not before this Tribunal. The ECT is the only pertinent instrument for establishing this Tribunal's jurisdiction.

391. Aware that it is unable to satisfy the "ownership or control" element of Article 17 of the ECT (or any other element, for that matter, as shown above), the Respondent instead attempts to confuse the Tribunal by arguing that the Moscow representative office of GML Management Services S.A. ("GML MS"), which provided administrative services to the Claimant, was the "seat of management and financial control of Claimant".[586] This is a *non sequitur,* as the question of

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Cyprus' new tax regime began on January l, 2003. *See* Cyprus Income Tax Law of 1961, **Annex C 1438**; Cyprus Income Tax Law of 2002, **Annex C 1439**. However, the tax declarations submitted by Hulley were for the years 2000-2001. The Respondent's entire argument falters on this basic chronological discrepancy.

586. Reply, ¶¶273-277. The Respondent also attempts to show that the Claimant had its seat of "management and control" in Russia by pointing to signatures on various contracts relating to the acquisition or disposal of Yukos shares. *See* Reply, ¶¶257, 278-279. The Respondent curiously only examines share purchase

"management and control" is a pure tax issue related to Cyprus tax law and the DTA, and has no bearing on ownership or control of the Claimant under the ECT. Article 17 of the ECT inquires only about *who* owns or controls the Claimant (and whether they are "citizens or nationals of a third state"), whereas the question of "management and control" under the DTA inquires as to *where* a company's management and control is exercised, and is thus a separate issue altogether. Only the former inquiry is relevant to determine the Tribunal's jurisdiction pursuant to the ECT.

392. In addition, GML MS has not performed any services for the Claimant since it was raided by the Respondent on October 3 and 9, 2003 and the documents that GML MS was maintaining for the Claimant were seized by the Russian Federation[587]; thus, the facts discussed by

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documents from before July 2003, when Mr. Lebedev was arrested, and almost all of the documents referred to by the Respondent are from *prior to* 2003. However, the relevant time period for this arbitration does not even begin until late October 2003. Thus, the Respondent's inquiry ends when the relevant time period begins. After October 2003, all of the Claimant's share purchase documents were in fact signed outside Russia by non-Russian directors of the Claimant. *See* **Exhibit R-439** (agreements after October 2003).

587. GML MS out of necessity ceased all services and functions on behalf of the Claimant as of October 15, 2003, ceased all activity as an entity as of January 26, 2004, and has since been liquidated. *See* Letter from GML Management Services to Hulley dated October 15, 2003, **Annex C 454**; Letter from GML Management Services to Hulley dated November 28, 2003, **Annex C 455**.

the Respondent related to GML MS are necessarily prior to the relevant time period.

393. In any event, the Respondent's claims about the role of GML MS are not supported by the assortment of evidence proffered by it. GML MS was merely a service provider supplying administrative, record-keeping, accounting and other services in Russia for various GML companies, including the Claimant.[588] The fact that GML MS kept the Claimant's documents that were filed with or issued by Russian authorities shows only that GML MS provided filing and document storage services for the Claimant, and does not support a finding that GML MS was the seat of the Claimant's "management and financial control." Similarly, that GML MS had 17 employees in 2001 (two years prior to the beginning of the events giving rise to this arbitration) proves nothing about the extent of its management or control over the Claimant, as GML MS provided administrative services for many

588. The Claimant entered into an Administrative Services Agreement with GML Management Services S.A. on July 3, 2003, pursuant to which the Claimant provided GML MS with many of its corporate, accounting and other documents for safe keeping at the place of its investment. However, that Agreement was suspended less than four months later on October 15, 2003 and terminated as of January 1, 2004 (by notice provided on November 28, 2003) as a result of raids of GML MS by the Russian Federation on October 3 and 9, 2003, resulting in the improper seizure of the Claimant's documents that had been maintained by GML MS. *See* Letter from GML Management Services to Hulley dated October 15, 2003, **Annex C 454**; Letter from GML Management Services to Hulley dated November 28, 2003, **Annex C 455**.

GML entities, not just the Claimant. It is therefore not surprising that the office would have several employees to carry out these services. Moreover, the fact that GML MS held the Claimant's official stamp again proves nothing more than that it assisted the Claimant with properly filing documents with Russian authorities—a purely administrative task that it is reasonable to assume a representative office in the local jurisdiction would be required to perform.[589]

394. In conclusion, the Respondent has failed to establish that Article 17 operates as a bar to the admissibility of the Claimant's claim. Whether the Claimant is owned and controlled by the Trustees of the Guernsey Trusts or by the board of directors of GML, both are nationals of a Contracting Party, since both Guernsey and Gibraltar are covered territories by virtue of the United Kingdom's declaration under the ECT.[590] The Respondent does not even address the ownership or control of the Claimant, instead focusing on unrelated factors not relevant to Article 17. The Tribunal must reject the Respondent's attempt to avoid the plain requirements of Article 17, and must find that those requirements have not been satisfied here.

* * * *

589. *See* Reply, ¶276. Nor does evidence that Mr. Lebedev's telephone number "was programmed into a telephone seized" at GML MS or that GML's attorney Anton Drel (not the Claimant's attorney) had an email address provided by GML MS show anything more than the existence of some relationship between GML MS and GML itself, which is unsurprising given that GML Management Services S.A. was a subsidiary of GML.

590. *See* Counter-Memorial,¶298.

APPENDIX Q

IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE RULES OF THE
UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW

PCA CASES No. AA226 & AA227

HULLEY ENTERPRISES LIMITED

YUKOS UNIVERSAL LIMITED

Claimants

- v -

THE RUSSIAN FEDERATION

Respondent

SECOND OPINION OF BRIAN GREEN QC

[TABLE INTENTIONALLY OMITTED]

[e] ***Appropriate formulation of the "control" question***

22. (1) I explained at paragraph 7(2) of my First Opinion the context in which the "*control*" question arose and therefore the precise question that I understood that I was being asked to deal with on *control*:

Appendix Q

"(a) As regards "control", I understand the question for me to be "who within any given Trust controls the GML shares?" in the context of the particular question before this Tribunal of "who controls GML?"

(b) I understand, therefore, that "control" of the GML shares for these purposes is concerned with "control" over those rights attaching to the GML shares that allow "control" to be exercised over GML".

I went on to explain that it was therefore "*control*" over the voting rights attaching to the GML shares that was important and *control* over such rights was clearly in the hands of the Trustees (paragraphs 32, 33 and 161 to 169 of my First Opinion – particularly paragraphs 166 and 167).

(2) Mr Mann suggests, quoting (1)(b) above but ignoring my (1)(a), that my characterization of the control issue is inaccurate and that the important enquiry is as whether the trustee of any given trust can exercise its voting rights *to any meaningful extent* (Section C paragraphs 1.2 to 1.4).[22]

(3) I entirely agree that, as Mr Mann *now* suggests, analysis of the "*control*" issue from a trust law standpoint has to be focused on the Trustees' voting rights over the

22. I have already commented at footnote 12 above on the inaccuracy of what is stated in the last sentence of his paragraph 1.4.

GML shares. The analysis in my First Opinion was focused on this very question (see (1) above).

(4) Mr Mann now seeks to formulate the question in terms of whether the Trustees' voting power gives them "*meaningful control*" over the conduct of GML's affairs and its daily business.

(5) As a matter of trust law, there is no doubt that the Trustees have "*meaningful control*" over the voting rights attaching to the GML shares – no other party does.

(6) As GML shareholders, the Trustees enjoy all the ordinary rights which one would expect to find in relation to a shareholder in a company.

The Articles of Association of GML are standard as regards conferring powers on members in general meeting, including as regards the appointment of directors etc (see now Article 72).

Further, until its removal in March 2007, Article 42 of the Articles of Association of GML required majority shareholder consent to be provided for certain material transactions undertaken by the company.

(7) Mr Mann's proposition that the shareholders in the present case (the Trustees) do not have "*meaningful control*" is not borne out as a matter of law – no-one else under the Trusts[23] has voting control (or is able to inhibit

23. Or otherwise. As discussed at Section C paragraphs 25

the Trustees in exercising the same). That was the advice in my First Opinion, and it continues to be my advice in this Opinion.

[2] Mr Mann's Section B Summary

23. (1) It will be seen from the Summary at Section B of Mr Mann's Second Opinion that his main focus is now on the question of *control* (points 1 and 2), and that consistently with what is observed at paragraph 14 above, he has scaled back what he says as to beneficial *ownership,* saying merely in his summary that "*[a]rguably*" none of the Trusts is such an owner (point 4).

(2) Mr Mann continues to attempt to make a point as regards the Protectors (point 3) – even this is apparently tempered by a reference to the Protectors' "*primary duty*" being to protect the settlor's "*selfish interests*" – but (apart from being wrong) the point continues to be made without any regard to –

> (a) the limited powers conferred on the Protectors under the Trusts,
>
> (b) the fact that in particular the Protectors have no function as regards the exercise of voting control attaching to the GML shares under the Trusts, and

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to 37 below, Mr Mann now argues for the first time in his Second Opinion that the Call Option Deeds require the Trustees to exercise their voting rights at the direction of GML, and therefore that they do not have control over the GML shares.

(c) even if the settlor himself had retained power *qua* settlor (rather than office-holder) to appoint and remove trustees, that would not have entitled him to promote his selfish interests.

(3) As will appear from the following paragraphs of this Opinion, Mr Mann's points 1 to 4 are wrong.

* * *

APPENDIX R

THE INTERNATIONAL BUREAU OF THE
PERMANENT COURT OF ARBITRATION

PEACE PALACE
THE HAGUE
THE NETHERLANDS
SATURDAY, 29TH NOVEMBER 2008

BEFORE:

MAÎTRE L YVES FORTIER CC QC
MR CHARLES PONCET
JUDGE STEPHEN M SCHWEBEL

BETWEEN:

HULLEY ENTERPRISES LIMITED (CYPRUS)

Claimant

-v-

THE RUSSIAN FEDERATION

Respondent

PCA/AA226

Appendix R

YUKOS UNIVERSAL LIMITED (ISLE OF MAN)

Claimant

-v-

THE RUSSIAN FEDERATION

Respondent

PCA/AA227

VETERAN PETROLEUM LIMITED (CYPRUS)

Claimant

-v-

THE RUSSIAN FEDERATION

Respondent

PCA/AA228

PROFESSOR EMMANUEL GAILLARD, DR YAS BANIFATEMI, MR PHILIPPE PINSOLLE, MR MARK McNEILL, MS JENNIFER YOUNAN, MS CORALIE DARRIGADE, MS XIMENA HERRERA, MS ANNA CREVON, MR JEAN-BAPTISTE GODON

and MR GUEORGUI BABITCHEV and MS JAMIA SULAYMAN, of Shearman Sterling LLP, appeared on behalf of the Claimants.

