No. 19-117

In The
Supreme Court of the United States

INVERSIONES Y PROCESADORA
TROPICAL INPROTSA, S.A.,

Petitioner,

v.

DEL MONTE INTERNATIONAL GMBH,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Circuit Court correctly held that the District Court had subject matter jurisdiction under 9 U.S.C. § 203 and 9 U.S.C. § 205 to deny Petitioner, Inversiones y Procesadora Tropical INPROTSA, S.A.'s ("INPROTSA"), petition to vacate arbitral award and grant Respondent, Del Monte International GmbH's ("Del Monte"), cross-petition to confirm arbitral award.

Whether the Circuit Court correctly held that INPROTSA failed to raise any legally sufficient grounds under the New York Convention or 9 U.S.C. § 10(a)(4) of the Federal Arbitration Act to vacate the arbitral award.

PARTIES TO THIS PROCEEDING

1. Inversiones y Procesadora Tropical INPROTSA, S.A., Petitioner here; Appellant in the Circuit Court; Petitioner in the District Court.

2. Del Monte International GmbH, Respondent here; Appellee in the Circuit Court; Respondent in the District Court.

RULE 29.6 DISCLOSURE STATEMENT

Respondent, Del Monte International GmbH, is an indirect subsidiary of, and its ultimate parent corporation is, Fresh Del Monte Produce Inc., a publicly traded company on the New York Stock Exchange under ticker symbol "FDP."

RELATED CASES

Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH, No. 18-14807, U.S. Court of Appeals for the Eleventh Circuit (this is a pending appeal).

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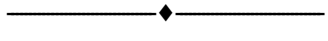
OTHER AUTHORITIES

OPINIONS BELOW

- The Eleventh Circuit's opinion is *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291 (11th Cir. 2019) (the "Opinion").

- The District Court's order granting Del Monte's motion to dismiss INPROTSA's petition to vacate and denying INPROTSA's motion for remand is *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, Case No. 16-24275-CIV-MORENO, 2016 WL 10568064 (S.D. Fla. Dec. 16, 2016) (the "Dismissal Order").

- The District Court's order granting Del Monte's cross-petition to confirm the arbitral award is *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, Case No. 16-24275-CIV-MORENO, 2017 WL 1737648 (S.D. Fla. May 2, 2017) (the "Confirmation Order").



STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

A. The Exclusive Pineapple Sales Agreement and Its Post-Termination Restrictive Covenants

The underlying commercial dispute arose from an exclusive Pineapple Sales Agreement (the "Agreement") entered into between the parties in May 2001. Opinion, 921 F.3d at 1294. Under the Agreement, Del Monte provided INPROTSA with, *inter alia*, a scarce

and expensive variety of pineapple seeds for planting on its farms and, in return, INPROTSA would sell pineapples of that variety exclusively to Del Monte. *Id.* at 1294-95. The Agreement provided that upon its termination, INPROTSA would destroy or return to Del Monte all of the pineapple plant stock and pineapples grown from seeds provided by Del Monte during the term of the Agreement and would refrain from selling pineapples grown from such seeds to third parties. *Id.* at 1295.

Upon termination of the Agreement, INPROTSA breached the post-termination restrictive covenants by (i) refusing to destroy or return the pineapple plant stock grown from Del Monte's seeds and (ii) selling pineapples to Del Monte's competitors in violation of the restriction against sales. *Id.* at 1295.

B. The ICC Arbitration Proceeding

In 2014, Del Monte commenced an arbitration proceeding before the International Court of Arbitration of the International Chamber of Commerce ("ICC") and asserted claims for, *inter alia*, breach of the Agreement, specific performance, and enforcement of the post-termination covenants. *Id.* at 1295; Confirmation Order, 2017 WL 1737648, at *2. INPROTSA asserted various fraud-based counterclaims and defenses. Opinion, 921 F.2d at 1295.

C. The Arbitral Tribunal's Final Award in Favor of Del Monte

On June 10, 2016, the ICC arbitral tribunal issued a detailed, reasoned award in favor of Del Monte and against INPROTSA, rejected all of INPROTSA's counterclaims and defenses (including its principal defense that it was defrauded by Del Monte); awarded Del Monte damages in the amount of $26,133,000.00, pre- and post-award interest, arbitral costs of $650,000.00, and attorney's fees and costs of $2,507,440.54; ordered specific performance; and, permanently enjoined INPROTSA from selling to third parties any pineapples grown from seeds provided by Del Monte. *Id.* at 1295-97; Confirmation Order, 2017 WL 1737648, at *2.

