IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Yukos Capital Limited (f/k/a Yukos Capital S.à.r.l.), **Petitioner,** **v.** **The Russian Federation,** **Respondent.**	**CIVIL ACTION** **No. 1:22-cv-00798 (CJN)**

RESPONDENT RUSSIAN FEDERATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE PETITION TO CONFIRM THE ARBITRATION AWARD FOR LACK OF SUBJECT MATTER AND PERSONAL JURISIDICTION

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PRELIMINARY STATEMENT

Pursuant to Fed.R.Civ.P. 12(b)(1), (2), (4), & (5), the Russian Federation ("RF") moves to dismiss the Petition of Yukos Capital Limited ("YC") seeking to confirm an arbitration award of $2.630 billion, €1.557 million in costs, $20.552 million in legal fees, and interest, under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§1602-1611, and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention"), implemented under the Federal Arbitration Act, 9 U.S.C. §§201-208.[1]

Yukos Oil Corporation ("Yukos"), controlled by Russian Oligarchs, used illegal tax schemes, as determined by both Russian and international courts, to divert profits from the sale of its Russian oil to offshore subsidiaries. After the RF began tax and criminal investigations, the Oligarchs created YC's predecessor in Luxembourg in early 2003, hoping to engineer an "insurance policy" under the Energy Charter Treaty ("ECT"), Ex. 1, to allow the Oligarchs to double recover Yukos' offshore funds. The Oligarchs had a BVI subsidiary funnel over $2.7 billion to YC through a non-recourse December 2003 "loan." YC then "lent" the same funds to Yukos—at a miniscule net interest rate of 0.0625%—in back-to-back, non-recourse transactions which enabled Yukos to pay a multi-billion dollar giga-dividend to the Oligarchs. This, along with a share "buy back," removed more than $5 billion from Yukos in late 2003-2004 when the Oligarchs were certain to lose control of Yukos.

Yukos, after failing to pay its tax liability, was placed into Russian bankruptcy. Eventually, YC filed an ECT arbitration in Switzerland, claiming its unpaid loan to Yukos was expropriated, even though it was merely an inter-company transaction used to pay the giga-dividend. Thereafter, the Oligarchs became YC's beneficial owners. The arbitration resulted in the Interim Award, Ex.

[1] Alternatively, the RF has defenses under the NY Convention, which it is not required to raise unless its jurisdictional objections are denied. The RF reserves all rights to assert these defenses.

2, and Final Award, Ex. 4.

FSIA provides the sole basis for obtaining jurisdiction over a foreign sovereign. It begins with the presumption of immunity, which the plaintiff must overcome by producing evidence that an exception applies. The sovereign may then demonstrate by applicable law and a preponderance of the evidence that there is no exception. The Court exercises *de novo* review of the law and evidence, which UNCITRAL Rules do not change. If no exception applies, the Court must dismiss for lack of jurisdiction. The Court should dismiss, with leave to re-serve if service was improper, and otherwise dismiss for lack of jurisdiction, with prejudice, for the following reasons:

(I) The FSIA §1605(a)(6) arbitration exception does not apply to YC's Awards because, *inter alia*: (1) without the RF's ratification, ECT Article 26 arbitration did not apply provisionally under ECT Article 45(1) because it was "inconsistent" with Russian laws; (2) YC was not an eligible ECT investor; and (3) YC's loans were not an eligible ECT investment.

(**II**) The Swiss Supreme Court's decision denying the RF's set-aside petition has no preclusive effect on the arbitration exception.

(III) The FSIA §1605(a)(1) waiver exception is inapplicable because the RF did not waive immunity merely by signing the NY Convention.

(IV) The decision in *Hulley Enterprises Ltd. v. Russian Federation*, No. 1:14-cv-01996-BAH (D.D.C. November 17, 2023), which YC will likely raise, is not binding and distinguishable.

(V) The RF was not properly served under FSIA §1608(c)(4) which does not permit service on embassies in violation of customary international law, and, thus justified the RF's rejection.[2]

[2] While the RF commends the Court's efforts in resolving the Rule 55 Motion, it must regrettably object to service contrary to the inviolability of its embassy. The 6/16/2023 Stipulation, ECF 56, ¶3, and statements by RF counsel at the 6/5/2023 hearing, all contemplated service on the RF's Ministry of Foreign Affairs, not its embassy, as required by applicable treaties and customary international law. *See* H.T., Ex. 120, 5.10-19; 6.9-7.4; 8.18-9.5.

RELEVANT BACKGROUND[3]

A. Yukos And Its Oligarch Owners

Yukos was a Russian oil company beneficially owned and controlled by Russian Oligarch nationals Khodorkovsky, Nevzlin, Lebedev, Brudno, Dubov, and Shakhnovsky ("Oligarchs"). *See* Misamore WS, Ex. 16, ¶¶5, 13; Yukos Structure Chart, Ex. A. *See also* Final Award, Ex. 4, ¶803. Misamore was the CFO and Deputy Chairman of the Board. *See* Misamore WS, Ex. 10, 3. He considered "the CEO, Mr. Khodorkovsky," his "boss." Misamore WS, Ex. 16, ¶¶4-6.

B. The "Yukos Laundromat" Massive Tax-Fraud Scheme

From 1999, Yukos engaged in an elaborate tax-evasion scheme, the "Yukos Laundromat," which operated as follows:

Tax Evasion: The Oligarchs controlled dozens of shell companies in the RF's Low Tax Regions ("LTRs"), which had no operations and, thus, were engaged in fraud to avoid paying applicable taxes. Their profits were transferred to Cypriot companies and then to offshore shell companies and then to Brittany Assets Limited (BVI) ("Brittany"), controlled by the Oligarchs. *See* Yukos Laundromat Chart, Ex. B.

Independent Court Determination of Tax Fraud: In 2012, the European Court of Human Rights ("ECHR") confirmed how the Yukos Laundromat operated:

> [Yukos] 'tax optimization techniques' applied with slight variations throughout 2000-2003 consisted of switching the tax burden from [Yukos] and its production and service units to letter-box companies in domestic tax havens in Russia. These companies, with no assets, employees or operations of their own, … were set up and run by [Yukos] itself. In essence, ***[its] oil-producing subsidiaries sold the extracted oil to the letter-box companies at a fraction of the market price. The letter-box companies, acting in cascade, then sold the oil either abroad, this time at market price or to [Yukos] refineries and subsequently rebought it at a reduced price and re-sold it at the market price. Thus, the letter-box companies accumulated most of [Yukos'] profits. … The arrangement was obviously***

[3] Unless otherwise stated, all emphases are added, and all citations, quotations marks, footnotes, ellipses and brackets are omitted.

> ***aimed at evading … the [RF] Tax Code …*** [T]he Court finds that there existed a sufficiently clear legal basis for finding [Yukos] liable in the Tax Assessments 2000-2003.

Yukos v. Russia, ECHR (March 8, 2012), Ex. 113, ¶¶591-99. In *OOO Promneftstroy, et al. v. Yukos Finance B.V., et al.,* ECLI:NL:GHAMS: 2017: 1695 (May 9, 2017), Ex. 96, the Amsterdam Court of Appeal agreed, stating: "there has been large-scale and long-term tax evasion in respect of profit taxation using legal entities without actual activities … to facilitate and conceal the conduct of Yukos." *Id*., 24, ¶4.27.

C. Yukos Capital, S.à.r.l ("YC") Was Formed in Luxembourg in 2003

Yukos created YC for "intra-group lending." Misamore WS, Ex. 12, ¶8. It was a "wholly owned subsidiary of Yukos." *See* YC Mgt. Agreement, Ex. 46; Arb. Notice, Ex. 6, ¶10. In 2016, YC was reorganized as a BVI company. *See* Final Award, Ex. 4, ¶¶97, 98, 803.[4]

D. Yukos Offshore Subsidiaries Made Back-To-Back Loans to YC to Repatriate Cash to Pay the Oligarchs the Giga-Dividend

Yukos "deci[ded] … to make a loan via … Brittany to Yukos Capital, Yukos Capital to Yukos." Misamore HT, Ex. 14, 24.2-6, 38.4-10. "[D]ecisions to execute contracts and make payments were made solely in Moscow, rather than by the companies' nominal directors." Yukos employee Merinson WS, Ex. 31, 4-5.

1. Yukos Eliminated "All Risks" to YC Under the 2003 Loan

In December 2003, Yukos structured an unsecured $2.7 billion loan, at 9% interest, between YC and itself. December 2, 2003 loan ("2003 Loan"), Ex. 9.[5] YC simultaneously took an unsecured $2.7 billion loan, at 8.9375% interest, from Brittany, with Yukos as "Sub-Borrower,"

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[4] "YC" describes both the BVI entity and prior Luxembourg entity unless distinguished.

[5] In August 2004, YC entered into a $335 million back-to-back loan scheme with another Yukos subsidiary and Yukos. However, no damages were awarded because the loan was made when it was "reasonably foreseeable" that it would not be repaid due to the tax, criminal, and other proceedings against Yukos. *See* Final Award, Ex. 4, ¶¶683-85, 697-99.

and Brittany bearing ***"all risks associated with Sub-Lending,"*** including the failure by Yukos to repay its loan. 2003 Brittany-YC Loan, Ex. 8, pp. 1, 3.

2. The 2003 Loan Was Not Made on Commercial Terms

For the 2003 Loan, YC's "sole source of funds was entities owned or controlled by Yukos." Misamore HT, Ex. 14 at 49.18-21. YC's role in the back-to-back loan scheme was to "minimise profit … to minimise tax in Luxembourg." Misamore HT, Ex. 14, 50.5-24. The 0.0625% interest difference between the 2003 Loan (9%) and the Brittany-YC Loan (8.9375%) was merely a "safe haven rate" negotiated with Luxembourg tax authorities. *Id.*, 40.1-15; 42.2-13; 84.10-21.

3. YC Was a Mere Conduit With No Resources to Make the 2003 Loan

"[O]il and refined products [Yukos] produced in Russia … [were sold] through [Yukos's] trading company networks to export companies." Misamore HT, Ex. 17, 479.4-17. ***"[T]hose profits were retained in the international sphere … [w]ithin the Yukos Group*** … [and were] the source of the funds used for the December 2003 Loan to [YC]." *Id.*, 478.7-480.8. *See* Final Award, ¶113, Ex. 4. "Brittany … used them … for the intra-group funding via [YC] … ***no intention existed for these funds to somehow leave the group***." Wilson WS, Ex. 29, ¶71.

4. The Purpose of the 2003 Loan Was to Shed Cash to the Oligarchs

In 2003, Yukos had "$7 to $8 billion [in] cash … and virtually no debt." Misamore HT, Ex. 17, 506, 23-24. After Khodorkovsky's arrest (*see* E.2 *infra*), from November 20-26, Yukos funneled $850 million from Brittany to YC, and on November 28, Yukos approved a "Giga-Dividend" to "shed" cash from Yukos. *Id.*, 519, 1-6; Yukos EGMS Minutes, Ex. 64. From December 3-8, YC "lent" $1.165 billion to Yukos. *See* Yukos Structure Chart, Ex. A. From December 8-18, Yukos transferred $1.029 billion to Hulley Enterprises Limited, which transferred that amount to Yukos Universal Limited ("YUL"), all controlled by the Oligarchs. *See* YUL 2003 Annual Report, Ex. 41; Haberman Report (July 6, 2018), Ex.33, ¶¶3.5.2-3.5.4, Appx. 3.2a, 3.2c.

5. Yukos Did Not Report the 2003 Loan on Its Financial Statements or Bankruptcy Filings

Yukos never treated the 2003 Loan as a real loan. "Yukos' [published] consolidated US GAAP financial statements," Misamore WS, Ex. 10, p. 24, which did not reflect the 2003 Loan as a liability because "[it was] eliminated in consolidation … because they are within the group … ***they completely offset one another***." Misamore HT, Ex. 14, 30.10-25. On December 14, 2004, Yukos filed a Chapter 11 bankruptcy petition, signed by Misamore as CFO. *See* Bankruptcy Petition, Ex. 38. Misamore swore under penalty of perjury that ***YC did not hold an unsecured claim against Yukos***. *See* Lists of Creditors, Ex. 39. The petition was later dismissed. *See In re Yukos Oil Co.*, 321 B.R. 396 (S.D. Tex. Feb. 24, 2005).

E. Tax Assessments, Criminal Investigations and Oligarch Arrests Establish That the Dispute With the RF Was Reasonably Foreseeable Prior to the 2003 Loan

1. The Oligarchs Obstruct Early Regional Investigations

By 1999, Russian regional authorities began tax and criminal investigations of the Yukos Laundromat. By 2000, regional audits found Yukos LTR shells received at least 2.5 billion rubles ($92.5 million) in illegal tax benefits. *See* Timeline Chart, 1, Ex. D (citing sources).

The Oligarchs were concerned that federal authorities would "connect the dots" from regional investigations and target Yukos itself. [6] They obstructed investigations by reorganizing and relocating the LTR shells. *Id*. (citing Gololobov WS, Ex. 22, ¶¶22-26). They also bribed local officials, *see* Anilionis WS, Ex. 32, ¶¶19, 20; falsely denied affiliation with LTR entities, *see* Miller Interrogation, Ex. 23, 3, 7-8; and destroyed evidence, *see* 3/15/2002 Email, Ex. 44.

