No. 19-____

IN THE

Supreme Court of the United States

REPUBLIC OF KAZAKHSTAN,

Petitioner,

v.

ANATOLIE STATI, GABRIEL STATI,
ASCOM GROUP, S.A., AND
TERRA RAF TRANS TRAIDING LTD.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Exercising a right guaranteed to it by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Republic of Kazakhstan ("Kazakhstan") sought to raise in the district court the defense that a $498 million foreign arbitral award against it was obtained by fraud and therefore its recognition and enforcement by the district court would violate United States public policy. Even though Kazakhstan, a foreign sovereign, raised that defense nearly two years before any ruling on the confirmation petition, the district court deemed it forfeited and refused to address it. The court of appeals, agreeing with the finding of forfeiture, affirmed. The effect of those decisions is to transform the award into a final judgment of the United States courts, and to make the courts of the United States an instrument of the fraud. The question presented is:

Whether a district court may confirm a foreign arbitral award that violates the long-established public policy of the United States, merely because the district court concludes after the fact that a fraud-based public policy defense should have been raised earlier in the confirmation proceeding.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is the Republic of Kazakhstan, appellant below. The Republic of Kazakhstan is a sovereign nation. The requirements of Rule 29.6 therefore do not apply to it.

Respondents are Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd., appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Kazakhstan respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The judgment of the D.C. Circuit is unreported and is reproduced at page 1a of the Appendix to this petition ("App."). The orders denying Kazakhstan's petition for panel rehearing and rehearing *en banc* are unreported and reproduced at App. 53a-55a. The opinion of the United States District Court for the

District of Columbia is reported at 302 F. Supp. 3d 187 and reproduced at App. 7a.

JURISDICTION

The judgment of the D.C. Circuit was entered on April 19, 2019. App. 1a. The D.C. Circuit denied Kazakhstan's petitions for panel rehearing and rehearing *en banc* on June 4, 2019. App. 53a-54a, 55a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS

The pertinent text of the relevant treaty provision, Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, (the "New York Convention"), June 10, 1958, 330 U.N.T.S. 38, and the relevant statutory provision, 9 U.S.C. § 207, are set forth in the Appendix at App. 56a-57a and 58a, respectively.

INTRODUCTION

Kazakhstan is the world's ninth largest country and an important U.S. ally. A secular, constitutional republic, Kazakhstan is Central Asia's dominant economic force, accounting for sixty percent of that region's gross domestic product. The majority of that economic activity stems from Kazakhstan's substantial oil, gas, and mineral resources.[1]

Respondents (the "Statis") are two Moldovan multimillionaires, Anatolie and Gabriel Stati, and companies they own. After investigating a report from the President of Moldova that the Statis had

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[1] *See generally* CIA, *Kazakhstan*, The World Factbook (last visited Aug. 22, 2019), https://tinyurl.com/5ejoqz; *Kazakhstan*, Explore Almaty (last visited Aug. 22, 2019), www.almaty-kazakhstan.net/kazakhstan/.

illegally concealed profits and funneled Kazakh earnings into investments in countries subject to U.N. sanctions, Kazakhstan ultimately terminated their oil-and-gas contracts. Respondents then initiated an arbitration under the Energy Charter Treaty ("ECT"), Dec. 17, 1994, 2080 U.N.T.S. 95, that resulted in a $498 million award (the "Award"). The district court and the court of appeals, purporting to apply the New York Convention, summarily confirmed that award in the orders below.

Those confirmation orders, however, contain a clear legal error that requires this Court's intervention. While the confirmation proceeding was still pending in the district court, Kazakhstan discovered that the Statis obtained the Award by fraud. They falsely inflated the value of their assets through sham, concealed, related-party transactions and then used that falsified information to dupe the tribunal into granting them an inflated award. Confirming an award obtained through fraud violates United States public policy, but the district court deprived Kazakhstan of its right, guaranteed by the New York Convention and the Federal Arbitration Act ("FAA"), to present this public policy defense. It held that Kazakhstan had forfeited any such defense by setting forth its specific evidence thirteen days too late—even though the district court did not confirm the award until nearly two years after that. The district court's holding, and the judgment of the court of appeals affirming it, contradicts this Court's precedent and threatens the integrity and international reputation of this Country's judiciary. Certiorari or summary reversal is therefore warranted to reaffirm that United States courts cannot refuse to consider fraud-

based public policy defenses to the confirmation of foreign arbitral awards.