MR TIM OSBORNE, and MR CHRISTOPHER COOK appeared on behalf of Hulley Enterprises Limited and Yukos Universal Limited. MR RODNEY HODGES appeared on behalf of Veteran Petroleum Limited.

DR CLAUDIA ANNACKER, MR MATTHEW D SLATER, MR JONATHAN BLACKMAN, MR DAVID SABEL, MR WILLIAM McGURN, MR CAMERON MURPHY, DR MAJA MENARD, MS KSENIA KHANSEIDOVA, MR LORENZO MELCHIONDA, MR MILO MOLFA, MR LEE BURGER, MR GUILLAUME DE RANCOURT, MR MATTHEW BUNDA, MR THOMAS PRICE, MR STEPHANE SOLLOGOUB, of Cleary Gottlieb Steen & Hamilton LLP, and MR RASHID SHARIPOV appeared on behalf of the Respondent.

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[32]THE CHAIRMAN: Maître Pinsolle.

Submissions by MR PINSOLLE

MR PINSOLLE: Thank you, Mr President. With your permission I will do this presentation à l'ancienne, the old-fashioned way, because we are discussing trusts, perhaps. But I will ask you to follow in the ring binder that you have, starting from tab 53, my explanations. I would also ask you to have to hand the slides that were presented by Mr McGurn two days ago, because I will make reference to three of them.

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Actually I have not included the tree slides that I wanted to refer to in my own binder because they were not my slides. If you want a copy of them to be included for the ease of when I read it again later—I don't remember when I used certain decisions, for example—you let us know, because we can include the three slides in your binder later if you prefer.

THE CHAIRMAN: Now you are speaking of the red binder?

MR PINSOLLE: Absolutely.

I will refer to two of these slides in my introduction, and two other of these slides at the end of my presentation. So it's four of them, actually. But if you want me to include them later in your own red binder, you let me know.

THE CHAIRMAN: Okay. Proceed.

[33]MR PINSOLLE: Also an administrative matter: I have produced here under 53 our own corrected version of the structure, which you may want to remove from the binder and keep in front of you for reference during my presentation. It should be the first document under 53. This was just to correct what we think is incorrect in the other presentation. (Pause).

Two days ago we heard a story regarding the trust structure, and more generally the holding structure of Yukos and GML, which was entirely divorced from reality. In fact, the argument of the Respondent is simply to invite

you to disregard trusts as a legal institution in general, and not those trusts in particular. And the reason for that is: if you look at their written submissions, the thrust of the argument was at that time that those trusts were shams. And I didn't count the number of times where you can see that the word "sham" appeared in the memorial, but it's certainly a great number of times.

Today they don't say that anymore, but their argument comes to the same effect. The reason why they don't say that is, as we have seen and I will come back to, because both experts agree that all the trusts we are discussing in this matter are not shams, they are valid trusts.

* * *

[53]certainty as to whether they will get one day the benefit of trust property?

"Answer: That's usually the case yes."

Again, this is a discretion of the trustee in these trusts, and here I have reproduced for your convenience, because the issue here isn't whether or not they will one day get the assets, but it's an important aspect that you should keep in mind against the proposition that the beneficiaries are the actual persons who control the trustee.

Article 11(2) of the Auriga Type Trust, and it's a standard proposition and you can find it in the others, in relation to the exercise of power, I quote:

Appendix R

"Subject to the previous sub-clause, every discretion vested in the trustees shall be absolute and uncontrolled, and every power vested in them shall be exercisable at their absolute and uncontrolled discretion, and the trustees shall have the same discretion in deciding whether or not to exercise any such power."

It could not be wider, and one aspect which is, we submit, extremely relevant of the discretion of the trustees is the exercise of voting rights here. Because that's part of their discretion.

Here you can go to tab 57, and again I have [54] reproduced the second opinion of Mr Mann, where I think he is not in disagreement with the proposition that voting rights are important for ascertaining control. Paragraph 1(4), and I quote:

"The enquiry needs to focus on the specific trust property, ie the GML shares, and in particular the voting rights attached to them, and, specifically, whether the trustee of any given trust can exercise these to any meaningful extent."

That's his opinion. He goes on:

"This is doubly relevant because Mr Green QC's principal argument is that control over these is concomitant with beneficial ownership."

So he considers the exercise of the voting right of the GML shares as a relevant factor, and we agree with that.

Appendix R

Then we discuss that again during the cross-examination. In essence what was established was (1) that the voting right was part of the discretion of the trustees, and (2) it did not require protector's consent. That's an important aspect. And the record read as follows:

"Question: Can we agree on the fact that the voting by the trusts of the GML shares is also part of the discretion of the trustees, if I can say so?

[55]"Answer: Well—

"Question: The voting rights, the exercise of the voting rights.

"Answer: Yes, the shares are registered with the trustee, or in the trustee's name or in the name of a nominee in Gibraltar, so that will carry the voting rights, and the trustees have those voting rights, subject to any constraints on them, and can vote them in accordance with their discretion."

There is no disagreement on that.

Then he goes on that they will be given guidance by the settlor, which is commonly the case. Then we discuss the protector at lines 23 and 25. My question:

"Question: Does it require protector's consent to vote the shares?

"Answer: No."

Appendix R

So one thing we know is that the exercise of the voting right is the entire discretion of the trustees. And when they vote, I would say they can entail personal liability for that as trustees. They have their duties as trustees: they vote in the interest of the trust. And that's part of their discretion. And that's a protection in the trust instrument, clause 4(4), which I have reproduced again in tab 57, and it's clause 4(4) of all the trust instruments, namely Auriga, Palmus and [56]Southern Cross, and it reads as follows:

"No beneficiary shall be entitled in any way whatsoever to compel, control or forbid the exercise in any particular manner of any powers, discretions or privileges [and that's the important part between parentheses] (including any voting rights) conferred on the trustees by reasons of any shares or other rights of whatsoever nature in or over such company."

So here we have a valid trust instrument which in essence prohibits the beneficiaries from interfering with the exercise of the voting rights.

Then you will find, just to be complete, that we have reproduced the type of decision that would require protector's consent; and the exercise of the voting right is not among them. That's just for your information.

So again we have trustees who own the shares; they exercise the voting right in their discretion; nobody is entitled to tell them how to do that; they do that using all relevant factors, but they vote the shares in their discretion.

Appendix R

I will now discuss the arguments beyond the arguments resting merely on speculations, the arguments that were actually put forward by the Respondent to challenge the proposition that the trustees can vote the . . . .

* * * *

APPENDIX S

ARBITRATIONS PURSUANT TO THE RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

HULLEY ENTERPRISES LIMITED
v.
THE RUSSIAN FEDERATION

(PCA CASE NO. AA226)

YUKOS UNIVERSAL LIMITED
v.
THE RUSSIAN FEDERATION

(PCA CASE NO. AA227)

VETERAN PETROLEUM LIMITED
v.
THE RUSSIAN FEDERATION

(PCA CASE NO. AA228)

CLAIMANTS' OBJECTIONS TO THE RESPONDENT'S REQUEST FOR PRODUCTION OF DOCUMENTS

July 8, 2011

Counsel for the Claimants:
SHEARMAN & STERLING LLP

[5]With respect to the particular categories of documents listed in the Respondent's Request, the Claimants would make the following additional observations:

(a) "*Yukos Documents*": As discussed further below, large quantities of these documents were either seized by the Russian Federation and never returned or were transferred to the Moscow City Main Archival Department on the eve of the Company's liquidation in November 2007.[10] Such documents are thus in the Respondent's possession, custody or control. There is therefore no basis for the Respondent to request production of such documents by the Claimants.

(b) "*GML Documents*": Despite the Respondent's attempts to conflate their identities, GML Limited is a legally independent and separate entity from the Claimants and is not a party to these arbitrations and therefore its documents are not in the possession, custody or control of the Claimants. In any event, to the extent that GML Limited is the ultimate parent of the Claimants Hulley and YUL, it is GML Limited that controls Hulley and YUL and not the other way around.

(c) "*Oligarch Documents*": With respect to such documents, the Respondent's claim is once again based on a false premise, namely that the so-called

10. See below, ¶ 18.

"Oligarchs" "own and control the Claimants".[11] The Arbitral Tribunal has already rejected this premise in its Interim Awards on Jurisdiction and Admissibility, where it determined that ownership and control of the Claimants resides in GML Limited and/or Palmus Trust Company Limited in the cases of Hulley and YUL,[12] and that ownership and control resides in WJB Chiltern Trust Company (Jersey) Limited in the case of VPL.[13] The documents of the so-called "Oligarchs", as beneficiaries of the Guernsey Trusts,[14] are not, and cannot be deemed to be, in the possession, custody or control of the Claimants.

* * * *

11. Respondent's First Merits Request for Documents, June 17, 2011, p. 3. See also p. 2, where the Respondent describes the so-called "Oligarchs" as "the ultimate beneficial owners and controllers of Claimants".

12. See Hulley Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶¶ 499-536; YUL Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶¶ 500-537.

13. See VPL Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶¶ 536-548.

14. See Hulley Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶ 462; YUL Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶ 463.

APPENDIX T

ARBITRATIONS PURSUANT TO THE RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

PERMANENT COURT OF ARBITRATION CASES
Nos. AA226/AA227/AA228

HULLEY ENTERPRISES LIMITED,

Claimant,

v.

THE RUSSIAN FEDERATION,

Respondent.

YUKOS UNIVERSAL LIMITED,

Claimant,

v.

THE RUSSIAN FEDERATION,

Respondent.

VETERAN PETROLEUM LIMITED,

Claimant,

v.

THE RUSSIAN FEDERATION,

Respondent.

Appendix T

CLAIMANTS' REPLY ON THE MERITS

March 15, 2012

* * *

1156. *First*, the Respondent's contention that Hulley and VPL were not the beneficial owners of the dividends they received from Yukos for the purposes of Article 10(2) of the DTA misstates both the law and the facts.

