UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

Petitioners,

v.

THE RUSSIAN FEDERATION,

Respondent.

Case No. 1:14-cv-01996-BAH

PETITIONERS' SUPPLEMENTAL SUBMISSION
IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS
UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

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Banifatemi Declaration	**Note:** This declaration, and its exhibits, were submitted in support of Petitioners' original Opposition to the Russian Federation's Motion to Dismiss under the FSIA. ECF 63-2.
Banifatemi Decl., Ex. 1	Petitioners' Notice of Arbitration (Feb. 3, 2005) (ECF 63-3)
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Banifatemi Decl., Ex. 6	UNCITRAL Arbitration Rules (ECF 63-8)
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Banifatemi Decl., Ex. 17	Treaty Between the United States and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment (ECF 63-19)
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Banifatemi Decl., Ex. 19	Agreement between the Government of Qatar and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments (ECF 63-21)
Cotlick Decl., Ex. 1	Deed Submitted by Petitioners to the Hague Court of Appeal on February 26, 2019
Cotlick Decl., Ex. 2	Witness Statement of Kelvin Mark Hudson, dated February 14, 2019, submitted to the Hague Court of Appeal as Exhibit HVY-G5
Cotlick Decl., Ex. 3	Brunswick UBS Warburg Research Report, dated April 10, 2003, submitted in the arbitrations as Exhibit NAV-398 and to the Hague Court of Appeal as part of Exhibit HVY-1.
Cotlick Decl., Ex. 4	Press release by Group Menatep Limited, June 19, 2002, submitted to the Hague Court of Appeal as Exhibit HVY-462
Cotlick Decl., Ex. 5	Supplementary Witness Statement of Leonid Borisovich Nevzlin, dated August 21, 2019, submitted to the Hague Court of Appeal as Exhibit HVY-G7
Cotlick Decl., Ex. 6	Supplementary Witness Statement of Timothy William Osborne, dated July 26, 2019, submitted to the Hague Court of Appeal as Exhibit HVY-G6
Cotlick Decl., Ex. 7	Witness Statement of Timothy William Osborne, dated February

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	14, 2019, submitted to the Hague Court of Appeal as Exhibit HVY-G4.
Cotlick Decl., Ex. 8	Witness Statement of Leonid Borisovich Nevzlin, dated February 15, 2019, submitted to the Hague Court of Appeal as Exhibit HVY-G1
Cotlick Decl., Ex. 9	Presidential Decree No. 889, August 31, 1995, submitted in the arbitrations as Exhibit R-261 and to the Hague Court of Appeal as part of Exhibit HVY-1. *See also* Dkt. 40-1.
Cotlick Decl., Ex. 10	GKI Order 1365-r, September 25, 1995, submitted to the Hague Court of Appeal as Exhibit HVY-473
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Cotlick Decl., Ex. 17	Unofficial English translation of the transcript of interview with Anatoly Chubais as broadcast on the Russian television station NTV, December 8, 1995; video of interview submitted to the Hague Court of Appeal as Exhibit HVY-460
Cotlick Decl., Ex. 18	Letter from the GKI to the Duma, dated January 12, 1996, submitted to the Hague Court of Appeal as Exhibit HVY-474
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Cotlick Decl., Ex. 23	Ruling in cassation of the Moscow Federal Arbitrazh Court of July 24, 1996 (unofficial English translation only), submitted to the Hague Court of Appeal as Exhibit HVY-188
Cotlick Decl., Ex. 24	Document Inspection Report, February 1, 2007, submitted to the Hague Court of Appeal as Exhibit HVY-507
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Cotlick Decl., Ex. 27	Decision of the Moscow Khamovnichesky District Court of 27 December 2010, submitted in the arbitration as Annex (Merits) C 1057 and to the Hague Court of Appeal as Exhibit HVY-1
Cotlick Decl., Ex. 28	Witness Statement of Vladimir Matveevich Dubov dated January 29, 2019, submitted to the Hague Court of Appeal as Exhibit HVY-G3
Cotlick Decl., Ex. 29	Payment Orders No. 2, 5, 6 and 20, January 12, 1996, submitted to the Hague Court of Appeal as Exhibit HVY-366
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Cotlick Decl., Ex. 31	Proof of completion of the investment program, January 18, 1996, submitted to the Hague Court of Appeal as Exhibit HVY-368
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Cotlick Decl., Ex. 33	Note submitted by the Russian Federation to the Energy Charter Conference of 1997, relating to provisional application, submitted in the arbitrations as Annex C 925 and to the Hague Court of Appeal as part of Exhibit HVY-1

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Mishina Decl., Annex 8	B. Osminin, *Provisional Application of International Treaties: State Practice*, 12 Russian Law Journal, pp. 110-121 (English translation)
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Mishina Decl., Annex 11	Amendments to the Russian Constitution Proposed on March 11, 2020 (English translation), *previously filed* at ECF 181-8
Mishina Decl., Annex 12	Minutes of the Meeting of the Working Group on Drafting Proposals for Amendments to the Russian Constitution (Feb. 26, 2020) (English translation)
Mishina Decl., Annex 13	Decision No. 1820-O of 18 September 2014 (the "Free Economic Zones Decision") (English translation), Exhibit M-82
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Mishina Decl., Annex 16	V.P. Zvekov, *et al*., Commentary on the Federal Law "On International Treaties of the Russian Federation" (1996) (English

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Mishina Decl., Annex 23	A.S. Karzov, *On the Question of Realization of Constitutional Control in Respect of International Treaty on Including a New Subject into the Russian Federation*, 4(46) Journal of Constitutional Justice (2015), pp. 1-8.
Mishina Decl., Annex 24	Complete set of all exhibits to Mishina's three reports
Shepard Decl., Ex. 1	Dutch Court of Appeal Decision
Shepard Decl., Ex. 2	First Tobias Cohen Jehoram Declaration
Shepard Decl., Ex. 3	Second Tobias Cohen Jehoram Declaration
Shepard Decl., Ex. 4	Petitioners' Summary of the Dutch Court of Appeal Decision
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Shepard Decl., Ex. 6	Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331
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INTRODUCTION

The Dutch Court of Appeal and the Dutch Supreme Court exhaustively considered—and completely rejected—every one of the arguments made by the Russian Federation in its motion to dismiss. Over the last five years, those courts reviewed thousands of pages of briefing; dozens of expert reports; and tens of thousands of pages of exhibits. Those courts collectively held four days of oral argument. They then issued rigorous decisions that collectively span 180 pages in English translation. And yet the Russian Federation's Supplemental Brief makes no mention of any of this; that brief is written as though the now-reversed decision of The Hague District Court were the last and final word on these subjects.

The Dutch courts' decisions, of their own force, resolve the Russian Federation's motion. The doctrine of "issue preclusion" applies in full, since the relevant issues were fully litigated in, and finally resolved by, the Dutch courts. At the very least, the Dutch decisions deserve an extraordinary degree of deference—both as a matter of comity and because the scope of this Court's review, under the New York Convention, is far more limited than the full *de novo* trial, of all relevant issues, that was conducted by the Dutch Court of Appeal.

Furthermore, the Dutch courts *got it right*: The Energy Charter Treaty (ECT) was applied provisionally by the Russian Federation from its signature in 1994. An "agreement to arbitrate" was thus formed in 2005 when Petitioners submitted their notice of arbitration pursuant to Article 26 of the ECT. The Russian Federation's provisional application of the ECT (including Article 26) is supported by the Russian Constitution; by numerous decisions of the Russian Constitutional Court; by the plain text of Russian federal law; and by the Russian Federation's long-standing practice of provisionally applying international treaties, even when those treaties deviated from Russian law on matters of extraordinary importance.

The Russian Federation has submitted just one new document, on the topic of provisional application, that was not considered by the Dutch courts: the "Christmas Decision" of December 2020. That decision issued under highly suspicious circumstances and in direct response to the Dutch Court of Appeal's judgment in Petitioners' case. It is a clear departure from the Russian law that existed in 2005, when the agreement to arbitrate was formed. It does not even *claim* to retroactively change the law as it existed in 2005; and even if it did attempt such a retroactive effect, that attempt would fail as a matter of U.S. law (which considers an agreement to arbitrate to be irrevocable) and would also violate the Vienna Convention on the Law of Treaties (which the Russian Federation has ratified, and which prohibits States from using domestic law to defeat the purposes of treaties they have signed).

The Russian Federation's other arguments—that Petitioners did not qualify as "Investors," and that their shares of Yukos did not qualify as "Investments," under the ECT's definitions of those terms—are even more easily resolved. Two D.C. Circuit decisions—*Chevron* and *Stileks*—are on all fours with this case. Those cases squarely hold that the question of whether *this specific* dispute came within the scope of the ECT's arbitration clause is simply not relevant to the FSIA's "arbitration exception." Even if this Court were to take up this question, it need not proceed any further than the Russian's Federation's agreement to delegate it to the Arbitral Tribunal to decide—as both *Chevron* and *Stileks* also make clear.

Even if this Court were to wade into the merits of these "Investor" and "Investment" arguments (which it need not do), that exercise would end with the same result: The Arbitral Tribunal and the Dutch courts correctly interpreted the plain text of the ECT's definitions of "Investor" and "Investment," which simply *do not* contain any requirement regarding the

nationality of Petitioners' "controllers," nor any requirement regarding the "legality" of Petitioners' investments.

Finally, even if this Court were to permit the Russian Federation to re-litigate the factual issues for yet a third time, the result is still the same: The Russian Federation has come nowhere close to carrying its burden of demonstrating, by a preponderance of the evidence, that Petitioners were "controlled" by Russian nationals at the relevant times; that any "illegalities" occurred during the Yukos privatization; or that Petitioners themselves even had anything to do with that privatization.

The Dutch courts' decisions resolve this motion by their issue preclusive effect and by the persuasive power of their thorough findings of fact and rigorous interpretation of the relevant legal principles. The motion should be denied.

SUPPLEMENTAL PROCEDURAL HISTORY: 2016 TO PRESENT

I. The Arbitral Awards

Petitioners are the former majority owners of OAO Yukos Oil Company ("Yukos"). Twenty years ago, Yukos was one of the largest oil-and-gas companies in Russia and the world. But beginning in 2003, the Russian Federation caused "the destruction of [Yukos] . . . and the expropriation of its assets for the sole benefit of the Russian State and State-owned companies," as the unanimous Arbitral Tribunal panel found. ECF 2-1 (Arbitral Award),[1] at 396 (¶ 1180); *see also id.* at 387 (¶ 1148) (same). These actions had "an effect 'equivalent to nationalization or expropriation,'" of Yukos, and therefore "breach[ed]" the Russian Federation's "treaty obligations under … the [Energy Charter Treaty (ECT)]." *Id.* at 517-519 (¶¶ 1580 & 1585).

[1] The three Arbitral Awards are nearly identical. For the Court's convenience, Petitioners cite only one: the Award to Hulley Enterprises Ltd., ECF 2-1.

Petitioners' earlier opposition brief, ECF 63, recounted the first ten years of this dispute's procedural history—starting when Petitioners initiated arbitration proceedings (in 2005), through the appointment of the Arbitral Tribunal in The Hague (2005), that Tribunal's interim decisions affirming its jurisdiction over the Russian Federation (2009), and ending with the Awards, which collectively awarded Petitioners more than $50 billion (2014). *Id.* at 6-9.

II. This Action

This is an action to confirm the Arbitral Awards into a judgment of this Court that is enforceable in the United States. This action is brought under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), June 10, 1958, 21 U.S.T. 2517, 1970 WL 104417. That Convention is codified in the Federal Arbitration Act at 9 U.S.C. § 201 *et seq.*

"Confirmation proceedings under the [New York] Convention are summary in nature." *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 369 (D.C. Cir. 2011). "[T]he court must grant the confirmation unless it finds that the arbitration suffers from one of the defects listed in [Article V of] the Convention." *Id.*

III. The Dutch Proceedings

Soon after the Arbitral Awards were handed down, the Russian Federation initiated proceedings in the Dutch courts to have the Awards "set aside." In April 2016, The Hague District Court (the "Dutch District Court") issued its now-reversed order setting aside the awards. Petitioners then moved this Court to stay this action; the Court granted that motion; and this proceeding was stayed until April 13, 2022. *See* Order Denying Motion to Stay, ECF 228.

