ORAL ARGUMENT NOT SET

Case No. 20-7113

United States Court of Appeals for the District of Columbia Circuit

HULLEY ENTERPRISES LTD.; YUKOS UNIVERSAL LTD.; and VETERAN PETROLEUM LTD.,

Petitioners-Appellants,

v.

THE RUSSIAN FEDERATION,

Respondent-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 14-1996 (BAH)

BRIEF OF *AMICUS CURIAE* THE KINGDOM OF SPAIN IN SUPPORT OF RESPONDENT-APPELLEE AND AFFIRMANCE

Derek C. Smith
Diana Tsutieva
Nicholas Renzler
FOLEY HOAG LLP
1717 K Street, N.W.
Washington, D.C. 20006
Phone: (202) 223-1200
dcsmith@foleyhoag.com
dtsutieva@foleyhoag.com
nrenzler@foleyhoag.com

Andrew Z. Schwartz
Andrew B. Loewenstein
Jared Kadich
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
Phone: (617) 832-1000
aschwartz@foleyhoag.com
aloewenstein@foleyhoag.com
jkadich@foleyhoag.com

Counsel for Amicus Curiae *The Kingdom of Spain*

June 30, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* the Kingdom of Spain ("Spain") submits this certificate as to parties, rulings, and related cases.

I. PARTIES AND *AMICI*

The Appellants in this matter are Hulley Enterprises Ltd.; Yukos Universal Ltd.; and Veteran Petroleum Ltd. The Appellee in this matter is the Russian Federation. Professors Andrea Bjorklund, Diane Desierto, and Franco Ferrari filed an *amicus curiae* brief in support of Appellants. Spain appears as an *amicus curiae* in support of the Appellee.

II. RULINGS UNDER REVIEW

The ruling under review is the November 20, 2020 Memorandum Opinion and Order of the District Court for the District of Columbia (Hon. Beryl A. Howell) in Civil Action No. 14-cv-1996 (BAH), granting Appellee's Motion to Stay. The Memorandum Opinion is reported at 2020 U.S. Dist. LEXIS 219601 (D.D.C. Nov. 20, 2020).

III. RELATED CASES

Undersigned counsel is not aware of any related cases pending in this Court or any other court in the United States.

/s/ Andrew B. Loewenstein
Andrew B. Loewenstein
Counsel for Amicus Curiae the Kingdom of Spain

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Spain is a foreign sovereign state and a party to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention" or "Convention"), which is the principal focus of the arguments advanced by the parties in the present appeal. Spain's primary interest in submitting this brief is to ensure the proper interpretation and application of the Convention.

Spain disagrees with the arguments of Appellants and *amici curiae* Andrea K. Bjorklund, Diane Desierto, and Franco Ferrari that the District Court "fail[ed] to properly interpret the United States' obligations under Article VI of the New York Convention" when the District Court stayed the proceedings and did not require the Russian Federation to provide security as a condition for the stay. *Amici Curiae* Br. 1; *see also* Appellants Br. 17. Those arguments cannot be squared with the Convention's text or the treaty-parties' understanding of its provisions. Spain thus submits this brief to assist the Court in discharging its "responsibility to read the treaty in a manner consistent with the *shared* expectations of the contracting parties." *Lozano v. Alvarez*, 572 U.S. 1, 12 (2014) (citations and quotation marks omitted; emphasis in original).

Beyond Spain's interest as a party to the New York Convention in its proper interpretation and application, Spain has a particular interest in this Court's

jurisprudence under the Convention. Spain is a respondent in two pending proceedings in the District Court for the District of Columbia that, like the action on appeal here, seek the enforcement of arbitral awards under the New York Convention. *Novenergia II — Energy & Env't (SCA) v. Kingdom of Spain*, No. 18-01148-TSC ("*Novenergia*"); *Foresight Lux. Solar 1 S.A.R.L. v. Kingdom of Spain*, No. 20-0925-TSC ("*Foresight*"). In both actions, the District Court issued stays in light of ongoing parallel set-aside proceedings in foreign jurisdictions, pursuant to its inherent authority to manage its own docket. Consolidation and Stay Order, *Novenergia*, at 3 (D.D.C. Sept. 9, 2020) (consolidating *Novenergia* and *Foresight*, and staying both); *Novenergia*, 2020 U.S. Dist. LEXIS 12794, at *6 (D.D.C. Jan. 27, 2020). In both cases, the District Court declined to condition the stays on Spain posting security. *Id.* Spain is also a party to seven additional actions pending in the District Court for the District of Columbia that seek to enforce arbitral awards rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, as codified in 22 U.S.C. § 1650a. In each case where the District Court has ruled on the matter, it has stayed the proceedings pursuant to its inherent authority while annulment of the arbitral awards is being litigated elsewhere.[1]