[6] "[L]egal consultants at Yukos and retained counsel had always advised the Oligarchs that [their] tax-optimization schemes … created obvious legal risks…." Gololobov Dec. Ex. 21, ¶74. *See also* 11/23/2001 Email, Ex. 43 (identifying as "risks" inquiries at the federal level and cross-audits); 2002 Confidential Memorandum to Khodorkovsky, Ex. 45 ("materials submitted to the SEC and made available to the public must contain the names of [LTR] entities and indicate their affiliation with [Yukos]. The Russian tax authorities could use such information to contest our approach to a number of deals and hence result in significant tax claims against [Yukos].").

Nonetheless, from September 2001 to April 2002, new audits and criminal investigations of at least 19 Yukos LTR shells disclosed "gross tax evasion violations" of up to 12 billion rubles ($450 million). *See* Timeline Chart, 1, Ex. D (citing sources).[7] In late 2002, regional authorities audited Yukos itself. *Id.*

2. 2003 Federal Investigation Targets Yukos and the Oligarchs

By June 2003, federal authorities learned of Yukos' LTR scheme. *See* Gololobov WS, Ex. 22, ¶¶76-78. The existential threat of a federal investigation into Yukos snowballed.

June 2003: As Yukos CFO Misamore admitted, "***The campaign against Yukos began in earnest in the summer of 2003*** with the arrest of key Yukos executives … " Misamore WS, Ex. 11, ¶30. "[I]t is difficult to fully convey the extent of those threats and the ***extreme pressure*** [on Yukos]. The potential consequences [included] ***Yukos' financial ruin***…" *Id.* ¶33.[8]

June-July – Searches, arrests, seizures: Yukos Security Chief Pichugin was arrested in June, Oligarch Lebedev was arrested on July 2. *See* Timeline Chart, 2, Ex. D (citing sources). On July 4, the General Prosecutor's Office ("GPO") questioned Oligarchs Khodorkovsky and Nevzlin and searched Yukos' share registrar. *Id*. On July 11, GPO conducted a massive 17-hour search of Yukos' offices, seizing evidence. *Id*.

July-August – Yukos' and the Oligarchs' Reactions: On July 7, Yukos announced a share buyback worth $3.7 billion which would transfer cash outside of Yukos' control so that Russian authorities could not seize it. *Id*. Between July and August, Oligarchs Brudno and Nevzlin fled the country, while Khodorkovsky stayed after allegedly being warned to leave by high-level officials. *Id*., 2-3. The share buyback was completed in September. *Id*., 3.

[7] Yukos' former attorney Gololobov believes the Oligarchs thwarted the investigations through "corrupt arrangements." Gololobov WS, Ex. 22, ¶¶36-39. *See also* Anilionis WS, Ex. 32, ¶¶19, 20.

[8] *See also* "Yukos Review: Special Issue 2003" (published by Yukos in November 2003), Ex. 56.

Fall – Further searches, arrests, and seizure of shares: By October, GPO searched Lebedev's criminal defense attorney's office and the Oligarchs' homes. *Id*. Oligarch Shakhnovsky was detained on October 17, and Khodorkovsky was arrested on October 25.[9] *Id*., 3-4. On October 27, President Putin remarked that there would be "no negotiations" concerning the GPO's actions. *Id*., 4. On the same day, Oligarch Dubov fled the country. *Id*. On October 30, GPO seized Yukos shares held by Hulley and YUL, owned by the Oligarchs. *Id*.

November-December – Giga-Dividend and 2003 Loan: On October 28, Yukos Directors approved a $2 billion giga-dividend to Yukos shareholders owned by the Oligarchs. *Id*. On November 28, Yukos shareholders approved the giga-dividend, and Yukos Directors approved the 2003 Loan to fund it. *Id*., 4-5. The 2003 Loan was executed on December 2, and Yukos paid $1 billion of the giga-dividend by December 8, when the Tax Ministry started re-auditing Yukos. *Id*., 5. On December 29, the audit was concluded, resulting in additional tax liability of 98.5 billion rubles ($3.37 billion) for year 2000. *Id*.

2004 Events: In January-June 2004, YC advanced Yukos an additional $1.5 billion under the 2003 Loan, while the authorities' actions escalated. *Id*., 6. On April 14, the Tax Ministry imposed tax liability of $3.48 billion. *Id*. On April 15, a Moscow court froze Yukos' assets, and on April 16, bailiffs commenced enforcement. *Id.* On May 26, the court allowed collection of $3.48 billion from Yukos. *Id*. On the following day, Yukos announced it was facing bankruptcy "before the end of 2004." Yukos 5/27/2004 Statement, Ex. 49.

Khodorkovsky's Own Words: After Khodorkovsky was convicted and served time, he published his own book and contributed to another. His own words establish that the threat to

[9] According to Yukos' former attorney, "Following Khodorkovsky's arrest … an atmosphere of fear and uncertainty became pervasive at Yukos." Mkhitaryan WS, Ex. 30, ¶16.

Yukos' survival was known well before the time of his arrest. *See* Khodorkovsky Chart, Ex. E.[10]

In sum, the risk that the 2003 Loan would not be repaid due to the dispute with the RF was foreseen in December 2003. "Yukos' financial ruin" loomed. Misamore WS, Ex. 11, ¶33.

F. YC Was Beneficially Owned and Controlled By Russian Nationals

When YC was incorporated in January 2003, its sole shareholder was Yukos Finance BV, owned by Yukos. Final Award, Ex. 4, ¶97. In 2005, Yukos Finance transferred ownership of YC to its subsidiary, Yukos International UK BV, and its shares in Yukos International were delivered to a Dutch foundation, *Stichting Administratiekantoor Yukos International* ("Stichting"), controlled by Yukos officers Misamore, Godfrey, and Theede. *Id*. YC became a BVI entity in 2016. *Id*. ¶98. The Oligarchs always remained the ultimate owners of YC. *Id.* ¶803.

G. The Swiss Arbitration Decisions

In 2008, YC demanded arbitration under the ECT, but delayed five years before filing a claim. *See* YC 8/28/2008 Demand, Ex. 37; Notice of Arbitration, Ex. 6. In 2013, arbitration began in Switzerland under the ECT and the 1976 UNCITRAL Rules. In 2017, the Tribunal issued an "Interim Award," finding jurisdiction. Ex. 2, ¶¶18, 44, 567(5). Arbitrator Stern dissented because RF never ratified the ECT. Stern Dissent, Ex. 3, ¶¶46-61, 71, 86-87. On July 23, 2021, the Tribunal issued its "Final Award" for YC. Ex. 4, ¶898.

H. The Swiss Supreme Court Decision Denying the RF Annulment Application

On September 14, 2021, the RF applied to the Swiss Federal Supreme Court to annul the Awards. *See* Petition, ¶38, ECF 1. In denying relief, the court exercised *de novo* review of the Tribunal finding jurisdiction. *See* Swiss Decision, Ex. 84, §6.4.1 ("Asked to examine the objection of lack

[10] *See*, *e.g*, Mikhail Khodorkovsky, *The Russia Conundrum*, 99 (2022), Ex. 82: "An unmistakable indication of [the authorities'] intentions came in June 2003, when a detachment of special forces stormed into the office of Yukos's head of internal security, Alexei Pichugin… ***His arrest was a signal to us that Yukos was in their sights***."

of jurisdiction, the Federal Court freely examines the questions of law, including preliminary questions, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal.")

ARGUMENT

FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 439 (1989); *see also Creighton Ltd. v. Qatar*, 181 F.3d 118, 121 (D.C. Cir. 1999). The "FSIA begins with a presumption of immunity, which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies[.]" *Bell Helicopter v. Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). "Unless an enumerated exception applies, courts of this country lack jurisdiction over claims against a foreign nation." *Belize Soc. v. Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015). FSIA guarantees the "resolution of an immunity assertion before the sovereign can be compelled to defend" under the FAA (NY Convention). *Process & Indus. Devs. v. Fed. Republic of Nig.*, 962 F.3d 576, 585 (D.C. Cir. 2020). Neither exception asserted by YC applies.

I. FSIA'S ARBITRATION EXCEPTION DOES NOT APPLY UNDER THE ECT

A. This Court Reviews *De Novo* FSIA Jurisdictional Defenses That the RF Did Not Agree to Arbitrate This Dispute Based on the Law and Evidence

Under the FSIA arbitration exception,[11] the Court makes "two jurisdictional inquiries—namely, [i] whether the award was made pursuant to an appropriate arbitration agreement with a foreign state and [ii] whether the award is or may be governed by a relevant recognition treaty." *Chevron v. Ecuador*, 949 F.Supp.2d 57, 63 (D.D.C. 2013), *aff'd*, 795 F.3d 200 (D.C. Cir. 2015).

[11] The "arbitration exception," 28 U.S.C. § 1605, provides:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States . . . in any case . . . (6) . . . to confirm an award made pursuant to such ***an agreement to arbitrate***, if . . . (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 . . . .

The petitioner "bears the initial burden of supporting its claim that the FSIA exception applies," and then "the burden shift[s] to [the respondent sovereign] to demonstrate by a preponderance of the evidence that the [treaty] and the notice to arbitrate did not constitute a valid arbitration agreement between the parties." *Chevron*, 795 F.3d at 204-205. "The jurisdictional task" before this Court is "to determine whether [RF] had sufficiently rebutted the presumption that the [treaty] and [petitioner's] notice of arbitration constituted an agreement to arbitrate." *Id*. at 205.

An "investment treaty" (like the ECT) is not a typical agreement to arbitrate between disputing parties, but instead constitutes a state's "standing offer to arbitrate," which the claimant may "accept" by submitting a notice of arbitration. *BG Group*, 572 U.S. at 42-46. Whether specific offerees fall within the "standing offer to all potential [eligible] investors" to arbitrate under a foreign-investment treaty is a jurisdictional question under FSIA, as it determines whether an arbitration agreement was ***ever*** formed between the parties. *Chevron,* 795 F.3d at 206. Importantly, in all contexts, not just under FSIA, arbitrability is "subject to independent review by the courts."[12] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995). Precedent make clear that this Court's task is to determine, on *de novo* review, whether there is clear and unmistakable evidence of an agreement to arbitrate between YC and RF.

First, "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," are questions for resolution by "courts, not arbitrators." *BG Group*, 572 U.S. at 34; *see also id*. at 32-

[12] "Arbitrability" is a term with many meanings and may include, for example, (1) "whether the parties are ***bound*** by a given arbitration clause," that is, disputes over "formation of the parties' arbitration agreement"; to (2) whether an arbitration clause in a concededly binding contract ***applies*** to a particular type of controversy"; and (3) whether "particular preconditions for the use of arbitration," such as time limits, notice, laches, estoppel, waiver, etc., have ***occurred***. *BG Group*, 572 U.S. at 34-45.

36 (presumptively, arbitrability issues are reviewed *de novo*). FSIA "requires the District Court to satisfy itself," *i.e.*, conduct *de novo* review, as to the existence of an agreement to arbitrate—so that for a court to "eschew[] making this determination as part of its jurisdictional analysis" constitutes "error." *Chevron*, 795 F.3d at 205 n.3.[13] "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is '***clea[r] and unmistakabl[e]'*** evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). *See also Granite Rock Co. v. Int'l Bhd.*, 561 U.S. 287, 297 (2010) ("[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate ***that dispute.***")

Second, although *Chevron* initially concluded that the dispute over whether Chevron made an eligible investment under the BIT at issue fell under the FAA, it expressly addressed the issue *de novo* under FSIA. 795 F.3d at 204-27. *Chevron* held that FSIA was satisfied because "Ecuador failed to demonstrate by a preponderance of the evidence that Chevron's lawsuits were not protected by the BIT." *Id.* at 206. *Al-Waleed v. Saudi Arabian Oil Co*., 19 F.4th 794, 802 (5th Cir. 2021), similarly analyzing *de novo* whether the parties were bound by an arbitration agreement as a FSIA jurisdictional question, rejected jurisdiction under FSIA "[b]ecause there exist[ed] no agreement ***among the parties*** to arbitrate[.]" *Id.*

Third, in past briefing, YC leaned heavily on snippets lifted from *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021). The *Stileks* panel did not (and indeed could

[13] *See also First Inv. Corp. v. Fujan Mawei Shipbuilding, Inc.,* 703 F.3d 742, 756 (5th Cir. 2012) (dismissing under § 1605(a)(6) because China was not bound by the arbitration agreement); *Al-Qarqani v. Chevron Corp*., 8 F.4th 1018, 1026 (9th Cir. 2021) (holding petitioners had no "right to enforce" the arbitration clause, and, hence, award, because they were not proper parties to the alleged arbitration agreement). To hold that a petitioner can meet its § 1605(a)(6) burden to demonstrate subject-matter jurisdiction merely by alleging the ***existence*** of an arbitration agreement and award would countermand *Chevron's* "burden-shifting" analysis. 795 F.3d at 204.

not, given circuit precedent) reverse *Chevron*'s holding that an "arbitrability" challenge disputing the ***existence*** of an arbitration agreement, including whether petitioner was a "potential . . . investor," is jurisdictional under FSIA § 1605(a)(6). Indeed, unlike the RF here, in *Stileks,* Moldova ***conceded*** the existence of the arbitration agreement—*i.e.*, the underlying offer and acceptance. *Id.* at 874-76, 878 & n.3.[14] This Court starts with the presumption that it must evaluate issues all issues relating to arbitrability *de novo*, absent clear and unmistakable evidence that the parties agreed to have those issues decided exclusively by the arbitral panel.