A. The Dutch Court of Appeal's Decision

After 3.5 years of litigation, the Dutch Court of Appeals issued a comprehensive decision in February 2020, totaling 144 single-spaced pages in English translation, which

reversed the Dutch District Court and rejected all of the Russian Federation's bases for setting aside the Awards. A certified translation of the Court of Appeals' decision is Exhibit 1 to the Shepard Declaration (and was previously submitted at ECF 181-26). A summary of the decision's key points is provided by Petitioners' Dutch counsel, Tobias Cohen Jehoram, in paragraphs 97 through 122 of his First Declaration (Exhibit 2 to the Shepard Declaration, previously submitted at ECF 181-43), and in paragraphs 7 through 23 of his Second Declaration (Exhibit 3 to the Shepard Declaration, previously submitted at ECF 204-2). For the Court's convenience, Petitioners have also prepared a summary of the Dutch Court of Appeal's decision, which is Exhibit 4 to the Shepard Declaration (previously submitted at ECF 181-27).

The Dutch Court of Appeal conducted a full, *de novo* review ("a full legal and factual re-trial") of all of the Russian Federation's grounds for attacking the Awards. First Cohen Jehoram Decl. ¶¶ 30-31. That court considered an enormous volume of submissions. In addition to the complete records from the Arbitrations, the Court of Appeal also considered, from the Russian Federation: 1,340 pages of briefing, 1,079 exhibits, 31 expert reports, and 5 witness statements. *See id.* ¶ 19. Petitioners submitted 1,318 pages of briefing, 1,151 exhibits, 27 expert reports, and 9 witness statements. *Id.* The justices heard three days of oral arguments. *Id.* ¶ 19(l), (m).

The Dutch Court of Appeal fully considered the question of whether the Energy Charter Treaty (ECT) contained an offer, by the Russian Federation, to submit to arbitration (the "ECT Question"). Article 1065(a) of the Dutch Code of Civil Procedure sets forth the only possible grounds for setting aside arbitral awards. The first such ground is that "a valid arbitration agreement is lacking." Second Cohen Jehoram Decl. ¶ 9 (quoting the Dutch Code). This ground for setting aside was one of the Russian Federation's "principal contentions in the Dutch Proceedings." *Id.* ¶ 10. The Court of Appeal considered this question *de novo*, that is, "without

deference to the Arbitral Tribunal's findings." *Id.* ¶ 11. The Court of Appeal provided a "full" and "thorough" trial of all the Russian Federation's claims. *Id.* ¶ 32. The Court of Appeal found that Article 26 of the ECT "constituted an agreement by the Russian Federation to submit to arbitration the claims made against it by HVY." *Id.* ¶ 8.

1. Provisional Application of the ECT's Arbitration Agreement

In the Dutch Court of Appeal, the Russian Federation contended (as it does again, here) that it did not agree to be bound by Article 26 (which provides for arbitration) because, in its view, provisional application of Article 26 is "inconsistent with [the Russian Federation's] constitution, laws or regulations." Second Cohen Jehoram Decl. ¶ 15. The Court of Appeal rejected that argument. *Id.* (summarizing the Court of Appeals' findings, with citations to the relevant paragraphs of the decision).

2. "Investors" and "Investments"

In the Dutch Court of Appeal, the Russian Federation contended (as it does again, here) that Article 26 did not contain an agreement to arbitrate *Petitioners'* claims, since according to the Russian Federation, Petitioners were not "Investors," and their shares of Yukos were not "Investments," within the meaning of the ECT's definitions of those terms. Second Cohen Jehoram Decl. ¶ 18. The Court of Appeal rejected these arguments. *Id.* ¶ 19 (summarizing the Court of Appeals' findings, with citations to the relevant paragraphs of the decision).

3. Article 21(5) (Taxation Referral)

In the Dutch Court of Appeal, the Russian Federation contended (as it did in its original motion, ECF 24, at 36-38) that the Awards should be set aside because the Tribunal failed to refer certain tax-related questions to the Russian tax authorities. The Court of Appeal rejected that argument. The Tribunal's failure to obtain an opinion from the Russian authorities was

neither material to the arbitration nor prejudicial to the Russian Federation. Court of Appeal Judgment, ¶¶ 6.3.1-.3.

B. The Dutch Supreme Court's Decision

On May 15, 2020, the Russian Federation initiated "cassation" proceedings in the Dutch Supreme Court. Second Cohen Jehoram Decl. ¶ 35. The parties submitted 942 pages of briefing, pleading notes, and post-hearing submissions. *See id.* ¶¶ 35-38. The Court held a day-long oral hearing on February 5, 2021. *Id.* ¶ 37.

The Dutch Supreme Court's review was more limited in scope than the Court of Appeal's review. *See* First Cohen Jehoram Decl. ¶¶ 45, 55-80. Essentially, the Supreme Court's task, as a court of cassation, is "not to adjudicate disputes, but to assess whether or not the decisions of the lower courts are correct as to the law." *Id.* ¶ 45.

The Dutch Supreme Court issued its decision on November 5, 2021. An English translation of that decision is Exhibit 5 to the Shepard Declaration (and was previously submitted at ECF 204-8). This decision rejected the appeal as to all of the issues described above. Second Cohen Jehoram Decl. ¶¶ 16-17 (provisional application); *id.* ¶ 20 ("investors" and "investments"); Dutch Supreme Court Judgment, ¶ 5.5.7 (referral of tax questions).

The sole ground on which the Russian Federation prevailed, in the Dutch Supreme Court, related to the Russian Federation's complaint about its right to be heard on its allegation that Petitioners had somehow committed fraud *during* the arbitration proceedings. *Id.* ¶ 41. The Dutch Supreme Court did not address, or express any opinion on the *merits* of these allegations.[2] *Id.* ¶ 43. The Russian Federation did *not* contend that these allegations of fraud

[2] Petitioners vehemently deny that any fraud occurred during the arbitrations. They and the Russian Federation are currently litigating this and related issues, on remand from the Dutch Supreme Court, in the Amsterdam Court of Appeal. Second Cohen Jehoram Decl. ¶¶ 44-45. In

during the arbitration (if ever proven) would mean that there was no valid agreement to arbitrate. *Id.* ¶ 41. So too, here, the Russian Federation has not asserted that this alleged fraud is a basis for this Court to find that the Russian Federation has sovereign immunity. *See generally* ECF 23, 108, 232 (the Russian Federation's briefs make no mention of this argument).

C. The Dutch Courts' Decisions, As to All Relevant Issues, Are Now Final

As to all issues other than the contentions relating to the supposed fraud-in-the-arbitrations, the Dutch courts' judgments are now final. Second Cohen Jehoram Decl. ¶ 24. These judgments are entitled to issue-preclusive effect under Dutch law. *Id.* ¶¶ 24-29.

ARGUMENT

I. Legal Standard

The "arbitration exception," 28 U.S.C. § 1605(a), has three elements: "[1] the existence of an arbitration agreement, [2] an arbitration award and [3] a treaty governing the award." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021). Only the first element—the "existence of an arbitration agreement"—is in dispute.[3]

Petitioners bear "the initial burden of" showing that the Russian Federation agreed to arbitrate. *Chevron Corp. v. Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015). However, "[t]his is only a burden of production." *Id.* Petitioners met that burden years ago, "by producing the [Energy Charter Treaty (ECT)], and the notice of arbitration," which together constitute "prima facie" evidence of an agreement. *Id.* at 205 (describing agreement to arbitrate that was formed

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addition to contesting the merits of the supposed "fraud," Petitioners also contend that the Russian Federation's extraordinary delay in raising this issue was a violation of due process.

[3] The Arbitral Awards are in the record, *see* ECF 2-1, 2-2 & 2-3, and the Russian Federation is a signatory to the New York Convention, which "is exactly the sort of treaty Congress intended to include in the arbitration exception." *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022) ("*P&ID*") (citation omitted). The Russian Federation ratified the New York Convention in 1960. *See* New York Arbitration Convention, Countries, http://www.newyorkconvention.org/countries.

when investor submitted notice of arbitration, to sovereign, pursuant to the arbitration clause of a bilateral investment treaty); *see* ECF 2-7 (ECT); ECF 63-3 (Petitioners' notice of arbitration).

Now that Petitioners have met their initial burden of *production*, "the burden of persuasion" "shift[s]" to the Russian Federation 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 204-05.

The Russian Federation wrongly contends that the arbitration exception requires not only an agreement to arbitrate, but also a "clear" and "unambiguous" *waiver*, by the sovereign, of its immunity. ECF 232, at 16 (quoting *World Wide Minerals, LTD. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 & n.11, 15 (D.C. Cir. 2002)). But *World Wide Minerals* (the sole case that the Russian Federation cites for this proposition) was *not* an "arbitration exception" case under Section 1605(a)(6); rather, the case concerned whether Kazakhstan's contracts, with an investor, contained a valid "waiver" of immunity for purposes of a *different* provision of the FSIA (Section 1605(a)(1)).

In three more recent arbitration-exception decisions, the D.C. Circuit has applied the above burden-shifting framework to find that a sovereign's agreement to arbitrate removed its immunity. *P&ID,* 27 F.4th at 776; *Stileks*, 985 F.3d at 878-79; *Chevron*, 795 F.3d at 204-05. *None* of these decisions required a "clear and unambiguous" waiver of immunity.

II. The Dutch Courts' Decisions Should Be Given Issue Preclusive Effect

The above burden-shifting framework "requires the District Court to satisfy itself that the party challenging immunity has presented prima facie evidence of an [arbitration] agreement between the parties and that the sovereign asserting immunity has failed to sufficiently rebut that evidence." *Chevron*, 795 F.3d at 205 n.3. In applying that framework, this Court should accord issue-preclusive effect to the decisions of the Dutch courts.

The D.C. Circuit has not yet addressed whether a district court may rely on issue preclusion (i.e., collateral estoppel) in the course of "satisfy[ing] itself" that a sovereign has "failed … to rebut" a petitioner's prima facie evidence of an agreement to arbitrate. *Id.* Contrary to what the Russian Federation claims, the *Chevron* court did *not* "disregard[]" the "prior conclusions of the Dutch courts" when assessing Ecuador's sovereign immunity. ECF 232, at 8. In *Chevron*, the D.C. Circuit was not asked to consider,[4] and did not consider *sua sponte*,[5] whether the findings of the Dutch courts had issue-preclusive effect. That is likely because the district court had issued its judgment, confirming the arbitral award, before the Dutch set-aside proceedings had concluded and without mentioning issue preclusion.[6] The Second Circuit cases, cited by the Russian Federation, are distinguishable because they addressed claim preclusion rather than issue preclusion.[7] As this Court previously recognized, the foregoing cases "simply do not grapple with the question of what import to ascribe to a decision at the court of primary jurisdiction" in proceedings to set aside the arbitral awards. *Hulley Enterprises Ltd. v. Russian Fed'n*, 211 F. Supp. 3d 269, 282–83 (D.D.C. 2016).

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[4] *Chevron v. Ecuador*, Brief of Appellees, No. 13-7103, 2014 WL 4160858, *36-*43 (D.C. Circuit) (not invoking issue preclusion based on Dutch courts' findings, and instead arguing that "[t]he existence of an arbitration agreement by Ecuador is . . . uncontested").

[5] *See Arizona v. California*, 530 U.S. 392, 412-13 (2013) (federal appellate courts should not "raise" preclusion defenses "sua sponte," absent "special circumstances").

[6] *See Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 61 (D.D.C. 2013) (noting that Ecuador's "appeal[]" of the "Dutch District Court's judgment" "remains pending").