[1] Memorandum Opinion, *Infrared Env't. Infrastructure GP Ltd. v. Kingdom of Spain*, No. 20-00817-JDB, at 10 (D.D.C. June 29, 2021); Memorandum Opinion and Order, *Cube Infrastructure Fund SICAV v. Kingdom of Spain*, No. 20-01708-EGS,

Further, Spain is a party to at least 30 additional arbitrations where the opposing parties, if successful, could seek to enforce the resulting arbitral awards in this Circuit. *See* 28 U.S.C. § 1391(f)(4). This Court's decision in the instant appeal thus could have important implications for future actions in which Spain would be a party.

All parties to this appeal have consented to Spain filing this brief. Fed. R. App. P. 29(a)(2); D.C. Cir. R. 29(b).

at 9-10 (D.D.C. May 17, 2021); Memorandum and Opinion, *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, No. 19-01618-TSC, at 4 (D.D.C. Sept. 30, 2020); Memorandum Opinion, *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, No. 19-03783-CJN, at 5-6 (D.D.C. Mar. 31, 2021); Memorandum and Opinion, *9REN Holding S.A.R.L. v. Kingdom of Spain*, No. 19-01871-TSC, at 3 (D.D.C. Sept. 30, 2020); Memorandum Opinion and Order, *Infrastructure Servs. Lux. S.A.R.L., v. Kingdom of Spain*, No. 18-01753-EGS, at 5 (D.D.C. Aug. 28, 2019).

RULE 29(A)(4)(E) STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E) and D.C. Cir. R. 29(a)(4)(E), Spain states that no counsel of record for a party in this appeal or the action in the District Court below authored this brief in whole or in part. Further, no party or counsel for a party, and no person other than Spain itself, contributed money intended to fund preparing or submitting this brief. Spain notes that Foley Hoag LLP and its French affiliate Foley Hoag AARPI represent and advise Appellee the Russian Federation in connection with related proceedings in other jurisdictions.

This brief was prepared and is being submitted by the undersigned attorneys, who represent Spain in three pending actions in the District Court for the District of Columbia. As described above, like the action on appeal here, the other actions in which the undersigned attorneys represent Spain are actions to enforce arbitral awards where the District Court has, acting pursuant to its inherent authority to manage its docket, issued stays while set-aside or annulment of the underlying arbitral awards is being litigated in parallel proceedings in other fora.[2]

[2] Consolidation and Stay Order, *Novenergia*, at 3 (D.D.C. Sept. 9, 2020); *Novenergia*, 2020 U.S. Dist. LEXIS 12794, at *6 (D.D.C. Jan. 27, 2020); *Infrastructure Servs. Lux. S.A.R.L., v. Kingdom of Spain*, No. 18-1753-EGS, 2019 U.S. Dist. LEXIS 237711, at *6 (D.D.C. Aug. 28, 2019).

ARGUMENT

Appellants accuse the District Court of applying Article VI of the New York Convention in a way that "every challenge to an award, in the primary jurisdiction" would "automatically trigger a stay." Appellants Br. 28. Appellants further argue that the District Court wrongfully "based its denial" of security as a condition for the stay "on a so-called 'presumption' against ordering foreign sovereigns to post security." *Id*. at 48.

In Appellants' erroneous view, the approach of the District Court – which Appellants accept is no different than that followed by the District Court on no fewer than 15 prior occasions, Appellants Br. 41 – somehow "undermine[s] the principal goal of the New York Convention." *Id*. at 4; *see also Amici Curiae* Br. 5-6 (arguing the District Court's decision "contradicts the text of Article VI and the spirit of the Convention"). To make this argument, Appellants and *amici* try to inject into the Convention a purported "pro-enforcement attitude." This supposed "stance," they argue, constrains a court's ability to exercise its discretion in deciding whether to stay enforcement proceedings while a set-aside action is pending in the arbitral seat. *Amici Curiae* Br. 6, 9, 12; *see also* Appellants Br. 24-26.