STATEMENT OF THE CASE

A. Factual Background.

1. The Statis Begin Operating In Kazakhstan.

Since the fall of the Soviet Union, Kazakhstan has sought to use its substantial hydrocarbon deposits to benefit its people, including by attracting foreign investment in its oil-and-gas industry. *See* U.S. Dep't of State, *2019 Investment Climate Statements: Kazakhstan* (July 11, 2019), https://tinyurl.com/yyflesf7. In the United States' view, Kazakhstan is now "an attractive destination for [international] investors." *Id.*

The Statis are among those who have tried to benefit from this investment climate. Beginning in 1999, they acquired two companies, Kazpolmunai ("KPM") and Tolkynneftegas ("TNG"), and obtained Kazakhstan's approval to explore and develop various oil and gas fields in the country. JA41-44 ¶¶ 221-249.[2] As part of their activities in Kazakhstan, the Statis began construction in 2006 of a liquefied petroleum gas plant (the "LPG Plant"). JA44 ¶ 250.

In 2008, Kazakhstan's President received a letter from the President of Moldova, the Statis' home country, reporting that they had not only concealed profits in offshore accounts, but also funneled the proceeds of their Kazakh operations into illegal investments in rogue states and territories. JA47 ¶ 291. Kazakhstan investigated, JA48 ¶ 296, and eventually terminated KPM and TNG's subsoil use contracts, JA54 ¶ 611.

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[2] "JA" refers to the Joint Appendix filed in the D.C. Circuit.

2. The Statis Initiate Arbitration And The Panel Issues Its Award.

Just five days after the contracts were terminated, on July 26, 2010, the Statis filed a Request for Arbitration (the "Request") with the Stockholm Chamber of Commerce ("SCC"), claiming that Kazakhstan's actions violated its obligations as a signatory to the ECT. JA32 ¶ 6. The ECT provides that under certain specified conditions, each signatory consents to arbitrate energy-related disputes in foreign tribunals. *See generally* ECT, art. 26(1)-(4).

The Arbitral Panel issued its Award on December 19, 2013. The Panel found that Kazakhstan had failed to treat the Statis fairly and equitably, as required by the ECT, JA64-67 ¶¶ 1085-95, and ordered Kazakhstan to pay roughly $498 million in damages, of which $199 million was compensation for the unfinished LPG Plant, JA87 ¶¶ 1856-57, 1859. In the arbitration, the Statis and their experts had expressly urged the Arbitral Panel to value the LPG Plant, at minimum, in the amount of a $199 million bid (the "KMG Bid") that the Statis had obtained from a state-owned entity called KMG. *See*, *e.g.*, JA388 n.16. Accepting this argument, the Panel awarded the Statis $199 million in compensation for the LPG Plant. JA81-82 ¶¶ 1746-48.

B. Procedural History.

1. Initial Proceedings In The District Court.

In September 2014, the Statis filed their Petition to Confirm (the "Petition"), asking the district court to recognize and confirm the Award under the New York Convention, as implemented by the FAA. *See* JA14-25. The Convention provides seven grounds on which

confirmation should be denied. App. 56a-57a. The FAA in turn provides that a district court must deny confirmation if "it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." App. 58a.

In February 2015, Kazakhstan filed an opposition to the Petition presenting proof of its then-known defenses. Briefing on those defenses concluded on May 26, 2015, with the submission of Kazakhstan's Sur-Reply. JA305-31.

2. The District Court Refuses To Permit Kazakhstan To Present Its Public Policy Defense.

After this initial briefing on the Petition was complete, Kazakhstan discovered evidence that the Statis obtained the Award by fraud. Specifically, in the course of defending against the Statis efforts to enforce the Award, Kazakhstan had petitioned the U.S. District Court for the Southern District of New York under 28 U.S.C. § 1782 for permission to subpoena documents from a Stati business partner in Kazakhstan that also had engaged in international arbitration proceedings against the Statis. *See* JA713-14. These other arbitration proceedings overlapped in time with Statis' arbitration against Kazakhstan and concerned certain of the same issues, including the valuation of the LPG Plant.