[7] *VRG Linhas Aereas S/A v. MatlinPatterson Global Opportunities Partners II L.P.*, 605 F. App'x 59 (2d Cir. 2015), is a nonprecedential summary order. One sentence of the order rejects the petitioner's attempt to apply claim preclusion, that is, to "directly enforce or give preclusive effect to the judgments of the Brazilian courts." *Id*. at 60-61 (emphasis added). The *VRG* order did not hold that issue preclusion was inapplicable in New York Convention cases. Similarly, *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005), does not concern *issue* preclusion. Rather, *Sarhank* held that a judgment of the Egyptian courts, based on Egyptian law, did not have a *claim* preclusive effect, given that "the arbitrators' conclusion that Oracle was bound to arbitrate as a non-signatory was based solely upon Egyptian law." *Id.* at 662.

Here, unlike the district court in *Chevron*, this Court now has the considerable benefit of the comprehensive decisions of the Dutch courts, which fully considered and then rejected each of the arguments that the Russian Federation now makes. Those decisions have issue-preclusive effect, in federal court,[8] as a matter of "comity." *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 34 (D.D.C. 2007) (granting preclusive effect to foreign judgment because there had been a "full and fair trial in a foreign court of competent jurisdiction . . . under a judicial system which does not violate U.S. public policy").

Two Restatements of the Law also confirm that issue preclusion is appropriate here. A "U.S. court," when "requested to grant post-award relief"—such as the confirmation sought here—should "give[] issue preclusive effect to those findings [of the foreign set-aside courts] that are relevant to challenges to the award in the recognition and enforcement proceeding." Restatement (Third) U.S. Law of Int'l Comm. Arb. § 4.8 cmt. c(ii) (2019); *see also id.* § 2.11 cmt. c ("[A] party seeking to refute a particular defense to enforcement of an arbitration agreement may invoke a prior foreign judgment in which it had successfully refuted that defense[.]").[9] Similarly: "A foreign judgment entitled to recognition . . . is given the same preclusive effect by a court in the United States as the judgment of a sister State entitled to full faith and credit." Restatement (Fourth) of Foreign Relations Law § 487 (2018). The Dutch

[8] "Federal law governs the preclusive effect of foreign judgments with respect to federal-law claims." Restatement (Fourth) of Foreign Relations Law § 487, reporter's note 1 (2018) (collecting cases). Petitioners' claims are federal-law claims, since Petitioners seek confirmation pursuant to the New York Convention, which is a treaty codified in federal law.

[9] The most recent version of the Restatement (Third) is the Proposed Final Draft, released on April 24, 2019. Shortly after that Draft was released, the American Law Institute (ALI) formally approved it as final. ALI, Press Release, Restatement of The U.S. Law of International Commercial and Investor-State Arbitration Is Approved (May 20, 2019), https://www.ali.org/news/articles/restatement-us-law-international-commercial-and-investorstate-arbitration-approved/.

courts' judgment is "entitled to recognition" because it is "a final [and] conclusive . . . judgment . . . determining a legal controversy." *Id.* § 481.[10] At least two district courts have agreed.[11]

The Russian Federation's sovereign status does not immunize it from the doctrine of issue preclusion where, as here, the party invoking that doctrine (Petitioners) was *also* a party to the Dutch proceedings. *See United States v. Mendoza*, 464 U.S. 154, 158 (1984) (although a *different* party may not invoke "nonmutual" collateral estoppel against the United States, the *same* party may do so, because "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation" (citing *Montana v. United States*, 440 U.S. 147, 153 (1979) (applying mutual collateral estoppel against the United States)).

The traditional U.S. test for issue preclusion is also satisfied. All of the issues before this Court were "actually litigated" and "necessarily determined" by the Dutch courts, *supra*, at 4-8, and the Russian Federation has not demonstrated that granting issue preclusive effect would "work an unfairness." *Hurst*, 474 F. Supp. 2d at 34. Nor can it: The Russian Federation *agreed* to hold the arbitration in the Netherlands. ECF 63-5 at 4 ("The Russian Federation would further propose that The Hague be selected as the venue for the . . . arbitrations."). The Russian

[10] The additional requirement that the foreign judgment be "enforceable" does not apply in this case, because the Dutch judgment does not, of its own force, "grant[] . . . recovery of a sum of money." *Id.* § 481 cmt. d. Instead, the Dutch judgment denies the Russian Federation's request for non-monetary relief (the setting aside of the Awards). In any event, the Awards themselves are now enforceable in the Netherlands. Second Cohen Jehoram Decl. ¶¶ 47-71; First Cohen Jehoram Decl. ¶¶ 123-130.

[11] *Belmont Partners, LLC v. Mina Mar Grp., Inc.*, 741 F. Supp. 2d 743, 751-53 (W.D. Va. 2010) (granting *claim*-preclusive effect to the judgment of the Ontario superior court, which had refused to modify the arbitral award and had, instead, confirmed it); *Gulf Petro Trading Co. v. Nigerian Nat. Petroleum Corp.*, 288 F. Supp. 2d 783, 794-95 (N.D. Tex. 2003) (giving preclusive effect to the decision of the Swiss court—the primary jurisdiction—which had refused to set aside the award), *aff'd*, 115 F. App'x 201 (5th Cir. 2004).

Federation thus agreed, in 2005, that set-aside proceedings would be decided by the Dutch courts. And then the Russian Federation itself initiated the set-aside proceedings in those courts.

At the very least, this Court should accord considerable deference to the Dutch courts' findings. The Netherlands, unlike the United States, is a signatory to the ECT. ECF 2-7, at 92. As this Court explained two years ago: "United States courts generally and appropriately defer to the foreign courts selected by the parties as the primary jurisdiction to determine relevant issues according to their own law." *Hulley Enterprises Ltd. v. Russian Fed'n*, 502 F. Supp. 3d 144, 157 (D.D.C. 2020) (collecting cases). Furthermore, the Dutch courts have already conducted a searching review of the merits, whereas the confirmation proceeding in this Court is "summary in nature." *Argentine Republic*, 637 F.3d at 369; *see also Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2d Cir. 1998) ("The limited scope of review allowed under the [New York] Convention also favors deference to proceedings in the originating country that involve less deferential standards of review . . . .").

III. The Russian Federation Agreed to "Provisional Application" of the ECT

Even if the doctrine of issue preclusion did not resolve this motion (it does), the motion should also be denied because the Russian Federation has failed to carry its "burden of persuasion," *Chevron*, 795 F.3d at 204-05, to show that an agreement to arbitrate did not exist. Article 26(1) of the ECT provides for arbitration of "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former . . . ." ECF 2-7, at 52. The Russian Federation contends (as it did in the Dutch courts) that it is merely a "signatory,"[12] not a "Contracting Party," since it never ratified the ECT.

[12] There is no dispute that the Russian Federation signed the treaty in 1994. *See* Court of Appeal Judgment ¶ 4.3.2 (providing details); *see also* ECF 2-7, at 93 (signature).

The answer to this argument is found in Article 45(1), which provides that, by signing the ECT, a state agrees to apply the treaty "provisionally" from the moment of signature:

> Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory . . . *to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.*

ECF 2-7, at 78 (emphasis added). In other words, each signatory State agreed that it would be bound by the ECT (just like a Contracting Party would be), from the moment of signature and throughout the provisional application period, so long as "provisional application" of the ECT was "not inconsistent with [the signatory's] constitution, laws or regulations."

In the Dutch Court of Appeal, Petitioners presented two highly qualified experts on Russian law: Ekaterina Mishina, Ph.D., and Paul B. Stephan. Both attested that provisional application of Article 26 was "not inconsistent with" Russian law. Both have reaffirmed their opinions here. Mishina Decl. ¶ 3; Stephan Decl. ¶ 2.

A. Background on Provisional Application

"Provisional application" means that a State binds itself to comply with a treaty from the moment that it signs the treaty, even *before* the treaty is ratified by the State's legislature. This is a common practice recognized by Article 25 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("**Vienna Convention**"). *See* Shepard Decl., Ex. 6 (official text). Russia is a party to the Vienna Convention,[13] and was a party in 1994 when it signed the ECT. Stephan Decl., Annex 1 (first Stephan report), ¶¶ 62-68. The Russian Federation routinely agrees to provisionally apply treaties from the date of signature, prior to the treaties' ratification by the Russian Parliament. *See infra*, at 20-22 (providing examples).

[13] United Nations Treaty Collection, Depositary, Status of Vienna Convention (May 6, 2022), https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

In 1995, the Russian Federation enacted the Federal Law on International Treaties (FLIT) which "incorporates the language of the Vienna Convention on provisional application verbatim," "made clear that Russian legislation imposed no substantive limits on the kinds of treaties that may be provisionally applied," and "confirmed that a treaty . . . may apply provisionally for an indefinite period." Stephan Decl., Annex 1 ¶ 16; *see also id.* ¶¶ 56-59; Court of Appeal Judgment ¶ 4.7.10 (the FLIT was "intended to seek alignment with previously existing practice" of the Russian Federation "regarding provisional application of treaties"). The FLIT is contained in Annex 19 to the Mishina Declaration.

B. The Relevant Question Is Whether the ECT Was Provisionally Applied in 2005, When the Agreement to Arbitrate Was Formed

In this case, the agreement to arbitrate was formed in February 2005, when Petitioners submitted their notice of arbitration and thereby "accepted" the ECT's standing "offer" to arbitrate. *See Chevron*, 795 F.3d at 206. What matters here, therefore, is whether the ECT was provisionally applied by the Russian Federation in 2005. If so, then the agreement to arbitrate is valid and irrevocable. 9 U.S.C. § 2 (an agreement to arbitrate is "irrevocable" under U.S. law).[14] The Vienna Convention—to which the Russian Federation is a party—likewise forbids the Russian Federation from reneging on its treaty obligations.[15]

Article 45(3)(a) of the ECT permits a State to "terminate its provisional application of" the treaty by a "written notification." ECF 2-7, at 79. The Russian Federation did so in late 2009, just one month before the Arbitral Tribunal issued its interim judgments on jurisdiction.

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[14] Section 2 of the FAA, which makes an agreement to arbitrate "irrevocable," applies in full to confirmation proceedings brought under the New York Convention. *See* 9 U.S.C. § 208.

[15] Shepard Decl., Ex. 6 (Vienna Convention), art. 18 (a State must "refrain from acts which would defeat the object and purpose of a treaty" that "[i]t has signed"); *id.* art. 26 ("Pacta Sunt Servanda" "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); *id.* art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

See Stephan Decl., Annex 1 (first Stephan report), ¶ 151. But that termination is neither immediate nor retroactive as far as Article 26's arbitration clause is concerned.[16]

C. Article 45(1) of the ECT Asks Whether *Provisional Application* of Article 26 (the Arbitration Clause) Is Incompatible With Russian Law

The Court of Appeal correctly held that the relevant question, under Article 45(1), is whether "the *provisional application* of [Article 26] is incompatible with a rule of national [Russian] law." Court of Appeal Judgment ¶¶ 4.5.12-4.5.14 (emphasis added) & ¶ 4.5.26; *see also id.* ¶ 4.5.48 (formally adopting this interpretation). The question is *not* (as the Russian Federation contends) whether investor-State arbitration *is in itself* "inconsistent with Russian law." *Id.* ¶ 4.5.3; *see also id.* ¶¶ 4.5.11-4.5.12, 4.5.26; Dutch Supreme Court Judgment ¶ 5.2.16 ("[T]here can be no reasonable doubt that the interpretation of [Article 45(1)] advocated by the Russian Federation is not correct[.]").

In arriving at this interpretation of Article 45(1), the Dutch courts applied the well-known interpretive rules set forth in Article 31 of the Vienna Convention. Court of Appeal Judgment ¶ 4.5.8. U.S. courts also recognize and apply Article 31, as "reflecting customary international law." Restatement (Fourth) of Foreign Relations Law § 306 cmt. a.

Article 31(1) of the Vienna Convention instructs courts to begin with the plain text of the treaty. The Dutch courts' interpretation "does justice" to the text, which is most naturally read to refer to laws that *forbid* provisional application of all or some kinds of international treaties or treaty provisions. Court of Appeal Judgment ¶¶ 4.5.12-.13.