1157. The recipient of a dividend will only be deemed not to be the beneficial owner thereof if it does not have the full right to use and enjoy the dividend. This occurs when the recipient is obliged (*i.e.*, because of a contractual, fiduciary or other duty) to pass on the dividend payment to another person. This understanding is confirmed by the OECD Commentaries to the OECD Model Tax Convention,[1905] as well as by the recent cases of *Prévost Car v. R.*,[1906] *Velcro Canada v. The*

1905. See OECD Discussion Draft, "Clarification of the Meaning of 'Beneficial Owner' in the OECD Model Tax Convention" (2011), at 4, **Annex (Merits) C 1318**; OECD Model Tax Convention on Income and on Capital (2005), Commentary to Article 10, ¶¶ 12 and 12.1, **Exhibit RME-1959**. See also Rosenbloom Report, ¶¶ 95-105.

1906. See *Prévost Car v. R.* [2008] TCC 231, (2008) 10 ITLR 736 (Tax Court of Canada), **Annex (Merits) C 1562**, affirmed by *Prévost Car v. R.* [2009] FCA 59, (2009) 11 ITLR 757 (Federal Court of Appeal of Canada), **Annex (Merits) C 1563**.

Queen[1907] and *Skatteministeriet v. FS Invest II Sarl.*[1908] Thus, the beneficial ownership limitation is a narrow one, targeted at nominees, agents and other conduits under an obligation to pass on the amount received as a dividend to another party.[1909]

1158. Contrary to the Respondent's allegations,[1910] there is no doubt that Hulley and VPL had the full right to use and enjoy the dividends they received from Yukos and that they were under no obligation to pass them on to another entity.[1911] In accordance

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1907. See *Velcro Canada Inc v. The Queen* [2012] TCC 57, 14 ITLR (not yet published) (Tax Court of Canada).

1908. See *Skatteministeriet v. FS Invest II S.à.r.l.*, Case No. B-2152-10, Decision of December 20, 2011 (Eastern High Court of Denmark), **Annex (Merits) C 1565**.

1909. See Report of Philip Baker QC of March 14, 2012 ("Baker Report"), ¶ 59.

1910. The Respondent's reliance on Article 87 of Hulley's Articles of Association to establish that Hulley was not the beneficial owner of the dividends is unavailing, because said provision merely provides for a list of reserved matters on which the directors cannot bind the company without the shareholder's consent: see Respondent's Counter-Memorial, April 4, 2011, ¶¶ 145-146 and 174-175. The effect of a "reserved matters" provision is that the shareholder can block the making of certain decisions by the directors and not, as the Respondent would like it, to restrict Hulley's full right to use and enjoy the dividends it received from Yukos or impose any obligation to pass the dividend on to YUL. See also, Baker Report, ¶ 65.

1911. See Baker Report, ¶¶ 60-66.

with their respective statutes and the applicable corporate laws of Cyprus, the power to propose the declaration and payment of a dividend lies solely with the directors of Hulley and VPL.[1912] Therefore, YUL had no power to oblige the directors of Hulley to propose a dividend. Similarly, there was no obligation on VPL to pay over dividends it received from Yukos to YUL.[1913] Thus, there is no basis to

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1912. See Hulley Enterprises Limited, Memorandum and Articles of Association, Article 117, **Exhibit RME-236**; VPL Articles of Association, Article 1, **Annex (Merits) C 1380**; Cypriot Companies Law Cap. 113, First Schedule, Table A, Part I, Regulations Nos. 114-115, **Annex (Merits) C 1381**. See also Baker Report, ¶ 64.

1913. The Respondent's reliance on Clause 4 of the Deed of Appointment of the Custodian Trustee to establish that VPL was not the beneficial owner of the dividends is unavailing, because the Deed of Appointment does not concern the powers of the directors of VPL. See Respondent's Counter-Memorial, April 4, 2011, ¶¶ 152-153 and 182-184. Instead, it prescribes the obligations of Chiltern as the custodian trustee of the VPT. In this context, Clause 4 of the Deed of Appointment specifies that any income received by the custodian trustee and arising out of VPL's shares in Yukos has to be paid to YUL in its capacity as Settlor of VPT (and not to the Russian Service Provider): see Appointment of Custodian Trustee in respect of "The Veteran Petroleum Trust" made on April 25, 2001 between Yukos Universal and WJB Chiltern Trust Co. (Jersey) Limited, Clause 4, **Exhibit RME-215**. Thus it does not entitle YUL to request that the dividend arising to VPL must be paid to YUL. As Mr. Baker QC concludes in his Report, the Deed of Appointment does not "impose an obligation such as to deprive VPL of the beneficial ownership of any dividends it received from Yukos". See Baker Report, ¶ 64.

conclude that either Hulley or VPL were not the beneficial owners of the dividends.[1914]

1159. Nor, moreover, is the fact that Hulley and VPL were the beneficial owners of the dividends they received from Yukos affected by any alleged transfers of shares between VPL and YUL, on the one hand, or Hulley and YUL, on the other, prior to and after Yukos' dividend record dates.

1160. As for the alleged transfers of shares between VPL and YUL, such transfers never took place. Not only do these allegations constitute a repetition of the same assertions that were considered by the Tribunal in the jurisdiction and admissibility phase of these arbitrations, but they contradict the explicit findings of the Tribunal in relation thereto:

* * *

1914. See Baker Report, ¶¶ 60-66. In addition, the ownership structure of Yukos was a matter of public knowledge. In fact, Yukos' ownership structure was disclosed on June 19, 2002 on GML's website. GML being the first business group to disclose its ownership structure in Russia, there is no doubt that the Russian Federation was aware of the identity of the shareholders of the Claimants. See "Information for the Management of OAO NK 'Yukos'", Group Menatep Limited, **Annex (Merits) C 597**.

APPENDIX U

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:18-CV-1807

WALEED BIN AL-QARQANI, *et al*,

Plaintiffs,

VS.

ARAB AMERICAN OIL COMPANY, *et al*,

Defendants.

Filed November 17, 2020

MEMORANDUM OPINION AND ORDER

This is a proceeding to enforce a foreign arbitration award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("the Convention"). (Dkt. 77 at p. 2) Before the Court is Petitioners' Second Amended Petition for Enforcement of Foreign Arbitral Award against Respondent Saudi Arabian Oil Company ("Saudi Aramco"). (Dkt. 108) The parties have compiled and presented an extensive record and thorough briefing on the relevant issues, and the Court has reviewed all the parties' filings and documents submitted in the record.

The record establishes that, over the strenuous objections of the parties to an arbitration agreement, Petitioners, who are nonsignatories to this agreement, used the agreement to arbitrate a dispute that fell outside of the scope of the agreement. The arbitration proceeding was conducted in direct contravention of the agreement's explicit procedural terms and was so riddled with irregularities that it resulted in criminal convictions for several of the arbitrators involved. For the reasons discussed in greater detail below, the Court will not confirm the arbitration award and Petitioners' motion (Dkt. 108) is **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

The petitioners claim to be "the private landowner and titleholders of plots of rich oil land located in Ras Tourna, Saudi Arabia." (Dkt. 77 at p. 4) They have initiated two proceedings, this case and a case in the Northern District of California ("the California case"), to confirm and enforce an $18 billion arbitration award that they obtained in Egypt against "Chevron Company of USA, Chevron Saudi Arabia[1] and Aramco" in 2015. (Dkt. 77 at pp. 3-4; Dkt. 77-2 at p. 6) The petitioners contend that an arbitral panel properly found that they own land on which the oil companies are conducting operations and that the oil companies owe the petitioners "rental value"

1. The Court will collectively refer to all companies with "Chevron" in their names as "the Chevron entities." The Chevron entities were the respondents in the California case.

for use of that land. (Dkt. 77 at p. 3) The claimed basis for the arbitral panel's jurisdiction is an arbitration clause contained in an agreement executed in 1933 ("the 1933 agreement" or "the Saudi Arabian Concession") by the Saudi Arabian government ("the Government") and Standard Oil Company of California ("SoCal") under which the Government gave SoCal "the absolute right for a period of sixty years" to, among other things, search for oil in Saudi Arabia. (Dkt. 77-1 at p. 3) The arbitration clause was Article 31 of the 1933 agreement. (Dkt. 77-1 at pp. 16-17)

According to the petitioners' translation of the 1933 agreement,[2] the arbitration clause stated:

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2. The parties agree that the 1933 agreement was signed in two iterations, one in Arabic and one in English. (Dkt. 111 at pp. 40-41; Dkt. 119 at pp. 26-27) The petitioners concede that they have not provided the English-language version and have instead provided an English translation of the Arabic-language version. (Dkt. 119 at pp. 26-27) Saudi Aramco does not agree that the translation is accurate. (Dkt. 111 at p. 12) The petitioners' translation of the 1933 agreement notably stipulates that "the English version shall prevail"—and, again, the Court does not have the English version—if there is "a difference on the interpretation relating to the Company's obligations[.]" (Dkt. 77-1 at p. 18) The Court finds that, under these circumstances, the petitioners' failure to provide the original or a duly certified copy of the English-language version of the 1933 agreement warrants the denial of this petition under Article IV of the Convention, which allows a petitioner to rely on a translation to prove up the pertinent arbitration agreement only "[i]f the . . . agreement is not made in an official language of the country in which the award is relied upon[.]" *See* 21 U.S.T. at 2519-20. Judge White of the Northern District of California, after examining the same documents that the petitioners presented

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> Should any doubt, difficulty or difference arise between the Government and the Company in interpreting this Agreement, the execution thereof or the interpretation or execution of any of it or with regard to any matter that is related to it or the rights of either of the two parties or the consequences thereof, and the two parties fail to agree on the settlement of the same in another way, then the issue shall be referred to two arbitrators with each party appointing one of the two arbitrators and with

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to this Court, concluded in the California case that denial was required under Article IV. *Al-Qarqani v. Chevron Corp.*, No. 4:18-CV-3297, 2019 U.S. Dist. LEXIS 172126, 2019 WL 4729467, at *5 (N.D. Cal. Sept. 24, 2019). Judge White's holding that a failure to comply with Article IV of the Convention mandates denial of a petition to enforce an arbitration award is persuasive and supported by caselaw. *See China Minmetals Materials Import and Export Company, Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 293-94 (3d Cir. 2003) (Alito, J., concurring) ("The better reading of Article IV—which comports with fundamental principles of arbitration—requires that the party seeking enforcement both (1) supply a document purporting to be the agreement to arbitrate the parties' dispute and (2) prove to the court where enforcement is sought that such document is in fact an 'agreement in writing' within the meaning of Article II, Section 2. In the present case, accordingly, [the petitioner] was required to demonstrate to the District Court that an officer of [the respondent] signed the purported nickel contracts."). Nevertheless, the Court will proceed to address this petition under the assumption that the petitioners' translation is accurate and sufficient to satisfy Article IV of the Convention. Assuming the accuracy and sufficiency of their translation, the petitioners still do not prevail.

the two arbitrators appointing an umpire prior to proceeding to arbitration. Each party shall appoint its arbitrator within thirty days of the date of the application made to it in writing by the other party. Should the two arbitrators fail to appoint the umpire, then the Government and the Company shall at that point appoint an umpire by consent and should both of them fail to agree, then they should apply to the President of the Permanent International Court of Justice to appoint an umpire. The award passed by the two arbitrators in the case shall be final. However, if they failed to agree, then the award of the arbitrators in the case shall be final.[3] As regards the place of arbitration, the two parties shall agree on it and if they failed to agree to that then it shall be in the Hague (Holland). Dkt. 77-1 at pp. 16-17.