The Stati Parties intervened in the § 1782 proceedings and raised numerous objections in an effort to prevent Kazakhstan from obtaining this evidence. The district court rejected the Statis' objections, thus providing Kazakhstan the opportunity to begin to obtain the documents showing that the Statis obtained the Award by fraud. JA341-

49. The documents revealed that the $199 million valuation the Statis urged for the LPG Plant, which the Panel had accepted, was the result of a fraudulent conspiracy engaged in by the Statis. The discovery of that evidence led to additional litigation around the world, but ultimately, the district court refused to permit Kazakhstan to present it.

a. The Evidence Of Fraud.

The evidence Kazakhstan obtained demonstrated that, during construction of the LPG Plant, the Statis engaged in sham transactions with Perkwood Investments, a dormant shell company that the Statis owned and controlled. *See* JA397 ¶ 61; JA430 ¶ 42. Those transactions, which falsely inflated the LPG Plant's construction costs, included:

- TNG's "purchase" from Perkwood of $34.5 million worth of equipment for $93 million, which overstated TNG's costs by $58.5 million;[3]
- The charging of another $30.9 million to TNG for the very same equipment;[4]
- TNG's payment of an approximately $44 million "management fee" to Perkwood that the Statis later conceded was not a validly incurred construction expense.[5]

In these sham transactions, the Statis made it falsely appear that they had invested huge sums into the LPG Plant so that they could unjustly enrich themselves.

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[3] JA414; JA417-19 ¶¶ 3, 5-7, 9-10.

[4] JA418 ¶ 10(2).

[5] JA397-98 ¶¶ 60-62.

The Statis repeated the fraud in their financial statements, both by including the overstated construction costs and by hiding that Perkwood was a related party. *See* JA430 ¶ 42 ("TNG's audited accounts for the years 2007-2009 do not disclose the fact that Perkwood was a related party."). Accounting regulations typically require heightened scrutiny for related-party transactions, precisely to prevent this type of fraud.[6]

The Statis then used their falsified financial statements to obtain the inflated bid for the LPG Plant that they subsequently relied upon to dupe the Panel into awarding them $199 million. In 2008, the Statis retained an investment bank, Renaissance Capital, to assist them in selling assets that included the LPG Plant. JA434-40. Renaissance sent prospective buyers an "Information Memorandum" that included key information on the assets. *Id.* The Memorandum said that the financial information it contained—including the falsely inflated statements of the LPG Plant construction costs—came from the financial statements of Stati companies, including TNG. JA438. It also pledged that those statements could be relied upon because they were audited or reviewed by reputable auditors applying International Financial Reporting Standards. JA439.

KMG, the bidder whose valuation was the sole basis for the Panel's damages award for the LPG Plant,

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[6] *See, e.g.*, Elaine Henry, et al., *The Role of Related Party Transaction in Fraudulent Financial Reporting*, 4 J. Forensic & Inv. Accounting 186, 187 (2012) ("Many high profile accounting frauds in recent years * * * have involved related party transactions * * * in some way, creating concern among regulators and other market participants about the appropriate monitoring and auditing of these transactions.").

made its $199 million bid in express reliance upon the falsified information the Information Memorandum contained. *See* JA444 ("In formulating our Indicative Offer, we have relied upon the information contained in the Information Memorandum and certain other publicly available information.").

The Statis then relied upon their fraud during the arbitration by claiming that the LPG Plant should be valued by reference to the fraudulently obtained KMG Bid. JA388 n.16. The Panel accepted this argument and awarded compensation to the Stati for the LPG Plant in the amount of $199 million. JA81-82 ¶¶ 1746-48.

b. The English High Court's Findings.

Litigation regarding the award's validity has proceeded in other countries, including Sweden and England. After the documents exposing the fraud came to light, Kazakhstan submitted them to Swedish courts, asserting that they showed that confirmation would violate Sweden's public policy. The Swedish court disagreed, finding that even if accepted as true, the alleged fraudulent procurement of the arbitral award would not violate Swedish public policy. JA477-708; JA750-51. Thus, the Swedish courts declined to make factual findings as to the extent or materiality of the fraud. JA477-708; JA751.

The English courts, applying English public policy, took the opposite view. After Kazakhstan discovered the Statis' fraud, the High Court of Justice (the "English High Court") permitted Kazakhstan to submit evidence to support its request to amend its defenses to show that the Award would contravene English public policy because it was obtained by fraud. Such a showing required Kazakhstan to prove

that the Statis had "deliberately and dishonestly failed to disclose [material] in the arbitration" or "made submissions * * * which deliberately and dishonestly continued that concealment and misled the tribunal," and further that that conduct would have had an "important influence on * * * the result of the arbitration." JA727 ¶ 11(4). Kazakhstan was permitted to submit more than 2,200 pages of documents and testimony evidencing the fraud. In February 2017, the court held a two-day hearing in which it carefully considered Kazakhstan's contention that the Award was the product of the Statis' fraud.