Appellants and *amici*'s arguments are based on a misreading of the Convention. Neither Article VI nor the Convention as a whole imposes any "limits on an enforcing court's discretion to stay enforcement." *Amici Curiae* Br. 14.

Rather, Article VI is an integral part of the Convention's carefully crafted framework that is designed to facilitate the enforcement of arbitral awards while also protecting the equally important interest in preventing premature enforcement of awards that may be set aside in the primary jurisdiction. To accommodate these dual objectives, Article VI endows courts in enforcing jurisdictions with unqualified discretion to decide if the particular circumstances of a case militate in favor of a stay – with or without security – solely on the basis of whether the court, to use the words of Article VI, "considers it proper."

Section I demonstrates that Article VI gives courts maximum flexibility in deciding whether to stay enforcement proceedings when there is a parallel set-aside action. This was a deliberate choice by the Convention's drafters, who desired to protect the role of courts in the primary jurisdiction from being usurped by efforts to enforce awards before set aside proceedings could determine whether the award should be annulled. Both the United States and the Netherlands stressed this point during the Convention's negotiation. As the decision whether to stay is an inherently case-specific determination, the drafters left it to the discretion of the court before which the enforcement action is pending to decide, based on the particular facts and circumstances, whether a stay would be appropriate.

Section II shows that Article VI likewise gives courts where enforcement is sought discretion to decide whether to condition a stay on security. Further, contrary

to Appellants' attempt to suggest otherwise, it is not error to presume that a foreign sovereign is solvent and will discharge its legal obligations. That presumption is required by international law and fully consistent with the approach of other courts.

Finally, Section III demonstrates that Appellants are wrong in arguing that a district court has jurisdiction under 28 U.S.C. § 1609 to require a foreign sovereign to provide security because the Foreign Sovereign Immunities Act ("FSIA") is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of" the FSIA. Section 1609 applies only to existing international agreements that expressly conflict with the statute. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989). As the Convention is silent as to immunity, it does not fall within the ambit of Section 1609.

I. Article VI of the Convention Gives Enforcing Courts Unqualified Discretion To Stay Enforcement Proceedings Pending Adjudication of Parallel Set Aside Proceedings

In construing a treaty like the New York Convention, a court must "first look to its terms to determine its meaning." *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). *See also* Restatement (Fourth) of the Foreign Relations L. of the U.S. § 306(1) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.").

Article VI of the Convention provides:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e),[3] the authority before which the award is sought to be relied upon may, *if it considers it proper*, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security. (Emphasis added.)

By its terms, Article VI grants a court unqualified discretion to stay the enforcement of an award pending the adjudication of a set aside action in the arbitral seat. The phrase "if it considers it proper," which has no qualifying language, admits no other interpretation. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) ("[W]here the text [of a treaty] is clear… [courts] have no power to insert an amendment."). As this Court has ruled, "it is difficult to conceive of a greater delegation of discretion than 'if [the court] considers it proper.'" *LLC SPC Stileks v. Republic of Mold.*, 985 F.3d 871, 880 (D.C. Cir. 2021) (quoting New York Convention, art. VI).

In the words of the Proposed Final Draft of the Restatement (Third) of the U.S. L. of Int'l Commercial Arb. (Am. L. Inst., Proposed Final Draft 2019) ("Arbitration Restatement"): "In keeping with the plain meaning of the Convention language, U.S. courts consider adjournment under Article VI to be *wholly*

[3] Article V(1)(e) provides that enforcement may be denied where "[t]he award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, art. V(1)(e).

discretionary." *Id.*, Reporters' Notes § 4-14(e) (emphasis added). *See also* UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 271 (2016) ("UNCITRAL GUIDE") (Article VI does not "provide any standard by which a court should decide whether to stay enforcement proceedings, thereby leaving courts in Contracting States to use their discretion"); Christoph Liebscher, *Article VI, in* NEW YORK CONVENTION, COMMENTARY 438, 440 (Reinmar Wolff ed., 2012) ("Article VI entrusts courts with discretion to grant the adjournment when the proceedings to set aside or suspend the award are still pending in the country of the award's origin.").