B. UNCITRAL Rules Do Not Change FSIA *De Novo* Jurisdictional Review

YC has contended that the RF is not entitled to *de novo* review of its arguments against jurisdiction because the parties agreed to apply UNCITRAL Rules under the ECT. YC must meet a heavy burden of establishing UNCITRAL Rules contain "clear and unmistakable" language that ***must*** be construed in all situations as conferring ***exclusive*** jurisdiction on arbitrators to determine ***all*** issues relating to arbitrability. This is contrary to the leading decisions and, recently, *Blasket Renewable Investments, LLC v. Kingdom of Spain*, 2023 U.S. Dist. LEXIS 54502 (D.D.C. March 29, 2023).

1. *Chevron* and *Blasket* Confirm That UNCITRAL Does Not Preclude *De Novo* Review of an Agreement to Arbitrate

Article 21.1 of the relevant 1976 UNCITRAL Rules reads:

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[14] *Stileks'* statement that "arbitrability of a dispute is not a jurisdictional question under the FSIA," 985 F.3d at 878, clearly indicated that only ***some*** of the ***many*** issues which fall within arbitrability need not be regarded as jurisdictional, particularly when there is an absence of evidence indicating that the parties did ***not*** expect such issues to be reviewable *de novo* by courts. If construed more broadly, this statement is dicta which conflicts with *Chevron* and must be disregarded. *E.g Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005) ("this Court is bound to follow circuit precedent until it is overruled either by an *en banc* court or the Supreme Court."). It would also conflict with the presumption "that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability.'" *BG Group*, 572 U.S. at 34. *See also First Options*, 514 U.S. at 945 (elaborating on why courts "hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power").

> The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence of validity of the arbitration clause or of the separate arbitration agreement.

This language, known as a "competence-competence" clause in international arbitration, merely authorizes arbitrators to rule on ***objections*** to their jurisdiction, and plainly leaves room for courts to conclude in a particular case that the parties did ***not*** intend for the arbitrators to have ***exclusive*** authority over ***all*** issues of arbitrability—including whether an agreement to arbitrate was made in the first place. This open-ended UNCITRAL language contrasts sharply with examples of "clear and unmistakable" language excluding any role for the courts. *See, e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (Parties provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement.").[15]

In the past, YC relied on *Chevron* and *Stileks*. But *Chevron* recognized that FSIA "requires the District Court to satisfy itself"—*i.e.*, conduct *de novo* review, that the parties agreed to arbitrate—so that for a court to "eschew[] making this determination as part of [its] jurisdictional analysis" constitutes "error." *Chevron*, 795 F.3d at 205 n.3. *Chevron* and *Stileks* only stand for the limited proposition that in the ***absence*** of a factual or legal record demonstrating otherwise, courts apply a default presumption that resort to UNCITRAL Rules conveys on arbitrators exclusive

[15] *See also, e.g., China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 287 n.14 (3d Cir. 2003) (noting LCIA Art. 23.4 bars court relief from jurisdictional rulings based on language mandating that "the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority"); *Telenor Mobile Communs. v. Storm LLC*, 524 F. Supp. 2d 332, 351 (S.D.N.Y. 2007) (contrasting AAA rules, which "provide arbitrators with general, unrestricted authority to 'rule on their jurisdiction'" with "the UNCITRAL language, [which] standing alone, is insufficient to strip" a party objecting to arbitration of its ability to present evidence "on the issue of arbitrability").

authority to resolve ***some*** matters relating to arbitrability, such as the ***scope*** of the arbitration, *i.e.*, whether a particular investment was subject to arbitration. Moreover, neither *Chevron* (applying U.S. law because the arbitration took place here) nor *Stileks* focused on the international legal principles applicable in interpreting treaties.

Most recently, in *Blasket*, the Court held that under FSIA's arbitration exception, Spain did not agree to arbitrate under the ECT. In concluding that UNCITRAL Rules did not prevent engaging in *de novo* review of this issue, *Blasket* rejected deference to an arbitral tribunal on a threshold matter such as whether "the parties were incapable of entering into an agreement to arbitrate anything at all," as that would "effectively assume[] away the antecedent question of whether the parties could have agreed to do so in the first instance." 2023 U.S. Dist. LEXIS 54502 at *15. As *Blasket* recognized, interpretation of the ECT is governed by ***international law***. Relevant international law compels the conclusion that incorporation of UNCITRAL Rules is not "clear and unmistakable" evidence of exclusive delegation of arbitrability in ***this*** ECT arbitration.

2. Applicable Law and the Context of the ECT Arbitration Demonstrate YC Cannot Establish There is No "Clear and Unmistakable" Exclusive Delegation to Determine Arbitrability to the Arbitrators

The ECT is an international treaty governed by international law. *See* ECT Article 27(3)(g) ("The tribunal shall decide the dispute in accordance with this Treaty and applicable rules and principles of international law"). This Court must determine the meaning of the ECT's incorporation of UNCITRAL Rules by applying the interpretive principles set forth in the Vienna Convention on the Law of Treaties, which U.S. courts apply "as an authoritative codification of customary international law." *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000). *E.g., United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013) (citing Vienna Convention as authority on "[b]asic principles of treaty interpretation"); *Blasket*, 2023 U.S. Dist. LEXIS 54502 at *16-*17 (applying Vienna Convention to interpret ECT).

In applying international law, under FSIA, a foreign sovereign has the right to present legal and factual evidence reflecting the parties' course of conduct concerning arbitrability, and have the court make legal and factual findings based on that record, given "the relevant jurisdictional facts" and law must be resolved by the district court "in order to maintain jurisdiction." *Chevron,* 795 F.2d at 204. *See also Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co*., 581 U.S. 170, 177-78 (2017) (unless parties "stipulat[e] as to all relevant facts," fact-finding at the jurisdictional stage is necessary). Thus, the "jurisdictional task" under FSIA is to decide whether the RF has "sufficiently rebut[ted]" YC's assertion the parties somehow agreed (via ECT incorporation of the UNCITRAL rules) that arbitrators would have exclusive authority to determine specific issues regarding arbitrability. *Chevron*, 795 F.3d at 205 n.3.

a) The ECT Signatories' Interpretation Establishes UNCITRAL Rules Do Not Constitute Exclusive Delegation

"In interpreting any treaty, the opinions of ... signatories … are entitled to considerable weight." *Abbot v. Abbot,* 560 U.S. 1, 16 (2010). Moreover, "[w]hen parties to a treaty both agree as to the meaning of a treaty provision … we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji. v. Avagliano*, 457 U.S. 176, 185 (1982). It is undisputed that the Swiss court exercised *de novo* review over the RF's annulment petition. *See* Swiss Decision, *supra.,* §6.4.1; YC Rule 55 Response, ECF 37 at 38, note 13 (admitting Swiss Supreme Court reviewed "the Tribunal's determinations *de novo*"). The ***only*** possible interpretation of ECT incorporation of UNCITRAL Rules, given Swiss court *de novo* review, is that it does not constitute exclusive delegation, as interpreted by signatories Luxembourg (YC), RF, and Switzerland, as well as many other signatories discussed, *infra.* This alone is dispositive.

b) ECT Context and the Parties' Practice Establish UNCITRAL Rules Do Not Constitute Exclusive Delegation to the Arbitrators

In addition, when interpreting arbitration rules, such as UNCITRAL, "[c]ontext matters,"

because "[i]ncorporation of such rules into an arbitration agreement does not, *per se*, demonstrate clear and unmistakable evidence of the parties' intent to delegate threshold questions of arbitrability to the arbitrator where other aspects of the contract create ambiguity as to the parties' intent." *DDK Hotels v. Williams-Sonoma*, 6 F.4th 308, 318 (2d Cir. 2021). *See also id*. (rejecting exclusive delegation based on the "context" of adoption of an AAA competence-competence clause); *Oehme, van Sweden & Assocs., Inc. v. Maypaul Trading & Servs., LTD*., 902 F. Supp. 2d 87, 97 (D.D.C. 2012) (same).

International and Russian law expert Professor Avtonomov, delving into this context, concludes that the ECT must be interpreted as a treaty that accommodates *de novo* review. *See* Av.Dec. ¶¶ 24-39 (ECF 42). His conclusion that "UNCITRAL Rules Article 21(1) does not reflect an agreement to exclude post-arbitration *de novo* judicial review of Arbitrability" is based "on four sets of reasons" (¶ 14), as the Vienna Convention requires: (1) applying the "ordinary meaning" of the text of the UNCITRAL Rules (¶¶ 15-16); (2) reading UNCITRAL Rules in harmony with other "relevant rules" of international law (¶¶ 17-18); (3) honoring the "special meaning" of the competence-competence principle "shared by the ECT signatory states (¶ 19); and (4) considering the parties' "subsequent practice" in resolving the seat of arbitration (¶¶ 20-21). Avtonomov opines there is no "clear and unmistakable" evidence that the parties intended that the arbitral panel would have the final say on all issues relating to arbitrability. Av.Dec. ¶¶ 40-72. Several independent points support his conclusion.

First, the RF proposed to seat the arbitration only in countries (Switzerland, Germany, Austria, and France) that recognize the text of agreements that include competence-competence clauses as merely providing for ***initial*** review of arbitrability by arbitrators, with subsequent *de*

novo review of arbitrability by courts in the seat of arbitration.[16] RF's lawyer proposed these jurisdictions with explicit reference to post-arbitration judicial review. 2014 Hr'g Tr. 21 (Av.Dec., Ex. 2) (ECF 42-4) (describing possibility of "a potential annulment proceeding"). YC raised no objections in 2017, when the Swiss court acknowledged that review of arbitrability is *de novo*. *See* Swiss Interim Decision (July 20, 2017), at 5, 9, (ECF 41-3).

Second, YC likewise proposed arbitrating ***only*** in countries (United Kingdom, Netherlands) in which the text of agreements providing competence-competence clauses are compatible with *de novo* judicial review. Av.Dec. ¶¶59-65. Indeed, YC's lawyer proposed these jurisdictions with explicit reference to post-arbitration judicial review. 2014 Hr'g Tr. 12-13 (Av.Dec., Ex. 2) (ECF 42-4) (describing possibility of "recourse" by means of "a challenge proceeding before the English courts").

Third, that both YC and RF proposed arbitral sites ***only*** in countries which afford *de novo* judicial review is particularly understandable given that ***their own*** legal systems mandate *de novo* review of arbitrability issues, regardless of UNCITRAL Rules. *See* Fabio Trevisan Luxembourg Expert Report ("Trevisan. 2nd. Dec.") ¶ 5 ("[P]ost-arbitration review of the award under Luxembourg law by Luxembourg court" of "the existence of an agreement to arbitrate" is "*de novo*," with a "full and complete" examination); *id*. ¶¶ 34-40; Av.Dec. ¶¶ 45-54 (Russia).

Finally, the above sharply distinguishes this case from *Chevron* and *Stileks*, which considered no such "context" evidence concerning UNCITRAL Rules. Here, (1) three experts, Avtonomov, Arfazadeh, and Trevisian, taken together, opine that ***all eight relevant countries*** (four

[16] *See* 3d Kondakov Decl. (ECF 43) ¶¶ 38-42. *See also* Av.Dec. ¶¶ 43, 66-72 (explaining all four countries provide post-arbitration *de novo* judicial review of arbitrability regardless of UNCITRAL Rules); Arfazadeh.2nd.Dec., ¶¶ 5, 7-34, 41 (Swiss courts decide arbitrability *de novo* in annulment and recognition actions, regardless of UNCITRAL Rules).

proposed by RF, two proposed by YC, plus the RF and Luxembourg) provide for *de novo* review of arbitrability, regardless of UNICITRAL Rules. On this record, there is no "clear and unmistakable" evidence that the parties intended to delegate arbitrability; to the contrary, *de novo* Swiss court review establishes they thought the opposite. Therefore, under *Abbot* and *Sumitomo*, *supra.,* this Court is obligated to review arbitrability issues *de novo*.

C. The RF Did Not Clearly and Unambiguously Agree to ECT Article 26 Arbitration Under ECT Article 45(1), As It Is Inconsistent With Russian Law

Of particular significance, the RF signed the ECT but never ratified it. Thus, ECT Art. 26 arbitration could only apply "provisionally pending [the ECT's] entry into force for such signatory … ***to the extent that such provisional application is not inconsistent with its constitution, laws or regulations***." ECT Art. 45(1). Professor Avtonomov's second expert report ("Av.2d.Dec") establish that arbitration under the unratified ECT is inconsistent with the RF Constitution and laws. Thus, there was no agreement to arbitrate to satisfy FSIA §1605(a)(6).[17]

1. Separation of Powers in the Russian Legal System

Under the RF Constitution, "state power" is divided among three "independent" branches: "legislative, executive and judicial." *See* Av.2d.Dec, ¶26, Av.Ex. 1 (quoting 1993 RF Constitution, Art. 10). The Constitution is the highest source of law, followed by statutes enacted by the legislature ("Federal Assembly"),[18] which cannot be contradicted by decisions of the RF Government. The Federal Assembly has exclusive authority to ratify treaties and determine court

[17] *See, e.g.*, Interim Award, Stern Dissent, ¶¶87, 94-95 (Under ECT Article 26, arbitration "cannot be introduced in the Russian legal order through an administrative act [a non-ratified ECT]" and "cannot be provisionally applied on the international level, … and cannot serve as a basis" for the Tribunal's jurisdiction and, thus, the Tribunal had "no jurisdiction *ratione temporis*.").

[18] The legislative authority of the Russian Federation consists of the Duma (lower house) and the Federation Council (upper house). *See* Av.2d.Dec., ¶19.

jurisdiction.[19] The RF Government is prohibited from exercising those powers.[20] The RF Government cannot bind the Russian Federation to unratified treaties whose rules differ from those set forth in the Constitution or statutes and provide for investor-State arbitration. *See* Av.2d.Dec, ¶127-136.