D. INPROTSA's Petition to Vacate the Arbitral Award and Del Monte's Cross-Petition to Confirm the Arbitral Award

In September 2016, INPROTSA filed a petition to vacate the arbitral award in Florida state court, relying exclusively on vacatur grounds contained in the Florida domestic arbitration statute, Chapter 682, Fla. Stat. Opinion, 921 F.3d at 1297; Dismissal Order, 2016 WL 10568064, at *1. No federal grounds for vacatur were alleged. *Id.* Del Monte timely removed the state court action to the District Court in Miami, Florida and cross-petitioned to confirm the arbitral award. Opinion, 921 F.3d at 1297. INPROTSA moved to remand the action for lack of subject matter jurisdiction. *Id.* The District Court denied the motion to remand, Dismissal Order, 2016 WL 10568064, dismissed the petition to

vacate as legally insufficient, *id.*, confirmed the arbitral award, Confirmation Order, 2017 WL 1737648, and entered final judgment in favor of Del Monte.

INPROTSA appealed all of the orders and the final judgment to the Eleventh Circuit Court of Appeals (the "Circuit Court") in May 2017. Opinion, 921 F.3d at 1298. In April 2019, the Circuit Court affirmed the District Court's orders denying remand, dismissing INPROTSA's petition to vacate the arbitral award, and granting Del Monte's cross-petition to confirm the arbitral award, and affirmed the final judgment. Opinion, 921 F.3d 1291. In so ruling, the Circuit Court also held that the District Court was vested with original subject matter jurisdiction under 9 U.S.C. § 203 and removal jurisdiction under 9 U.S.C. § 205 to enter the Dismissal Order and Confirmation Order. Opinion, 921 F.3d at 1298-1300.

SUMMARY OF THE ARGUMENT

A. The District Court Had Subject Matter Jurisdiction over INPROTSA's Petition to Vacate the Arbitral Award

INPROTSA contends that the District Court lacked subject matter jurisdiction to dismiss INPROTSA's petition to vacate arbitral award or to confirm the arbitral award. INPROTSA is incorrect.

Congress vested broad jurisdiction in the district courts to adjudicate disputes relating to arbitral

awards governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 38. *See* Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201, *et seq*. Congress ordained that district courts will have original jurisdiction over any action or proceeding "falling under the Convention," 9 U.S.C. § 203, and removal jurisdiction over any "action or proceeding pending in a State court that relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205. Because the underlying arbitral award is governed by the Convention and the District Court had removal jurisdiction under 9 U.S.C. § 205 – which INPROTSA conceded below, Opinion, 921 F.3d at 1299 – the Circuit Court correctly determined that the District Court had subject matter jurisdiction to adjudicate INPROTSA's petition to vacate the arbitral award and Del Monte's cross-petition to confirm the award.

The Circuit Court's jurisdictional analysis not only comports with the plain language of § 203 and § 205 of the FAA, but is consistent with the holdings of at least three other courts of appeal. Moreover, there is no decision of any court of appeal that conflicts with the holding or rationale of the Circuit Court. In short, there is no conflict to be resolved by the Court. There is no contrary legal authority suggesting that the Circuit Court made a jurisdictional error worthy of certiorari review by this Court.

B. INPROTSA's Petition to Vacate the Arbitral Award Was Properly Dismissed

INPROTSA contends that by relying on its prior precedent in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998), the Circuit Court employed the wrong legal standard to determine whether INPROTSA's petition to vacate should be dismissed. Furthermore, INPROTSA contends that there is an irreconcilable conflict between decisions of other courts of appeal and *Industrial Risk* that requires certiorari review by this Court. Both contentions are incorrect.

INPROTSA argues that the Circuit Court should have declined to follow *Industrial Risk* and instead evaluated the legal sufficiency of INPROTSA's petition to vacate under 9 U.S.C. § 10(a)(4) of Chapter 1 of the FAA to determine whether the arbitral tribunal "exceeded their powers" rather than focusing on the defenses to enforcement of an arbitral award enumerated in Article V of the Convention. However, INPROTSA neglects to mention in its petition for certiorari that the Circuit Court did, in fact, assess the sufficiency of INPROTSA's grounds for vacatur under 9 U.S.C. § 10(a)(4) and held that, even if 9 U.S.C. § 10(a)(4) were applicable, INPROTSA's petition to vacate was without merit and properly dismissed.

More importantly, certiorari review of this case by this Court will have no meaningful effect on the outcome of the dispute between the parties. INPROTSA's petition to vacate was legally insufficient, whether

judged under 9 U.S.C. § 10(a)(4) or Article V of the Convention. The errors allegedly committed by the arbitral tribunal are, as the Circuit Court held, woefully insufficient to set aside an arbitral award. The Court should, therefore, decline certiorari review because even if it overruled *Industrial Risk*, as INPROTSA requests, the result below would not change.