Four months later, the court ruled in Kazakhstan's favor, finding that Kazakhstan had presented a prima facie case that the Statis obtained the Award by fraud. JA732 ¶ 37. The facts on which it relied included:

- that the Statis conceded in the Swedish proceeding that Perkwood was a Stati-related company, despite having taken a contrary position in the arbitration (JA731 ¶ 26);
- that related-party transactions between Perkwood and TNG artificially inflated the LPG Plant's costs (JA731-32 ¶¶ 27-28, 30-32);
- that the Statis had likely violated their discovery obligations in the arbitration by failing to disclose the agreement with Perkwood (JA731 ¶ 29);
- that the Statis had concealed the true construction costs of the LPG Plant from their auditors, KMG, Kazakhstan, and—most critically—the SCC Panel (JA732 ¶ 34);
- that the KMG Bid states on its face that its estimated value of the LPG Plant is based on information contained in the Information Memorandum, which was in turn "expressly

based" on KPM and TNG's financial statements (JA733-34 ¶¶ 40, 42); and

- that, at the express invitation of the Statis and their experts, the Panel relied exclusively on the KMG Bid in valuing the LPG Plant (JA735 ¶ 45-47).

Based on the foregoing, the English High Court determined that "there [was] the necessary strength of [a] prima facie case" that when the Statis "ask[ed] the Tribunal to rely on the KMG Bid," they committed "a fraud on the [Panel]." JA735 ¶ 48. Thus, it concluded, the fraud allegations needed be "examined at a trial and decided on their merits" before a decision on confirmation could be made. JA744 ¶¶ 92-93.

Shortly thereafter, however, the Statis sought to dismiss their claim rather than face an adverse ruling on the merits of the fraud allegations. The English High Court declined. *See Stati & Ors* v. *The Republic of Kazakhstan*, [2018] EWHC (Comm) 1130, 2018 WL 02163653 (Eng.), ¶¶ 60-67. It found the Statis' claims that they could not afford a trial and that they no longer needed to confirm the award in England incredible in light of their zealous continuation of other enforcement actions elsewhere. *Id.* ¶¶ 19-24. The English High Court instead found it likely that the "real reason" for the Statis abrupt decision to drop the confirmation action was that they did "not wish to take the risk that the trial may lead to findings against them and in favour of [Kazakhstan]." *Id.* ¶ 25. Because the Statis were able to reverse that decision on appeal, they ultimately did avoid a trial, but on the condition that they give up all right to seek enforcement of the Award in England. *See Stati & Ors* v. *The Republic of Kazakhstan*, [2018] EWCA Civ 1896, 2018 WL 03777710 (Eng.), ¶ 67 (allowing

dismissal of Statis' enforcement proceeding "on terms * * * that the [Statis] give to the court the undertakings offered by them"); *Stati & Ors* v. *The Republic of Kazakhstan*, [2018] EWHC (Comm) 1130, 2018 WL 02163653 (Eng.), ¶ 47 (Statis seeking dismissal under an "undertaking * * * that they will not pursue further proceedings in England").

c. The District Court's Initial Refusal To Permit Kazakhstan To Present Its Fraud Defense.

In the district court, as in England, briefing on Kazakhstan's initial defenses to confirmation was completed before Kazakhstan discovered the fraud. Accordingly, on April 5, 2016, Kazakhstan moved for leave to add new defenses arising from the Statis' fraud, including that confirmation of the fraudulently obtained Award would violate the public policy of the United States. JA332-39; *see* App. 57a (New York Convention, art. V(2)(b)). Kazakhstan told the court that while it "ha[d] not completely unraveled the totality" of the Statis' wrongdoing, it "presently underst[ood]" that they had "misrepresented the LPG Plant construction costs for which they claimed reimbursement in the SCC Arbitration." JA335-37. Kazakhstan stated that "the $199 million awarded to [the Statis] for the LPG Plant in the SCC Arbitration was a direct result of the fraud," and explained that the "supplemental filing" it wished to submit would set forth "[t]he full details" of the Statis' scheme and its effect on the Award. JA337-38.