2. Arbitration Is Inconsistent With Russian Law Prohibiting Arbitration of Public Law Disputes Absent a Statute or Ratified Treaty

Under Russian law, public law disputes are not arbitrable, absent a statute or ratified treaty. *See* Av.2d.Dec, ¶56. Public law disputes involve subordinate relationships (*i.e.*, coercive government measures against private parties) and other public elements such as a public interest in the case, the government as a party, and impact on the state budget. *See* Av.2d.Dec ¶50-52. No statutory prohibition is required to invalidate agreements to arbitrate public law disputes. *See* Av.2d.Dec, ¶58.

Russian courts have repeatedly held that public law disputes may not be arbitrated, unless authorized by statute or ratified treaty. *See* Av.2d.Dec., ¶57. For example, the Presidium of the Supreme Arbitrazh [commercial] Court ("SAC") vacated an arbitral award for lack of jurisdiction over a case involving the lease of state-owned forest land to a private logging company. The Presidium stated that the "public law nature of disputes ... dictates the impossibility to refer them to arbitration...." Resolution No. 11059/13 (February 11, 2014). *See* Av.2d.Dec, ¶50, Av.Ex. 41. The SAC Presidium vacated another arbitral award over a case involving government procurement

[19] *See* Av.2d.Dec., ¶129 (citing Constitution Art. 47(1)) The RF courts include the Constitutional Court; Supreme Court; cassation, appellate, and trial courts of general jurisdiction; and cassation, appellate, and trial arbitrazh (commercial) courts. *See* Av.2d.Dec., ¶22. There was a Supreme Arbitrzah Court ("SAC") whose jurisdiction was transferred to the Supreme Court.

[20] *See* Av.2d.Dec., ¶47 ("RF Government could not circumvent Russian law through an unratified treaty which would provisionally provide for investor-state arbitration, which is otherwise unauthorized by Russian law. Such conduct by the RF Government is prohibited by the Constitution, Art. 10 and 11, as well as Art. 115, as interpreted by many court decisions").

from the private sector. The Presidium stated: "The concentration of … significant public elements in a single legal relationship does not permit … [their recognition as disputes] that can be resolved privately by arbitral tribunals." SAC Resolution No. 11535/13 (January 28, 2014). *See* Av.2d.Dec, ¶53, Av.Ex. 42. YC's expropriation allegations, *i.e.,* tax, bankruptcy, and tort claims, are public law disputes subject to court jurisdiction, not arbitration.[21]

3. Arbitration Is Inconsistent With Russian Law Which Requires Claims Based on Sovereign Acts to Be Filed in Courts Absent a Ratified Treaty

YC's expropriation claims are plainly public law disputes, involving (1) a subordinate relationship between the state and a purported investor; (2) the state as a defendant; and (3) the impact on budgetary funds, both from the aspect of taxes as well as claims against the RF. *See* Av.2d.Dec, ¶63. The Russian Civil Code provides for causes of action for torts, such as expropriation, against the state. *See* Av.2d.Dec, ¶64, 65. Arbitrazh Procedural Code Art. 198(3) ***requires*** tort claims against the state to be brought in courts:

> Applications to hold non-normative legal acts invalid, decisions and actions (inactions) illegal ***shall be adjudicated in arbitrazh court*** unless jurisdiction of other courts to adjudicate them is provided for by a federal statute.

Similarly, Russian law has consistently provided for tax-assessment disputes to be exclusively resolved in courts and/or administratively by tax authorities;[22] for tax enforcement disputes to be exclusively resolved in courts;[23] and for bankruptcy cases to be exclusively resolved

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[21] The Tribunal wrongly concluded that the non-arbitrability of public law disputes "is not germane" and the Swiss Supreme Court made the same mistake. But the non-arbitrability of public law disputes is fundamental to Russian law. *See* A.2d.Dec., ¶180, 195.

[22] *See* Av.2d.Dec., ¶71 (quoting Tax Code (part 1) No 146-FZ (July 31, 1998) (Av.Ex. 4), Art. 138(1) (as amended) ("the acts of tax authorities, the actions or failure to act of their officials may be challenged before a higher tax authority (higher tax official) or in court.")).

[23] See Av.2d.Dec., ¶75 (citing RF Statute No. 229-FZ (Oct. 2, 2007) (Av.Ex. 19), Art. 128(1) (arbitrazh or general jurisdiction courts have exclusive jurisdiction in enforcement actions)).

in courts.[24] *See* Av.2d.Dec ¶72, 76, 80.

YC's expropriation claims require deciding the legality of, *inter alia*, (a) assessment of taxes on Yukos; (b) taxation enforcement measures against Yukos; and (c) rejection of YC's claims in the Yukos bankruptcy, as well as the legality of arrests and convictions of Yukos executives and searches of its offices. *See* Av.2d.Dec, ¶61. All such public law issues may only be resolved in RF courts, absent a treaty ratified by a statute clearly and unambiguously providing for arbitration.[25] *See* Av.2d.Dec, ¶56.

4. The RF Constitution Does Not Permit Application of Unratified Treaties Which Conflict With Statutes Requiring Claims to Be Filed in Courts

The Russian principle of separation of powers requires that only international treaties ratified by the Federal Assembly can have rules different from those of federal statutes.[26] RF Constitution Art. 15(4) provides:

> The universally recognized principles and norms of international law and international treaties of the [RF] are integral parts of its legal system. If an international treaty of the [RF] provides for other rules than those envisaged by law, the rules of the international treaty shall be applied.

A treaty's place in the RF legal hierarchy depends on the rank of the authority that signs it and decides on its provisional application. RF courts repeatedly hold that unratified international treaties cannot override the Constitution or statutes. *See* Av.2d.Dec, ¶86-93 (quoting cases).

First, the RF Supreme Court reversed a lower court's application of an unratified treaty

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[24] *See* Av.2d.Dec., ¶78 (explaining RF bankruptcy statutes at all relevant times provided for the exclusive jurisdiction of state courts over bankruptcy cases, e.g. RF Federal Statute No. 127-FZ (Av.Ex. 18), Art. 33(3) ("bankruptcy case may not be referred to arbitral tribunal")).

[25] Under international law, waiver of sovereign immunity must be "clear and unambiguous." *See* Av.2d.Dec., ¶42-44 (citing international law cases).

[26] *See* Av.2d.Dec., ¶108, 111 (citing 1978 USSR and 1995 RF statutes on treaties (requiring ratification of treaties containing rules different from those contained in statutes)).

with China on prosecuting illegal border crossing. The Supreme Court held that because the treaty was not ratified, it could not override the RF Criminal Code and Criminal Procedure Code, which were enacted by statutes. The Court stated:

> Since the [RF] Government is not entitled to adopt, amend or abrogate the provisions of criminal statutes or statutes on criminal procedure, the provisions of the ***unratified Treaty between the [RF] Government and the Government of China*** on the Russian-Chinese Border Regime dated November 9, 2006, ***to the extent it provides for rules different from those provided for by the RF Criminal Code and the RF Criminal Procedure Code, shall not apply in the [RF]***.

RF Supreme Court Ruling No. 59-O09-35 (Dec. 29, 2009) *See* Av.2d.Dec, ¶89, Av.Ex. 45.

Second, an arbitrazh court held that rail freight tariffs under a CIS treaty were illegal because the treaty was unratified and the tariffs exceeded what RF law allowed, stating:

> Article 15(1)(a) of the Federal Statute "On International Treaties of the [RF]" states that ***international treaties*** requiring the amendment of existing or the adoption of new federal statutes to ensure their implementation, or ***establishing rules different from those stipulated by statute, are subject to ratification***.
>
> The above-mentioned ***Tariff Agreement Between Railway Administrations of the CIS Member-States has not been ratified***; freight rates defined by the [RF] Railways Tariff Policy and brought into effect by telegram of the [RF] Ministry of Railways No. 722, dated September 5, 1998, have not been duly approved and hence ***cannot be considered as mandatory*** freight tariff rates.

Case No. F09-3124/03-AK (Oct. 2, 2003) *See* Av.2d.Dec, ¶88, Av.Ex. 40, at 3.

Third, in 2003, the RF Supreme Court Plenum issued guidance to lower courts on "providing correct and uniform application of international law." The Plenum stated:

> The rules of an international treaty of the [RF] that has ***entered into force*** and consent to be bound by which was given ***in the form of a federal statute*** shall be applied with priority over the statutes of the [RF].

Resolution No. 5, "On Application . . . of International Law and International Treaties of the [RF]" (Oct. 10, 2003) *See* Av.2d.Dec, ¶87, Av.Ex. 44.[27]

[27] The Tribunal ignored Resolution No. 5, and mistakenly found Ruling No. 59-O09-35 "not in point." The Swiss Court erred in interpreting both acts. *See* Av.2d.Dec., ¶185, 186, 200, 201.

Fourth, in 1995, the RF Supreme Court Plenum issued "clarifications . . . for the purpose of uniform application of constitutional norms" to ensure "the supremacy of the Constitution":

> [W]hen considering a case, the court may not apply the rules of any statute governing legal relations if an international treaty, that has entered into force for the [RF] and the decision of the [RF] to be bound by which was taken ***in the form of a federal statute***, establishes rules different from those provided for by such statute.

RF Supreme Court Resolution No. 8 (Oct. 31, 1995) *See* Av.2d.Dec, ¶86, Av.Ex. 43.

Finally, the legislative history of the 1993 Constitution shows that its reference to "international treaties" means only ratified treaties outrank statutes. *See* Av.2d.Dec., ¶94-104, Av.Ex. 71 (quoting Constitutional Commission Executive Secretary: "when there is an inconsistency between the treaty and the internal legislation, we write that the treaty norm applies. The norm of which treaty? Solely the one that is ratified.").

5. RF Federal Statutes on International Treaties Do Not Permit Unratified Treaties to Contradict RF Statutes

Since 1978, the applicable laws on international treaties were governed by federal statutes on international treaties ("FLITs"): (1) the 1978 USSR Statute On International Treaties ("USSR FLIT"), Av.Ex. 9;[28] and (2) the 1995 RF Federal Statute On International Treaties ("1995 FLIT"), Av.Ex. 13. *See* Av.2d.Dec, ¶105. Consistent with the Constitution, the FLITs do not permit treaties to outweigh statutes prior to ratification. *See* Av.2d.Dec, ¶109, 116.

First, USSR FLIT governs here because it was in effect when the ECT was signed in 1994. USSR FLIT Art. 12 did not permit unratified treaties to contradict statutes:

> International treaties of the USSR … ***providing for rules different from those contained in the USSR legislative acts, are subject to ratification.***

[28] After the USSR's dissolution on December 31, 1991, the USSR FLIT remained in force to the extent it was not inconsistent with RF Constitution and laws. *See* Av.2d.Dec., ¶107.

Given the ECT "provid[ed] for rules different from" RF legislative acts governing investor-state arbitration, these provisions ***required*** ratification to become effective. USSR FLIT, Art. 12.

Second, assuming *arguendo* the 1995 FLIT applies, Art. 15(1)(a) requires ratification if the international treaty provides for rules different from RF statutes:

> The following ***international treaties of the [RF] shall be subject to ratification:*** [treaties] ***that set out rules different from those provided for by a statute***.

Third, although 1995 FLIT Art. 23 allows provisional application of treaties, it does not permit treaties signed by the RF Government and applied provisionally before ratification to override statutes, because RF Government decisions rank lower than statutes. *See* Av.2d.Dec, ¶116, 117. Further, Constitutional Court Resolution No. 2867-O-P (December 24, 2020), Av.Ex. 35, at 14, expressly addressed this issue, holding that 1995 FLIT Art. 23:

> … ***does not permit provisional application of those provisions of the Russian Federation's international treaties that contemplate resolution of disputes between the Russian Federation and foreign investors*** arising in the course of investing and entrepreneurial activities in the Russian Federation ***in an international arbitration (arbitral tribunal), even if such international treaty has been officially published, without the adoption of a federal statute on its ratification.*** [29]

Finally, the legislative history of the 1995 FLIT shows that its reference to "international treaties" means that only ratified treaties outrank statutes. *See* Av.2d.Dec, ¶¶ 2-126, Av.Ex. 68 (quoting Deputy Foreign Minister: "only those treaties that are ratified in Parliament and therefore are approved in the form of a statute will have a priority in legislation in the event of a collision between legal norms").

6. Russian Law Requires Jurisdiction of Courts and Exemptions Therefrom to Be Established By a Federal Statute or Ratified Treaty

[29] Resolution 2867-O-P was decided after the Interim Award and not considered by the Tribunal, while the Swiss Court found it inadmissible under procedural rules, because it was decided after the Tribunal's ruling. *See* Av.2d.Dec., ¶188, 202.

The prohibition on the RF Government altering court jurisdiction is further established by Constitution Art. 46, which provides: "Decisions and actions (or inactions) of state bodies, local authorities, public associations and officers can be ***challenged in court***." *See* Av.2d.Dec, ¶128. Further, Constitution Art. 47(1) provides: "No one can be deprived of the right for his case to be heard ***by such court and such judge whose jurisdiction is determined by statute.***" *See* Av.2d.Dec, ¶129 (quoting Constitution). Russian courts have repeatedly read these provisions as prohibiting interference with jurisdiction set by the Federal Assembly. *See* Av.2d.Dec, ¶¶131-134.