Lastly, no genuine conflict exists among the courts of appeal concerning the standards governing a petition to vacate an arbitral award under the Convention. The grounds to vacate an award under 9 U.S.C. § 10(a)(4) are functionally the same as the defenses to enforcement of an award under Article V of the Convention. Both focus on whether the arbitrators have so blatantly and egregiously exceeded their delegated authority under the arbitration agreement that the resulting arbitral award is unjust and should be set aside. Despite the differences in approach among the courts of appeal, there is nothing in the cases to reflect a significant conflict that should be resolved by this Court.

REASONS FOR DENYING THE PETITION

A. The District Court Had Subject Matter Jurisdiction to Address INPROTSA's Petition to Vacate and Del Monte's Cross-Petition to Confirm the Arbitral Award

Congress vested broad jurisdiction in the district courts under 9 U.S.C. § 203 to adjudicate disputes relating to arbitral awards governed by the Convention:

> An action or proceeding falling under the New York Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 203. Congress similarly provided in 9 U.S.C. § 205 for broad removal of state court actions that relate to Convention-governed arbitral awards:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

9 U.S.C. § 205.

Consistent with the broad jurisdictional grant under Chapter 2 of the FAA, it is now well-established that jurisdiction under 9 U.S.C. § 203 exists if (1) the arbitral agreement or award falls under the Convention and (2) the dispute relates to the arbitral agreement or award. *See*, *e.g.*, *Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar*, 895 F.3d 375, 378 (5th Cir. 2018) (for a federal court to have jurisdiction under the Convention, there must be an arbitration agreement or award that falls under the Convention and the dispute must relate to the arbitration agreement

or award); *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1324 (11th Cir. 2018) (two-step inquiry to determine jurisdiction entails whether the arbitration agreement or award "falls under the Convention" and whether there is a non-frivolous basis to conclude that the agreement or award "relates to" the case before the court such that the agreement to arbitrate or award could conceivably affect the outcome of the case), *cert. granted sub nom. on other grounds*, *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 139 S.Ct. 2776 (2019) (review granted to resolve whether a non-signatory to an agreement is bound to arbitrate under the Convention). And, the courts of appeal that have addressed the jurisdictional issue have held, without exception, that a district court has subject matter jurisdiction under 9 U.S.C. § 203 to consider petitions to vacate Convention-governed arbitral awards. *E.g.*, *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012); *Costa v. Celebrity Cruises, Inc.*, 470 F. App'x 726, *1 (11th Cir. 2012); *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 400 F. App'x 654, *1, n.1 (3d Cir. 2010). Consistent with these authorities, the Circuit Court concluded that the District Court, following removal of INPROTSA's state court action, had jurisdiction to address INPROTSA's petition to vacate and Del Monte's cross-petition to confirm the Convention-governed arbitral award. Opinion, 921 F.3d at 1298-1300.

Ignoring all of the circuit court cases which are adverse to the position it advocates in its petition, INPROTSA argues – without any legal support – that the District Court below lacked subject matter jurisdiction under 9 U.S.C. § 203 to consider INPROTSA's petition to vacate the arbitral award that was removed to federal court pursuant to 9 U.S.C. § 205. INPROTSA also ignores the cases recognizing a party's right to remove state court actions to federal court under 9 U.S.C. § 205 that relate to arbitral awards governed by the Convention. *See* Response Brief of Appellee Del Monte International GmbH, 11th Cir. Case No. 16-17623, at 22-25.

The Court's procedural rules limit certiorari review to instances where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or where a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(a), (c). Significantly, the Circuit Court's Opinion does not conflict with the decision of any other U.S. court of appeals on the same matter. To the contrary, the Circuit Court applied the plain language of § 203 and § 205 to determine, rather straightforwardly, that the District Court had jurisdiction to consider INPROTSA's petition to vacate:

> In our view, an action or proceeding "fall[s] under the Convention," for purposes of § 203,

> when it involves subject matter that – at least in part – is subject to the Convention, such that the action or proceeding implicates interests the Convention seeks to protect. In practice, this will require that the case sufficiently relate to an agreement or award subject to the Convention, such that the agreement or award "could conceivably affect the outcome of the case."