The discretion that Article VI bestows upon courts accommodates competing interests. In the "context of parallel proceedings, article VI achieves a compromise between the two equally legitimate concerns of promoting the enforceability of foreign arbitral awards and preserving judicial oversight over awards by granting courts of Contracting States the freedom to decide whether or not to adjourn enforcement proceedings." UNCITRAL GUIDE 264. *See also* Nicola Christine Port, et al., *Article VI, in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, 416 (Herbert Kronke, et al. eds., 2010) (Article VI "strikes a balance between the pro-enforcement objectives of the Convention and the need to protect losing parties that have a bona fide claim against the validity of an award by allowing those parties to

pursue an appeal of the arbitral award in another forum prior to actual enforcement.").

As the Arbitration Restatement explains, "[i]f a set-aside action before a competent authority operated automatically to defer enforcement, the Convention['s] aims could be easily subverted." Arbitration Restatement, Reporters' Notes § 4.14(e). On the other hand, "to confirm or enforce an award that is later set aside by a competent court potentially burdens the interstate system with inconsistent dispositions of the same dispute." *Id.* Article VI thus "introduce[s] flexibility into a court's treatment of awards that are the subject of foreign set-aside proceedings." *Id.*

While *amici* – unlike Appellants – acknowledge that Article VI "grants the enforcement court discretion to adjourn the decision on enforcement," they nonetheless argue that a court's discretion under Article VI is "not unfettered." *Amici Curiae* Br. 12. That is demonstrably wrong. For instance, the English High Court, in applying Article VI, used that precise word when ruling that the court's discretion in determining whether to order adjournment is "unfettered." *Continental Transfert Technique Ltd. v. Federal Government of Nigeria* [2010] EWHC (Comm) 780 (Eng.).

The UNCITRAL Guide explains that "[i]n light of the permissive language of article VI, courts have full discretion to adjourn enforcement proceedings." UNCITRAL GUIDE 269-70 (internal quotation omitted). The Guide explains:

> The fact that courts were granted full discretion in that respect has been widely recognized throughout the world. The President of the First Instance Court of Paris acknowledged, in *Saint-Gobain*, that article VI of the Convention gives discretion to the enforcing judge to decide whether enforcement proceedings should be adjourned when an application to set aside or suspend an award has been made to a competent authority in the country where the award was issued. Similar rulings have been rendered in many countries, including Canada, Italy, Germany, Sweden and the United States of America. Australian courts have found that section 8(8) of the International Arbitration Act 1974 (which implements article VI of the Convention) gives them "wide discretion" or a "general discretion" to adjourn enforcement proceedings if they are satisfied that an application for the setting aside or suspension of an award had been brought before a competent authority of the country in which, or under the law of which, the award was rendered. Similarly, English courts consider that they have "wide" discretion under article VI and are "unfettered when considering the exercise of [their] discretion".

Id. at 270 (internal citations omitted; alteration in original).

Despite the fact that *amici* point to no part of Article VI which supports their argument that a court's discretion is somehow qualified, they try to imply it from the Convention's purported pro-enforcement "attitude," *Amici Curiae* Br. 12, which they impute by comparing the New York Convention to an earlier treaty, the 1927 Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301, which had required an award's confirmation in the jurisdiction where

the arbitration occurred before it could be enforced in other jurisdictions. *Amici Curiae* Br. 13

The New York Convention's drafting history confirms that no such extra-textual limitation on the court's discretion should be implied from the Convention's elimination of the double exequatur. *See El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999) ("[W]e have traditionally considered as aids to [a treaty's] interpretation the negotiating and drafting history"); *Air France v. Saks*, 470 U.S. 392, 400 (1985) ("In interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation.").

The Netherlands proposed the provision that became Article VI as part of a suite of amendments that, in addition to "eliminat[ing] the double exequatur," introduced language which "provided some protection for the losing party in the form of the stipulation" that "enforcement might be refused so long as the award was still open to ordinary means of recourse." U.N. Conference on International Commercial Arbitration, *Summary Record of the Eleventh Meeting*, E/CONF.26/SR.11, at 5 (May 27, 1958). In that connection, the Netherlands stated: "The judge in the country of enforcement must be given *complete latitude* either to grant an exequatur immediately, if he considered that there was no reason to refuse it, or to await the outcome of proceedings for its annulment instituted in the country in which it had been made." *Id.* (emphasis added).