Article 31(2) instructs courts to consider the context of treaties. *Id.* ¶¶ 4.5.5, 4.5.23-.27. This criterion also supports the Dutch courts' interpretation, since one of the "aims" of the ECT

[16] Article 26 is contained in Part V of the treaty. ECF 2-7, at 52. Article 45(3)(b) "obligat[ed]" the Russian Federation to continue to "apply . . . Part[] V" for "twenty years following the effective date of termination." *Id.* at 79.

"is to stimulate investment in the energy sector . . . by providing stable and transparent investment conditions." *Id.* ¶ 4.5.26. The Russian Federation's interpretation of Article 45(1) would frustrate that aim, since "it is practically impossible" for an investor, "even if [it] seeks legal advice, to assess whether the laws of the state in which it wishes to invest deviate from the ECT in any manner." *Id.* By contrast, the interpretation of Article 45(1) advocated by Petitioners and adopted by the Court of Appeal merely requires an investor to "ascertain … what the national rules on provisional application of treaties are in the country in which it is considering to invest and to what extent they preclude provisional application of the ECT." *Id.* ¶ 4.5.27. That legal analysis can be accomplished "relatively easily," at least "with the help of expert legal advice." *Id.*

Article 31(3) instructs courts to consider "state practice." There is no "state practice" that conflicts with the Dutch courts' interpretation of Article 45(1). *Id.* ¶¶ 4.5.28-.32.

D. Russian Law Authorized the Provisional Application of the ECT

Applying the foregoing interpretation of Article 45(1), the Dutch courts had no trouble finding that provisional application of Article 26 (the arbitration provision) was "*not* inconsistent with" Russian law regarding the provisional application of international treaties. Article 23(1) of the Russian Federal Law on International Treaties (FLIT) states:

> 1. An international treaty or a part thereof may, prior to its entry into force, be applied by the Russian Federation provisionally if the treaty itself so provides or if an agreement to such effect has been reached with the parties that have signed the treaty.
>
> 2. Decisions on the provisional application of a treaty or a part of a treaty by the Russian Federation shall be made by the body that has taken the decision to sign the international treaty . . . .

Mishina Decl., Annex 19 (FLIT). This text expressly authorizes provisional application of *all* international treaties; it "does *not* comprise *any limitation* as to the treaty provisions … that can

be applied provisionally." Court of Appeal Judgment ¶ 4.6.1 (emphasis added).[17] "The Russian legal scholars Osminin and Karzov confirm that there are no restrictions on the provisional application of treaties that have to be ratified." *Id.*; *see also* Mishina Decl. ¶¶ 18, 39 (summarizing opinions of these two legal scholars, and others agreeing with them); *id.* Annex 8 (Osminin article), Annex 23 (Karzov article).

The Russian Government itself stated, on at least three occasions, that it was applying the ECT provisionally. In none of these statements did the Russian Federation suggest in any way that Article 26 was *not* being applied provisionally:

- In a note submitted to the Energy Charter Conference of July 8, 1997, the Russian Federation declared that it applied the Energy Charter Treaty on a provisional basis, Cotlick Decl., Ex. 33;
- At the Energy Charter Conference of December 17-18, 2002, the Russian Federation again stated that, even though it had not yet ratified the Treaty, "as a Signatory," it would apply the Treaty as "from the day it entered into force," Cotlick Decl., Ex. 35; *see also* Court of Appeal Judgment ¶ 4.7.30 (finding that this statement "could only be understood to mean that the Russian Federation was provisionally applying the ECT" and "cannot reasonably mean anything else"); and
- In 2005, the Russian Ministry of Foreign Affairs published an Information Memorandum on the Energy Charter Treaty, in which it stated that the Russian Federation "applies it on a provisional basis," Cotlick Decl., Ex. 34, at 1.

In 1996, the Russian Government declared, in an explanatory Note submitted to the State Duma, that the ECT's "provision on provisional application was in conformity with Russian legal acts." Stephan Decl., Annex 1 (first report), ¶ 210 (quoting this Note); *see also id.* ¶¶ 211-18 (further analysis of this Note).

In short: In 2005, the Russian law regarding provisional application of international treaties contained *no limitations* on the kinds of treaty provisions that could be provisionally

[17] Prior Russian law, in effect before the FLIT was enacted in 1995, also expressly authorized provisional application. Court of Appeal Judgment ¶¶ 4.7.10-.15.

applied. Therefore, Article 45(1) obligated the Russian Federation to apply the entire ECT (including Article 26) provisionally, from the date of signature.

E. Even Under the Russian Federation's Incorrect Interpretation of Article 45(1), the ECT Constitutes an Agreement to Arbitrate, Since Arbitration of Investor-State Disputes Is "Not Inconsistent With" Russian Law

The Dutch Court of Appeal then assumed, in the alternative, that the Russian Federation's proposed interpretation of Article 45(1) was correct, i.e., that the relevant question was whether Article 26's promise to arbitrate investor-State disputes was "inconsistent with" Russian law. Court of Appeal Judgment ¶ 4.6.2. The Court of Appeal then exhaustively reviewed the Russian law, and found no inconsistency whatsoever. *Id.* ¶¶ 4.7.2.1-.65. The Dutch Supreme Court denied the Russian Federation's appeal. Supreme Court Judgment ¶ 5.2.17 ("[T]he correctness of this judgment cannot be questioned in cassation.").

1. The Russian Constitution Gave Provisionally Applied Treaties "Priority Over" Any Contrary Russian Federal Law

The first reason why Article 26 was "not inconsistent with" Russian law is that the Russian Constitution gave provisionally applied international treaties *priority over* any contradictory Russian federal law, no matter the subject matter or its importance to the State. Therefore, it simply *does not matter* whether a separate Russian law barred arbitration of investor-State disputes, since the ECT would take priority over such a law. (As discussed below, there is no such law in any event.)

Article 15(4) of the Russian Constitution states: "If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied." Mishina Decl., Annex 6, art. 15(4). The Russian Constitutional Court is the final authority on the meaning of the Russian Constitution, and its

decisions are binding on all other courts and organs of the state. Mishina Decl., Annex 2 (first report), ¶¶ 94-122 (describing authority of the Constitutional Court).

In Resolution No. 8-P of the Constitutional Court of the Russian Federation, dated March 27, 2012, the Constitutional Court applied Article 15(4) to hold that provisionally applied international treaties are "*essentially equivalent*" to ratified treaties, and therefore "*have priority over*" any conflicting Russian laws. Mishina Decl. ¶ 14 (quoting the decision); *see also* Court of Appeal Judgment ¶¶ 4.7.22-.24 (quoting Resolution No. 8-P and other decisions); *id.* ¶ 4.7.25 (finding that these decisions "indisputably rebutted" the Russian Federation's claim that Article 26 was not applied provisionally).

Resolution No. 8-P's holding was thereafter confirmed by later decisions of the Constitutional Court, such as the Free Economic Zones Decision, Mishina Decl. ¶¶ 32-34, and in the Crimea Judgment, *id.* ¶¶ 35-39. In the Crimea Judgment, the Constitutional Court held that the Crimea Treaty—which formalized the Russian annexation of Crimea in 2014—applied provisionally, from the moment of signature, even though it re-drew state borders and transformed two million inhabitants of Crimea into Russian citizens. *Id.* ¶ 37. Even those profound changes could be accomplished through provisional application, the Constitutional Court held, without violating the Constitution or its concept of "separation of powers." *Id.* ¶ 38.

2. The Russian Federation's Long-Standing Treaty Practice Demonstrates that Provisionally Applied Treaties Have Priority Over Any Contrary Federal Law

In addition to the Constitutional Court's decisions, the Russian Federation's treaty practice demonstrates that the Russian Federation has often agreed to provisional application of international treaties, including treaties that significantly altered Russian laws of great importance. Stephan Decl., Annex 1 (first Stephan report), ¶¶ 81-96 (discussing four examples); Mishina Decl. ¶¶ 41-48 (same); Mishina Annex 15, ¶ 66 & attachment 2 (Gladyshev expert

report, listing 45 treaties applied provisionally by the Russian Federation as of 2006); *id.* attachment 3 (list of *390* treaties applied provisionally by the Russian Federation and the USSR since 1920). In 2014, the Russian Federation told the United Nations' International Law Commission that it was provisionally applying "more than 120 treaties." Shepard Decl., Ex. 7.

This practice is further evidence that it simply *does not matter* whether any Russian federal law purported to bar arbitration of investor-State disputes, since Article 26 of the ECT would in any event take priority over that law during the ECT's provisional application.

For example: the Russian Federation continues to apply provisionally the 1990 Maritime Agreement with the United States, which establishes the border in the Bering Strait. Stephan Decl., Annex 1 (first Stephan report), ¶¶ 83-86. Other international treaties—*including at least two that provided for binding arbitration of disputes*—have also been applied provisionally.[18] And, as discussed above, the Constitutional Court expressly held that the Free Economic Zone Agreement and the Crimea Treaty applied provisionally, even though both of them altered federal laws of great significance. *Supra*, at 20.

In the Dutch Court of Appeal, the Russian Federation contended that this prior practice, of provisionally applying treaties even when those treaties departed from Russian federal law, was just an "accident[]." Court of Appeal Judgment ¶ 4.7.17. The Court of Appeal was unconvinced, finding it "implausible that the (years-long) provisional application of treaties that derogate from the law is the result of inadvertency." *Id.* "[T]here has been no evidence," that

[18] Stephan Decl., Annex 1 ¶ 181 (provisional application of the OECD Agreement, which provides for arbitration); *id.* ¶¶ 94-95 (provisional application of the EDB Agreement, which provides for arbitration); *see also id.* ¶¶ 91-92 (provisional application of the U.S. Transit Agreement, which authorized U.S. military operations on Russian soil and immunized American soldiers from Russian criminal law).

anyone ever "noted," prior to this case, that "the provisional application of treaties" that departed from Russian law was "unconstitutional." *Id.*

3. There Was No Russian Federal Law Barring Investor-State Arbitration

Even if the Constitution and long-standing treaty practice did not establish that a provisionally applied treaty takes priority over any contrary Russian law, there *is no contrary Russian law* that forbids the arbitration of investor-State disputes.

i) No Russian federal law prohibits arbitration of investor-State disputes

The Russian Laws on the Legal Protection of Foreign Investments—one enacted in 1991, the other in 1999—expressly state that the Russian Federation may agree to *any* type of method for resolving investor-State disputes. Court of Appeal Judgment ¶ 4.7.46 (quoting these laws). These laws demonstrate that arbitration of investor-State disputes is "not *inconsistent* with Russian law," since "both laws explicitly allow the option of resolving a dispute between a foreign investor and the Russian Federation other than by a Russian court." *Id.* ¶ 4.7.47. The Russian Government's official Note, sent to the State Duma in 1996, confirmed this: "The provisions of the ECT are consistent with Russian legislation." *Id.* ¶ 4.7.38 (the Note "allow[s] no other interpretation than that the government held the view that . . . Article 26 . . . [was] 'consistent' with Russian law").[19]

Far from *forbidding* investor-State arbitration, Russian law has frequently provided for it, in numerous bilateral investment treaties. *Id.* ¶ 4.7.37; *see also* Banifatemi Decl., ECF 63-2, Exs. 16-19 (four examples of such treaties). Indeed, beginning in 1992, Russian law established a "model" template for a bilateral investment treaty, which provided for investor-State arbitration. Court of Appeal Judgment ¶ 4.7.53; *see also* Stephan Decl., Annex 2 (second

[19] *See also* Stephan Decl., Annex 1 (first report), ¶ 210-18 (further analysis of this Note).

report), ¶¶ 186 & 203-207. "A state that regularly agrees to the international arbitration of investment disputes and explicitly takes that form of dispute resolution as a point of departure in its negotiations . . . cannot credibly maintain that this form of arbitration is . . . inconsistent with Russian law." Court of Appeal Judgment ¶ 4.7.37.

ii) The "separation of powers" principle did not bar the Russian Government from provisionally applying a treaty that provided for arbitration of investor-State disputes

Arbitration of investor-State disputes did not violate any "separation of powers" principle, since the federal laws quoted above constituted explicit authorization, by the Russian Parliament, for the Russian Government to agree to "international arbitration [of] investment disputes in so many words." *Id.* ¶ 4.7.5; *see also id.* ¶¶ 4.7.6-.31; *id.* ¶ 4.7.32. Moreover, the Constitutional Court's Crimea Judgment held that there is no "separation of powers" violation when the Russian Government signs treaties that apply provisionally. Mishina Decl., ¶ 38.