Opinion, 921 F.3d at 1299-1300 (quoting the Eleventh Circuit's earlier decision in *Outokumpu Stainless*, 902 F.3d at 1324). *Outokumpu Stainless*, in turn, specifically

> join[ed] the Fifth, Eighth, and Ninth Circuits[1] and agree[d] that the 'relates to' language of Section 205 provides for broad removability of [Convention-related] cases to federal court. While the link between the arbitration agreement and the dispute is not boundless, the arbitration agreement need only be sufficiently related to the dispute such that it conceivably affects the outcome of the case.

Outokumpu Stainless, 902 F.3d at 1324. Because the Circuit Court's Opinion is consistent with the Fifth, Eighth, and Ninth Circuits, and there are no decisions of any other court of appeals that conflict with the Opinion, there is no basis for certiorari review.

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[1] *See Beiser v. Weyler*, 284 F.3d 665, 672 (5th Cir. 2002); *Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 844 (8th Cir. 2012); and *Infuturia Glob. Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1137-38 (9th Cir. 2011).

Similarly, this case does not constitute one in which a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c) of the Rules of the Supreme Court of the United States. Although this Court has not had an occasion to resolve a case or controversy concerning the scope of a district court's jurisdiction under Chapter 2 of the FAA, in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), the Court acknowledged Congress' grant of expansive removal jurisdiction under 9 U.S.C. § 205:

> As [Petitioner] points out, these sections [9 U.S.C. § 203 and § 205] demonstrate that "when Congress wants to expand [federal-court] jurisdiction, it knows how to do so clearly and unequivocally."

Vaden, 556 U.S. at 59 n.9; *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 580 (1999) (acknowledging Congress' grant of removal jurisdiction under 9 U.S.C. § 205).

Where, as here, there is no conflict among the courts of appeals on the jurisdictional question presented by INPROTSA's petition and the Opinion does not conflict with a decision of this Court, the Court has no reason to devote its limited time and resources to address, or even ratify, what is, by all measures, an uncontroversial statement of jurisdiction law that is supported by the plain language of the Federal Arbitration Act and on which four courts of appeal are aligned.

Moreover, as the Circuit Court noted in its Opinion, INPROTSA is urging the Court to adopt a contorted construction of the FAA that will undermine uniformity and create uncertainty in the enforcement of foreign arbitral awards. On the one hand, INPROTSA does not dispute that a district court has subject matter jurisdiction over an action initiated in federal court to confirm an arbitral award governed by the Convention. INPROTSA likewise does not dispute that the same district court has subject matter jurisdiction to consider a cross-petition to vacate the same arbitral award. Where INPROTSA runs askew, however, is in the position it insists this Court adopt, i.e., that a district court lacks subject matter jurisdiction over a petition filed in state court to vacate a Convention-governed arbitral award that is removed to federal court pursuant to 9 U.S.C. § 205.[2] The Eleventh Circuit noted the irrationality of that position:

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[2] INPROTSA argues that "[n]owhere does the New York Convention authorize proceedings to vacate an arbitral award," Pet. at 10, but the Circuit Court observed that INPROTSA took the *opposite* position before the District Court, conceding that the Convention "explicitly permits such proceedings in the countries in which an award was rendered or whose law served as governing law for the arbitration." Opinion, 921 F.3d at 1299 (citing USDC Doc. 15 at 8). Furthermore, as noted *supra*, the Circuit Court rejected the argument, holding that "[i]n our view, an action or proceeding 'fall[s] under the Convention,' for purposes of § 203, when it involves subject matter that – at least in part – is subject to the Convention, such that the action or proceeding implicates interests the Convention seeks to protect." *Id.* at 1299-1300. A petition to vacate a Convention-governed arbitral award plainly "implicates interests the Convention seeks to protect."

> In this case, Congress specifically authorized removal "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205. It would make little sense for Congress to specifically authorize removal of cases over which the federal courts would lack subject-matter jurisdiction. *It would likewise be puzzling for Congress to provide a federal forum for a party seeking to determine whether an international arbitral award should be enforced, while requiring the same litigants to remain in state court to determine whether the same award should be vacated under principles controlled largely by federal law*.