For example, Constitutional Court Resolution No. 4-P (February 25, 2004) found unconstitutional a statute that allowed the Central Election Commission to determine which courts would hear claims of violations of election statutes:

> … the case must be tried by the court lawfully determined and not chosen arbitrarily; ***recognition of the court as lawfully determined requires that its competence for trying the particular case is determined by statute***. Therefore, giving the Central Election Commission … the authority to change the set jurisdiction … ***makes that decision dependent on [the Commission's] discretion and not on will of legislature expressed in the statute …***

See Av.2d.Dec, ¶131, Av.Ex. 27 (quoting Resolution No. 4-P).

Constitutional Court Resolution No. 9-P (March 16, 1998) found unconstitutional the provisions of procedural codes adopted by statutes which allowed court chairmen to move pending cases to other courts. The Court emphasized that only a statute can change judicial jurisdiction:

> the statute …giving the chairman … authority to change the set territorial jurisdiction [venue] of criminal and civil cases de facto makes that decision ***dependent not on the legislature's will expressed in a statute but on subjective discretion of certain head of judicial organ….***

See Av.2d.Dec, ¶132, Av.Ex. 23 (quoting Resolution No. 9-P).

Similarly, Constitutional Court Resolution No. 2867-O-P stated:

> A consequence of the requirement in Article 47 (Part 1) of the Constitution of the Russian Federation for the jurisdiction of the courts to be defined exclusively by a

> statute is that ***the federal legislative body cannot delegate [authority to determine jurisdiction] to other state bodies competent to enact regulations, including the Government of the Russian Federation.***

See Av.2d.Dec, ¶133, Av.Ex. 35, at 11 (quoting Resolution No. 2867-O-P).

Numerous other decisions, as well as commentary by legal scholars, further confirm that only the Federal Assembly—through either a statute or ratified treaty, not the RF Government—may alter court jurisdiction. *See* Av.2d.Dec, ¶134-135 (citing cases and commentary).

7. The RF 1991 and 1999 Foreign Investment Statutes Do Not Authorize Arbitration Against the RF Based on an Unratified Treaty

From 1991, two Foreign Investment Statutes ("FILs")—the 1991 RF Federal Statute on Foreign Investments ("1991 FIL"), Av.Ex. 11, and its successor, the 1999 RF Federal Statute on Foreign Investments ("1999 FIL"), Av.Ex. 16,—governed claims by foreign investors. *See* Av.2d.Dec, ¶137, 146. Neither statute creates arbitral jurisdiction or a mechanism for international arbitration over the YC expropriation claim without a ratified treaty. *See* Av.2d.Dec, ¶145, 150.

First, the 1991 FIL—applicable when the ECT was signed in 1994—included expropriation claims as an investment dispute. It governs because it was in force when the RF signed the ECT. The 1991 FIL, Art. 7(3) provided: "The decisions of state management authorities on expropriation of foreign investments ***may be appealed to the courts of RSFSR."*** *See* Av.2d.Dec, ¶139 (quoting statute). Further, the 1991 FIL, Art. 9(1), provided:

> ***Investment disputes***, including the disputes regarding the amount, conditions and procedure for payment of the compensation ***shall be resolved in the [RSFSR] Supreme Court*** … or in ***the [RSFSR] Supreme Arbitrazh Court*** …, unless otherwise provided by an international treaty in force in [RSFSR] territory.[30]

As Avtonomov explains, "international treaty" means a ratified treaty, because to allow otherwise

[30] The "in force" language in Article 9(1) was included to reference USSR treaties to which the RF succeeded or otherwise became parties after the USSR's dissolution, i.e. became "in force" within the RF. *See* Av.2d.Dec. ¶143. In 1991, it was not clear which USSR treaties would apply to the RF.

would permit the RF Government to violate the Constitutional separation of powers and usurp the Federal Assembly's authority to establish the jurisdiction of the courts. *See* Av.2d.Dec, ¶142.

Second, nothing in the 1999 FIL suggests it applies to treaties signed before its enactment. Assuming, *arguendo,* the 1999 FIL applies, it (like 1991 FIL Art. 9) has what Russian law considers a "blanket provision" contained in Art. 10, which provides:

> A dispute of a foreign investor arising in connection with its investments and business activity conducted in [RF] territory … shall be resolved in accordance with [RF] international treaties … and [RF] federal statutes in [RF] courts, arbitrazh courts or through international arbitration (arbitral tribunal).

What Russian courts and commentators call a "blanket norm" is not a complete, self-contained source of authority. Rather, it is a partial rule that re-directs to other non-specific sources for the rest of the rule. Blanket norms are often used in RF legislation and are also used in other continental European jurisdictions. *See* Av.2d.Dec, ¶37. Blanket provisions, like 1999 FIL Art. 10, merely duplicate other rules, such as Constitution Art. 15(4), which establishes the place of international treaties in the hierarchy of Russian laws and has been repeated in over one hundred codes and statutes. *See* Av.2d.Dec, ¶39, 40. The 1999 FIL Art. 10 itself does not authorize arbitration of public law disputes by foreign investors against the RF unless such is provided by a ratified international treaty. *See* Av.2d.Dec, ¶147.

Third, when provisions of "international treaties" are inconsistent with RF statutes, they are only implemented if ratified, as held by RF courts and mandated by the FLITs.[31] *See* Av.2d.Dec, ¶149. Again, in 2020, Constitutional Court Resolution No. 2867-O-P confirmed a provisionally applicable treaty may not impose investor-State arbitration because this violates the

[31] The Tribunal wrongly found 1995 FLIT Art. 23 grants the RF Government the power to consent to provisional application of treaties conflicting with RF statutes. The Swiss Court made the same mistake interpreting Art. 23 to be a "sufficient delegation of authority" to the Government. *See* Av.2d.Dec., ¶184, 199.

separation of powers between the RF government and Federal Assembly. *See* Av.2d Dec, ¶91.

Fourth, in addition to the Federal Assembly not being able to delegate the power to change court jurisdiction to the RF Government, the Russian law "certainty" principle precludes interpreting the 1991 or 1999 FILs as authorizing the RF Government to bind the RF to investor-State arbitration through unratified treaties.[32] *See* Av.2d.Dec, ¶159. This principle requires any delegation of power to be ***certain*** and accord the RF Government no discretion. *See* Av.2d.Dec, ¶154-158, Av.Ex. 39 (citing Constitutional Court Resolution No. 2-P dated February 28, 2006: "Otherwise, the legislature would be authorized to delegate to the Government … powers that are uncertain in their scope and the Government ... would be authorized to exercise them at its discretion, which would violate the principle of separation of powers."). Here, such a delegation would be too uncertain, without specifics of the institution to oversee arbitration, the nature of the tribunal, the governing procedural rules, governing law, and/or situs of the arbitration. In contrast, when a treaty such as the ECT is ratified, such specifics are known to and approved by the Federal Assembly.

Finally, the RF is party to bilateral investment treaties ("BIT") which provide for investor-State arbitration. When the 1991 FIL and then the 1999 FIL were in force, the RF Government submitted pre-ratification Explanatory Notes about BITs to the Federal Assembly. Many Explanatory Notes stated that the 1991 FIL and 1999 FIL did not provide for international arbitration of expropriation disputes. *See* Av.2d.Dec, ¶162, 163, Av.Ex. 77, 78 (quoting Explanatory Notes: "[neither 1991 FIL nor 1999 FIL] … provide[s] for the mechanism of consideration of [investment] disputes in international arbitration."). Because Russian law did not

[32] The Tribunal wrongly interpreted the 1999 FIL Art. 10 to be a "permissive rule," and the Swiss Court wrongly found it "expressly contemplates arbitration as means of settling disputes between a foreign investor and the State." *See* Av.2d.Dec., ¶182, 198.

authorize arbitration under unratified BITs, *a fortiori,* arbitration under the ECT is also inconsistent with Russian law. *See* Av.2d Dec, ¶164.

8. ECT Legislative History and Contemporaneous Statements Establish that Investor State Arbitration Is Inconsistent With Russian Law

Numerous statements confirm that ECT provisions, including its dispute resolution mechanisms, did not override statutes absent ratification. *See* Av.2d.Dec, ¶165. In May 2004, Energy Charter Secretariat Deputy Secretary General Konoplyanik stated that without ratification, ***"Russia applies the ECT on a temporary basis, which, in particular, does not give it the opportunity to use to its own interests the dispute resolution mechanisms provided for by the treaty***…" *See* Av.2d.Dec, ¶166, Av.Ex. 53 (quoting Konoplyanik article (May 19, 2004)). An Explanatory Note of the RF Government to the Federal Assembly for ECT ratification listed contradictions between ECT provisions and Russian legislation, *see* Av.2d.Dec, ¶167, and noted that such ECT provisions would, upon ratification, take precedence over domestic law.[33] *See* Av.2d.Dec, ¶169, Av.Ex. 74. A separate Explanatory Note from a Duma committee also identified ECT provisions conflicting with Russian legislation. *See* Av.2d.Dec, ¶171, Av.Ex. 75. All of these statements confirm the understanding that ECT provisions could not override statutes unless the ECT was ratified.

D. YC Was Not An Eligible Investor Under The ECT

Under FSIA, there was no valid acceptance of the RF's purported offer to arbitrate because YC was not an eligible "Investor" under ECT Arts. 1(7) and 26.

1. YC Was Not an Eligible Investor Based on the "Common Nationality" Doctrine Because It Was Beneficially Owned and Controlled by Russians

[33] The Tribunal misunderstood the Explanatory Note as providing that the ECT was "in conformity with the Russian legal acts" and "consistent with the provisions of the existing Law." The same incorrect analysis was accepted by the Swiss Court. Rather, the Note explained the contradictions. *See* Av.2d.Dec., ¶190, 203.

YC was not an eligible investor because it was not an "Investor of ***another*** Contracting Party" under ECT Art. 26(1), as it was owned and controlled by Russian nationals. *See Littop Enterprises Ltd. v. Ukraine*, SCC Case No. V 2015/092, Final Award (Feb. 4, 2021), Ex. 92, ¶¶613, 614 (claimants whose ultimate beneficial owners were citizens of the respondent state were not entitled to ECT protection.). "[T]he ECT was not designed to protect the interest of domestic investors against their State." *Id*. at ¶614.[34]

First, it is "the nationality of the beneficial owner of the claim, rather than that of the nominal owner of the claim, that determines the nationality of the claim." *Saghi v.The Islamic Republic of Iran*, Iran-U.S. Claims Tribunal ("IUSCT") Case No. 298, Award No. 544-298-2 (Jan. 22, 1993), Ex. 101, ¶26. "[N]ational character of a claim must be tested by the nationality of the individual holding a beneficial interest therein rather than by the nationality of the nominal or record holder of the claim. Precedents for the foregoing well settled proposition are so numerous that it is not deemed necessary to document it with a long list of authorities…." *Claim of Am. Sec. & Trust Co*., U.S. F.C.S.C. (Jan. 30, 1957), Ex. 90 (declining jurisdiction). As Arbitrator Stern observed, "where the legal title and the beneficial ownership are split … international law grants relief to the owner of the economic interest and not to the one having a mere legal title."[35] Stern Dissent, Ex. 3, ¶122. In *TSA Spectrum de Argentina S.A. v. Argentina*, (ICSID 2008), Ex. 108, for example, the tribunal held it had no jurisdiction under the ICSID Convention because the "ultimate owner of TSA … was [an] Argentinian citizen… [Thus,] TSA cannot be treated … as a national

[34] *See also ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06 (July 18, 2013), Ex. 102, ¶408 ("[N]ational of a State … cannot, in principle, sue its own State in an international arbitration.").

[35] *See also Occidental Petroleum Corp. v. Ecuador,* ICSID Case No. ARB/06/11 (Nov. 2, 2015), Ex. 95, ¶260 ("[T]he real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner.").

of the Netherlands [and] the Arbitral Tribunal therefore lacks jurisdiction." *Id*. ¶162.[36]

At the time of the 2003 Loan, YC was owned by Yukos, a Russian company; Yukos itself was beneficially owned by Russian Oligarchs.[37] Even after the loan, the Oligarchs remained the "ultimate owners" of YC. Final Award, Ex. 4, ¶803. Thus, based on ownership, YC is not an eligible ECT investor under the "common nationality" doctrine.

> ***Second***, "Investor" is also determined by the "control in fact" of the "Investment":
>
> 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.

ECT Art. 1(6) "Understanding," Ex. 1, at 41. *See also, e.g.*, *National Gas S.A.E. v. Egypt*, (ICSID 2014), Ex. 94, ¶137 ("The Tribunal … concludes that it has no jurisdiction over the Claimant, as the latter is not under foreign control, but under Egyptian control."). This is similar to ignoring the corporate veil. *See McKesson Corp. v. Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995) ("[S]eparate corporate existence" can be overcome by evidence of "sufficient control" under "international law."); U.S. Dep't of State, *Digest of U.S. Practice in Int'l Law* 637-38 (2002) ("[I]nternational 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.'"). Because Yukos and the Oligarchs exercised complete control over YC, it is not an eligible ECT investor under the

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[36] *See also*, *e.g.*, *Venoklim Holdings R.V. v. Venezuela*, ICSID (April 3, 2015), Ex. 111, ¶156 ("Pretending that an investment … should be considered as a foreign investment only because this company is incorporated in the Netherlands, [though] is in the end the property of Venezuelan legal entities, would allow formalism to prevail over reality and betray the object and purpose of the [treaty].").

[37] *See Littop*, Ex. 92, ¶611 (nationality determined at time of investment); *Cem Cengiz Uzan v. Turkey*, (SCC 2016), Ex. 89, ¶¶152, 153 (same).

"common nationality" doctrine.