The United States likewise stressed that a rush to enforce an award should not prejudice the authority of the courts in the arbitral seat to subject the award to scrutiny. It stated: "[J]udicial supervision was of the utmost importance, for it alone could ensure that justice was done." The United States emphasized:

> The proper place for the exercise of judicial supervision would appear to be the country in which the arbitration took place. That country had arbitration laws and procedural rules governing arbitration. Whatever the motives of the parties might be in choosing to conduct their arbitration in a particular country, by that voluntary act of selection they brought the arbitration within the purview of that country's laws. In particular, the parties were entitled to a review of the award by the country's courts. *The successful party should not be permitted to rush an award into enforcement in another country before the losing party had had sufficient opportunity to avail itself of its right to a judicial review*.

U.N. Conference on International Commercial Arbitration, *Summary Record of the Fourteenth Meeting*, E/CONF.26/SR.14, at 5-6 (May 29, 1958) (emphasis added).

Consistent with this understanding of Article VI, the U.S. State Department's transmittal letter to the Senate explained:

> The article is *purely discretionary* in that it permits the authority to which application is made for enforcement of a foreign award to adjourn its decision if it is satisfied that an application for annulment or suspension of the award was made for a good reason in the country where the award was given or under whose law it was given. But this is a discretionary authority only.

Senate Treaty Doc. 90-21 at 21 (emphasis added).

Appellants attempt to argue that a stay under Article VI should only be granted if the respondent can convince the court that the award is likely to be set aside in the

primary jurisdiction. Appellants Br. 29. This position, however, is refuted by the Convention's drafting history. The Chairman of the working group that drafted what became Article VI explained that a court might refuse to stay where "the losing party … may have started annulment proceedings *without a valid reason purely to delay or frustrate* the enforcement of the award." U.N. Conference on International Commercial Arbitration, *Summary Record of the Seventeenth Meeting*, E/CONF.26/SR.17, at 3-4 (June 3, 1958) (emphasis added). In other words, a stay might be denied if the respondent challenged the award in bad faith.

That is how the Article VI is applied. The Arbitration Restatement illustrates this practice by reference to the Southern District of New York, which, in light of "the importance under the Convention of the courts at the arbitral seat, reasoned that adjournment should only be denied if the attack on the award in those courts was '*transparently frivolous*.'" Arbitration Restatement, Reporters' Notes § 4-14(e) (quoting *Spier v. Calzaturificio Tecnica, S.p.A.*, 663 F. Supp. 871, 875 (S.D.N.Y. 1987)) (emphasis added). *See also, e.g.*, Liebscher, *supra*, at 442 ("when the enforcing courts have even a slightest doubt as to the award's validity, and the assessment of how likely the claim is to succeed in the domestic court would force the enforcing court to consider the intricacies of a foreign law, the courts tend to defer to domestic courts and to stay the proceedings in the meantime"); R. DOAK BISHOP & ELAINE MARTIN, ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 39

(2009) ("[I]t is likely that the court before which the enforcement is sought will adjourn its decision on enforcement if it is prima facie convinced that the request for the setting aside or a suspension of the award in the country of origin is not made on account of dilatory tactics, but is based on reasonable grounds.").

II. The District Court Has Complete Discretion Under Article VI to Decide Whether to Require Security

Article VI imposes no constraints on the authority of a court to decide whether to condition a stay on the posting of security. It provides simply that the court "*may* … on the application of the party claiming enforcement of the award, order the other party to give suitable security." New York Convention, art. VI (emphasis added).

Article VI thus plainly commits the decision about security to the discretion of the District Court. As the UNCITRAL Guide explains, the article "provides the courts with a wide discretion to determine when to require security and in what amount and form." UNCITRAL GUIDE 280. *See also* Port, et al., *supra*, at 434 (Article VI "leave[s] courts to determine for themselves when to require security and in what amount"). A survey of judicial decisions applying Article VI abroad observes that "in cases where the enforcing courts did not have any doubts as to the resources of the defendants and as to their tendency to be law abiding, the security was refused." Liebscher, *supra*, at 446.

In the action below, the District Court properly exercised its discretion when it declined to condition the stay on the posting of security. Although the District

Court based the decision on its finding that Appellee "has significant assets in the United States," JA___[StayII.Op.29], the District Court also recognized that courts presume foreign sovereigns "will comply with legitimate orders issued by courts in this country," and that "courts generally have not required foreign sovereigns to post security because they are presumably solvent." JA___-___[StayII.Op.28-29] (citing *Novenergia*, 2020 U.S. Dist. LEXIS 12794, at *16; *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 76 (D.D.C. 2011)) (internal quotations omitted). *See also Cef Energia, B.V. v. Italian Republic*, No. 19-3443-KBJ, 2020 U.S. Dist. LEXIS 130291, at *23 (D.D.C. July 23, 2020); *Getma Int'l v. Republic of Guinea*, 142 F. Supp. 3d 110, 118 n.10 (D.D.C. 2015).