Opinion, 921 F.3d at 1300 (emphasis supplied). The District Court also rejected the arbitrary distinction pressed by INPROTSA: "It seems INPROTSA is asking the Court to split hair – finding jurisdiction is only proper if asked to confirm an award, but not if there is a motion to vacate the same award." Confirmation Order, 2017 WL 1737648, at *3.[3]

Unfazed by the rejection of its jurisdiction argument by both lower courts, INPROTSA relies on inapposite cases addressing the enforcement of *domestic* arbitration awards under Chapter 1 of the FAA to

[3] Ironically, INPROTSA relies heavily on *BG Gp PLC v. Rep. of Argentina*, 572 U.S. 25 (2014), in Section II of its petition, but in *BG Gp*, the D.C. Circuit affirmed the district court's exercise of subject matter jurisdiction over a petition to vacate filed in the first instance in the district court. This Court found no fault with the jurisdictional ruling.

imply – incorrectly – that Congress intended to limit a federal court's ability to enforce arbitration agreements and arbitral awards governed by the Convention, and that state courts should "have a prominent role to play as enforcers of agreements to arbitrate." *See* Pet. at 8 (citing *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008) and *Vaden*). In fact, as *Vaden* makes clear, the law is just the opposite where foreign arbitral awards are concerned. Given that federal law exclusively governs the enforcement of agreements and awards "falling under the Convention," Congress intended the federal courts to have expansive jurisdiction to adjudicate actions "falling under the Convention" and equally broad removal jurisdiction to encompass any state court action that even "relates" to a Convention-governed arbitral award so that enforcement would be quick, uniform and certain. After all, "[t]he goal of the [New York] Convention . . . was . . . to unify the standards by which . . . arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

> The purpose of the New York Convention, and of the United States' accession to the convention, is to encourage the recognition and enforcement of international arbitral awards, to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation. Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. * * * The Convention, and

> American enforcement of it through the FAA, provide[ ] businesses with a widely used system through which to obtain domestic enforcement of international commercial arbitration awards resolving contract and other transactional disputes, subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy.

Industrial Risk, 141 F.3d at 1440 (citations omitted); *Outokumpu Stainless*, 902 F.3d at 1324 ("In amending the FAA, Congress further sought to promote the development of a uniform body of federal law under the Convention.").

In the teeth of Congress' clear intent to streamline the enforcement of foreign arbitral awards and unify the standards for enforcement, INPROTSA urges the Court to adopt a rule that not only *prohibits* a federal court from exercising jurisdiction if the losing party in an international arbitration wins a race to the state courthouse to file a petition to vacate, but also encourages states to apply their own parochial standards in actions to vacate Convention-governed arbitral awards.[4] Rather than advancing the policies of uniformity and efficiency, INPROTSA's suggested course of action will promote only chaos.

Lastly, INPROTSA assails the Circuit Court for reading § 203 and § 205 *in pari materia*, suggesting

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[4] INPROTSA, in fact, requested the Florida state court in which it filed its petition to vacate to apply Florida law as a basis to nullify the arbitral award. Opinion, 921 F.3d at 1302 n.14.

that § 205 is nothing more than a "procedure for removal." Pet. at 12. Of course, this Court rejected that argument in *Vaden*, noting that § 203 and § 205 "demonstrate that when Congress wants to expand [federal-court] jurisdiction, it knows how to do so clearly and unequivocally." *Vaden*, 556 U.S. at n.9 (internal quotations omitted). Moreover, other courts of appeal likewise read these statutory sections together. *See Beiser*, 284 F.3d at 672; *Reid*, 701 F.3d at 844; *Infuturia Glob. Ltd.*, 631 F.3d at 1137-38; *Stemcor USA Inc.*, 895 F.3d at 378; *Outokumpu Stainless USA*, 902 F.3d at 1323-24.

INPROTSA conceded below that the underlying arbitral award is governed by the Convention and that the District Court had removal jurisdiction under 9 U.S.C. § 205. Opinion, 921 F.3d at 1299. Those admissions were fatal to its appeal to the Circuit Court. They also preclude certiorari review. The Circuit Court's jurisdictional analysis below not only comports with the plain language of § 203 and § 205, but is consistent with the holdings of the other courts of appeal that have ruled on this issue. Because there is no legitimate argument that the Circuit Court made a jurisdictional error, certiorari should be denied.

B. There Is No Conflict Among the Circuits that Warrants Certiorari Review by this Court

As a second ground for certiorari review, INPROTSA contends that by relying on its prior precedent in *Industrial Risk*, the Circuit Court employed the wrong

legal standard to determine that INPROTSA's petition to vacate was groundless. According to INPROTSA, *Industrial Risk* was wrongly decided, conflicts with the decisions of four other courts of appeal, and was abrogated by this Court's decision in *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014). Pet. at 15-21. INPROTSA is incorrect all counts.