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3. This sentence is difficult to comprehend in the context of the arbitration clause and may be a mistranslation; it seems that the phrase "award of the arbitrators" should read "award of the umpire." Elsewhere in the record, this part of the arbitration clause is quoted as using the term "deciding arbitrator" instead of the term "umpire" and saying that "[t]he ruling of the two arbitrators shall be considered absolute; if they do not agree among themselves in opinion, then the ruling of the deciding arbitrator shall be considered final." (Dkt. 111-4 at pp. 113-14) The possible mistranslation has no effect on the Court's reasoning but does help illustrate why the English version of the 1933 agreement is required to sufficiently prove up the agreement to arbitrate under Article IV of the Convention.

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The 1933 agreement defined "the Government" as "the Government of Saudi Arabia" and defined "the Company" as "Standard Oil of California Company[.]" (Dkt. 77-1 at p. 3) The 1933 agreement specified that it was an "[a]greement . . . between the Government and the Company[.]" (Dkt. 77-1 at p. 3) No other party was included in the agreement, except that: (1) SoCal could "assign its rights or obligations specified in this Agreement" with the Government's consent; and (2) SoCal could "transfer its rights and obligations provided for in this agreement to a company to be set up by it for this project after notifying the Government of the same." (Dkt. 77-1 at pp. 3, 17) It is undisputed that the petitioners are nonsignatories to the 1933 agreement. It is further undisputed that Saudi Aramco, which did not exist in 1933, is a nonsignatory to the 1933 agreement.

In claiming the right to invoke the arbitration provisions of the 1933 agreement, the petitioners argue that the arbitration provisions were incorporated into a separate agreement signed sixteen years later by the petitioners' ancestors and a subsidiary of SoCal. Under Article 25 of the 1933 agreement, the Government authorized SoCal "to obtain from the owner of the land the surface rights of the lands which the Company deem[ed] necessary for use in its works pertaining to this project, provided that the Company [was required to] pay to the occupant of the lands an allowance in consideration for abandoning the use of such lands." (Dkt. 77-1 at p. 14) In 1949, the petitioners' ancestors transferred land rights to a SoCal subsidiary, Arabian American Oil Company

("Aramco"),[4] as part of the petroleum exploration project. (Dkt. 77-3) The transfer was memorialized in a deed ("the 1949 deed"). (Dkt. 77-3) The petitioners contend that the following language from the 1949 deed incorporated the arbitration provisions of the 1933 agreement:

> For the good and valuable consideration to be paid to us, we the undersigned, for our property under the Deed No. 124, in connection with the Plots of Land stated in such Deed, we hereby give and transfer, each for himself and on behalf of his heirs, guardians and lawful representatives, to the Arab American Oil Company, being the Company referred to in the said Deed, its successor and whomever it appoints, the right to use and occupy the mentioned Plots of Land, for the purposes of the Saudi Arabian Concession,[5] concluded on 4 Safar 1352 H., corresponding to 29 July 1933 G. and any additional agreements that may be annexed thereto. We hereby declare and affirm that the rights of the said Company, as to using and occupying the said Plots of Land, are based on the requirements of Article (25) of the said Concession, and we hereby further agree to

4. SoCal assigned the 1933 agreement to a subsidiary, California Arabian Standard Oil Company, which changed its name to Arabian American Oil Company. (Dkt. 111-2 at pp. 27-31)

5. The parties agree that the reference to the "Saudi Arabian Concession" is a reference to the 1933 agreement. (Dkt. 77 at p. 6; Dkt. 111 at p. 13)

> safeguard the said Company, its successors and whomever it may appoint, against all claims, in the past, at present and in future, by any person claiming ownership or interest in any one of the said Plots of Land. Dkt. 77 at p. 6; Dkt. 77-3 at p. 6.

The 1949 deed made no explicit reference to either arbitration or Article 31 of the 1933 agreement.

During the decades after the execution of the 1949 deed, the Government began buying Aramco's assets. (Dkt. 111-1 at pp. 136, 140) By 1988, the Government had bought all of Aramco's assets and had created Saudi Aramco. (Dkt. 111-1 at pp. 136, 140, 159, 161) Aramco dissolved in 1990. (Dkt. 111-1 at pp. 175, 205)

In 2011, more than sixty years after the execution of the 1949 deed, the petitioners initiated legal proceedings against Saudi Aramco in the Saudi Arabian courts, contending that the 1949 deed memorialized a lease, not a sale. (Dkt. 111-1 at pp. 13-14, 243-44, 296-97) The petitioners' characterization of the 1949 transaction as a lease rather than a sale provides the foundation for their contentions that they now own the land discussed in the 1949 deed and that Saudi Aramco and the Chevron entities owe the petitioners "rental value" for the period beginning at the time the 1933 agreement expired. (Dkt. 77 at p. 3) A Saudi Legal Committee and the President of the Council of Ministers rejected the petitioners' claim and found that the 1949 deed memorialized a sale. (Dkt. 111-1 at pp. 13-14, 243-44, 296-97) The proceedings determined that the

Government, which had long since bought all of Aramco's assets, owned the land discussed in the 1949 deed. (Dkt. 111-1 at pp. 13-14, 243-44, 296-97)

The petitioners then initiated an arbitration proceeding in Egypt against Saudi Aramco and the Chevron entities using an entity called the International Arbitration Center ("IAC"). After receiving notice of the arbitration from the IAC, Saudi Aramco wrote a letter to the IAC saying that it would not participate. (Dkt. 128-4 at p. 140) In its letter, Saudi Aramco "reject[ed] the arbitration" as "null and void in [its] entirety." (Dkt. 128-4 at p. 140) Saudi Aramco stated in its letter that it had no arbitration agreement with the petitioners and that the land discussed in the 1949 deed belonged to the Government. (Dkt. 128-4 at p. 140) In a letter of their own, the Chevron entities also objected to the arbitration and argued that no valid arbitration agreement between them and the petitioners existed, though the Chevron entities, "as a precautionary measure," nominated an arbitrator. (Dkt. 111-4 at p. 37) Over these protests, the petitioners pushed forward with the IAC arbitration in Egypt.

Even setting aside the fact that every single respondent vigorously objected to the proceeding and denied the existence of any arbitration agreement, the IAC arbitration progressed in a manner that can only be described as concerning. At least three arbitrators resigned during the proceeding, with two of them doing so via a joint letter that expressed a "lack of confidence in the ability of [the IAC] to be entrusted with the administration of the required arbitration." (Dkt. 77-2 at pp. 9-17; Dkt.

111-4 at p. 53) Remarkably, one of the arbitrators who signed the joint resignation letter expressing a lack of confidence in the IAC had been selected *by* the IAC on behalf of the petitioners. (Dkt. 77-2 at p. 9; Dkt. 111-4 at p. 53) At least seven different arbitrators ultimately participated in the proceeding at one point or another, and at least three different combinations of arbitrators filled the three seats on the arbitration panel. (Dkt. 77-2 at pp. 9-17) The disjointed proceeding produced a disjointed result: the tribunal issued an opinion holding that it lacked jurisdiction over the dispute, then, with different members, reopened the arbitration and issued a second opinion holding not only that it had jurisdiction but that the petitioners were entitled to $18 billion. (Dkt. 77-2; Dkt. 111-4 at pp. 104-15) Perhaps most telling, the second opinion also held that the IAC itself was entitled to "arbitration fees" totaling 1/8 of one percent "of the total value of the Claims of the [petitioners]"—about $23 million. (Dkt. 77-2 at p. 35)

The second opinion, and in particular the IAC's award of a staggeringly large fee to itself, attracted the attention of Egyptian prosecutors, who concluded that the second opinion was part of a "criminal plan" to "obtain the arbitration fees, representing a percentage of the award[.]" (Dkt. 111-3 at pp. 87, 105-06) An Egyptian court convicted two IAC administrators and three arbitrators of fraud, forgery, and similar crimes for their roles in reopening the arbitration and issuing the $18 billion award. (Dkt. 111-3 at pp. 203-15) The Egyptian court found that, "[d]espite the fact that an award definitively ending the fabricated case—which concluded that the Arbitration Tribunal did not have jurisdiction to hear it—had already been issued,

the [IAC administrators and arbitrators] nevertheless insisted on issuing [a] falsified award" with the aim of "fabricat[ing] a proof of debt against the . . . companies in order to misappropriate their assets." (Dkt. 111-3 at pp. 203-04)

It is not surprising that the petitioners' quest to confirm their award has thus far come up empty. Two federal district judges have examined the award, and neither confirmed it. The California case, in which the petitioners named various Chevron entities as respondents, has been dismissed in its entirety by Judge White of the Northern District of California and is on appeal before the Ninth Circuit. *See Al-Qarqani v. Chevron Corp.*, No. 4:18-CV-3297, 2019 U.S. Dist. LEXIS 172126, 2019 WL 4729467 (N.D. Cal. Sept. 24, 2019); *see also* Ninth Circuit Docket Number 19-17074. In this case, in which the petitioners originally named Aramco Services Company ("ASC") and Aramco as respondents, Judge Miller of the Southern District of Texas granted ASC's motion to dismiss because "ASC is not bound to the arbitration agreement and none of the theories to bind a nonsignatory apply." (Dkt. 47 at p. 7) The dismissal rulings by Judge Miller and Judge White left as the lone remaining named respondent Aramco, which, as Judge Miller noted, dissolved 25 years before the arbitration proceeding at issue. (Dkt. 47 at p. 1) This case was then reassigned to the undersigned judge.