The Statis opposed the motion, arguing (among other things) that Kazakhstan's proposed pleading would be "futile" because the Panel based its $199 million award for the LPG Plant on the KMG Bid, which—in a continuation of the very strategy that

defrauded the SCC tribunal itself—the Statis falsely asserted was neutral and independent. JA358-63. In reply, Kazakhstan emphasized that the Statis' contention was an improper attempt to dispute the alleged facts and that, in any event, the fraud went directly to the KMG Bid: "As will be shown in detail by Kazakhstan in its proposed supplemental filing, the Statis' fraud ***infected the $199 million number relied upon by the Tribunal***." JA370 (emphasis added); *see also* JA370-71 ("Kazakhstan's supplemental filing will show that the Statis submitted false testimony and evidence to the SCC arbitration tribunal, that this fraud ***directly resulted in the $199 million award to the Statis for the LPG Plant*** and that this $199 million is a material component of the SCC award.") (emphasis added).

Nevertheless, six days after Kazakhstan filed its reply, the district court denied the motion for leave. JA376-79. Without even permitting Kazakhstan to present its proffered evidence, the court summarily accepted the Statis' argument, holding that any supplemental filing regarding fraud would be "futile" under Rule 15 of the Federal Rules of Civil Procedure, because "it is clear that the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision." JA378. The district court further reasoned that because the "issue ha[d] already been presented to the Swedish authorities, it would not be in the interest of justice to conduct a mini-trial on the issue of fraud" in a United States court. JA379.

d. The District Court's Waiver Ruling And Confirmation Order.

Kazakhstan moved for reconsideration one week later, on May 18, 2016. JA380-93. With its motion, Kazakhstan submitted nearly 200 pages of evidence

supporting the assertions in its original motion papers, showing the connection between the Statis' fraud and the KMG Bid, and demonstrating that the Statis had committed fraud on the Panel by urging it to rely on the KMG Bid as a neutral and objective measure of the value of the LPG Plant when, in fact, it too had been obtained by fraud. *See*, *e.g.*, JA388 n.16. Having thus demonstrated that the court erred in concluding that amendment would have been futile, Kazakhstan again requested that the court permit it to present the full merits of that defense and supporting evidence.

More than two months later, without having ruled on the fully-briefed motion to reconsider, the district court *sua sponte* stayed the case in deference to the outcome of the Swedish proceedings. JA455-76. The stay lasted more than a year, until November 2017. In the interim, Kazakhstan apprised the district court of the English High Court's holding that Kazakhstan's evidence, when fully considered, established a prima facie case that the Statis had obtained the Award by fraud. JA709-45.

Then, in March 2018—four months after ending the stay—the district court finally resolved Kazakhstan's motion for reconsideration and issued its final judgment. App. 7a-45a. As to the fraud defense, the district court acknowledged that both in its initial motion for leave and on reconsideration, Kazakhstan had asserted that the Statis "fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed reimbursement." App. 21a-22a. Nevertheless, the court refused to consider the fraud defense on the merits, stating that the motion for reconsideration relied on an "entirely separate theory of fraud that [Kazakhstan] did not

seek leave to introduce" in its original filing. App. 22a-23a. Specifically, the court believed that Kazakhstan's original motion had focused only on "false sworn testimony and expert reports," while its reconsideration motion had argued that "the [KMG Bid] was itself the product of fraud." App. 21a-22a.[7]

That supposed change in Kazakhstan's theory was the basis of the court's refusal to address the fraud defense's merits. Rather than address the merits, the court held that Kazakhstan's supposedly alternative theory was forfeited for "the simple reason that [Kazakhstan] did not [initially] present the facts it now seeks to introduce." App. 21a. "[B]ecause [Kazakhstan] d[id] not claim that these facts were not available to it at the time it filed its initial motion to include additional defenses," the district court went on, "they are improperly raised now." App. 21a. The district court reiterated that point throughout its order denying reconsideration, offering no findings as to the merits of the fraud and no other grounds on which reconsideration could alternatively have been denied. *See* App. 21a-23a.[8]

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[7] In concluding that Kazakhstan's theory had changed, the district court did not consider the unlikelihood that Kazakhstan could have developed a new theory (and compiled nearly 200 pages of documentary evidence supporting it) in the one week between the district court's denial of Kazakhstan's motion and the filing of Kazakhstan's reconsideration request. In fact, the documents presented in the reconsideration motion were just a small portion of the "full details" of the fraud Kazakhstan had promised to provide the Court in its initial motion. JA338.