1. *BG Group* Did Not Overrule *Industrial Risk*

As a preliminary matter, *BG Group* did not overrule or abrogate the holding in *Industrial Risk* or, for that matter, even address the grounds available to a losing party to vacate a Convention-governed arbitral award. Rather, the issue before the Court in *BG Group* was "whether a court of the United States, in reviewing an arbitration award made under [an investment treaty between the United Kingdom and Argentina] should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions." *BG Group*, 572 U.S. at 29. Not surprisingly, the Court concluded that, as a matter of federal arbitration law, "the matter is for the arbitrators, and courts must review their determinations with deference." *Id.* And, because the "arbitrators did not stra[y] from interpretation and application of the agreement or otherwise effectively dispens[e] their own brand of . . . justice," *BG Group*, 572 U.S. at 45 (internal quotations omitted), the Court affirmed the arbitrators' decision. As correctly noted in the Circuit Court's Opinion, "[t]he Court [in *BG Group*] was not

asked to decide whether the Convention provides the exclusive grounds for vacating awards subject to the Convention, the parties did not brief that issue, and the Court did not address that issue in its opinion." Opinion, 921 F.3d at 1302. Nor was there any discussion in *BG Group* as to whether the grounds for vacatur set forth in 9 U.S.C. § 10 apply in a New York Convention case.[5]

2. The Circuit Court Reviewed *De Novo* the Legal Sufficiency of INPROTSA's Petition to Vacate under 9 U.S.C. § 10(a)(4)

More significantly, the Circuit Court did *not* base its affirmance of the District Court's Dismissal Order solely on *Industrial Risk* or because INPROTSA failed to raise any of the defenses enumerated in Article V of Convention. Although the Circuit Court held that the District Court "did not err by dismissing the petition to vacate, because INPROTSA did not assert a valid defense under the Convention," Opinion, 921 F.3d at 1302, the Circuit Court also assessed the merits of INPROTSA's three grounds to vacate the arbitral award under 9 U.S.C. § 10(a)(4) and concluded that "even if we were not bound by *Industrial Risk*, the petition to vacate would warrant denial. Of the original grounds cited in INPROTSA's petition, it asserts only

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[5] Because *BG Group* did not address whether FAA Chapter 1 defenses are available to a losing party seeking to vacate a Convention-governed arbitral award, the Circuit Court appropriately concluded that *BG Group* did not directly or indirectly overrule *Industrial Risk.* Opinion, 921 F.3d at 1302.

three on appeal, and none supports vacatur in this case." Opinion, 921 F.3d at 1302.

The path to vacatur of an arbitral award under 9 U.S.C. § 10(a)(4) is exceedingly narrow. Section 10(a)(4) provides:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration – * * * (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

This Court has held that a court may vacate an arbitrator's decision under § 10(a)(4) "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Limited judicial review "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). "If parties could take 'full-bore legal and evidentiary appeals,' arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.' " *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (quoting *Hall Street Associates*, 552 U.S. at 588). "[T]he sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Sutter*,

569 U.S. at 569.[6] If the answer is yes, then the arbitrator's decision cannot be vacated:

> A party seeking relief under [§ 10(a)(4) of the FAA] bears a heavy burden. "It is not enough . . . to show that the [arbitrator] committed an error – or even a serious error." *Stolt-Nielsen*, 559 U.S. at 671, 130 S.Ct. 1758. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits."

Sutter, 569 U.S. at 569.

INPROTSA argued on appeal before the Circuit Court that the arbitral tribunal "exceeded its powers" under 9 U.S.C. § 10(a)(4) by (i) "rewriting the parties' Agreement," (ii) "imposing its own rough sense of justice by awarding damages far in excess of the amount allowed by Florida law," and (iii) "refusing to apply the procedural rules the parties' [sic] had contracted for, i.e., ICC rules, permitting corrections of awards." Opinion, 921 F.3d at 1303-04. The Circuit Court addressed

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[6] Thus, consistent with this Court's directive in *Sutter*, misconstruing or misapplying a contract or making errors of law is not a ground to vacate an arbitral award. *Southern Commc'ns v. Thomas*, 720 F.3d 1352, 1359 (11th Cir. 2013). Manifest disregard of the law is not a ground to vacate an arbitration award. *White Springs Agric. Chem., Inc. v. Glawson Inv. Corp.*, 660 F.3d 1277, 1283 (11th Cir. 2011) ("[W]e will not entertain arguments that the arbitrator 'exceeded her powers by acting contrary to the law' because we do not review the arbitrator's award for underlying legal error.").

each of INPROTSA's grounds for vacatur as if 9 U.S.C. § 10(a)(4) were applicable and held that "none supports vacatur in this case." Opinion, 921 F.3d at 1302.[7]

- With regard to the argument that the arbitral tribunal "rewrote" the Agreement by completely misconstruing it, the Circuit Court correctly noted that, consistent with this Court's ruling in *Sutter*, because "the tribunal at least arguably interpreted the contract, . . . the tribunal did not exceed its authority." Opinion, 921 F.3d at 1303-04 (noting that "the test for whether an arbitrator exceeds his authority is whether the arbitrator had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator correctly decided that issue").