There can be no serious argument that the ECT impinges on the jurisdiction of the Russian courts, since Article 26 provides for *concurrent* jurisdiction of those courts. The decision is left to the investor, who "may choose to submit" its dispute "to the courts … of the Contracting Party." ECF 2-7, at 52 (art. 26(2)(a)).

iii) Arbitration of investor-State disputes does not violate the doctrine against arbitrating "public law" disputes

Although "public law" disputes are not arbitrable under Russian law, a "dispute between a foreign investor and the host country" is *not* "of a public law nature." Court of Appeal Judgment ¶¶ 4.7.34-.35 (citing Russian authorities). If such investor-State disputes *were* of a public law nature, then surely the Russian Federation would not have adopted a "model" bilateral investment treaty that *provided for* investor-State arbitration. *Id.* ¶ 4.7.37.

4. The "Double *Renvoi*" Doctrine Does Not Apply

The Russian Federation contends that the Dutch courts' reasoning is invalid because of something called "double *renvoi*." ECF 232, at 15. The sole authorities cited (other than the Russian Federation's expert's say-so) are the now-reversed decision of the Dutch District Court and a *dissenting* opinion of an arbitrator in a *different* case. *Id.*, n.5. The doctrine does not apply.

The rule against "double *renvoi*" means that a court should not interpret one conflict-of-law principle as simply referring to a different conflict-of-law principle. Stephan Decl., Annex 3 (third report), ¶ 15. This rule has no relevance here because Article 15(4) of the Russian Constitution *is not* a conflict-of-law principle. Court of Appeal Judgment ¶ 4.7.29 ("Article 15(4) of the Constitution is clearly more than just a 'conflict of laws rule,' because it puts the fact that a treaty is an integral part of the Russian legal system first."); *see also* Stephan Decl., Annex 3, ¶ 16 (no Constitutional Court decision, or legal commentary, has ever referred to Article 15(4) as a conflict-of-law rule) & ¶ 17 (no scholarly commentary on Russia's conflict-of-law rules has ever suggested that Article 15(4) is a conflict-of-law rule).

5. Neither of the Russian Federation's Two Authorities Meets Its Burden of Demonstrating that ECT Article 26 Was Not Applied Provisionally in 2005

The Russian Federation now contends that two decisions by Russian courts compel a different result, under the U.S. Supreme Court's 2018 decision in *Animal Science Products*. ECF 232, at 12-16 (citing *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018)). The Russian Federation misconstrues the decisions of both *Animal Science Products* and the Russian courts.

Animal Science Products did *not* hold that this Court must accept, as "binding," any "decision of" the Russian courts. ECF 232, at 12. The Russian Federation misquotes a passage that described how federal courts treat decisions *of U.S. state supreme courts* under the *Erie*

doctrine. 138 S. Ct. at 1874 (referring to the relevant "state law" as "established by" the decisions of *U.S. state supreme courts*). When it comes to *foreign* law, a district court "may consider any relevant material or source." *Id.* at 1873 (quoting Fed. R. Civ. P. 44.1).[20]

Neither of the two Russian decisions comes close to carrying the Russian Federation's burden to demonstrate that the ECT's arbitration clause did not apply provisionally in 2005.

i) The "Chinese Border Case" is irrelevant

The Supreme Court of the Russian Federation's Cassation Ruling No. 59-O09-35 (the "**Chinese Border Case**") is irrelevant for two reasons. Court of Appeal Judgment ¶ 4.7.26. *First*, the agreement at issue was an "exchange of memoranda" between governments—a "lower status" kind of agreement that *does not* take priority over Russian laws. *Id.* There is a significant difference between an "exchange of memoranda" and an "interstate treaty" like the ECT. *Id.* ¶ 4.7.25. Indeed, the Chinese Border Case *confirmed* that "interstate treaties" like the ECT *do* have "priority over the laws of the Russian Federation." *Id.* (quoting decision). That is because Article 15(4) of the Russian Constitution gives "interstate treaties" (but not lesser agreements) priority over Russian laws. *See id.* Because the agreement at issue in the Chinese Border Case was not an "interstate treaty" like the ECT, the case has no relevance here. *Second*, the "exchange of memoranda" did *not* provide for provisional application. *Id.* ¶ 4.7.26.

Even if the Chinese Border Case were relevant, it would still not take precedence over the decisions of the *Constitutional* Court, described above at pages 19-20. The *Constitutional*

[20] The issue presented in *Animal Science Products* was *not* the weight to be given to the decision of a foreign court, but rather the weight to be given to an amicus brief submitted by the sovereign. "Given the world's many and diverse legal systems," the Supreme Court did *not* adopt any rigid rules, but rather indicated that the "appropriate weight" to be given to a sovereign's views of its own law "will depend upon the circumstances…." *Id.* at 1873-74. The *Saiyed* decision is entirely inapposite because it applied *Virginia* state law. *Saiyed v. Council on Am.-Islamic Rels. Action Network, Inc.*, 346 F. Supp. 3d 88, 95 (D.D.C. 2018).

Court (and not the Supreme Court) has "the last word" on what the Constitution means. Court of Appeal Judgment ¶ 4.7.26; Mishina Decl., Annex 3 (second report), ¶ 119.

ii) The "Christmas Decision" was issued in highly suspicious circumstances and is not an accurate description of Russian constitutional law in 2005

The Russian Federation's Supplemental Brief relies heavily on Ruling No. 2867-O-P of the Constitutional Court of the Russian Federation, dated December 24, 2020 (the "**Christmas Decision**"). But that decision is *not* an accurate description of Russian law *when the arbitration notice was submitted in 2005*, which is the relevant question here. *See supra*, at 15-16.

The Christmas Decision was issued in response to a request, from the Russian Government, that the Constitutional Court "clarify" its 2012 decision in Resolution No. 8-P, which Petitioners and the Dutch courts relied on. *See supra*, at 19-20. The circumstances of this decision are highly suspicious. *First*, the Russian Government requested this "clarification" for the express purpose of attempting to undo the Dutch Court of Appeal's judgment. Mishina Decl., ¶ 22 & Annex 22. That is a "highly unusual" reason for requesting clarification. *Id.* ¶ 23. *Second*, the request for clarification followed after a series of constitutional and statutory amendments, in 2020, which stripped the Justices of the Constitutional Court of tenure protection, *id.* ¶ 19, mandated that the Court decide requests for clarification in total secrecy, *id.* ¶ 21, and made other changes specifically intended to frustrate Petitioners, *id.* ¶ 20. *Third*, the request for clarification was made extraordinarily late—*eight years* after Resolution No. 8-P. *Id.* ¶ 26. *Fourth*, Resolution 8-P was not in need of any "clarification." Later decisions of the Constitutional Court, academic commentary, and even acts of the Russian Parliament and President all showed no confusion about what Resolution No. 8-P meant. *Id.* ¶¶ 16-18.

The Christmas Decision's holding is *not* an accurate description of Russian law as it existed before 2020. As discussed above, Resolution No. 8-P affirmed that the Russian

Constitution gave provisionally applied international treaties "priority over" any conflicting provisions of Russian federal statutes. *See supra*, at 19-20. This was widely understood. Mishina Decl. ¶ 16; *see also id.* ¶¶ 30-39 (describing later decisions of the Constitutional Court, which reaffirmed Resolution 8-P's holding). The Christmas Decision also represents a dramatic departure from prior Russian practice of provisionally applying all kinds of important international treaties, even those that significantly altered pre-existing federal law. *Id.* ¶¶ 41-48.

Finally, the Christmas Decision does not even purport to have any retroactive, *nunc pro tunc* effect. *Id.* ¶ 50. That is, the Decision does not alter the understanding or content of Russian law as it existed before December 2020. *Id.* The decision therefore has no relevance to whether Article 26 was provisionally applied in 2005.

IV. Article 1 of the ECT (Defining "Investors" and "Investments") Is Irrelevant to the Sovereign Immunity Question

The Russian Federation next contends that, even if Article 26 constituted an offer to arbitrate *some* investor-State disputes, that offer did not include this *specific* dispute since, the Russian Federation alleges, Petitioners do not qualify as "Investors," and their shares of Yukos do not qualify as "Investments," as those terms are defined in the ECT. ECF 232, at 16-27.

The Court need not even consider this argument at this stage because this "arbitrability" issue is *irrelevant* to the FSIA's "arbitration exception." Even if this Court were to take up the issue, there would be nothing to resolve, since the Russian Federation expressly agreed to delegate this question to the Arbitral Tribunal. And even if the Court were inclined to pursue the argument further, the ECT makes clear that Petitioners and their Yukos shares do qualify as "investors" and "investments" under the plain meaning of those terms' definitions. In any event, the Russian Federation has failed to carry its burden to prove that Petitioners' "control persons" were Russian nationals, or that Petitioners' investments involved any "illegality" whatsoever.

A. This "Arbitrability" Dispute Is *Irrelevant* to the "Arbitration Exception"

In two recent decisions, the D.C. Circuit held that near-identical "arbitrability" arguments, by sovereign award-debtors, are simply *irrelevant* to the FSIA's "arbitration exception." That exception only requires "an agreement to arbitrate"; it does *not* require proof that the *particular* dispute at issue is within the scope of that agreement.

In *Chevron*, Ecuador had signed a bilateral investment treaty that contained a "standing offer . . . to arbitrate disputes." 795 F.3d at 202. Ecuador contended that Chevron's investments did not meet the treaty's definition of "investments." *Id.* at 203. The D.C. Circuit held that this issue was *not relevant* to the FSIA arbitration exception; the issue could *only* be considered as a merits defense under Article V of the New York Convention.[21] *Id.* at 205-07. In *Stileks*, Moldova also argued that the petitioner did not hold "an investment within the meaning of the ECT." 985 F.3d at 878. In other words, Moldova argued, even if "the ECT may establish that Moldova agreed to arbitrate certain disputes, it does not prove that it agreed to arbitrate this *particular* dispute." *Id.* The *Stileks* court reaffirmed *Chevron*: Although Moldova's argument "might" be "a defense to confirmation under [Article V(c)(1)] of the New York Convention," "the arbitrability of a dispute is not a jurisdictional question under the FSIA." *Id.*

B. The Russian Federation Delegated This "Arbitrability" Question to the Arbitrators

Even if this Court *were* to take up this issue now, it would not need to proceed far to resolve it, since the Russian Federation "delegate[d] [the] task," of determining whether this specific dispute was within the scope of the ECT, "to the arbitrator[s]." *Chevron*, 795 F.3d at 208; *see also id.* at 207 ("The District Court did not need to reach the question of whether

[21] Article V(c)(1) "provides that an award may be refused if it 'deals with a difference not contemplated by or not falling within the terms of the submission to arbitration.'" *Id.* at 207. This defense is not before the Court in this motion. *See* ECF 228.

Chevron's lawsuits fell within the terms of submission to arbitration because the BIT allows the arbitration tribunal to make that determination."); *accord BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 38-39 (2014) (courts presume that parties delegated the power to decide questions of "arbitrability" to the arbitrators).