Notwithstanding Appellants' protestations, there is nothing inconsistent with the New York Convention about a court making such presumptions when determining whether to require security in connection with a stay. Indeed, the presumption that a sovereign state will comply with its international legal obligations is required by international law. As the International Court of Justice – the principal judicial organ of the United Nations – has ruled: "Once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed." Questions relating to the Seizure and Detention

of Certain Documents and Data (Timor-Leste v. Austl.), Order of 3 March 2014, 2014 I.C.J. Rep. 147, ¶ 44 (Mar. 3).[4]

Moreover, special caution is warranted before a court imposes pre-judgment pecuniary obligations on a foreign sovereign, because doing so may have "implications to foreign policy and the potential for disruption." *NML Capital, Ltd. v. Republic of Argentina*, No. 04-0197-CKK, 2005 U.S. Dist. LEXIS 47027, at *23–24 (D.D.C. Aug. 3, 2005). This is a particular manifestation of the more general concern that adjudicating claims against foreign sovereigns carries the "potential for international discord and for foreign government retaliation." *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). *See also Williams v. Shipping Corp. of India*, 489 F. Supp. 526, 528 (E.D. Va. 1980) (construing FSIA to accord "the type of reciprocal immunity we would like to be accorded in a foreign court.").

Appellants are incorrect in arguing that the practice of the District Court is "contrary to the practice in other Circuits, where sovereigns are often ordered to pay security." Appellants Br. 49. There is no distance between the approaches in the

[4] *See also, e.g.*, South West Africa (Liber. v. S. Afr.), Second Phase, Judgment, Dissenting opinion of Judge Jessup, 1966 I.C.J. Rep. 325, at 330 (July 18) ("The Court should not act upon an assumption that a State Member of the United Nations would violate its obligation… It may be recalled that in the very first judgment rendered by the Permanent Court of International Justice, it refused Applicants' request that it award 'interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency.'") (quoting S.S. Wimbledon (U.K. v. Japan), 1923 P.C.I.J. (ser. A) No. 1, at 32 (Aug. 17)).

District Court and in other Circuits. Three of the four cases Appellants cite were actions against state-owned companies, *not* foreign sovereigns *per se*.[5] The sole case cited by Appellants that involved a foreign sovereign is *Kensington Int'l, Ltd. v. Republic of Congo*, No. 03-4578-LAP, 2005 U.S. Dist. LEXIS 4331 (S.D.N.Y. Mar. 18, 2005). *Kensington* was decided under S.D.N.Y. Local Civ. R. 54.2, not Article VI. *Id*. at *1-*2. Further, the court expressly determined that the foreign sovereign was "extremely unlikely and obviously unwilling to pay" because it had "repeatedly refused to honor court judgments." *Id*. at *5-*6.

III. The FSIA's Existing Treaty Exception Does Not Confer Jurisdiction On The District Court To Order A Foreign Sovereign To Post Security

Appellants incorrectly argue that the District Court has jurisdiction to order a foreign sovereign to post a bond because the FSIA's grant of immunity from attachment is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of" the FSIA, 28 U.S.C. § 1609, and the Convention is such an agreement. Appellants Br. 47. Instead of addressing what it means for the FSIA to be "subject to" an international agreement, Appellants simply assert that because the New York Convention pre-dates the FSIA, the Court may

[5] *Int'l Ins. Co. v. Caja Nacional De Ahorro Y Seguro*, 293 F.3d 392, 401 (7th Cir. 2002); *Conproca, S.A. De C.V. v. Petroleos Mexicanos*, No. 11-9165-LLS, 2014 U.S. Dist. LEXIS 172370, at *4 (S.D.N.Y. Dec. 11, 2014); *Skandia Am. Reinsurance Corp. v. CAJA Nacional De Ahorro Y Segoro*, No. 96-2301-KMW, 1997 U.S. Dist. LEXIS 7221, at *19 (S.D.N.Y. May 21, 1997).

apply Article VI against foreign sovereigns without concern for the protections that the FSIA accords them. *Id.*