Since Aramco has not existed for decades, the petitioners sought leave from the Court to amend their petition to name Saudi Aramco as a respondent. (Dkt. 50 at p. 14) The Court granted leave to amend. (Dkt. 55)

Appendix U

THE NEW YORK CONVENTION

United States District Courts have federal question jurisdiction over petitions to confirm awards under the Convention. *See* 9 U.S.C. § 203; *see also* 28 U.S.C. §1331. The text of the Convention is contained at pages 2517 to 2566 of Volume 21 of a United States Department of State publication entitled United States Treaties and Other International Agreements. *See* 21 U.S.T. 2517. The legislation implementing the Convention is contained in Chapter 2 of the Federal Arbitration Act ("the FAA"). *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644, 207 L. Ed. 2d 1 (2020).

An action to confirm an international arbitration award is not "an ordinary civil action" but "a summary procedure in the nature of federal motion practice[.]" *Imperial Ethiopian Government v. Baruch-Foster Corp.*, 535 F.2d 334, 335, 337 & n.2 (5th Cir. 1976). "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. The Court has examined the evidence in the record and will not confirm the IAC arbitration award. The Court finds that the following three grounds for refusal to confirm exist:

(1) There was no agreement to arbitrate between the petitioners and Saudi Aramco;

(2) The question of whether the 1949 deed memorialized a lease or a sale fell outside the

scope of the arbitration clause invoked by the petitioners; and

(3) The IAC proceeding did not conform to the procedures outlined in the arbitration clause invoked by the petitioners.

A. The Court will not confirm the petitioners' award because there was no agreement to arbitrate between the petitioners and Saudi Aramco.

In United States federal courts, the absence of a valid agreement to arbitrate is a ground for refusing to confirm an arbitration award under the Convention. *Exceed Int'l Ltd. v. DSL Corp.*, No. 4:13-CV-2572, 2014 U.S. Dist. LEXIS 59913, 2014 WL 1761264, at *4-5 (S.D. Tex. Apr. 30, 2014) (Atlas, J.) (discussing *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005); *China Minmetals Materials Import and Export Company, Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 286 (3d Cir. 2003); and *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II, L.P.*, 717 F.3d 322, 325 (2d Cir. 2013)). That ground for refusal is found in Article V(2) of the Convention, which provides that a United States federal court is not required to confirm an award when the subject matter of the parties' difference is not capable of settlement by arbitration under United States law or when enforcement would be contrary to the public policy of the United States. *Id.*; *see also* Article V(2) of the Convention, 21 U.S.T. at 2520 ("Recognition and enforcement of an arbitral award may also be refused if

the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country . . . or . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country."). Under United States law, a valid agreement to arbitrate is a prerequisite for an enforceable arbitration award; and the enforcement of an arbitration award when there was no valid agreement to arbitrate is contrary to the public policy of the United States. *Exceed*, 2014 U.S. Dist. LEXIS 59913, 2014 WL 1761264 at *4-5.

Here, there was no agreement to arbitrate. The petitioners rely on the arbitration provisions of the 1933 agreement to establish the existence of an arbitration agreement between them and Saudi Aramco. It is undisputed that the petitioners and Saudi Aramco are nonsignatories to the 1933 agreement. Although nonsignatories can, under certain circumstances, enforce and be bound by arbitration agreements, the petitioners here cannot enforce the arbitration provisions of the 1933 agreement, even assuming that Saudi Aramco is bound by those provisions.

As a preliminary matter, the Court notes that Chapter 1 of the FAA applies to proceedings that are brought under Chapter 2 to the extent that Chapter 1 is not in conflict with Chapter 2 or the Convention. *GE Energy*, 140 S. Ct. at 1644; *see also* 9 U.S.C. § 208. Chapter 1 and Chapter 2 are not in conflict on the question of whether a nonsignatory to an arbitration agreement, like petitioners and Saudi

Aramco here, can invoke or be bound by that agreement. *Todd v. Steamship Mutual Underwriting Association (Bermuda) Limited*, 601 F.3d 329, 334-35 & n.10 (5th Cir. 2010). Rather, "in both FAA and Convention cases, courts have largely relied on the same common law contract and agency principles to determine whether nonsignatories must arbitrate[.] Consequently, . . . cases discussing whether nonsignatories can be compelled to arbitrate under the FAA are relevant for this case governed by the New York Convention." *Id.* at 334-35.

"The federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Morrison v. Amway Corp.*, 517 F.3d 248, 254 (5th Cir. 2008) (quotation marks omitted). Moreover, "[a]rbitration agreements apply to nonsignatories only in rare circumstances." *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 358 (5th Cir. 2003). So, "[w]here the very existence of any agreement is disputed, it is for the courts to decide at the outset whether an agreement was reached, applying state-law principles of contract." *Will-Drill Resources, Inc. v. Samson Resources Company*, 352 F.3d 211, 218 (5th Cir. 2003). "Courts addressing whether a non-signatory can enforce an arbitration agreement are guided by traditional principles of state law, which allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Halliburton Energy Services, Inc. v. Ironshore Specialty Insurance Company*, 921 F.3d 522, 531 (5th Cir. 2019) (quotation marks omitted).

With these bedrock guidelines in mind, the Court will analyze the question of whether the petitioners can invoke the arbitration provisions of the 1933 agreement using "Texas law, which is the law of the forum, there having been no showing that the law of any other arguably more appropriate state materially differs in respect to the present issue." *Morrison*, 517 F.3d at 254; *see also Exceed*, 2014 U.S. Dist. LEXIS 59913, 2014 WL 1761264 at *6-7 (applying Texas law in a proceeding to enforce an arbitration award under the Convention). Under Texas law, "[w]ho is bound by an arbitration agreement is normally a function of the parties' intent, as expressed in the agreement's terms." *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 633 (Tex. 2018). When addressing the matter of whether nonsignatories are bound by an arbitration agreement, Texas courts "endeavor to keep [Texas substantive law] consistent with federal law." *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 643 (Tex. 2009). Drawing on federal law, the Texas Supreme Court has "articulated six scenarios in which arbitration with non-signatories may be required: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary." *Jody James Farms*, 547 S.W.3d at 633; *see also In re Kellogg Brown & Root Inc.*, 166 S.W.3d 732, 739 (Tex. 2005).

The petitioners have provided a lengthy discourse on Texas contract law but have not put forward a viable basis on which they can establish entitlement to enforce the arbitration provisions of the 1933 agreement. (Dkt. 119 at pp. 11-24) They argue that the following three principles

listed in *Jody James Farms* allow them to enforce the arbitration provisions: incorporation by reference; equitable estoppel; and third-party beneficiary. (Dkt. 119 at pp. 16-22) The petitioners also argue, citing *Labatt*, that their claims are derivative of the Government's rights. (Dkt. 119 at pp. 22-23) The Court disagrees with all of the petitioners' contentions.

* * *

iii. Third-party beneficiary

The petitioners next argue that they can enforce the arbitration provisions of the 1933 agreement using the third-party beneficiary doctrine. (Dkt. 119 at pp. 21-22) The Court also finds this argument unpersuasive.

"Parties are presumed to be contracting for themselves only. This presumption may be overcome only if the intent to make someone a third-party beneficiary is clearly written or evidenced in the contract." *Bridas*, 345 F.3d at 362 (citation and quotation marks omitted). Texas third-party beneficiary law comports with the Fifth Circuit's general statement in *Bridas*:

> Like other contracts, arbitration agreements may also be enforced by third-party beneficiaries, so long as the parties to the contract intended to secure a benefit to that third party and entered into the contract directly for the third party's benefit. The benefit must be more than incidental, and the contracting parties' intent

> to confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied. Whether the third party intended or expected to benefit from the contract is irrelevant, because only the intention of the contracting parties in this respect is of controlling importance.
> *Jody James Farms*, 547 S.W.3d at 635 (footnotes and quotation marks omitted).

The petitioners do not specify any language in the 1933 agreement indicating that the Government and SoCal entered into the 1933 agreement directly for the petitioners' benefit, and the Court can find no such language on its own. The provisions of Article 25 regarding the acquisition of surface rights did nothing more than allocate the responsibilities for such acquisition between the Government and SoCal; they did not, for instance, "identify a specific sum which the [Government and SoCal were to] pay to a certain person or entity" or "illustrate a clear intent to repay a debt owed[,]" so they cannot rebut the presumption that the Government and SoCal contracted for themselves only. *Tawes v. Barnes*, 340 S.W.3d 419, 426-29 (Tex. 2011) ("The [oil and gas operating] Agreements demonstrate that the clear intent of the signatories thereto was to allocate responsibilities for the payment of operating expenses for the specific purpose of maintaining each . . . lease, not to directly benefit [a nonsignatory lessor who was claiming third-party beneficiary status]."); *see also Brown v. Fullenweider*, 52 S.W.3d 169, 170 (Tex. 2001) (holding that a decree of divorce was not a third-party beneficiary

agreement in favor of one party's attorney because the decree did not name the attorney and merely allocated responsibility for the payment of his fees, along with other financial obligations, between the parties). At best, the petitioners were incidental beneficiaries of the 1933 agreement, which does not entitle them to utilize the third-party beneficiary doctrine.

iv. Derivative claims

Finally, the petitioners argue that they can enforce the arbitration provisions of the 1933 agreement because their claims are derivative of the Government's rights. (Dkt. 119 at pp. 22-23) For this proposition, the petitioners cite *Labatt*, in which the Texas Supreme Court held that wrongful death beneficiaries are bound by a decedent's agreement to arbitrate because the beneficiaries "stand in [the decedent's] legal shoes[.]" *Labatt*, 279 S.W.3d at 645-47.

The Court disagrees with petitioners' argument. The principle established by *Labatt* is not applicable under the facts of this case. The Texas wrongful-death statutes provide a "right of statutory beneficiaries to maintain a wrongful death action [that] is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death." *Id.* at 644. By contrast, the petitioners' claims were in no way derivative of any claimed right of the Government to sue for unpaid rent. To the contrary, the petitioners have consistently argued that they, and not the Government, own the land discussed in the 1949 deed. In fact, the reason the petitioners initiated

this arbitration in the first place was to circumvent the findings of a Saudi Legal Committee and the President of the Council of Ministers that the Government owns the land at issue. (Dkt. 111-1 at pp. 13-14, 243-44, 296-97) Under these facts, the petitioners cannot use *Labatt* to establish an agreement to arbitrate.

There was no agreement to arbitrate between the petitioners and Saudi Aramco. Accordingly, under Article V(2) of the Convention, the Court refuses to confirm the petitioners' arbitration award.