Article 26 of the ECT offers to arbitrate under the Arbitration Rules of the United Nations Commission on International Trade (UNCITRAL). ECF 2-7 (ECT), at 54 (art. 26(4)(b)). The Petitioners accepted that offer. ECF 63-3, at 4 (Notice of Arbitration ¶ 1). And the UNCITRAL Rules delegate this dispute to the arbitrators to decide. ECF 63-8, at 16 (Rule 21(1)) ("The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause…."); *Stileks*, 985 F.3d at 878 ("Moldova agreed to assign arbitrability determinations to the tribunal" because "[u]nder Article 26 of the ECT, all parties agree to arbitration under UNCITRAL's rules," which is "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability") (citation omitted); *see also Chevron*, 795 F.3d at 207-08 (same).

Moreover, the Russian Federation expressly agreed that the Tribunal would decide its own jurisdiction: "The Russian Federation . . . has reached the determination to accept the jurisdiction of this Arbitral Tribunal to determine its own jurisdiction." ECF 63-5, at 2 (letter to the Tribunal). That language indicates that the Tribunal will decide whether this dispute comes within the scope of the ECT. *Stileks*, 985 F.3d at 879 ("Whether the ECT applies to the dispute and whether the tribunal had jurisdiction . . . are different ways of framing the same question.").

C. Petitioners Are "Investors," and Their Shares of Yukos Are "Investments"

Even if the merits of this dispute were before this Court, the result is the same: Petitioners are "Investors," and their Yukos shares are "Investments," under the plain meaning of the ECT's definitions of those terms.

The ECT defines "Investor" to include "a company or other organization organized in accordance with the law applicable in [a] Contracting Party." ECF 2-7, at 9 (art. 1(7)). It defines "Investment" to include "every kind of asset, owned . . . by an Investor and includes . . . shares." ECF 2-7, at 7 (art. 1(6)). The Russian Federation raised, with the Dutch courts, all of the arguments it now presses here regarding what these definitions require. *See* Court of Appeal Judgment ¶¶ 5.1.3-.4, 5.1.8.1-.3, 5.1.8.5, 5.1.9.1, 5.1.11.1 (summarizing the arguments).

The Court of Appeal correctly applied the interpretive rules of Article 31 of the Vienna Convention, *id.* ¶ 5.1.6, to hold that the ECT's definitions, just quoted, do *not* contain any of the additional requirements that the Russian Federation now seeks to add. Second Cohen Jehoram Decl. ¶ 19 (summarizing each of the Court of Appeal's holdings). The Dutch Supreme Court affirmed the Court of Appeals' holding. Supreme Court Judgment ¶ 5.3.12 ("[T]he parties to the ECT deliberately opted for a broad meaning of the terms 'Investor' and 'Investment' and . . . refrained from including additional criteria.").

As for "Investor," Petitioners qualified because they were organized under the laws of "another Contracting Party" (the Isle of Man and Cyprus). Court of Appeal Judgment ¶ 5.1.6. The ECT's drafters could have included more requirements—e.g., the nationality of control persons—as other treaties have done. But the ECT's drafters "chose[]" not to. *Id.* ¶ 5.1.7.2. The ECT's broad, clear definition of "Investor" is consistent with the purpose of the ECT—which was to bring stability and transparency to international energy investments. *Id.* ¶ 5.1.7.3.

As for "Investment," Article 1(6) defines that term to include "shares" "owned" by an Investor.[22] Although the drafters of the ECT could have adopted a narrower definition (e.g., required that the Investor make an economic contribution to the host state), the drafters chose

[22] The Yukos shares are plainly "in the Area of" the Russian Federation, as required by Article 26(1), because "Yukos is a company incorporated under Russian law." *Id.* ¶ 5.1.6.

not to. *Id.* ¶ 5.1.9.5. Instead, the ECT adopted the "asset based" definition, *id.*, which Petitioners' shares of Yukos clearly satisfy. Again, this broad and clear definition is supported by the treaty's aim of fostering stability and transparency. *Id.*

The sole authorities cited by the Russian Federation are inapposite. The cited passages of the *Littop* award concerned *Article 17* of the ECT. ECF 215-2 (*Littop Enterprises Ltd. v. Ukraine*), ¶¶ 612-614. *Article 17* does not apply here. *See* Court of Appeal Judgment ¶¶ 5.1.8.1-.4.[23] As for the "Understanding" of the ECT drafters, *see* ECF 51-9, that document refers to an *alternative* definition of "Investment" (not relevant, here) which applies to assets that are merely "controlled" (as distinct from "owned") by an Investor. *See* ECF 51-9, at 3 (discussing Article 1(6)). The Understanding's discussion of "control," in this context, is irrelevant, since Petitioners' Yukos shares qualify as "Investments" because those shares were "owned" outright by Petitioners. ECF 2-7, at 7; *see* Court of Appeal Judgment ¶ 5.1.9.5.

D. Even If "Control In Fact" Were Relevant, The Russian Federation Has Failed to Prove that Russian Nationals Controlled Petitioners in 2005

Even if the ECT's definition of "Investor" excluded entities controlled by Russian nationals (it doesn't), that exclusion still would not apply to Petitioners. As of February 2005 (when the "agreement to arbitrate" was formed, *see supra*, at 15-16), Petitioners were *not controlled* by Khodorkovsky et al.[24] The documents that the Russian Federation cites come

[23] Article 17 concerns the right of the host State to deny the benefits of the ECT's substantive provisions to Investors controlled by "citizens or nationals of a third state," that is, of a state not a party to the ECT. Article 17 is irrelevant here for at least three reasons: (1) it does not pertain to the Tribunal's jurisdiction (nor does the Russian Federation argue it does); (2) it does not create any exception to the ECT's clear definition of "Investor," *id.* ¶ 5.1.8.4; and (3) the Russian Federation does not allege that Petitioners were *not* controlled by "citizens or nationals of a third state."

[24] In its brief, the Russian Federation refers to this group of seven Russian nationals as the "Russian Oligarchs." *E.g.*, ECF 232 at 3. Petitioners adopt the terminology used by the Hague Court of Appeal and the Dutch Supreme Court, "Khodorkovsky et al." Court of Appeal Judgment ¶ 3.2.2; Dutch Supreme Court Judgment ¶ 3.4(ix).

nowhere close to meeting the Russian Federation's burden. Moreover, the Russian Federation is wrong to contend that Petitioners "never provided any convincing rebuttal." ECF 232, at 26. In fact Petitioners rebutted all these allegations at great length in the Dutch proceedings. *See* Cotlick Decl., Ex. 1 (Petitioners' February 2019 "Deed" filed with the Court of Appeal).

This failure is particularly glaring as regards the Russian Federation's latest document, the "Deed of Accession." The Russian Federation claims that this document "transferr[ed] voting rights" in Petitioners' parent company, GML Limited, "from the trustee to . . . Mr. Platon Lebedev." ECF 232 at 24. But the Deed of Accession is dated *April 3, 2003*. *Id.* at 19; ECF 202-1.

It was only *six months later* (on October 20, 2003) that the shares of GML—and thus control of GML, Hulley, and YUL—were fully transferred to the Guernsey trusts.[25] *See* ECF 2-4, ¶¶ 462–463, 535–536; *see also* Cotlick Decl., Ex. 1 (February 2019 Deed) ¶¶ 1134–1159; Cotlick Decl., Ex. 2 (Hudson Witness Statement) ¶¶ 15–22. *Petitioners never disputed* that Mr. Lebedev and others controlled GML before such transfers to the Guernsey Trusts. *See* ECF 2-4, ¶ 492. Indeed, Lebedev's control over GML at that time was a matter of public knowledge.[26]

Moreover, the Deed of Accession expired, under its own terms, at the very latest in November 2003 when Mr. Khodorkovsky resigned his position in Yukos, two weeks after his

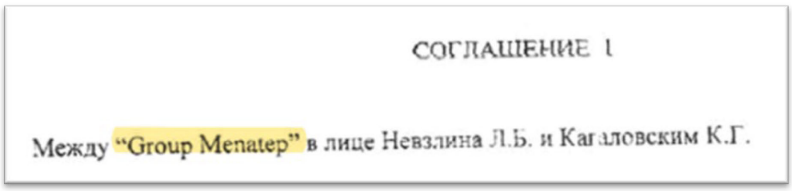
[25] The Russian Federation does not claim—nor could it—that the Deed of Accession had anything to do with control of Petitioner VPL. VPL was not owned and controlled by GML (which itself was owned and controlled by the Guernsey-based trustees), but by a separate trustee based in Jersey. *See* February 2019 Deed ¶ 1133.

[26] *See* Cotlick Decl., Ex. 3, at 15 (NAV-398) (April 10, 2003 public research report stating: "the voting power of the trust on Yukos-related issues (including disposal of Yukos shares by Group Menatep) belongs to Group Menatep Director Platon Lebedev"); Cotlick Decl., Ex. 4, at 1. (HVY-462) (June 19, 2002 screenshot of GML's publicly accessible website: "In accordance with a separate agreement on voting the 50 percent of shares of Group MENATEP, Platon Lebedev, the director of Group MENATEP, has the right to vote such shares of Group MENATEP on issues relating to voting or disposal of the shares in YUKOS").

arrest. *See* ECF 2-1 (Hulley Final Award) ¶¶ 778, 782. The Deed of Accession states that it will be effective only "for so long as Mr. Mikhail B. Khodorkovskiy holds a senior administrative position in YUKOS." ECF 202-1, at 1. The Deed of Accession thus proves nothing about control at the relevant date for assessing the Tribunal's jurisdiction, namely, February 2005. The Russian Federation's suggestion that this document would have somehow changed the Arbitral Tribunal's conclusion that Petitioners were "Investors," for purposes of the ECT, is simply not plausible.[27]

Most of the other documents that the Russian Federation cites, in support of its "control in fact" theory, were already addressed by Petitioners in the Dutch Court of Appeal. None comes even close to showing what the Russian Federation claims.

As just one example, the Russian Federation contends that the evidence it previously filed at ECF 202-3 "document[s] multimillion-dollar transactions entered into by . . . Leonid Nevzlin, on behalf of . . . GML." ECF 232, at 19. Petitioners thoroughly refuted this contention in the Dutch Court of Appeal. Even a cursory examination of the document reveals that the agreements were ***not*** entered into on behalf of GML. The Russian Federation's argument relies on a misleading translation. Here is the document, in the original Russian:

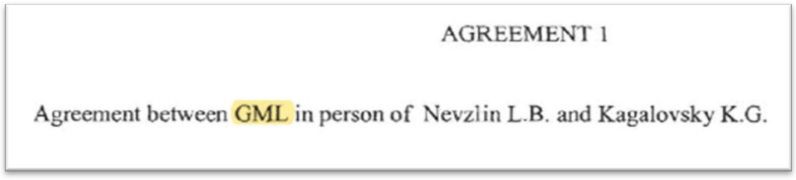


СОГЛАШЕНИЕ 1

Между "Group Menatep" в лице Невзлина Л.Б. и Кагаловским К.Г.

ECF 202-3, at 4. And here is the English translation that the Russian Federation relies on here:

[27] Though the Russian Federation also uses the Deed of Accession to support an irrelevant allegation about a supposed disclosure violation by Petitioners in the arbitrations (an allegation Petitioners strongly dispute), the Russian Federation nowhere explains why Petitioners would have been in possession of this document, to which they are not a party. Nor does it explain when or how it obtained the document.



AGREEMENT 1

Agreement between GML in person of Nevzlin L.B. and Kagalovsky K.G.