Accordingly, this Court lacks FSIA jurisdiction because YC was beneficially owned and controlled by Russian nationals.[38]

2. YC Was Not an Eligible Investor Based on the "Continuous Nationality" Doctrine After Surrendering Luxembourg Nationality

YC surrendered its Luxembourg nationality by becoming a BVI entity, *see* 8/4/2016 and 9/1/2016 Certificates, Ex. 50, which it concealed before the issuance of Interim Award on January 18, 2017, and for a full year after, *see* 1/15/2018 Letter, Ex. 51. As a result, it lost any arguable "investor" status under ECT Art. 1(7) because it was no longer "organized in" a "Contracting Party." Under international law, YC was required to maintain continuous nationality until the Final Award in 2021. This rule has been consistently applied by the U.S. and confirmed by former Chief Judge Abner Mikva of the D.C. Circuit, sitting as arbitrator in *The Loewen Group, Inc. v. U.S.*, (ICSID 2003), Ex. 105, ¶225:

> Claimant … urges that since it had the requisite nationality at the time the claim arose, and, antedates 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 … through the date of the resolution of the claim***…

All treaties, including the ECT, are contracts between States: once the investor ceases to be a national of a contracting State, the benefits of the treaty do not extend to it. As explained in the U.S. Comments and Observations to the U.N. Int'l Law Comm'n (2006), Ex. 114, 42-43:

> ***[N]ationality should be required continuously [to] the date of resolution of the claim***… [It is] a clear customary international law rule … [and] avoids a situation where the respondent State owes the claimant State for an injury to a person that is

[38] The Tribunal erred by holding that the material time for finding jurisdiction was the date when YC submitted its claim to arbitration (Final Award, Ex. 4, ¶198), and then sidestepped the issues of beneficial ownership and actual control of YC, finding that at the time of filing "it was owned and controlled by a Dutch Stichting acting by its Board," ignoring its beneficial owners. *Id*. ¶202.

no longer the legal concern of that State.[39]

Accordingly, YC lost any ECT investor status under the "continuous nationality" doctrine.

3. YC Was Not an Eligible Investor Based on "Treaty Abuse"

YC was not an eligible investor under ECT Arts. 2 and 26 based on the well-established "treaty abuse" doctrine, because its purported investment was not made in good faith, as evidenced by the Yukos Laundromat and tax evasion, but rather was artificially structured to manufacture ECT jurisdiction over a preexisting dispute when the risk of loss was foreseen by the Oligarchs.

First, the purpose of the ECT is to protect bona fide foreign investments. *See* ECT Art. 2.[40] The ECT does not protect "investments" manufactured to create arbitration rights against one's own state. *See Phoenix Action Ltd. v. Czech Rep.*, ICSID Case No. ARI3/06/5 (Apr. 15, 2009), Ex. 98, ¶¶106, 113 ("States cannot be deemed to offer access to [treaty] dispute settlement mechanism to investments not made in good faith."). Under the "treaty abuse" doctrine, tribunals dismiss claims for lack of jurisdiction where purported investments were structured to benefit from a treaty's protections at a time when a specific dispute was foreseeable. *See*, *e.g.*, *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Panama*, ICSID Case No. ARB/13/28 (June 2, 2016), Ex. 107, ¶¶116, 118 (claimants were "inserted" into a transaction "at a time when it was clear that there was a problem" and declining jurisdiction "on the ground of abuse by Claimants of the investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute"); *Phoenix Action Ltd.*, ¶¶136, 144 (declining jurisdiction where claimant "bought an 'investment' … already burdened with … civil litigation [and] problems with

[39] The Tribunal incorrectly adopted a contrary position proposed by the Int'l Law Comm'n in the "Draft Articles on Diplomatic Protection 2006." Final Award, Ex. 4, ¶¶207-209. The "Articles" have never been codified in a binding treaty and remain only a "Draft," even 17 years later.

[40] "Purpose of the Treaty" is "to promote long-term cooperation in the energy field … in accordance with the objectives and principles of the [European Energy] Charter." ECT Art. 2.

the tax and customs authorities").[41]

As in *Transglobal*, the chronology here demonstrates that the 2003 Loan was made when Yukos' dispute with the RF was not only foreseeable but known, stretching back to tax investigations that began in 1999 and mushrooming into criminal prosecutions and multi-billion-dollar tax liabilities in 2003. The Timeline Chart establishes that the Oligarchs purposely channeled the 2003 Loan through YC to manufacture ECT jurisdiction at a time when the dispute with the RF was well under way. *See Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012-12 (Dec. 17, 2015), Ex. 97, ¶585 ("A dispute is foreseeable when there is a reasonable prospect that a measure which may give rise to a treaty claim will materialise."). It was treaty abuse because investment treaties "are not insurance policies against bad business judgments." *Maffezini v. Spain*, ICSID Case No. ARB/97/7 (Nov. 13, 2000), Ex. 93, ¶64.[42]

Second, "all the circumstances of the case" may be considered in determining treaty abuse, including "the substance of the transaction [and] the true nature of the operation." *Transglobal*, ¶103. The substance of the non-recourse, back-to-back loans from Brittany to YC and on to Yukos involved repatriation of Yukos' own funds from offshore subsidiaries, and its true nature was getting cash to the Oligarchs in light of government investigations and their fear of imminent arrest. As Arbitrator Stern pointed out: "The purpose of the overall contractual scheme put in place in

[41] The Tribunal erred in holding the "treaty abuse" doctrine applies only where "an investor changes its corporate structure to gain the protection of an investment treaty … when a specific dispute was foreseeable." Final Award, Ex. 4, ¶¶598-599. Altering ***transactional*** structure to manufacture international jurisdiction when a dispute is foreseeable is equally abusive. *Phoenix Action Ltd,* ¶143 (requiring only an "artificial transaction to gain access to [treaty]").

[42] The Tribunal erred in concluding that dispute with the RF was not "foreseeable" when the 2003 Loan was advanced in December 2003. Final Award, Ex. 4, ¶¶669-672. In fact, foreseeability was admitted by Yukos CFO Misamore. *See* Misamore WS, Ex. 11, ¶¶30, 33 ("The campaign against Yukos… in the summer of 2003… [threatened] Yukos' ***financial ruin***.…").

2003 must not be overlooked: it was for Brittany, a BVI company, to lend money to Yukos Oil, a Russian company, through the intermediary of [YC], a Luxembourg company at the time of the events at issue in this case." Final Award, Stern Dissent, Ex. 5, ¶11. *See Transglobal*, ¶118 (abuse where claimants were "inserted" into transaction to "create artificial international jurisdiction"); *Phoenix Action, Ltd.*, ¶143 ("Although, at first sight, the operation realized by Phoenix looks like an investment, [it is] an abuse of rights … consisting in the Claimant's ***creation of a legal fiction*** in order to gain access to an international arbitration procedure….").

Accordingly, YC was not an eligible investor under the "treaty abuse" doctrine.

E. The Loan Was Not an Eligible Investment Under the ECT

Under FSIA, there was no valid acceptance of the RF's purported offer to arbitrate because the 2003 Loan was not an eligible investment under ECT Article 1(6)—a jurisdictional issue under FSIA as it is under the ECT. *See* Interim Award, Ex. 2 at 105-166; Final Award, Ex. 4 at 168.

1. The 2003 Loan Was Not an "Investment" Because YC Was Only a Passive Conduit With No Control *in Fact*

Under Article 1(6), an "Investment" is limited to "investment associated with an Economic Activity in the Energy Sector." It is interpreted, under VCLT Art. 31(1), Ex. 122, in good faith with its ordinary meaning and in light of treaty objectives. *See, e.g.*, *Alps Finance and Trade v. Slovak Republic*, UNCITRAL (March 5, 2011), Ex. 87, ¶¶ 236-237. The ECT's object is protect "***foreign*** energy investments … made by investors of ***other*** Contracting Parties," not ***domestic*** investments. ECT, Ex. 1 at 14. The ECT is for resolving disputes "between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter into the area of the former." *Id.* at 72. It does not protect money diverted offshore by nationals evading tax claims by their State.

The 2003 Loan to Yukos in Russia was not a ***foreign investment*** in Russia because it was

controlled by Yukos, not a national of another state. *Venoklim Holdings, supra,* rejected the form over function approach and dismissed for lack of jurisdiction because "[p]retending that an investment made by [claimant] should be considered as a foreign investment only because this company is incorporated in the Netherlands, even though the investment … [is] the property of Venezuelan legal entities, would allow formalism to prevail over reality and betray the object and purpose of the ICSID Convention." *Id.*, Ex. 111, ¶156. The "Understanding to ECT Article 1(6)" states "control of an Investment means ***control in fact, determined after an examination of the actual circumstances*** … Where there is doubt as to whether an Investor controls, … an Investor ***claiming such control has the burden of proof that such control exists***." ECT, Ex. 1 at 41, 42.

Yukos officers confirmed YC was a passive conduit with no control over the 2003 Loan and not a commercial lender. It had no resources. Loan funds came from Yukos through the LTRs, then to Brittany, next to YC, solely to be repatriated/loaned to Yukos for tax-avoidance purposes. Yukos ***eliminated all risks*** to YC and excluded the 2003 Loan from its consolidated financials. Yukos directed all YC actions. *See* Yukos Structure and Laundromat Charts, Exs. A and B.[43]

YC having no "control in fact" of the 2003 Loan means it is not a "***foreign*** energy investment" within the meaning of the ECT. *See Standard Chartered Bank v. Tanzania,* ICSID Case No. ARB/10/12 (Nov. 2, 2012), Ex. 104, *Id.* ¶¶230, 232, 265 (dismissing for lack of jurisdiction stating "[h]aving failed to demonstrate its control over the transactions relating to the Loans, Claimant has not established an investment in the territory of Tanzania that would justify a finding of jurisdiction by this Tribunal.").

[43] *See also, TSA Spectrum de Argentina S.A., supra,* Ex. 108, ¶¶159, 162 (Tribunal determined no jurisdiction because claimant "was not under foreign control and cannot be treated as a national of another Contracting State.")

2. The 2003 Loan Was Not an "Investment" Under the Applicable Four Part Test[44]

Under international law, the "objective definition of investment … comprises the elements of a [**1**] contribution or allocation of resources, [**2**] duration, and [**3**] risk, which includes [**4**] the expectation (albeit not necessarily fulfilled) of a commercial return." *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, (ICSID 2013), Ex. 91, ¶¶ 173, 222 (finding lack of jurisdiction because the claimant did not hold an "investment" under the investment treaty). *See Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID ARB/06/2 (Sep. 27, 2012) , Ex. 99, ¶219 ("[C]ontribution of money or assets …, risk and duration are all three part of the ordinary definition of investment. It understands risk to include the expectation of a commercial return.").[45]

First, YC used no resources of its own. All funds for the loan flowed from Yukos to Brittany to YC. Misamore HT, Ex. 17, 479.3-480.8. *KT Asia, supra*, determined lack of jurisdiction, because "KT Asia has made no contribution" to the investment. *Id.* ¶206. *See also Standard Chartered Bank*, *supra*, Ex. 104 ¶¶200, 271 ("Cla[i]mant lacks the status of an investor … because the record evidences no contribution to … the Loans"); *Quiborax, supra,* Ex. 99, ¶232 (Tribunal lacked jurisdiction because claimant made no personal contribution); *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL (Nov 26, 2009), Ex. 100, ¶¶ 220-222 (dismissing for lack of jurisdiction under BIT for lack of contribution).

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[44] The Tribunal erred by applying a form-over-function approach when examining the objective investment factors by disregarding Yukos's consolidated ownership and control. *See e.g.,* Interim Award Dissent, Ex. 3, ¶¶ 92-142.

[45] *See also, Caratube Int'l Oil Co. LLP v. Kazakhstan*, ICSID Case No. ARB/08/12CSID (June 5, 2012), Ex. 88, ¶360 ("[T]erm investment … includes existence of a contribution over a period of time and requiring some degree of risk. Such minimum requirements have been identified not only by ICSID tribunals, but also in investment treaty arbitrations not based on the ICSID Convention.").

Second, YC had zero risk on the loan. "[T]he underlying concept of investment … implies an economical operation ***initiated*** and conducted ***by*** an entrepreneur using its own financial means and ***at its own financial risk***." *Toto Costruzioni v. Lebanon*, ICSID case No. ARB/07/12 (Sept. 11, 2009) , Ex. 106, ¶84. *KT Asia* held no jurisdiction because "the risk element of an investment is lacking," given "the corporate structures involved in the transaction [were used] to shield the Claimant from any investment risk …. [T]he risk element of an investment is lacking …." *Id., supra*, ¶¶219-221.

Third, the "loan" was Yukos's ***own*** funds, funneled through YC via a zero-risk loan and eliminated in Yukos' group financials. Misamore affirmed it was ***not*** a debt owed by Yukos to YC. The minuscule 0.0625% interest rate was not a rate negotiated between YC and Yukos, but merely a device by which Yukos was able to avoid being taxed on its own funds used to pay the giga-dividend. *See Caratube, supra,* Ex. 88, ¶ 435 ("[P]ayment of only a nominal price and lack of any other contribution by the purported investor must be seen as an indication that the investment was not an economic arrangement, is not covered by the term 'investment' as used in the BIT.").

Fourth, the loan had no real term because it involved circular movement of Yukos' own funds through intra-subsidiary loans. Yukos was effectively on both sides of the transaction, the loan was eliminated in Yukos's consolidated financial statements, and Misamore denied there was a debt owed to YC in the Yukos U.S. bankruptcy.

In sum, 2003 Loan has ***none*** of the four elements that comprise an ECT investment.