Appellants are wrong. The Supreme Court mandates that Section 1609's "exception applies when international agreements '*expressly conflic[t]*' with the immunity provisions of the FSIA." *Amerada Hess*, 488 U.S. at 442 (quoting H.R. Rep. No. 94-1487, at 17 (1976); S. Rep. No. 94-1310, at 17 (1976)) (emphasis added) (alteration in original). Thus, as this Court has recognized, international agreements preempt the FSIA "only if there is an express conflict between the treaty and the FSIA exception." *De Csepel v. Republic of Hung.*, 714 F.3d 591, 601 (D.C. Cir. 2013) (quoting *Wyatt v. Syrian Arab Republic*, 266 F. App'x 1, 2 (D.C. Cir. 2008); *see also Simon v. Republic of Hung.*, 812 F.3d 127, 135 (D.C. Cir. 2016).[6]

An "express conflict" with the FSIA only arises when an international agreement contains a provision *relating to the sovereign immunity of a foreign state*. Restatement (Third) of the Foreign Relations L. of the United States § 456 cmt. c ("The Foreign Sovereign Immunities Act provides that international agreements of the United States *concerning immunity* that were in effect when the FSIA was adopted are not modified by the Act.") (emphasis added); *see also Mashayekhi v.*

[6] The single case Appellants cite in support of their argument, *Skandia America Reinsurance Corp. v. Caja Nacional de Ahorro y Seguro*, No. 96-2301-KMW, 1997 U.S. Dist. LEXIS 7221 (S.D.N.Y. May 23, 1997), does not address the Supreme Court precedent or the meaning of Section 1609's "subject to" clause.

Iran, 515 F. Supp. 41, 42 (D.D.C. 1981) ("Under the FSIA, passed by Congress in 1976, what were then 'existing international agreements' remained valid and superior to the FSIA wherever the *terms concerning immunity* contained in the previous agreement conflict with the FSIA." (citing H.R. Rep. No. 94-1487, at 17–18) (1976) (emphasis added).

The FSIA's legislative history confirms that by making the statute "[s]ubject to existing international agreements," Congress intended only to preserve treaty provisions that govern sovereign immunity.[7] Its desire to do so is unsurprising. International agreements are legally binding commitments that the United States has entered into with other parties; they should not lightly be abrogated by unilateral acts of the United States, such as legislation passed by Congress. The report of the House Committee on the Judiciary that accompanied the FSIA explains:

> In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

[7] Section 1604 (which governs immunity from suit) and Section 1609 (which governs immunity from execution) contain identical language: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act." The legislative history makes clear that this language has the same rationale, and is subject to the same interpretation, in both sections. H.R. Rep. No. 94-1487, at 10 (1976).

> Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. *To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.*

H.R. Rep. No. 94-1487, at 17–18 (1976) (emphasis added).

The examples of the types of international agreements that could conflict with the FSIA mentioned in the House report – status of forces agreements; treaties of freedom, commerce, and navigation ("FCN treaties"); and bilateral air transport agreements – are instructive. All frequently contain immunity provisions. For example, Article VIII(9) of the NATO Status of Forces agreement provides:

> The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of the civil jurisdiction of the courts of the receiving State except to the extent provided in paragraph 5 g. of this Article.

Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, art. VII(9), June 19, 1951, 4 U.S.T 1792, 199 U.N.T.S 67. Other U.S. status of forces agreements in effect when the FSIA was enacted contain similar provisions.[8]

[8] *See, e.g.*, Agreement under article VI of the Treaty of Mutual Co-operation and Security between Japan and the United States of America, regarding facilities and areas and the status of United States armed forces in Japan, Japan-U.S., art. XVIII(5),

Many U.S. FCN treaties likewise included provisions that address immunity. An example is the U.S.-Netherlands FCN treaty, which provides:

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, to the extent that it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America, Neth.-U.S., art. XVIII(2), Mar. 27, 1956, 8 U.S.T. 2043, 285 U.N.T.S. 231.[9]

As the House report notes, bilateral air transport agreements often contain provisions that address immunity as well. *Id.* The bilateral air transport agreement between the U.S. and the Netherlands includes such a clause:

> [N]either Government will assert on behalf of any air carrier enterprise of its nationality, which engages in air transport operations into or through the territory of the other, the defense of sovereign immunity from suit in any action or proceeding entered into against such air carrier enterprise in any court or other tribunal of the other Government (or in the latter's territories or possessions) based upon any claim arising

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(9), Jan. 19, 1960, 11 U.S.T. 1652, 373 U.N.T.S. 207 (containing provisions on immunity similar to those of the NATO Status of Forces Agreement).