* * * *

APPENDIX V

EXHIBIT 1

TO THE DECLARATION OF CAROLYN B. LAMM
DATED DECEMBER 10, 2021

DEED OF ACCESSION
in relation to the terms of

AGREEMENT

Between Shareholders of "Group Menatep Limited"
Relating to Administration of Company's Assets
dated 5 April 2000

We the **Palmus Trust Company Limited** of PO Box 141, La Tonnelle House, Les Banques, St Sampson, Guernsey GY1 3HS, having acquired 2,499,999 shares of Group Menatep Limited ("**Group MENATEP**") as Trustees of the Palmus Trust hereby assume as a shareholder of Group Menatep Limited the obligation to accept and be bound by the terms of the Agreement between Shareholders of Group Menatep Limited relating to Administration of Company's Assets dated 5 April 2000 (hereinafter—"**Shareholders' Agreement**").

In accordance with Article 1 of the Shareholders' Agreement (as amended hereby), we hereby transfer to Mr. Platon L. Lebedev voting rights on shares in Group MENATEP with regard to the issues concerning shareholding of YUKOS shares, including voting on YUKOS shares, and all issues relating to YUKOS activity whenever such activity is connected to execution of voting

rights on stock in enterprises directly or indirectly held by Group MENATEP. We also undertake to take all necessary corporate or any other actions to enable Mr. Platon L. Lebedev to exercise such voting rights in such circumstances.

The parties to the Shareholders' Agreement being the Shareholders of Group MENATEP hereby acknowledge and agree that paragraph 1.1 of the Shareholders' Agreement shall be extended (with effect from the date hereof) to provide that the voting restriction as provided in Article 1 of the Shareholders' Agreement, shall be binding for an long as Mr. Mikhail B. Khodorkovskiy holds a senior administrative position in YUKOS and holds the capacity of a Protector of the Palmus Trust or is a beneficiary of the Palmus Trust.

The parties to the Shareholders' Agreement being the Shareholders of Group MENATEP hereby acknowledge and agree that the Shareholders' Agreement and this Notice of Accession shall be governed by, and shall be construed in accordance with, English law.

Words and expressions used or defined in the Shareholders' Agreement shall have the same meaning in this deed of accession.

Dated this 3rd day of April 2003

Executed and delivered as a deed
by **Palmus Trust Company Limited**

/s/_____	/s/_____
Director	Director/Secretary

Appendix V

DATE: 5th of April 2000

AGREEMENT

BETWEEN SHAREHOLDERS OF "GROUP MENATEP LIMITED" RELATING TO ADMINISTRATION OF COMPANY'S ASSETS

THIS SHAREHOLDERS' AGREEMENT
is made this 5th day of April, 2000

BETWEEN:

Mr. Mikhail B. Brudno,

Mr. Alexey D. Golubovich,

Mr. Vladimir M. Dubov,

Mr. Platon L. Lebedev,

Mr. Leonid B. Nevzlin,

Mr. Mikhail B. Khodorkovskiy,

hereinunder referred to as "The Shareholders"

WHEREAS

The Shareholders jointly control 100% of shares in "Group Menatep Limited", having a registered office at Suit E, Regal House, Queensway, P.O. Box 24.6, Gibraltar (hereinunder referred to as "Group MENATEP"),

Group MENATEP directly and/or through its subsidiary and/or controlled companies holds a controlling stock in Oil Company "YUKOS", a major company in YUKOS Group of Companies (hereinunder referred to as "YUKOS"), the management of which is performed by Mr. Mikhail B. Khodorkovskiy,

In order to avoid possible conflict of interests the Shareholders of Group MENATEP, have entered into this Agreement on the following:

1. VOTING RESTRICTION WITH REGARD TO SHARES OF GROUP MENATEP

1.1. Mr. Mikhail B. Khodorkovskiy, holding a senior administrative position in YUKOS, hereby transfers to Mr. Platon L. Lebedev voting rights on shares in Group MENATEP with regard to the issues concerning shareholding of YUKOS shares, including voting on YUKOS shares, and all issues relating to YUKOS activity whenever such activity is connected to execution of voting rights on stock in enterprises directly or indirectly held by Group MENATEP.

1.2. For due performance under the present Agreement Mr. Platon L. Lebedev, Director of Group MENATEP, is authorized and undertakes to personally and solely exercise all and any voting rights on shares in Group MENATEP, where such vote can not be exercised by Mikhail B. Khodorkovskiy in accordance with paragraph 1.1. of this Agreement or when such vote is undesirable because of potential conflict of interests of ultimate

beneficiaries of shares and persons, holding senior administrative positions is YUKOS.

1.3. Voting restriction as provided in this article 1 of the Shareholders Agreement, shall be binding during the occupation by Mr. Mikhail B. Khodorkovskiy of senior administrative position in YUKOS.

2. GUARANTEES

2.1. Each of the Shareholders undertakes to the others that he will (to the extent permitted by law) use the powers as Shareholder of the Company to procure that the present Agreement is duly complied with.

2.2. Shareholders hereby agree that no change in shareholding and/or management structure of Group MENATEP shall be interpreted as invalidating the present Agreement in whole or part.

3. CONFIDENTIALITY

3.1. The Shareholders shall keep all data and information acquired or received in connection with this Agreement as well as the content and existence of this Agreement (hereinafter—"confidential information") secret and confidential during the continuance of this Agreement and for a period of 5 Years thereafter (irrespective of the reason for the termination hereof) and neither Shareholder shall divulged the same in any way to any third party for any purpose whatsoever, without the prior written consent of other Shareholders, provided that:

(a) either Shareholder may, without such approval, disclose confidential information:

(i) to any auditor, lawyer or other external professional consultant, provided that such disclosure is subject to strict terms of confidentiality; or

(ii) to the extent required by Law or the regulations of any recognised stock exchange; or

(iii) to the extent that it can be demonstrated by the disclosing Shareholder, that such information prior to such disclosure and through no breach of this Agreement, has become generally available to the public.

4. BREACH OF OBLIGATION AND FORCE MAJEURE

4.1. The obligations of the Shareholders hereunder, could only be breached in the event of action of an compelling force (hereinunder "Force Majeure"). In such event the Shareholder shall inform the Director of Group MENATEP or any other Shareholder. The Shareholder who has been informed of default under the present Agreement by the other Shareholder. shall be obliged to inform the Director of Group MENATEP, who in his turn shall inform other Shareholders.

4.2. For the purpose of this Agreement "Force Majeure" shall mean any extraordinary event which is beyond the reasonable control of one, several or all of the Shareholders including, but not limited to, fire, flood, earthquake, difficult weather conditions, which are abnormal or are more difficult than those which are normal for the region, natural disasters, mutinies, wars (declared and undeclared), military conflicts, terrorism, uprising or any other act of violence, strikes or other massive labour conflicts, accidents, epidemics, quarantine restrictions, action or inaction of any executive authorities of the State, blockade, embargo and other extraordinary circumstances.

4.3. During the continuance of Force Majeure affecting one or more Shareholders, leading to breach of any provision of the present Agreement, the rest Shareholders shall be entitled to revise this Agreement or pass decision on termination of the Agreement. Provisions, revised therethrough at the time of continuance of Force Majeure, shall be binding upon the Shareholder(s), who at the moment of decision, have been under pressure of such circumstances.

5. DURATION AND TERMINATION

5.1. This Agreement shall commence on the execution hereof by all Shareholders and shall remain in effect until a decision is passed of termination of present Agreement or until the activity of Group MENATEP is ceased.

Appendix V

6. MISCELLANEOUS

6.1. A waiver of right with regard to any term, provision or condition of, or consent granted under, this Agreement shall be effective only if given in writing and signed by the waiving or consenting party and then only in the instance and for the purpose for which it is given.

6.2. In the event that any of the Shareholders takes a position of or shall be appointed in future as a senior administrator of YUKOS provisions of Article 1 of the present Agreement shall be equally binding upon any such Shareholder of Group MENATEP.

6.3. This Agreement may be executed in any number of counterparts each of which when executed and delivered is an original, but all the counterparts together constitute the same document.

AS WITNESS whereof this Agreement has been executed on the date first above written.

Mr. Mikhail B. Brudno	/s/ Mikhail B. Brudno
Mr. Alexey D. Golubovich	/s/ Alexey D. Golubovich
Mr. Vladimir M. Dubov	/s/ Vladimir M. Dubov
Mr. Platon L. Lebedev	/s/ Platon L. Lebedev
Mr. Leonid B. Nevzlin	/s/ Leonid B. Nevzlin
Mr. Mikhail H. Khodorkovskiy	/s/ Mikhail H. Khodorkovskiy

APPENDIX W

[ORAL ARGUMENT SCHEDULED FOR
FEBRUARY 28, 2024]

Nos. 23-7031, 23-7032, 23-7038

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEXTERA ENERGY GLOBAL HOLDINGS B.V., *et al.*,

Petitioners-Appellees,

v.

KINGDOM OF SPAIN,

Respondent-Appellant.

9REN HOLDING S.A.R.L.,

Plaintiff-Appellee,

v.

KINGDOM OF SPAIN,

Defendant-Appellant.

Appendix W

BLASKET RENEWABLE INVESTMENTS, LLC,

Petitioner-Appellant,

v.

KINGDOM OF SPAIN,

Respondent-Appellee.

On Appeal from the United States District Court
for the District of Columbia

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

RICHARD C. VISEK
Principal Deputy Legal Adviser

U.S. Department of State

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

SHARON SWINGLE
THOMAS PULHAM
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Appendix W

* * *

ARGUMENT

I. A Federal Court Must Determine that an Arbitration Agreement Exists Before Exercising Jurisdiction Under the Arbitration Exception to the FSIA

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). "Under the Act, a foreign [9]state is presumptively immune," and "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Thus, "[a]t the threshold of every action" against a foreign state, a district court "must satisfy itself that one of the exceptions applies." *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 (1983).