ECF 202-3, at 3. There is, of course, no reason to translate "Group Menatep" from the original Russian document; even in the original Russian document, "Group Menatep" is written ***in English***. But by relying on that misleading translation, the Russian Federation has significantly altered the meaning of the document. As Mr. Nevzlin explained to the Hague Court of Appeal, to him, "Group Menatep" and "GML" "are not the same thing at all." Cotlick Decl., Ex. 5 (Nevzlin Supp. Witness Statement) ¶ 27. "Group Menatep," he explained, "is the term used for many years by my partners and myself to refer to ourselves – i.e. the group of business partners who had been working together since the late 1980s." *Id.* "GML," by contrast, "was the abbreviation my partners and I used in our internal discussions or in discussions with advisors to refer to the company 'Group Menatep Limited', which was the name of GML until November 2005, when 'Group Menatep Limited' officially changed its name to 'GML Limited.'" *Id.* ¶ 28. The Russian Federation misleadingly relies on a flawed translation, in which *the English words* "Group Menatep" are misleading translated as "GML," thereby "misrepresent[ing] the content of the original Russian text." *Id.*; *see also* Cotlick Decl., Ex. 6 (Osborne Supp. Witness Statement) ¶ 6 (explaining that he "checked [GML's] books and records" and concluded that "neither GML, nor any of its subsidiaries, have ever authorized and have certainly never made any payments to Mr Kagalovsky on the basis of those purported contracts"). In short: ECF 202-3 in no way supports the Russian Federation's suggestion that Mr. Nevzlin entered into contracts on GML's behalf in 2004.

Petitioners will not repeat their prior briefing on the other documents the Russian Federation recycles here.[28] To the extent the Court is interested, Petitioners addressed each one in painstaking detail in paragraphs 1160–1193 of its February 26, 2019 Deed filed with the Dutch Court of Appeal, as well as in witness statements submitted by Mr. Nevzlin, Mr. Timothy Osborne, and Mr. Kelvin Hudson.[29] Suffice it to say none of these documents show anything remotely resembling control by Khodorkovsky et al. over Petitioners or GML in February 2005 or anytime thereafter. Petitioners also explained in the February 2019 Deed why the declaration of Dmitry Gololobov, which the Russian Federation submitted to this Court in 2016 and to the Dutch courts in 2017, should not be given any weight. *See* February 2019 Deed ¶¶ 824–828 (noting that Gololobov "does not have any direct knowledge of many of the subjects" of his testimony, that he had previously insisted that "the attack on Yukos was politically motivated," and that he only signed his witness statement after the Russian public prosecutor offered to drop all charges against him); *see also* ECF 149. Those reasons apply with equal force today.

E. Even if the Legality of Petitioners' Investments Were Relevant, the Russian Federation Has Failed to Prove that Petitioners Acquired their Shares Illegally

Even if the ECT's definition of "Investment" excluded shares obtained "illegally" (it does not), that exclusion still would not apply here. The Arbitral Tribunal and the Dutch Court

[28] The one document that the Russian Federation relies on here that HVY did not discuss in its submissions to the Hague Court of Appeal is ECF 202-5. The document plainly says nothing about which individuals supposedly exercised control over GML or when they exercised that supposed control.

[29] See the following documents, submitted as Exhibits to the Cotlick Declaration: Nevzlin Supp. Witness Statement ¶¶ 12-18 (addressing ECF 202-4); February 2019 Deed ¶¶ 1161–1175 (addressing the 2011 GML bonus arrangement with directors of the Dutch Yukos Foundations raised by the Russian Federation at ECF 142-2, at 27-30); Osborne First Witness Statement) ¶¶ 18–23 (same); Hudson Witness Statement ¶¶ 30–33 (same); February 2019 Deed ¶¶ 1183–1193 (addressing the emails and testimony from Eric Wolf regarding settlement negotiations between the Dutch Yukos Foundations and Promneftstroy raised by the Russian Federation at ECF 142-2 at 30–31); Nevzlin First Witness Statement) ¶ 65 (same); Osborne First Witness Statement ¶ 31–34 (same); Hudson Witness Statement ¶¶ 34–36 (same).

of Appeal found, based on voluminous evidentiary submissions, that "the conduct complained of" by the Russian Federation, which allegedly occurred in connection with Yukos's privatization in 1995–96, "is too far removed from the transactions by which [Petitioners] acquired their shares in Yukos" in 1999–2001. Court of Appeal Judgment ¶ 5.1.11.7; *see also* Supreme Court Judgment ¶¶ 5.4.2–5.4.7 (rejecting the Russian Federation's cassation petition challenging this finding by the Court of Appeal).[30]

Petitioners were formed in 1997 and 2001 as legitimate holding companies whose main activities are holding shares in Yukos. *See* February 2019 Deed ¶¶ 1100–1114.[31] And the Russian Federation has never challenged that their acquisition of their Yukos shares was lawful. *See* February 2019 Deed ¶¶ 1209–1212; *see also* ECF 2-1, ¶ 1370; ECF 2-4, ¶ 430.

F. The Russian Federation's Assertions Regarding the Illegality of the Yukos Privatization Are Unfounded

Even if the legality of Yukos's privatization of Yukos in 1995-96 (several years before Petitioners even existed) were relevant to the question of whether Petitioners' shares qualify as "Investments" (and it isn't relevant) the Russian Federation has wholly failed to prove that anything illegal occurred.

1. Background to the Yukos Privatization

Some background is in order. Yukos's privatization occurred as part of President Boris Yeltsin's attempt, in the early-to-mid 1990s, to transform Russia's centrally-managed economy to a market-based system. *See* February 2019 Deed ¶ 1228. The privatization of state-owned

[30] *See also* Court of Appeal Judgment ¶ 5.1.11.8 ("There is an insufficient connection between the (alleged) illegalities in 1995/1996 and the making of the investment by [Petitioners]. This does not change if the—possible—involvement of [Petitioners] in the payment of bribes to the Red Directors is taken into account. This circumstance is also insufficiently linked to the investment made by [Petitioners] themselves."); *see also* ECF 2-1 (Hulley Final Award), ¶ 1370.

[31] Indeed, VPL was established under the advice and supervision of White & Case, the same firm that represents the Russian Federation here. *See* February 2019 Deed ¶ 1109.

companies was a key component of that transformation. *Id.* Russia's privatization program, which began in 1992, was led by Deputy Prime Minister Anatoly Chubais. *Id.* ¶¶ 1228–1229.

With respect to the privatization of Yukos in particular, the Russian Federation set up and administered two simultaneous processes: (1) a loans-for-shares ("LFS") auction; and (2) an investment tender. Under the LFS auction, participants would bid on the opportunity to offer a loan to the Russian Federation in exchange for a pledge on some Yukos shares. The winner of that auction was determined by the amount of the loan offered, and the winner would also take on an obligation to invest a fixed amount in Yukos. Under the investment tender, which sought an additional investment in the company, the winner (as determined by the amount of that additional investment) would directly purchase other shares of Yukos. *See* February 2019 Deed ¶¶ 1228–1316. The Russian Federation, either directly or through committees that it established and controlled, set the rules, conducted, and oversaw both processes. *Id.* Those rules included minimum starting prices, a required security deposit, and the required investment that had to be made for the LFS auction. *See* February 2019 Deed ¶ 1246, 1260, 1263–64.[32]

The Yukos LFS auction / investment tender, which took place on December 8, 1995, drew three bidders. They were: ZAO Reagent and ZAO Laguna—both of which were entities that represented Bank Menatep—and AOOT Babayevskoye ("Babayevskoye"). *See* February 2019 Deed ¶¶ 1286–89. Babayevskoye was a sweets manufacturer serving as an investment

[32] *See also* Cotlick Decl., Ex. 9 (R-261) (Presidential Decree No. 889 of August 31, 1995); Cotlick Decl., Ex. 10 (HVY-473) (GKI Order No. 1365-r, September 25, 1995); Cotlick Decl., Ex. 11 (HVY-480) (GKI Order 1518-r, 20 October 1995); DG-087 (GKI Order 1547-r of 25 October 1995); Cotlick Decl., Ex. 12 (MP-109) (Protocol No. 1 of the Auction Committee for the Yukos LFS auction of 8 December 1995); Cotlick Decl., Ex. 13 (MP-148) (Protocol No. 1 of the Tender Committee for the Yukos investment tender of 8 December 1995); Cotlick Decl., Ex. 14 (MP-149) (Protocol No. 2 of the Auction Committee for the Yukos investment tender of 8 December 1995); Cotlick Decl., Ex. 15 (MP-020) (Protocol No. 2 of the Auction Committee for the Yukos LFS auction of 8 December 1995).

vehicle for a separate consortium of banks. *Id.* ¶ 1288. Because Babayevskoye had not made the entire security deposit required to participate in the investment tender, the Russian Federation, through its "Tender Committee," rejected Babayevskoye's application for the investment tender. *Id.* ¶ 1290. Babayevskoye subsequently withdrew from the LFS auction. *Id.* ¶ 1291. ZAO Laguna, on Bank Menatep's behalf, won both the LFS auction and the investment tender. *Id.* ¶¶ 1292–93. The following year, after the Russian Federation failed to repay the loan that Bank Menatep had extended under the LFS auction, companies representing the interests of Bank Menatep's shareholders acquired the pledged shares. *Id.* ¶¶ 1305–1316.

In total, Bank Menatep and its shareholders ultimately acquired a 78% stake in Yukos through these processes, and paid $519.725 million for that stake, including the purchase price for the shares and the required investment in the company. Cotlick Decl., Ex. 16 (Dubov Second Witness Statement) ¶ 15. Chubais himself confirmed, in an interview held on the day of the LFS auction / investment tender, that the bid submitted by Bank Menatep was the highest bid the Russian Federation could obtain. *See* Cotlick Decl., Ex. 17 (unofficial transcript of HVY-460), at 3 ("Given the level of media attention, it is clear that even 1 dollar deposited in excess of this amount would have meant that Menatep would not have been the winner. But, sadly, we don't have that dollar."); *see also* Cotlick Decl., Ex. 18 (HVY-474) (January 12, 1996 letter from the GKI to the State Duma, stating that the starting prices for the LFS auctions were set, by the Russian Federation, at 70-90% of the market value of the shares to be pledged).

Those statements are confirmed by Yukos's market valuation following its privatization. As a result of the uncertain political and economic climate in Russia, as well as the business structure of Yukos, the company's financial position showed little immediate improvement. Yukos still incurred significant losses in 1998, and by December 1998, the company's total

market value reached a low of $112 million (i.e., about *one quarter* of what Bank Menatep and its shareholders had paid). February 2019 Deed ¶ 867.

2. The Russian Federation Was Aware of, and Confirmed the Legitimacy of, Bank Menatep's Acquisition of the Shares in Yukos

The Russian Federation now contends that there was something "secret" about the fact that Bank Menatep stood behind two of the participants in the LFS auction / investment tender (ZAO Reagent and ZAO Laguna). ECF 232, at 25 (alleging "secret control" over the bidders). This contention of "secrecy" is refuted by Deputy Prime Minister Chubais's statement, in the interview held on the day of the auction / investment tender. In his words: "Menatep is the winner." Cotlick Decl., Ex. 17, at 3.[33]

Moreover, the Russian Federation successfully defended the legitimacy and validity of the privatization in subsequent court proceedings. Babayevskoye, the entity whose investment tender application had been disqualified for failing to meet the security deposit requirements, brought a lawsuit in Russia challenging the outcome of the LFS auction / investment tender. *See* February 2019 Deed ¶ 1324; *see also* Cotlick Decl., Ex. 21 (HVY-186) (March 28, 1996 Decision of the Moscow Arbitrazh Court). In those proceedings, in which the Russian Federation participated as a third party defending the privatization, Babayevskoye contended that ZAO Reagent and ZAO Laguna both represented a single bidder, Bank Menatep. *Id.*[34] The

[33] The fact that Menatep stood behind both entities was also publicly known; as Russian newspaper Kommersant reported the day after the auction, "there were two participants in the tender (and, therefore, in the loans-for-shares auction) left: AOZT Reagent and AOZT Laguna. Both represented the interests of Bank Menatep." Cotlick Decl., Ex. 19 (HVY-194), at 1; *see also* Cotlick Decl., Ex. 20 (HVY-196), at 6 (Russian official Alfred Koch, stating in a press conference immediately following the auction and tender: "As far as I understand, actually, the strategic partner that YUKOS referred to at the joint press conference is behind it all. I mean Bank Menatep.").