[8] The district court separately addressed whether its original order should be reconsidered because it applied the wrong legal standard to Kazakhstan's initial motion for leave to present its fraud defense. *See* App. 23a-27a. But that discussion did not

On the merits, the court rejected Kazakhstan's other defenses. The district court therefore confirmed the Award, transforming it into a final, enforceable judgment of a United States court. It did so without even permitting Kazakhstan to present its evidence demonstrating that the Award was procured by fraud. And it did so even though Kazakhstan undisputedly had presented both its theory of fraud and the supporting evidence in its motion for reconsideration filed 675 days—nearly ***two years***—earlier, long before the court ruled on the merits of the Petition.

3. Proceedings In The Court Of Appeals.

Kazakhstan appealed, arguing, *inter alia*, that the district court erred with respect to the fraud-based public policy defense. Kazakhstan argued that, even accepting the district court's reasoning that Kazakhstan had presented new allegations in its motion to reconsider, the district court was still required to consider such a new fraud defense on the merits. *See* D.C. Cir. Opening Br. 54-55 (regardless of timeliness, confirmation of award tainted by fraud would work manifest injustice); *see also* D.C. Cir. Reply Br. 23-24 (filed Oct. 15, 2018) (same).[9] As Kazakhstan explained, the district court erred by converting the arbitral ruling into "a judgment of a United States court against a sovereign nation * * * without even considering whether doing so would further advance the Statis Parties' fraud * * * ." D.C. Cir. Opening Br. 55. It further noted the "substantial injustice of confirming as a U.S.

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address the merits of Kazakhstan's actual fraud defense articulated in detail in Kazakhstan's motion for reconsideration.

[9] Kazakhstan also contested that it had it had changed theories.

judgment a half-billion [dollar] award procured against a foreign sovereign by fraud," *id.* at 55-56, and argued that it had an absolute right to present its fraud defense. *See* D.C. Cir. Reply Br. 26-27.

At oral argument, Kazakhstan emphasized those contentions, specifically citing and relying on a D.C. Circuit case, *Enron Nigeria Power Holding, Ltd.* v. *Federal Republic of Nigeria*, 844 F.3d 281 (D.C. Cir. 2016), for the proposition that, like subject-matter jurisdiction, the fraud-based public policy defense Kazakhstan sought to advance cannot be waived or forfeited:

> I would add * * * that the district court * * * cited this court's decision in *Enron Nigeria* * * * . One thing that that case holds, Your Honor, is that a defense under Article V of the New York Convention, a public policy defense, * * * cannot be waived and cannot be forfeited, and that the court must always consider it, even for the first time on appeal. The reason, the court held, is because the court is otherwise becoming [a] tool of the fraud.

Oral Arg. at 9:58-10:34.

More than four months later, the court of appeals affirmed in an unpublished, three-page order containing less than a page of legal analysis. The order devoted only a single sentence to the motion for reconsideration and the facts it raised, stating "[w]e further agree with the District Court that Kazakhstan improperly presented new facts in its motion for reconsideration that it had not introduced in its original motion to supplement." App. 5a-6a. The panel did not mention, address, or attempt to refute Kazakhstan's contention that, even where present, such untimeliness is irrelevant to a party's right to

present, and the court's independent duty to examine, a fraud-based public policy defense to confirmation raised long before any decision on the merits.

Kazakhstan sought rehearing, arguing that the panel's ruling disregarded binding precedent holding that "'because public policy violations implicate the integrity of the enforcing court,' parties 'cannot waive' or forfeit a fraud-based public policy defense to confirmation of an international arbitral award." Pet. for Reh'g 1 (filed May 20, 2019) (quoting *Enron Nigeria*, 844 F.3d at 287-89). Rehearing was denied. App. 53a-54a, 55a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD CONFIRM THAT DISTRICT COURTS MAY NOT DECLINE TO ADJUDICATE FRAUD-BASED PUBLIC POLICY DEFENSES UNDER THE NEW YORK CONVENTION.