The arbitration exception applies in any case brought "to confirm an award" made pursuant to an "agreement to arbitrate" "made by the foreign state with or for the benefit of a private party" if the award "is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). Thus, "the existence of an arbitration agreement, an arbitration award and a treaty governing the award are all jurisdictional facts that must be established." *LLC*

SPC Stileks v. Republic of Moldova, 985 F.3d 871, 877 (D.C. Cir. 2021).[2]

[10]A series of this Court's recent decisions make clear that the district court must make its own determination that an arbitration agreement exists. The first is *Belize Social Development Ltd. v. Government of Belize*, 794 F.3d 99 (D.C. Cir. 2015), which involved a petition to enforce an arbitral award arising out of the alleged breach of an "Accommodation Agreement" between Belize and a private telecommunications company. *Id.* at 100-01. Belize argued that the FSIA's arbitration exception did

2. This Court has applied a burden-shifting framework under which the plaintiff bears an initial "burden of production" to support its claim that the FSIA exception applies, but the ultimate "burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015). This view appears to have been derived from the FSIA's legislative history, which mistakenly described sovereign immunity as an affirmative defense that must be established by the defendant. *See* H.R. Rep. No. 94-1487, at 17. But the Supreme Court has emphasized that, under the text of the FSIA, "a foreign state is presumptively immune from the jurisdiction of United States courts." *Nelson*, 507 U.S. at 355. Even if "the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act." *Verlinden*, 461 U.S. at 493 n.20. There is therefore no justification for placing the ultimate "burden of persuasion" on the foreign state. For present purposes, however, it does not matter where the ultimate evidentiary burden lies. The relevant point is that the district court must determine that the necessary jurisdictional requirements are satisfied.

not apply because the former Prime Minister lacked authority to execute the Accommodation Agreement, which was therefore "void *ab initio*." *Id.* at 102. This Court explained that, "[i]n order to succeed in its claim that there was no 'agreement made by the foreign state . . . to submit to arbitration'" as required by the FSIA, "Belize must show that the Prime Minister lacked [11]authority to enter into the arbitration agreement" contained within the overarching Accommodation Agreement. *Id.* (omission in original). The Court determined that Belize failed to make this showing, but it underscored that Belize would have "carr[ied] its burden of establishing that [the petitioner's] allegations do not bring this case within the FSIA's arbitration exception" had it established "that the Prime Minister lacked authority to enter the *agreement to arbitrate*." *Id.* at 103.

The second case is *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200 (D.C. Cir. 2015). In that case, "Ecuador argue[d] that the District Court failed to determine in the first instance that an arbitration agreement existed, instead deferring to the judgment of the arbitrator." *Id.* at 204. This Court agreed that "[t]he jurisdictional task before the District Court was to determine whether" the parties had "an agreement to arbitrate" and that its failure to mak[e] this determination as part of its jurisdictional analysis . . . was error." *Id.* at 205 & n.3. The FSIA "requires the District Court to satisfy itself" that there existed "an agreement between the parties" to engage in arbitration. *Id.* at 205 n.3. Ecuador did not ultimately prevail, however, because the specific challenge it presented—that its "offer to

arbitrate" did not "encompas[s]" the "breach of contract claims" brought [12]by the petitioner—was a question about the scope of the arbitration agreement rather than its existence, and such scope-related questions lay beyond the jurisdictional inquiry. *Id.* at 205.

The third, and most recent, case is *Micula v. Government of Romania*, 805 F. App'x 1 (D.C. Cir. 2020) (per curiam). In that case, Swedish investors initiated arbitration before an ICSID tribunal pursuant to a bilateral investment treaty between Romania and Sweden. When they subsequently petitioned the district court to confirm their arbitral award, Romania argued—like Spain does here—that "the arbitration exception does not confer jurisdiction 'because the arbitration clause in the Sweden-Romania [treaty] has been declared invalid'" under EU law. *Micula v. Government of Romania*, 404 F. Supp. 3d 265, 277 (D.D.C. 2019). The district court analyzed the EU judicial decision invoked by Romania and, based on its independent analysis, concluded that the European court ruling did not preclude "jurisdiction under the FSIA's arbitration exception." *Id.* at 279.

This Court affirmed. On appeal, Romania agreed that the arbitration exception applied, but the European Commission, as *amicus curiae*, urged that the "agreement to arbitrate was nullified by [Romania's] ascension to the [EU]." *Micula*, 805 F. App'x at 1. This Court rejected the argument, [13]pointing to the district court's "carefu[l]" analysis. *Id.* Notably, the Court declined to consider the Commission's other arguments on the ground that they were "non jurisdictional" in nature. *Id.* at 1 n.1.

Together, these cases establish that when a foreign state contests application of the FSIA's arbitration exception by arguing that no arbitration agreement exists between that state and the party seeking to confirm an arbitral award, the district court must engage in an independent review of that objection before exercising jurisdiction over the petition to confirm. *See also Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 802 (5th Cir. 2021) (dismissing an enforcement petition for lack of jurisdiction because "there exists no agreement among these parties to arbitrate"). If the contested issue implicates factual questions, the court should consider affording respectful consideration to the findings made by the arbitral tribunal. *Cf. Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006) (noting that a court's independent consideration may be "informed by the arbitrator's resolution of the arbitrability question"). But the court ultimately must make an independent determination of whether an agreement to arbitrate exists and cannot treat the arbitrator's decision on the question as dispositive. *See Chevron*, 795 F.3d at 204 ("If there is no [14]arbitration agreement . . . , the District Court lacks jurisdiction over the foreign state and the action must be dismissed.").

The district court in *NextEra* and *9REN* mistakenly believed that this Court's decision in *Stileks* counseled a different approach. The parties in *Stileks* did not contest whether they had formed an agreement to arbitrate but instead disagreed on whether they had "agreed to arbitrate this *particular* dispute." 985 F.3d at 878. Adhering to the line drawn in *Chevron*, the Court held

that "the arbitrability of a dispute is not a jurisdictional question under the FSIA." *Id.* But it underscored that "the existence of an arbitration agreement" *is* a "jurisdictional fac[t] that must be established." *Id.* at 877.

This approach is consistent with "the established ongoing duty of a court to determine its own jurisdiction." *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 699 (D.C. Cir. 2022). Because "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011), a court must satisfy itself of the facts necessary to establish its jurisdiction and cannot simply rely on the conclusions of an arbitral panel. [15]*Cf. id.* (noting courts' obligation to "raise and decide jurisdictional questions that the parties either overlook or elect not to press").

It is also consistent with general principles that govern arbitration. "[T]he first principle that underscores all of [the Supreme Court's] arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent.'" *Granite Rock Co. v. International Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (quoting *Volt Info. Scis., Inc. v Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Thus, a court cannot order arbitration of a dispute or enforce the award of an arbitration already conducted unless "the court is satisfied that neither the formation of the parties' arbitration agreement nor (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." *Id.* (emphasis omitted); 1 Gary B. Born, *International Commercial Arbitration* 782 (3d ed.

2021) ("It is elementary that an international arbitration agreement cannot be recognized or enforced unless it has been validly formed."). If either of these issues is disputed, "'the court' must resolve the disagreement." *Granite Rock*, 561 U.S. at 300; *see also BG Grp. PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014) (discussing the presumption that "courts, not arbitrators," must decide [16]"questions such as 'whether the parties are bound by a given arbitration clause'").

As the Supreme Court noted in *Granite Rock*, 561 U.S. at 299, parties can delegate questions regarding the validity or enforceability of an agreement to an arbitrator. But even when they do so, there must still be an antecedent determination made that the parties have actually formed an agreement to arbitrate. And that particular "threshold question" is "necessarily for 'the court to determine'—such that it cannot be delegated to an arbitrator." *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Liberty Mar. Corp.*, 998 F.3d 449, 457 (D.C. Cir. 202 1) (alterations omitted) (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019)); *see Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1030 n.7 (9th Cir. 2022) (explaining that "contract formation is always an issue for the court, notwithstanding the presence of a delegation clause").

Finally, this Court's approach to determining jurisdiction under the FSIA is consistent with the New York Convention, the ICSID Convention, and the domestic laws implementing them. It is only once a court is satisfied that the FSIA's jurisdictional requirements are met that

the court can proceed to the recognition and enforcement procedures provided in those [17]treaties. That certain arbitrability questions—including those going to the validity or enforceability of an arbitration agreement—may be grounds to refuse to recognize or enforce an arbitral award under the New York Convention, *see* New York Convention art. V(1)(a), does not change the plain language of the FSIA and its threshold requirement that the parties have formed an arbitration agreement. *See Chevron*, 795 F.3d at 205 & n.3 (holding, in the context of a petition to confirm under the New York Convention, that the FSIA's jurisdictional analysis requires a determination that an arbitration agreement exists); *cf. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded."); *K.F.C. v. Snap Inc.*, 29 F.4th 835, 837-38 (7th Cir. 2022) (distinguishing between void and voidable contracts).

Similarly, the district court's threshold jurisdictional inquiry in an action seeking to enforce an arbitral award under the ICSID Convention is not altered by the fact that, under that Convention, substantive review of the award is only available through limited avenues within the ICSID system and not in United States courts. ICSID Convention arts. 53(1), 54(1); *see Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, [18]102, 118 (2d Cir. 2017) (explaining that member states' courts are "not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award"). A district

court is still required to determine its own jurisdiction under the FSIA. And doing so does not constitute improper review of the merits of the arbitral award itself. *See Micula*, 404 F. Supp. 3d at 275-76 (acknowledging the court's "limited" role in enforcing an ICSID award but nonetheless recognizing that it must "satisfy itself that one of the [FSIA] exceptions applies" (quoting *Verlinden*, 461 U.S. at 4994)). Nor does it run afoul of federal law implementing the ICSID Convention, which requires federal courts to give ICSID awards "the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). A party bringing an action against a foreign state in federal district court to enforce a judgment entered by a state court would likewise need to establish that one of the FSIA's exceptions would apply, so requiring that showing in a suit to enforce an ICSID award is fully consistent with Section 1650a(a). *See Mobil Cerro Negro*, 863 F.3d at 115 (explaining that Section 1650a(a) "does not constitute an independent grant of subject matter jurisdiction over a foreign sovereign").

* * * *

APPENDIX X

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23-7031

NEXTERA ENERGY GLOBAL HOLDINGS B.V.
AND NEXTERA ENERGY SPAIN HOLDINGS B.V.,

Appellees,

v.

KINGDOM OF SPAIN,

Appellant,

and

NO. 23-7032

9REN HOLDING S.A.R.L.,

Appellee,

v.

KINGDOM OF SPAIN,

Appellant.

Wednesday, February 28, 2024
Washington, D.C.

Appendix X

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE: CIRCUIT JUDGES PILLARD AND PAN AND SENIOR CIRCUIT JUDGE ROGERS

* * *

[58]MS. PEI: All right. Thank you.

JUDGE PILLARD: And now we'll hear for the United States as amicus, Sharon Swingle from the Department of Justice.

ORAL ARGUMENT OF SHARON SWINGLE, ESQ.