- With regard to the argument that the tribunal awarded Del Monte damages in excess of what Florida law allows, the Circuit Court, again channeling *Sutter*, noted that "[t]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." Opinion, 921 F.3d at 1304.

- And, with regard to INPROTSA's argument that the tribunal exceeded it powers by refusing to correct its award, the Circuit Court, citing *Howsam v.*

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[7] Moreover, even if errors of law or fact constituted grounds for vacatur under either the Convention or Chapter 1 of the FAA, the Circuit Court held that the arbitral tribunal did not err in its interpretation of the Agreement or in the calculation of the damages awarded to Del Monte. Opinion, 921 F.3d at 1303-04.

Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002), held that "the tribunal did not exceed its power by reasonably construing its own rules as barring substantive reconsideration of the merits of its damages award." Opinion, 921 F.3d at 1304.

Whatever INPROTSA's complaints may be about the merits of the holding in *Industrial Risk*, it is apparent from the Opinion that INPROTSA's arguments in support of vacatur were evaluated – carefully and in detail – by the Circuit Court as if 9 U.S.C. § 10(a)(4) applied. Irrespective of whether INPROTSA's theoretical grounds for vacatur purport to be based on Article V of the Convention or § 10(a)(4) of the FAA, the result below would not change for INPROTSA. Under these circumstances, therefore, certiorari review would have little, if any, value.

This Court has noted that certiorari is intended to resolve conflicts or issues that have a real effect on a litigant's legal rights. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). Certiorari review will serve no "meaningful" purpose in this case because, under any view of the applicable law, INPROTSA cannot prevail. INPROTSA asked the Circuit Court to review *de novo* its grounds for vacatur under 9 U.S.C. § 10(a)(4), and the Circuit Court obliged that request. It still lost.

Certiorari review is, therefore, particularly unnecessary given the alternate basis for the Circuit Court's decision.

> [I]n reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224. The reason for this rule is obvious. *It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate*.

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 88 (1943) (emphasis supplied).

3. *Industrial Risk* Does Not Genuinely Conflict with the Decisions of Other Courts of Appeal

As a last ditch effort at convincing the Court to accept this case for review, INPROTSA asserts that *Industrial Risk* is irreconcilably in conflict with the decisions of the Second, Third, Fifth, and Sixth Circuits.[8]

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[8] The Fourth, Seventh and Ninth Circuits have held, consistent with *Industrial Risk*, that an arbitral award governed by the Convention can be vacated only on the grounds specified in the Convention. *See RZS Holdings AVV v. PDVSA Petroleos S.A.*, 598 F. Supp. 2d 762, 766-67 and n.4 (E.D. Va. 2009) ("the reasons enumerated in Article V . . . provide the exclusive list of grounds to vacate international arbitral awards."), *aff'd*, 383 F. App'x 281

These courts of appeal have limited the available grounds for vacatur of an arbitral award to those set forth in 9 U.S.C. § 10(a). *Industrial Risk*, of course, limits the grounds for vacatur to the defenses contained in Article V of the Convention.[9]

(4th Cir. 2010); *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1025 (7th Cir. 2013) ("Chapter 2 [of the New York Convention] and 3 [of the Inter-American Convention] of the FAA state that a Convention award may be vacated only on grounds specified in the applicable Convention, 9 U.S.C. §§ 202, 302."); *Mgmt. & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1533-34 (9th Cir. 1987) ("Under the Convention, an arbiter's award can be vacated only on the grounds specified in the Convention.").

[9] At least one commentator has noted that "[t]he goal of the [New York] Convention . . . to unify the standards by which . . . arbitral awards are enforced in the signatory countries," *Scherk*, 417 U.S. at 520, n.15, can only be achieved if the grounds to vacate an award under the Convention are the same as the grounds to refuse to confirm the award:

> An intention that inconsistent standards are to be applied to the validity of an award falling under the Convention, by the same court in the same case between the same parties, depending on whether the issue is to confirm the award (at the suit of the winner) or to vacate it (at the suit of the loser), cannot easily (or even plausibly) be imputed to Congress. . . . [That a petition to vacate – like a petition to confirm – should be judged by Convention standards] is the conclusion imposed by logic, by the aim for uniformity that has inspired American accession to the Convention, and by the apparent objective of the intention to rescue international commercial arbitration in the United States from the labyrinthian complexities, inadequacies and incompleteness of Chapter 1.

Richard W. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 Am. Rev. Int'l Arb. 45, 74 (2011).