More than a century ago, this Court held that a court's obligation not to enforce an agreement "forbidden by * * * public policy * * * could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties." *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 267 (1880). Rather, a public policy defense is "one which the court itself was bound to raise in the interest of the due administration of justice." *Id.* And more than 50 years ago, in *Hurd* v. *Hodge*, 334 U.S. 24 (1948)—a companion case to the Court's landmark decision outlawing restrictive covenants in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948)—the Court relied on *Oscanyan* to make clear that "[t]he power of the federal courts to enforce the terms of private agreements is ***at all times*** exercised subject to the restrictions and limitations of the public policy

of the United States" and that "[w]here the enforcement of private agreements would be violative of that policy, it is the ***obligation*** of courts to refrain from such exertions of judicial power." *Hurd*, 334 U.S. at 35-46 (citing, *inter alia*, *Oscanyan*, 103 U.S. 261) (emphasis added).

The Court has never wavered from the view that federal courts have an obligation to adjudicate public policy defenses to enforcement of private agreements, lest the courts themselves become a tool of illegality. Thus, the Court in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-84 (1982), reversed a lower court decision declining to adjudicate a public policy defense to enforcement of an unlawful labor agreement. Quoting and relying on *Hurd*, the Court held that "[i]t is * * * well established * * * that a federal court has a ***duty*** to determine whether a contract violates federal law ***before enforcing it***." *Id.* at 83-84 (citing *Hurd*, 334 U.S. at 34-35) (emphasis added).

That duty is all the more important here, where the Statis asked the district court to confirm an arbitral award allegedly infected by fraud and thereby transform the award into a binding judgment of a United States court. This Court recognized long ago that federal courts have inherent power to protect themselves from becoming instruments of fraud. Federal courts are free to reopen cases after judgment on the basis of "after-discovered fraud, regardless of the term of their entry." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). That is because fraud against courts "tamper[s] with the administration of justice" and therefore "involves far more than an injury to a single litigant." *Id.* at 246; *see also United States* v. *Throckmorton*, 98 U.S. 61, 66 (1878) (recognizing doctrine that "[f]raud vitiates

every thing, and a judgment equally with a contract; that is, a judgment obtained by fraud.") (quotation omitted). Such fraud is "a wrong against the institutions set up to protect and safeguard the public." *Hazel-Atlas*, 322 U.S. at 246. In such cases, a court has not only the power but the ***duty*** to act. *See id.* at 249-50 (emphasis added).

That duty applies squarely to the confirmation proceeding at issue here. Under the FAA, a district court must deny confirmation if "it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." App. 58a. Article V(2)(b) of the New York convention expressly provides that recognition or enforcement of an arbitral award should be refused if doing so "would be contrary to the public policy" of the country where enforcement is sought. App. 57a. That exception to enforcement enshrines into law the "fundamental equitable principle" that courts may not "be[] made parties to fraud or other criminal acts." *Enron Nigeria*, 844 F.3d at 287; *see also Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004) (identifying elements of fraud-based public-policy defense to enforcement under New York Convention); *Bonar* v. *Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1385-86 (11th Cir. 1988) (refusing to enforce domestic award under FAA due to fraud on the arbitral panel).

Accordingly, and because the defense is designed to protect ***the court's*** own "integrity," no litigant can "waive an Article V(2)(b) public policy defense to enforcement of [an] [a]ward." *Enron Nigeria*, 844 F.3d at 288; *see also id.* ("[P]arties cannot waive their rights under Article V(2)(b) because public policy violations implicate the integrity of the enforcing court.") (citing

Hurd, 334 U.S. at 34-35; Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration § 2-16(b) (Am. Law. Inst., Tentative Draft No. 4, 2015)). To permit such waiver would "elevat[e] the parties'" conduct "above the fundamental need of the federal courts to protect their own integrity." *Id.*

The same principles establish that "forfeiture cannot divest the court of its duty to resolve [a] public policy question any more than waiver can." *Id.* Thus, irrespective of when a party raises a public policy defense, "the court ***must*** * * * decide the issue" in order to avoid entering a judgment that conflicts with the public policy of the United States. *Id.* at 289 (emphasis added);[10] *see also Hazel-Atlas*, 322 U.S. at 246 (court's duty to preserve the "integrity of the judicial process" need not "wait upon the diligence of litigants"). Indeed, in *Enron Nigeria*, the court considered a public policy defense even though (unlike here) the defense was never raised in the trial court. 844 F.3d at 288.