AS AMICUS CURIAE FOR THE
UNITED STATES OF AMERICA

MS. SWINGLE: Thank you, Your Honors, and thank you for the Court's invitation to be heard on the issues presented. I'd like to make just three basic points. First is that in determining whether a court has jurisdiction over a foreign state under the FSIA's arbitration exception, the Court must make an independent determination regarding the existence of an arbitration agreement.

I think that is a legal principle that is clear from this Court's cases, which treat the existence of the—existence of the arbitration agreement as a jurisdictional fact that must be established. In *Belize*, for example, the Court evaluated whether the prime minister lacked authority

to enter into the arbitration agreement; in *Ecuador*, the Court held that a district court erred when it failed to make that determination as part of its jurisdictional analysis; and in *Micula*, the Court reviewed whether Armenia's ascension to the European Union nullified its agreement to arbitrate.

Your Honor asked, Judge Pillard, about whether any [59]of those rules applied. ICSID rules—in *Micula*, of course, that was ICSID arbitration, but I would note that *Belize* also involved arbitration under rules that gave the arbitral tribunal authority to conclusively decide its own jurisdiction and to conclusively decide the existence and validity of the arbitration agreement and yet this Court nevertheless independently reviewed that.

JUDGE PAN: But you do acknowledge there's a difference between deciding if there's an agreement and whether it's a question of arbitrability, because that seems to be more—

MS. SWINGLE: We do, Your Honor, and we understand that to be the distinction the Court drew in *Stileks*, and I think that same distinction flows from the arbitration cases that the Court looks to. In *District No. 1*, for example, the Court recognized that the question of formation was one that could not be delegated to the arbitrator to decide and was necessarily for the court.

JUDGE PAN: So it doesn't seem like your position would be inconsistent with the view that there is an agreement based on the ECT and the—I guess what we

said in *Chevron* and *Stileks*: We have this treaty; we have an award; you know, we have an agreement by the investor under the terms of the treaty to arbitrate. Your position is not inconsistent with that. The agreement is the ECT—

[60]MS. SWINGLE: We do not—

JUDGE PAN: —et cetera.

MS. SWINGLE: —take a position on whether in fact there is a valid agreement here. I do want to take issue with—

JUDGE PILLARD: Under the ECT?

MS. SWINGLE: Yes, but I do want to take issue with one point. In our understanding, the ECT is not itself an agreement to arbitrate, and I think just an example will establish why that's so. For example, I do not think a foreign state that is a party to an—to the ECT could invoke arbitration against the wishes of an investor. We understand the ECT—

JUDGE PAN: Yes. Yes.

MS. SWINGLE: —to be a standing offer to arbitrate.

JUDGE PAN: Correct. It would be in combination with—

MS. SWINGLE: Right.

JUDGE PAN: —the acceptance by the investor, and then—

MS. SWINGLE: That's correct.

JUDGE PAN: —the arbitral award under our case law.

JUDGE PILLARD: And do you have a position on [61]whether the ECT is an agreement for the benefit—an agreement to resolve issues by arbitration for the benefit of others?

MS. SWINGLE: So again, we don't understand the ECT itself to be an agreement to arbitrate, and I—

JUDGE PILLARD: I'm asking the specific question, though, of—the FSIA has its own language?

MS. SWINGLE: Yes, and I want to look to that. It's, again, that is—that description of, which may arise—to enforce an agreement made by the foreign state with or for the benefit of a private party to arbitrate, and again, I think that is envisioning an arbitration agreement. I think that is the jurisdictional fact.

JUDGE PAN: But why isn't it an agreement among the contracting parties to arbitrate—

MS. SWINGLE: Because I think—

JUDGE PAN: —the benefit of—

MS. SWINGLE: —in some instances you can have third-party enforcement of an arbitration agreement. A third-party beneficiary of the arbitration agreement might—

JUDGE PILLARD: And why isn't that what we have here?

MS. SWINGLE: So again, we're not taking a position on the bottom line of whether there is in fact an [62]agreement to arbitrate here.

JUDGE ROGERS: So could I just clarify one thing in my own mind? When the United States, in its first point, that at least as to the FSIA, the district court, faced with an enforcement petition, must make an independent determination that there is an arbitration agreement, by that I assume that the United States is saying it's not enough for the district court to defer to an EU arbitrator's conclusion?

MS. SWINGLE: That is absolutely correct, Your Honor. We think the Court needs to make its own independent determination.

JUDGE ROGERS: Does that mean in the nature of a summary judgment proceeding, potentially, or maybe a trial?

MS. SWINGLE: If there are disputed jurisdictional facts, potentially, yes. You know, I think generally, it would be our view that this would likely be legal issues to be decided—

JUDGE ROGERS: Yes, I understand, but I just want to understand where we're going here, potentially. Depending on the evidence, it may not be possible to resolve this matter simply on a procedural Rule 56 proceeding.

MS. SWINGLE: And that's possible, Your Honor, as is typically the case in FSIA cases, if there are disputed questions of fact that are necessary to be resolved to [63] address the question of whether a particular exception to foreign sovereign immunity applies.

JUDGE ROGERS: So do you know—and there's no reason you should necessarily—whether or not throughout the world, when a party has an award and seeks its enforcement, there are independent determinations as to whether or not that party is properly before the Court and there is no deference as to whether or not the agreement of which it is seeking exists?

MS. SWINGLE: So I do not know, Your Honor, but I think that is unsurprising, and I would just—to return to the ICSID Convention, I think it's clear that—the ICSID Convention sets out a framework for arbitration, but it is not an agreement among states to waive their sovereign immunity. That's clear from the Convention itself, which references sovereign immunity only to make explicit that it is not abrogated by the Convention, and it's clear from Article 54, which provides that a state party, a state party with a federal constitutional structure like ours, agrees to enforce an arbitration agreement as if it were a final judgment of the courts of a constituent state. So under U.S.

law that requires that there be a basis for subject-matter jurisdiction under the FSIA.

And I would note that the Convention was implemented domestically through 22 U.S.C. 1605(a), which [64]doesn't itself abrogate sovereign immunity and doesn't provide an independent basis for jurisdiction over a foreign state. That's governed solely by the FSIA.

JUDGE PILLARD: But there's an argument, if that's—that immunity is not abrogated with respect to execution, and the investors' counsel points out that the limits of that abrogation imply that the immunity may well be abrogated—in their view, is abrogated—with respect to, you know, recognition and enforcement.

MS. SWINGLE: So I think both textually that's a dramatic overreading of the Convention, to take by negative implication that the parties meant to waive sovereign immunity. I—

JUDGE PILLARD: Well, it certainly doesn't expressly preserve it except with respect to execution.

MS. SWINGLE: Well, I don't think it's consistent with Article 54 either because the obligation to enforce an arbitration award as if it were a final judgment of the courts of a constituent state envision enforcement under domestic law, which in this case incorporates, you know, whatever you need to do to show that sovereign immunity doesn't apply.

And I would also just point to the legislative history of 1605(a), which was the implementing legislation. Obviously, the legislative history strongly suggests that it [65]was understood that the Convention was not waiving sovereign immunity. If you take a look at the Second Circuit's decision in *Mobil Cerro Negro*, it outlines that legislative history, but I also think it's not the kind of clear statement we would expect to constitute a waiver of sovereign immunity from suit. Certainly, that would not be sufficient to waive U.S. sovereign immunity.

JUDGE PILLARD: Going back to the arbitration exception, what about ICSID and the full faith and credit clause—you say in your brief that dismissing for lack of jurisdiction would not run afoul of the ICSID full faith and credit obligation, but is that—I mean, doesn't the full faith and credit encompass or effectuate issue preclusion, claim preclusion? If there's a jurisdictional issue that was decided by—

MS. SWINGLE: So—

JUDGE PILLARD: —the ICSID panel—

MS. SWINGLE: —I think the Court needs to have jurisdiction in order to exercise any power over a foreign state, right? The subject-matter jurisdiction inquiry under the FSIA is a threshold question of this Court's authority, and again, under ICSID, Article 54, you know, our obligation is to enforce the arbitral award in the same way that we would enforce a judgment of a constituent state, and that, too, under federal law, would

require finding a plenary [66]basis for jurisdiction under the FSIA at the threshold.

Now, on the merits, certainly the Court would not be reconsidering, assuming it had jurisdiction to enforce, would not be reconsidering the merits of the arbitral award, but that is a different inquiry, I think, from the subject-matter jurisdiction inquiry.

JUDGE PILLARD: So if an investor in Switzerland decided we are going to enter into an arbitration agreement and we are going to give the arbitrators the authority to decide whether we have agreed—whether we have an arbitration agreement and then to decide under it and the arbitrators say, yes, you have an agreement and, yes, you've decided under it, we as a U.S. court, enforcing that against Switzerland, could not credit the conclusion in that award as to the existence of an agreement?

MS. SWINGLE: On the merits, certainly—

JUDGE PILLARD: But not as a conceptual—

MS. SWINGLE: —but as conferring subject-matter jurisdiction on this Court, no, and I think that follows necessarily from this Court's prior decisions. In *Belize* itself, as I mentioned, arbitration took place under rules that gave the jurisdictional—or it gave the arbitral panel the authority to decide, conclusively, disputes about the existence and validity of the agreement.

JUDGE PILLARD: And what about *Chevron* and [67]*Stileks*?

MS. SWINGLE: Well, I think there's this basic distinction that we've drawn between the existence of the agreement and questions about arbitrability, and we understand *Chevron* and *Stileks* to be based on that distinction.

JUDGE PILLARD: And you're finding the existence of agreement based on what?

MS. SWINGLE: Well, I think independently examining—for example, in *Belize*, you know, the Court looked to whether the governmental official in fact had authority to enter into a binding agreement to arbitrate.

JUDGE PILLARD: That's *Belize*, but *Chevron*, *Stileks*, I mean, they're viewing—they're—where do you see them determining that there is an agreement to arbitrate?

MS. SWINGLE: So in *Chevron* the Court held that the district court had in fact determined that there was an agreement to arbitrate, right, and—

JUDGE PAN: Based on the treaty—

MS. SWINGLE: Right.

JUDGE PAN: —that offered arbitration—

MS. SWINGLE: Correct.

JUDGE PAN: —acceptance by the—

MS. SWINGLE: The court—

[68]JUDGE PAN: —Minister.

MS. SWINGLE: —the district court had not understood itself to be making that determination as part of the jurisdictional inquiry, but it had in fact determined that there was a valid agreement, and in *Stileks* the Court simply decided that it was a question of the scope of the arbitration agreement, it wasn't a dispute about the existence of the arbitration agreement itself.

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