While INPROTSA sees an irreconcilable conflict among the circuit courts, in actuality there is no conflict. "[I]t is generally recognized that the [New York] Convention tracks the Federal Arbitration Act." *Mgmt. & Technical Consultants*, 820 F.2d at 1534. Section 10(a)(4) focuses on whether the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made," whereas Article V(1)(c) of the Convention, which enumerates one of the defenses to recognition and enforcement of a Convention-governed arbitral award, focuses on whether the arbitral "award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Although they use different language, both § 10(a)(4) and Article V(1)(c) provide a limited failsafe mechanism to a losing party in the event the arbitral tribunal makes rulings on matters not submitted to arbitration or which are utterly disconnected to the contract giving rise to arbitration. But, as this Court made clear in *Sutter*, there is no basis to overturn an arbitral award – *no matter how flawed or incorrect the reasoning may be* – so long as the arbitrator "(even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Sutter*, 569 U.S. at 569. "Only if 'the arbitrator act[s] outside the scope of his contractually delegated authority' – issuing an award that 'simply reflect[s] [his] own notions of [economic] justice' rather than 'draw[ing] its essence from the

contract' – may a court overturn his determination" under § 10(a)(4). *Sutter*, 569 U.S. at 569 (citations omitted).

Thus, the Eleventh Circuit, in a decision predating the Circuit Court's Opinion, noted that there was little substantive difference between Article V and § 10(a)(4). *Bamberger Rosenheim Ltd. v. OA Dev., Inc.*, 862 F.3d 1284, 1287 (11th Cir. 2017) (holding that under either Article V or 9 U.S.C. § 10(a)(4), the court would not vacate the arbitrator's application of a venue clause in the underlying contract).[10] And, the Second Circuit has held that Article V(1)(c) and § 10(a)(4) address overlapping interests:

> Article V(1)(c) of the Convention similarly provides that a court may refuse to enforce an arbitration award if it "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." This

[10] The Eleventh Circuit held in *Bamberger*: "We see no reason to analyze Profimex's arguments under the New York Convention or § 10(a)(4) separately. In both arguments, Profimex asserts the arbitrator improperly applied the arbitral-venue provision in the parties' agreement to arbitrate. According to Profimex, the venue provision required arbitration of the defamation counterclaim in Tel Aviv, Israel. By arbitrating the counterclaim in Atlanta, Profimex argues, 'the arbitral procedure was not in accordance with the agreement of the parties,' New York Convention, Art. V(1)(d), and 'the arbitrator[ ] exceeded [his] powers,' 9 U.S.C. § 10(a)(4)." *Bamberger Rosenheim*, 862 F.3d at 1287. The Eleventh Circuit disagreed with the appellant and refused to vacate the award.

> defense "tracks in more detailed form" § 10(a)(4), and should likewise "be construed narrowly." *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 976 (2d Cir. 1974).

Phoenix Bulk Carriers, Ltd. v. American Metals Trading, LLP, No. 10 Civ. 2963 (NRB), 2013 WL 5863608, at *7 (S.D.N.Y. Oct. 31, 2013). "Put differently, a situation where an arbitrator 'deals with a difference not contemplated by or not falling within the terms of the submission to arbitration,' New York Convention, art. V(1)(c), is just one 'detailed' example of a broader category of acts that can be considered an excessive use of power by an arbitrator under Section 10(a)(4) of the FAA." *Int'l Trading and Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 27 (D.D.C. 2011).

Despite what INPROTSA argues in its petition, the courts of appeal in this country are united in their stance that Convention-governed arbitral awards cannot be vacated absent egregious misconduct by the arbitrators – irrespective of whether Article V or § 10(a)(4) provides the governing standard. Given the circumstances of this case, where INPROTSA has failed to proffer any compelling reasons to vacate the arbitral award – *either under Article V or § 10(a)(4)* – there is no reason for certiorari review. Despite the nominal differences in approach among the courts of appeal, there is nothing in the cases to indicate a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" warranting

certiorari review. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

CONCLUSION

The Circuit Court's Opinion reflects a thoughtful and careful analysis of the issues argued on appeal by INPROTSA. The Circuit Court's affirmance was completely consistent with the decisions of this Court and other courts of appeal, so there is no need or basis for certiorari review by this Court. Moreover, at the end of the day, INPROTSA failed to raise any compelling reasons to have the arbitral award vacated. A third review by this Court will not change the result.

For all of the foregoing reasons, Del Monte respectfully requests the Court to deny INPROTSA's petition for a writ of certiorari.

Respectfully submitted,

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August 26, 2019