II. THE SWISS COURT DECISION HAS NO COLLATERAL ESTOPPEL EFFECT ON WHETHER THE ARBITRATION EXCEPTION APPLIES

The Petition contends that this Court is required to defer to the Swiss Supreme Court decision on the arbitrability issue, based on issue preclusion. This is mistaken.

A. This Court Has an Independent Duty to Determine FSIA Jurisdiction

This Court is obligated to engage in *de novo* review of arbitrability issues under FSIA. Courts cannot assume jurisdiction over a foreign sovereign without analysis of the relevant law and facts simply because another court, in another country—with an entirely different legal system (*i.e.*, the Swiss civil law system)—decided arbitrability issues. Congress, in enacting FSIA, sought to circumscribe the exercise of jurisdiction by courts over foreign states in order to minimize their interference with U.S. foreign policy. Accordingly, our courts have consistently disregarded foreign court decisions as to the existence of arbitration agreements, while confirming their own obligation to address arbitrability *de novo* "as part of [their] jurisdictional analysis." *Chevron*, 795 F.3d at 205 n.3 (disregarding Dutch courts). *See also Jiangsu Beier Decoration Materials Co. v. Angle World LLC*, 52 F.4th 554, 563-64 (3d Cir. 2022) (disregarding Chinese courts: "A court need not, and should not, defer to a foreign panel's finding of arbitrability"); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661 (2d Cir. 2005) (disregarding Egyptian courts: "[W]hether a party has consented to arbitrate is an issue to be decided by the Court in which enforcement of an award is sought."); *VRG Linhas Aereas S/A v. MatlinPatterson Global Opportunities Partners II L.P.*, 605 F.App'x 59, 60 (2d Cir. 2015) (disregarding Brazilian courts).

B. YC Fails to Meet Its Burden of Establishing Swiss Law of Collateral Estoppel

Even if the doctrine could be relevant, issue preclusion is an affirmative defense under Fed. R. Civ. P. 8(c), so YC would have the burden of proving that the doctrine can apply here, which it has not done. Courts only apply issue preclusion to foreign decisions when ***the originating jurisdiction*** itself recognizes the doctrine.[46] Yet YC has not even attempted to demonstrate that

[46] *E.g., United States v. Buruji Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011) ("[T]he district court should have applied the United Kingdom's concept of collateral estoppel in deciding what weight to give the ruling of the English magistrate"); *Alfa Consult SA v. TCI Int'l, Inc.*, 2023 U.S. Dist. LEXIS 178309, *17 (N.D.Cal. 2023) ("[A]n international judgment will not have a preclusive

judgments of Swiss courts carry ***any*** issue preclusive effect.[47] Courts repeatedly hold that "[b]ecause Switzerland does not recognize the doctrine of collateral estoppel, [a court] cannot apply the doctrine to bar this aspect of [a party's] claims." *Weiss v. LaSuisse*, 293 F.Supp.2d 397, 405 (S.D.N.Y. 2003). *See also Gordon and Breach Science Publishers S.A. v. American Institute of Physics*, 905 F. Supp. 169, 179 (S.D.N.Y. 1995) ("[N]either Switzerland nor Germany recognize the doctrine of collateral estoppel."); *Bata v. Bata*, 163 A.2d 493, 506 (Del. 1960) ("Switzerland does not recognize the rule of collateral estoppel."). The Swiss Decision does not excuse this Court from *de novo* review of arbitrability issues in deciding subject-matter jurisdiction.

C. The Swiss Decision Has No Collateral Estoppel Effect Here

If this Court were to independently review Swiss law, it must conclude that the Swiss Decision has no collateral estoppel (preclusive) effect here. As set forth by Swiss legal expert Homayoon Arfazadeh ("Arfazadeh2ndDec."), based on the Swiss Civil Procedure Code ("CPC"), court decisions, and persuasive commentary, Swiss courts give preclusive effect only to the "operative" part of a judgment in subsequent proceedings between the same parties. *See* Arfazadeh2ndDec., ¶¶1, 6, 35-40.[48] The operative part of the Swiss Decision is limited to those paragraphs denying the annulment petition. *See id.* ¶35 (citing T. Denis, *Commentaire romand du Code de procédure civile,* ch. 7); Swiss Decision at 73. Preclusive effect given to the operative

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effect … unless it would also have preclusive effect under the foreign country's laws."); *Global Material Techs., Inc. v. Dazheng Metal Fibre Co*., 2015 U.S. Dist. LEXIS 57778, *28 (N.D.Ill. 2015) ("United States courts should apply the foreign court's concept of collateral estoppel in deciding what weight to give that court's ruling.").

[47] *See Estate of Botvin v. Islamic Repub. of Iran*, 772 F.Supp.2d 218, 227, 231 (D.D.C. 2011) (denying motion: "court is not obligated to remedy deficiencies in the presentation of foreign law . . . by the plaintiffs") (citing Fed. R. Civ. P. 44.1).

[48] A Swiss judgment includes the designation of the parties; the recitals or reasons, forming the body of the judgment and containing the factual and legal findings that support the operative part; and the operative part, which contains the decision on the merits. *Id*. ¶35 (citing Article 238 CPC).

part does not extend to the factual findings or legal conclusions in the reasoning or body of that judgment. Arfazadeh2ndDec., ¶35 (citing Decision of the Supreme Court ATF 136 III 345, consid. 2.1). The only *res judicata* (preclusive) effect of the Swiss Decision would be to bar new proceedings to annul the Interim or the Final Award in Switzerland. *Id*. ¶¶6, 40. Accordingly, the RF is not precluded under Swiss law from demonstrating, in an enforcement action in the United States concerning the same award, that it did not agree to arbitrate under the ECT. *Id*. ¶40.

III. FSIA'S WAIVER EXCEPTION DOES NOT APPLY MERELY BECAUSE THE RF SIGNED THE NY CONVENTION

As an alternative rationale for jurisdiction, YC cites the FSIA 1605(a)(1) "waiver exception."[49] Its theory is that the RF and 171 other sovereign nations, by signing the NY Convention, all ***impliedly*** waived their sovereign immunity against lawsuits brought against them in any of the other 171 nations that have signed the Convention.[50] No D.C. Circuit decision supports YC's argument, and the D.C. Circuit recently took care to avoid any endorsement of this sweeping implied waiver theory. Many factors caution against such an expansive view of waiver.

First, no textual support for YC's argument can be found in the NY Convention, which doesn't even mention sovereign immunity. As the Supreme Court has noted, for a foreign state to merely sign a Convention does not "create an exception to the FSIA . . . ." *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 442 (1989). "Nor do we see how a foreign state can waive its immunity under §1605 (a)(1) by signing an international agreement that contains no

[49] 28 U.S.C. §1605(a)(1) provides:

> (a) A foreign state shall not be immune from the jurisdiction of the 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 . . . .

[50] *See*: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

mention of a waiver of immunity to suit in United States courts." *Id*. *See also Haven v. Polska*, 215 F.3d 727, 733 (7th Cir. 2000) (Sovereign does not waive immunity by signing a treaty "that contains no mention of a waiver of immunity.").

Second, it is no mystery why the NY Convention does not mention sovereign immunity. It was not crafted to address arbitrations by a private party ***against*** a sovereign; rather, it addresses arbitrations ***between*** private parties and how best to ensure their orderly enforcement. Its express purpose was to facilitate "arbitration in the settlement of private law disputes." U.N. Conference Final Act ¶ 1, (ECF 41-6).

Third, that neither the text nor the purpose of the NY Convention supports the implied waiver theory is decisive, given that the D.C. Circuit "has followed the 'virtually unanimous' precedents construing the implied waiver provision narrowly." *World Wide Minerals v. Kazakhstan*, 296 F.3d 1154, 1161 n.11 (D.C. Cir. 2002). Courts "rarely find that a nation has waived its sovereign immunity without strong evidence that this is what the foreign state intended." *Foremost-McKesson v. Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990). An "implied waiver depends upon the foreign government's having at some point indicated its amenability to suit." *Princz v. Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (noting "intentionality requirement implicit in §1605(a)(1)") (collecting cases; citing H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 25-26 (1976); S. Rep. 94-1310 (1976)).

Fourth, YC's theory, if adopted, would have disturbing implications for the interests of the United States. Under this theory, if RF can be subjected to suit in the United States solely by signing the NY Convention (triggering an implied waiver of immunity), then the United States can likewise be subjected to suit in the RF on the same theory. Indeed, the United States could be sued in any of the other 170 nations that signed the NY Convention, including states with which it has

strained relations (e.g., Iran, Cuba) and failed states (*e.g.* Afghanistan, Haiti, Syria).[51]

Fifth, and confirming the destabilizing effect of YC's theory if adopted, after seeking the views of the United States regarding this implied waiver theory, the D.C. Circuit recently declined to affirm a decision that had adopted the theory to hold that a foreign state had waived immunity. In *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 506 F. Supp. 3d 1 (D.D.C. 2020), the court, after analyzing two non-authoritative D.C. Circuit decisions addressing the matter (one in dicta, the other in an unpublished disposition), *id*. at 13-15 & n.3, relied on this theory in finding jurisdiction to confirm an arbitration award against Nigeria. *Id*. at 21. After considering an *amicus* brief filed by the United States expressing "significant policy concerns," the D.C. Circuit declined to affirm on this ground, and instead affirmed based on the arbitration exception. *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 775-76 & n.3 (D.C. Cir. 2022).[52] *See also Blasket*, 2023 U.S. Dist. LEXIS 54502, at *21-*24 (rejecting waiver argument as "too clever by half," declining to read D.C. Circuit precedent "as having overruled the requirement for a valid agreement to arbitrate").

IV. THE *HULLEY* DECISION IS NOT BINDING AND IS DISTINGUISHABLE

In *Hulley Enters. Ltd. v. Russian Fed'n*, 2023 U.S. Dist. LEXIS 206199 (D.D.C. Nov. 17, 2023), the Court recognized three arbitral awards totaling $50 billion in favor of Yukos-Oligarch shareholders arising from ECT arbitration in the Netherlands against the RF. In rejecting the RF's FSIA jurisdictional arguments, *Hulley* held that the RF had exclusively delegated arbitrability

[51] The Fund for Peace's annual listing lists six signatories among the "bottom 10" most severely failed states: Congo Democratic Republic, Syria, Afghanistan, Sudan, Central African Republic, and Haiti. *See*: https://fragilestatesindex.org/2023/06/14/fragile-states-index-2023-annual-report.

[52] *See* United States *Amicus Curiae* brief in *Process and Indus.*, No. 21-7003, Document # 1931435 (Jan. 20, 2022), Ex.109. Among other things, the United States noted that for the waiver theory "could . . . implicate adverse reciprocity concerns were foreign courts to take a broad view of waiver in cases brought against the United States." *Id.* at 6. *See also id*. at 15.

issues to the Tribunal based on a July 29, 2005, letter that the RF sent agreeing to arbitration, *id*. at *36-*38, and the application of "competence-competence" under UNCITRAL Rules. *Id*. at *45-*47. Based on these findings, Hulley concluded it was barred from considering the merits of the RF's jurisdictional arguments.[53] *Hulley* is not binding on the RF here, and its analysis is not persuasive. And, as discussed below, the instant record is readily distinguishable.

First, *Hulley* is not binding on the RF here. Issue preclusion under federal common law only attaches when a ruling is merged into a final judgment concerning the identical issue. *E.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 891-92 (2008) (applying federal common law); *Yachts Am., Inc. v. United States*, 673 F.2d 356, 363 (Ct. Cl. 1982) ("Interlocutory conclusions, of course, do not constitute final dispositions and neither res judicata or collateral estoppel arise from them. The cases so holding are legion."); *Dinh v. United States*, 166 Fed. Cl. 513, 530 (2023) (denying issue preclusion where issues were "not identical"). There is no final judgment in *Hulley*, only an interlocutory order on a non-identical jurisdictional issue.

Second, *Hulley* is predicated on its finding that the RF exclusively delegated arbitrability issues to the Tribunal based on one sentence in the RF's July 29, 2005, letter to the Tribunal, stating that it had "reached the determination to accept the jurisdiction of this Arbitral Tribunal to determine its own jurisdiction . . . ." 2023 U.S. Dist. LEXIS 206199 at *38. The Court regarded this as "clear evidence" of a waiver of *de novo* judicial review of arbitrability, *id*. at *39—one "clearly and unambiguously" expressed. *Id*. at *45. But, as the Court acknowledged, the RF letter "does not mention foregoing challenge to the Tribunal's exercise of jurisdiction in a judicial forum," *id*. at 42, and the Court's finding that mere "silence" on subsequent *de novo* court review

[53] *See id.,* refusing to review RF arguments, *inter alia*: *62-*66 (RF never agreed to arbitrate because it never ratified the ECT); *id*. at *66-*70 (there could be no agreement to arbitrate under the ECT because the Oligarchs were Russian nationals).

does not meet the demanding standard that is required to show waiver on a jurisdictional point by a sovereign, described above. In any event, there is no letter similar to the 2005 letter here.

Third, the notion that the RF somehow waived *de novo* court review of arbitrability in the *Hulley* arbitration is belied by the RF having obtained *de novo* review in ***three different Dutch courts***: the Dutch District Court, Hague Court of Appeal, and Dutch Supreme Court. *Hulley* discussed the decisions reached by all three courts on *de novo* review, *see* 2023 U.S. Dist. LEXIS 206199 at *14 n.7, *16 n.8, *17 n.9, but failed to address how the Dutch courts could have conducted *de novo* review of arbitrability if the 2005 Letter and UNCITRAL Rules ***had*** "clearly and unambiguously" waived *de novo* review. Similarly, in this case, YC's theory that the RF is not entitled to *de novo* court review of arbitrability cannot be squared with the Swiss court conducting *de novo* review. All of this establishes the RF's broader point that the ECT's incorporation of "competence-competence" under UNCITRAL Rules—whether in the Netherlands or Switzerland—does not exclusively delegate arbitrability to the arbitrators.