[9] Other U.S. FCN treaties contained substantially similar provisions. *See, e.g.*, Treaty of Friendship, Commerce, and Navigation, Japan-U.S., art. XVIII(2), Apr. 2, 1953, 4 U.S.T. 2063, 206 U.N.T.S. 143; Treaty of Friendship, Commerce, and Navigation, Ger.-U.S., art. XVIII(2), Oct. 29, 1954, 5 U.S.T. 1939, 273 U.N.T.S 3.

> out of the air carrier's operations to and from the territory of the United States or the Netherlands . . . .

Exchange of Notes Constituting an Agreement Relating to the Nonassertion of Sovereign Immunity from Suit with Respect to Air Transport Services, Neth.-U.S., June 19, 1953, 4 U.S.T. 1610, 212 U.N.T.S. 249.

In contrast to the status of forces agreements, FCN treaties, and bilateral air transport agreements that Congress cited as international agreements it expected to be subject to the FSIA, the legislative history of the FSIA does *not* mention the New York Convention. *See* H.R. Rep. No. 94-1487.[10] This omission is unsurprising. The New York Convention does *not* contain any provision that addresses sovereign immunity. Neither Article VI nor any other article so much as mentions immunity. Nor does the Convention address proceedings against sovereign States. *See generally id.* As a leading commentary observes: "The Convention does not contain any specific rules of international law regarding immunity in [recognition] proceedings. Instead, domestic law (including any applicable rules of international law) governs whether enforcement proceedings can be commenced against a foreign state or whether assets of a foreign state can be seized." Andreas Börner, *Article III*,

[10] The report also refers to "commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes." H.R. Rep. No. 94-1487, at 17. Like the treaties cited above, such agreements frequently waive sovereign immunity.

in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 126 (Herbert Kronke, et al. eds., 2010); *see also, e.g.*, W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. Ill. L. Rev. 67, 77 (2014) ("The New York Convention … does nothing to lift a sovereign's immunity from suit or execution.").

Indeed, if the New York Convention had waived its signatories' sovereign immunity, that waiver would apply equally to the United States' own sovereign immunity from suit or attachment in the courts of all of the other States Parties. One would therefore expect some hint of that recognition in the legislative history of the U.S. ratification of the Convention. However, there is none. S. Rep. No. 91-702 (1970); H.R. Rep. No. 91-1181 (1970).

In sum, because the New York Convention is "silent on [the] question of immunity," it is not the sort of agreement that Congress intended would preempt the FSIA. H.R. Rep. No. 94-1487, at 17–18. Because the Convention does not address, much less abrogate, foreign sovereign immunity, Section 1609 of the FSIA does not provide a basis on which the Russian Federation, or any other foreign sovereign state, can be stripped of that immunity solely on account of being a party to the Convention.

CONCLUSION

The District Court did not abuse its discretion in granting the Russian Federation's motion for a stay and in refusing to condition that stay on the posting of security. Article VI of the New York Convention provides courts with broad authority to determine whether, and under what circumstances, to stay enforcement proceedings pending challenges to arbitral awards in the arbitral seat. The Court should therefore reject Appellants' petition for a writ of mandamus.

June 30, 2021

Respectfully submitted,

/s/ Andrew B. Loewenstein
Andrew Z. Schwartz
Andrew B. Loewenstein
Jared Kadich
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
Phone: (617) 832-1000
aschwartz@foleyhoag.com
aloewenstein@foleyhoag.com
jkadich@foleyhoag.com

(signature block continued on following page)

Derek C. Smith
Diana Tsutieva
Nicholas Renzler
FOLEY HOAG LLP
1717 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 223-1200
dcsmith@foleyhoag.com
dtsutieva@foleyhoag.com
nrenzler@foleyhoag.com

Counsel for Amicus Curiae the Kingdom of Spain

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Fed. R. App. P. 32(g)(1) and D.C. Cir. R. 29(a)(4)(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. R. 32(e)(3) because it contains 6,100 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

Dated: June 30, 2021

/s/ *Andrew B. Loewenstein*
Andrew B. Loewenstein
FOLEY HOAG LLP
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I, Andrew B. Loewenstein, certify that on June 30, 2021, I electronically filed the forgoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ *Andrew B. Loewenstein*
Andrew B. Loewenstein
FOLEY HOAG LLP
Counsel for Amicus Curiae