[34] *See also* Cotlick Decl., Ex. 21, at 2–3 (noting that "Bank Menatep [served as] the guarantor for ZAO Reagent and ZAO Laguna" and concluding that "[t]he Plaintiff's claim that one bidder

Russian courts, at the Russian Federation's urging, upheld the privatizations. *Id.*[35] It is impossible to credit any suggestion by the Russian Federation, today, that Bank Menatep somehow violated the rules governing Yukos's privatization processes, when the Russian courts (at the urging of the Russian Federation itself) rejected this contention in 1996.

3. The Russian Federation's Allegations of Bribery Are Meritless

Yet another theory of illegality that the Russian Federation presses today is the claim that Khodorkovsky et al. allegedly bribed a group of four individuals, which it refers to as the "Red Directors" (and which Petitioners refer to here as the "Yukos Directors").[36] *See* ECF 232, at 24–26; *see also* ECF 142-2 at 35–39. According to this theory, Khodorkovsky et al. allegedly bribed the Yukos Directors to assist in the 1995 LFS auction / investment tender. *Id.* The four supposedly bribed individuals, each of whom served as a manager of Yukos prior to (and subsequent to) its privatization, are: Sergey Muravlenko, Youry Golubev, Viktor Kazakov, and Viktor Ivanenko. *Id.* The Russian Federation made the same contention before the Dutch Court of Appeal, which Petitioners thoroughly refuted. *See* February 2019 Deed ¶¶ 1338–1426. For three reasons, the contention is without any merit whatsoever.

First, the Russian Federation has failed to prosecute any of the Yukos Directors for bribery, even though the principal basis for this contention (the two agreements from 2002 called the "Tempo Agreements," and payments made under them, *see* ECF 142-2 at 36) have been known to the Russian Federation since 2003, and were extensively examined in February

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took part in the tender is in direct opposition to the court record and is refuted by the arguments provided by the defendants and the third parties [i.e., the Russian Federation]").

[35] *See also* Cotlick Decl., Ex. 22 (HVY-187) (May 30, 1996 Decision of the Moscow Arbitrazh Court on appeal); *id.*, Ex. 23 (HVY-188) (July 24, 1996 Decision of the Moscow Federal Arbitrazh Court in cassation). Notably, the Russian Federation has not submitted these judgments to the Tribunal, to the Dutch courts, or to this Court.

[36] The term "Red Directors" is a term that was used for the directors of State-owned companies who had strong ties with the Communist Party and, in many cases, secretly stole from the State-owned companies they were directing. That term does not apply and should not be used here.

2007.[37] During the arbitrations, Petitioners even entered the bank statements reflecting the payments made under the Tempo Agreements into evidence. February 2019 Deed ¶ 1357 n.2475. And yet no criminal charges have been brought in Russia against the Yukos Directors.

That lack of prosecution is particularly telling since the acceptance of a bribe is a serious offense under Russian law, and since the Russian public prosecutor, unlike in the American system, is ***obligated*** both to investigate possible criminal offenses and to prosecute suspects for them. *See* Cotlick Decl., Ex. 25 (Thaman Report) ¶ 100. The Yukos Directors have not been outside the Russian Federation's reach; three of the four are still in Russia (Golubev died in 2007), and two of them have served in the Duma. February 2019 Deed ¶ 1339. And the Russian public prosecutor interrogated Muravlenko, Ivanenko, and Kazakov about the background and purpose of the Tempo Agreements in 2007. *Id.* ¶ 1347.[38] Indeed, the Russian courts themselves examined the Tempo Agreements in the context of the Russian Federation's criminal prosecution of Mikhail Khodorkovsky in 2009–2010, and concluded that agreements were an elaboration of an oral agreement that was made *in 1996* (i.e., *after* the LFS auction/investment tender), and that supposedly concerned the embezzlement of oil from Yukos, not alleged bribery in connection with the LFS auction / investment tender. *See* February 2019 Deed ¶ 1349; *see also* Cotlick Decl., Ex. 27 (HVY-1, Annex (Merits) C 1057), at 8. That 1996 date is consistent with the written agreement itself, which states that the payments were made "[p]ursuant to commitments entered into in 1996." ECF 109-5 at 2. Obviously, an agreement

[37] *See* Cotlick Decl., Ex. 24 (HVY-507) (Document Inspection Report concerning the Tempo Agreements stating that, on February 1, 2007, the Russian Prosecutor General "inspected the documents taken in the course of the search of" October 9, 2003).

[38] *See also* ECF 233-11 (Transcript of the interrogation of Viktor Ivanenko dated May 11, 2007); ECF 116-7 (Transcript of the interrogation of Sergey Muravlenko dated May 14, 2007); Cotlick Decl., Ex. 26 (HVY-508) (Transcript of the interrogation of Victor Kazakov, dated May 15, 2007).

concluded in 1996 cannot have affected the outcome of the LFS auction / investment tender, which took place in December 1995.

Second, the Russian Federation ignores the extensive evidence showing the true purpose of the Tempo Agreements: to incentivize the Yukos Directors to stay on and continue running the company after its privatization, in much the same was as a stock option works.[39] The agreements served their purpose: In the years following the privatization, the Yukos Directors stayed in their positions at Yukos and played a "pivotal role in the establishment of Yukos that would become the largest post-Soviet oil company." February 2019 Deed ¶ 1376.

The Tempo Agreements were not put in writing at the time they were made in 1996. As Petitioners explained, there was a fear that if the Communist party returned to power—as was expected following the parliamentary elections of December 1995 and before the presidential election in the summer of 1996—documentary evidence of collaboration with the so-called "capitalists" could have endangered the careers and lives of the Yukos Directors. *See* February 2019 Deed ¶ 1374; Dubov First Witness Statement ¶ 64. Accordingly, "Yukos' management was not at all eager to record the arrangements in writing." *Id.* It was not until years later, when Yukos was preparing to have its shares traded via American Depositary Receipts, that the agreements were memorialized in formal legal contracts. *See* February 2019 Deed ¶ 1422.[40]

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[39] As Petitioners explained to the Dutch Court of Appeal, Muravlenko, Kazakov, Ivanenko, and Golubev were four of Yukos's key managers prior to Yukos's privatization, and the new shareholders needed to retain managers with relevant expertise to run the company after privatization. *See* February 2019 Deed ¶¶ 1368-1376. The agreements were essentially stock options, aligning the interests of the Yukos Directors with the interests of Yukos's new owners, and giving the Yukos Directors a share in the success of Yukos if it became a profitable company. *Id.*; *see also* Cotlick Decl., Ex. 28 (Dubov First Witness Statement) ¶¶ 60–62.

[40] This formalization process involved Yukos's outside advisors, including PricewaterhouseCoopers, Brunswik UBS Warburg, Clifford Chance, Cleary Gottlieb, Akin Gump, and White & Case, who reviewed, investigated, advised on and documented the arrangements. *Id.*; *see also* ECF 109-7 (e-mail exchange among Yukos's legal advisors).

Third, the Russian Federation has put forward no sensible explanation as to how the alleged bribes could have had any possible effect on the LFS auction / investment tender. There is *no evidence* that the Yukos Directors had the power to influence the outcome of the Yukos privatization or that they facilitated the acquisition of the Yukos shares by Bank Menatep and its shareholders. In fact, most of the evidence to which the Russian Federation points relates to actions taken by people ***other than*** the Yukos Directors themselves. For example, the Russian Federation points to a document that it calls a "report on"—but in reality is a mere "[n]otification" of—Babayevskoye's disqualification from the investment tender, and the Russian Federation then claims that one M.F. Yudin supposedly "assisted" in "writing" this document. *See* ECF 232, at 25; ECF 233-15. But Yudin was *not a "Yukos Director"* who the Russian Federation contends was bribed. Rather, as the Russian Federation concedes, Yudin was merely a "secretary" to one of the Yukos Directors, and all the document shows is that Yudin signed the notification. ECF 232, at 25; ECF 233-15. Nowhere does the Russian Federation explain how Yudin's "assistance" affected the outcome of the tender process, which was run by a committee controlled by the Russian Federation, pursuant to rules that the Russian Federation set, and whose outcome was upheld by the Russian courts. *See supra* at 37-39; February 2019 Deed ¶¶ 1390–1391. Furthermore, the Russian Federation does not dispute that Babayevskoye did not satisfy the requirements to participate in the tender and was therefore correctly disqualified by the Tender Committee.

The Russian Federation similarly points to votes cast by an "associate" of a Yukos Director, Sergey Generalov, on the 1995 Investment Tender Committee and on the 1996 Commercial Tender Committee. ECF 232, at 25. Again, *Generalov is not even alleged to have*

been bribed. And the Russian Federation fails to explain how Generalov could have affected the outcome of the voting on either committee, given that he only had an advisory vote on the 1995 committee, and was only one of five voting members on the 1996 committee. *See* February 2019 Deed ¶¶ 1389–1391.

Nor does the September 1995 letter from Muravlenko supposedly "persuading" the Russian Government to restructure the Yukos privatization come anywhere close to showing bribery. *See* ECF 232, at 24–25. The Russian Federation fails to explain how Khodorkovsky et al. would have benefited from this supposed restructuring and fails to provide any evidence of a connection between Khodorkovsky et al. and the letter. As Petitioners explained above, the decision to combine the LFS auction and the investment tender was made by Russian authorities because it was in the state's and the company's interest. *See* February 2019 Deed ¶¶ 1397–1400.

Finally, as for the suggestion that Kazakov was bribed to falsely sign a certification stating that Khodorkovsky et al. had complied with their investment obligations, *see* ECF 142-2 at 38, the assertion is flatly incorrect. Petitioners submitted proof to the Dutch courts (which was at all times in the hands of the Russian Federation as well), that the payments had been made, and the investment obligations fully satisfied. *See* February 2019 Deed ¶ 1394.[41]

V. Article 21(5) of the ECT Is Irrelevant to the Sovereign Immunity Question

Article 21(5) of the ECT provides that an arbitral tribunal, when deciding whether a taxation measure constitutes "expropriation," should refer that question to the State's tax authority and "shall take into account" that authority's opinion. ECF 2-7, at 44-45. In this case, the Arbitral Tribunal did not make an express referral to the Russian tax authorities. In its

[41] *See also* Cotlick Decl., Ex. 29 (HVY-366) (Payment Orders No. 2, 5, 6 and 20, dated January 12, 1996); Cotlick Decl., Ex. 30 (HVY-367) (Payment Order No. 15, dated August 12, 1998); Cotlick Decl., Ex. 31 (HVY-368) (Proof of completion of the investment program, dated January 18, 1996); Cotlick Decl., Ex. 32 (HVY-369) (Proof of completion of the measures from the investment program, dated December 14, 1998).

original motion, the Russian Federation contended that this procedural misstep demonstrates that no "agreement to arbitrate" existed. ECF 24, at 36-38. But the Russian Federation cites *no* U.S. authority for the proposition that such a procedural requirement—which is to be followed during an arbitration—has any bearing on whether the sovereign agreed to arbitration in the first place. See ECF 63, at 33-37. Even if this issue were relevant to the *scope* of the arbitration agreement (it isn't),[42] the scope of agreement (i.e., the "arbitrability" of this dispute) was delegated to the Arbitral Tribunal to resolve. *See supra*, at 28-29. And the Dutch courts have now confirmed that any error was harmless, and that an opinion from the Russian tax authority would not have been "binding" on the Tribunal. Court of Appeal Judgment, ¶¶ 6.3.1-.3; Supreme Court Judgment ¶ 5.5.7.

CONCLUSION

The Dutch courts thoroughly considered the Russian Federation's claim that it did not "agree to arbitration." The exact same issue is presented here. The thorough and rigorous decisions of the Dutch courts supply the answer, either under the traditional principles of issue preclusion or under deferential principles of comity. The motion to dismiss should be DENIED.

[42] Article 21 does *not* affect the Arbitral Tribunal's jurisdiction; only Article 26 relates to the tribunal's jurisdiction. Court of Appeal Judgment, ¶¶ 5.2.5-5.2.8. This holding was not challenged before the Dutch Supreme Court. First Cohen Jehoram Decl. ¶ 106.

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Respectfully submitted,

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