Fourth, unlike *Hulley*, in which the Dutch judicial review occurred at the conclusion of a unitary arbitration, the *YC* arbitration, at the request of the RF, *see* 4/11/2014 Cleary Gottlieb letter, Ex. 116, was bifurcated, to permit *de novo* court review of jurisdictional issues following the preliminary phase.[54] YC only objected to bifurcation on the basis that conducting a preliminary phase, followed by *de novo* court review, would involve delay, holding the case "hostage for a period of years . . . ." 4/11/2014 Gibson Dunn letter, Ex. 117, 2. At no point did YC suggest that bifurcation was unwarranted because the arbitrators had ***exclusive*** authority to resolve arbitrability, so there could not be ***any*** court review. Indeed, following the RF's challenge to the Interim Award,

[54] The Swiss Supreme Court held that review of the Interim Award was premature because the Tribunal deferred some jurisdictional issues to the final phase. *See* Swiss Decision, Ex. 84.

rather than oppose a stay on the basis that there could be ***no*** judicial review, YC consented to a stay pending review. 3/1/2017 Gibson Dunn letter, Ex. 118.

In sum, the record before this Court demonstrates that the "competence-competence" principle under UNCITRAL Rules, in ***this*** case, does not preclude *de novo* judicial review.

V. THE RF WAS NOT PROPERLY SERVED UNDER FSIA, §1608(A)(4)

For "jurisdiction over a foreign state, a plaintiff must effect service in compliance with the [FSIA]." *Von Pezold v. Rep. of Zimbabwe,* 2022 U.S. Dist. Lexis 159797, at *3 (D.D.C. 2022). FSIA, §1608(a)(4) permits service of "papers through diplomatic channels to the foreign state," and follows §1608(a)(3), which requires service on the "ministry of foreign affairs of the foreign state concerned." In interpreting §1608(a)(4), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 81 (1804). *See Weinberger v. Rossi*, 456 U.S. 25, 33 (1982) (construing statute in accord with "principles of international law.") This Court should set aside service on the RF Embassy, *see* Service Return, ECF 57, which the RF rejected, affirming service should be effected through diplomatic channels on its Ministry of Foreign Affairs. ECF 60.

A. The VCDR Prohibits Service Upon Missions Which Are Inviolable

The U.S. is party to the Vienna Convention on Diplomatic Relations (December 13, 1972) ("VCDR"). 23 U.S.T. 3227, Ex. 86. It "codified longstanding principles of customary international law." *767 Third Ave. Assocs.* v. *Permanent Mission of The Republic of Zaire*, 988 F.2d 295, 300 (2d Cir. 1993). *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1060 (2019) held that to "avoid[] potential tension with" the VCDR, service could not be made on an embassy under §1608(a)(3). *Id.* at 1060. Prohibiting serving upon embassies should also apply to §1608(a)(4).

First, VCDR Art. 22(2) provides: "***The premises of the mission shall be inviolable.*** The agents of the receiving State may not enter them, except with the consent of the head of mission."

"As signatories to the [VCDR] … [the US is] obliged to hold 'inviolable' the premises of foreign missions." *Broidy Capital Mgmt. LLC v. Muzin*, 61 F.4th 984, 987 (D.C. Cir. 2023). The ICJ has held the VCDR "not only prohibits any infringements of the inviolability of the mission by the receiving State itself but also puts the receiving State under an obligation to prevent others … from doing so…." December 19, 2005 Judgment in *Armed Activities on the Territory of the Congo* (*Congo v. Uganda*), 2005 I.C.J. 278-279, ¶342, Ex. YN 26. International law expert Professor Nouvel's report ("Nouvel Rep.") explains the VCDR's principle of inviolability prohibits any interference by the receiving State (U.S.) in an embassy, including service of process. [55] As the receiving State, the United States cannot assign tasks to an embassy, such as accepting service, that the sending State (RF) has not authorized. *See* Nouvel Rep. at 4-7 (discussing U.S. State Department's acknowledgement of obligations under VCDR, and International Court of Justice, UK, Austria, France, Germany, and Switzerland judicial decisions determining service may not be made on an embassy). Scholarly publications are in accord. *See* Nouvel Rep., at 5 (quoting A. L. George, 19 Int'l L.J. 49 (1985), Ex. YN 34); Nouvel Rep., at 9 (quoting G.E. Do Nascimento e Silva, *Diplomacy in International Law*, Sijthoff, Leiden 1972, p.97, Ex. YN 56, and H. Fox, *The Law of State Immunity*, Oxford University Press, pp.179-180 (2002), Ex. YN 48). The U.S. State Department recognizes the intrusion created by attempted service, pointing out:

> The establishment by one country of a diplomatic mission in the territory of another does not implicitly or explicitly empower that mission to act as agent of the sending state for the purpose of accepting service of process. The Department of State, as in the case of any other foreign office, may not impute such authority to the diplomatic mission of the sending state.

August 10, 1964 Ltr. from the Acting Legal Adviser Meeker to Asst. Atty. Gen. Douglas ("Meeker

[55] Nouvel cites to sources of international law as established by the ICJ Statute, Article 38, including "international conventions," "custom," "generalized principles of law," and "judicial decisions… and teachings." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

Letter"), Am. J. Int'l L, at p.111 (1965), Ex. YN 53.

Second, the natural reading of §1608(a)(4) is that service is to be transmitted to a foreign State's ministry of foreign affairs (*see* §1608(a)(3), protecting VCDR inviolability). 22 CFR §93.1(c)(1) sets forth steps for transmittal under §1608(a)(4) through the U.S. embassy to the foreign ministry.[56] *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965), held that VCDR inviolability and the law of nations prohibited service on Tunisia through its ambassador, which is the same as serving an embassy. *Id.* at 980, notes 4 & 5. *Hellenic Lines* observed that the U.S. State Department's position that it "would not, in the absence of express statutory or treaty provision, attempt to transmit the summons by an official diplomatic note to the embassy of a sending state, unless the embassy indicated a willingness to accept the summons." *Id.* at 980, note 3 (quoting August 10, 1964 Meeker Letter). *See* Nouvel Rep. at 7-9 (service on embassy violates VCDR inviolability.)

Third, Nouvel explains the VCDR enshrines the principle of *ne impediatur legatio* (mission functions shall not be impeded). Nouvel Rep. at 9-11. *Hellenic Lines* credited the U.S. State Department's position that service on embassies (a) violates diplomatic immunity; (b) obstructs diplomatic functions; (c) prejudices relations with other States; and (d) could be perceived as departing from a universally "accepted rule of international law and practice." *Id*. at 980, note 5. Also, service on embassies creates a risk that U.S. missions "would be exposed to

[56] While 22 CFR §93.1(c)(2) permits service upon a mission only "if otherwise appropriate," such should be limited to when service on the Ministry of Foreign Affairs may be impossible. Otherwise, this language conflicts with the VCDR and international law. Further, while the 1976 FSIA House Report, 94-1487 at *24, suggests service can be made through diplomatic channels to an embassy, again when otherwise impossible, this is not a clear "affirmative expression of congressional intent to abrogate the [US's] international obligations." *Weinberger,* 456 U.S. at 32. "[L]egislative history alone cannot be sufficient to abrogate a treaty ...." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 238 (D.C. Cir. 2003).

incursions that are legal under a foreign state's law." *767 Third Ave. Assocs.,* 988 F.2d at 300.

B. Service on a Mission Violates Customary International Law

The U.S. "has a vital national interest in complying with international law" and ensuring that other States comply. *Boos v. Barry*, 485 U.S. 312, 323 (1988). In 2004, the U.N. General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property ("UNCSI"), requiring service by "transmission through diplomatic channels ***to the Ministry of Foreign Affairs*** of the State concerned," which is "deemed effected by receipt of the documents ***by the Ministry of Foreign Affairs***." UNCSI, Ex. 121, Art. 22(1)(c)(i)(2). "State immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the [UNCSI]." *Wallishauser v. Austria*, ECHR (Jan. 19, 2012)), Ex. 112, ¶30. While the UNCSI is not in force as to the U.S., *Wallishauser* recognized its service provision is customary international law, binding on the U.S. *Id.* ¶¶39, 62-73. *See* Nouvel Rep. at 11-12 (same). The UNCSI service provision represents a strong convergence of national practices and international conventions (including the European Convention on State Immunity, and state immunity legislation of many States, including the U.K., Australia, China, France, Israel, Japan, and Spain) that service must be on the ministry of foreign affairs, not embassies. *See* Nouvel Rep. at 12-18; *Republic of Sudan,* Amicus of Law Professors, Ex. 123 at 13-16 (listing cases affirming international law requires service on foreign ministry); Nouvel Rep. at 17-19 (discussing foreign judicial decisions prohibiting service upon embassies).

C. Service on the RF Embassy Was Discriminatory Under VCDR Article 47(1)

VCDR Article 47(1) states: "In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States." Service on the RF Embassy was discriminatory because the U.S. serves other States on their territory, including Turkey (2021), Germany (2017), and Tajikistan (1994), *see* Nouvel Rep. at 20-21. Service on the RF Embassy

also contradicted the U.S. practice of service in the RF at least four times between 2004 and 2018, *see id.* at 21, including in *Hulley*. *See* 2015 Service Return. Ex. 119. Service on the RF Embassy is discriminatory because it burdens the Embassy with handling service issues, a burden not imposed on other embassies. *See* Nouvel Rep. at 22.

D. Service on an Embassy Is Ineffective Under VCDR Article 22(1) If the Head of Mission Returns Service

Under VCDR art. 22 (1), "agents of the receiving state may not enter [an embassy] except with the consent of the head of the mission." On November 15, 2023, the RF Embassy returned the purported service, advising that service must be on the Foreign Ministry in the RF. *See* Rejection, ECF 60. *See* Nouvel Rep. at 22-24 (rejection of service proper under VCDR and customary international law); *Republic of Sudan,* Amicus of Law Professors, Ex. 123 at 19-24 (service on embassy requires consent of head of mission). Acceptance by mission employees is not consent. *See Sabbagh v. U.A.E.*, 2002 U.S. Dist. LEXIS 26380, at *6 (D.D.C. 2002) (despite "process server procur[ing] the consent of a low-level official … Embassy was not properly served). Return was justified because §1608(a)(4) does not permit service on embassies.

E. The U.S.'s Stated Positions That Service May Not Be Made on Embassies Is Binding on It, and Evidence of Customary International Law

First, U.S. official statements and positions in judicial proceedings that service cannot be made on embassies are binding commitments under customary international law. *See* Nouvel Rep. at 27 (citing, *inter alia,* August 10, 1964 Meeker Letter (service may not be made on embassy absent consent) and *U.S. v. Ms. Michèle S.-B.*, Pôle 6, ch. 4, no. 14/07682, YN Ex. 41 (French court upheld U.S. position that service may not be made on its embassy)); Nouvel Rep. at 30 (citing *Congo v. Rwanda*, I.C.J. Reports 2006 at 27, ¶46 (unilateral statements have "force of international commitments"), YN Ex. 26, and *Nuclear Test Case*, I.C.J. Reports 1974 at 267, ¶43 (unilateral declaration creates "legal obligations" and is "binding"), Ex. YN 37.)

Second, the U.S.'s statements and positions against service upon embassies also constitute "*opinio juris*," evidencing customary international law, obligating the U.S. to afford other States the same immunity it claims. *See* Nouvel Rep. at 31-32 (citing *Jurisdictional Immunities of the State (Germany v. Italy)*, I.C.J. Reports 2012 at 123, ¶55.) For example, as discussed by Nouvel in *United States v. Ms. Michèle S.-B.*, Paris Court of Appeal, Pôle 6, ch. 4, no. 14/07682, September 20, 2016, Ex. YN 41, the French Court references that on February 27, 2015 "the United States of America formally took a position in favor of a single transmission through official diplomatic channels, *i.e.* directly by the French Embassy in Washington D.C. to the U.S. State Department." Ex. YN 41. Based upon this, the French Court of Cassation held that service on an embassy through diplomatic channels can only be admitted with the express consent of the State concerned and that it "did not appear from any of its findings that the United States of America had consented to the notification of acts through diplomatic channels being made to its embassy in France". Nouvel Rpt. at 28, quoting Court of Cassation, 2nd civ., February 21, 2019, no. 16-25.266, Ex. YN 8. *See also Hellenic Lines*, 345 F.2d at 980, fn.3, *quoting* August 10, 1964 Meeker Letter.

In sum, the VCDR, numerous other sources of customary international law, the U.S.'s own statements and positions, and Nouvel's opinion establish that service of an embassy under §1608(a)(4) is prohibited by international customary law, absent consent of the receiving State.

CONCLUSION

The Motion should be granted and the case dismissed for failure to effect service, with leave to re-serve on the RF's Ministry of Foreign affairs under FSIA, §1608(a)(4), or, for lack of subject matter and personal jurisdiction based on YC's failure to establish an exception to sovereign immunity under FSIA, §1605(a)(1)&(6), with prejudice.

Dated: December 11, 2023

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CERTIFICATE OF SERVICE

I certify that on December 11, 2023, the foregoing document was filed electronically and served upon all counsel of record via the Court's CM/ECF filing system in accordance with the Federal Rules of Civil Procedure.

Dated: December 11, 2023

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