The courts below contravened these principles. It is undisputed that, at the very latest, Kazakhstan squarely raised its fraud-based public policy defense—and the evidence supporting it—in its motion for reconsideration filed on May 18, 2016. Yet the district court, summarily affirmed by the court of appeals, held that Kazakhstan waived and forfeited that defense by not (in the district court's view) raising it with sufficient clarity in Kazakhstan's initial motion, briefing on which was completed only

[10] The principle is also accepted in the lower courts. *See*, *e.g.*, *I.U.B.A.C. Local Union No. 31* v. *Anastasi Bros. Corp.*, 600 F. Supp. 92, 95 (S.D. Fla. 1984) (holding that "a party cannot waive the defense of illegality of the contract" in defending against enforcement of an arbitration based on that contract).

thirteen days before the reconsideration motion. In fact, the initial motion merely sought ***leave*** to present Kazakhstan's public policy defense and was not intended to present that defense itself. But the courts refused even to ***consider*** Kazakhstan's extensive evidence that the Award was obtained by fraud—evidence the English High Court had earlier held established a "prima facie" case of fraud. And they refused to do so even though Kazakhstan had clearly and squarely raised its fraud defense nearly ***two years*** before any ruling on the Statis' Petition to confirm the allegedly fraudulently obtained Award.

Those holdings cannot be reconciled with this Court's clear precedents, dating back nearly 150 years, holding that federal courts have an unfailing obligation to consider a public policy defense, regardless of when it is raised, "because public policy violations implicate the integrity of the enforcing court" and implicate the "fundamental need of the federal courts to protect their own integrity." *Enron Nigeria*, 544 F.3d at 288 (citing *Hurd*, 334 U.S. at 34-35). It is therefore the "***obligation*** of courts to refrain from * * * exertions of judicial power" to enforce agreements that violate public policy, *Hurd*, 334 U.S. at 35 (emphasis added), just as it is the duty of courts to refrain from being an instrument of fraud, *Hazel-Atlas*, 322 U.S. at 249-50.

The courts below wholly abdicated that obligation and duty, set forth in the New York Convention and the FAA, and confirmed by more than a century of precedent. They allowed enforcement of a high-profile, half-billion-dollar award against an important U.S. ally without even considering substantial evidence, placed before the district court nearly two years before enforcement, that the award was

procured by fraud. And they reached that result because, on their reasoning, Kazakhstan initially sought ***leave*** to present its fraud defense instead of simply filing the defense without permission. App. 5a; App. 21a-23a. In reaching that result, the courts below effectively converted the judiciary of the United States into an "instrument of fraud."

It is no answer to argue that the courts below could properly defer to foreign courts on this question. In its order denying Kazakhstan's motion for reconsideration, the district court found that hearing Kazakhstan's defense was not "required by justice" in part because the "Svea Court of Appeal heard and rejected [Kazakhstan's] fraud claims," which, the district court held, "len[t] force to [the court's] view that it would not be contrary to the public policy of the United States" to enforce the Award. App. 28a-29a.

That view betrays a fundamental misunderstanding of the U.S. courts' role in addressing foreign arbitral awards. The only "authorit[ies]" competent to assess the public policy "in the country where recognition and enforcement is sought," App. 57a, were ***the courts below***. The district court could not validly conclude the Award is not contrary to U.S. public policy simply because the Svea Court of Appeals held it did not violate Swedish public policy. Indeed, the English High Court, applying the New York Convention, properly rejected exactly that argument, correctly holding that it had an obligation to determine whether English public policy prohibited enforcement of the Award regardless of what the outcome would be under the public policy of Sweden. As that court explained, "[r]elevant public policy can and does differ from country to country." JA742, ¶ 84. Consequently, "the Swedish Court did not decide

whether under English law public policy required [the court to refuse] the application to enforce the Award in [England]." *Id.* Indeed, it could not have done so because, as the English High Court explained, "English public order must ultimately be a matter for the English Court." JA743 ¶ 87.

By refusing to conduct the same evaluation—admitting Kazakhstan's evidence and evaluating it against the requirement of U.S. public policy—the district court violated its obligations under the New York Convention. Indeed, the court itself recognized that "the legal standards to be applied" in Sweden and the United States were different. App. 28a. Accordingly, to the extent the courts below deferred a question of U.S. public policy to foreign courts reviewing the Award, that deference was directly contrary to the textual command contained in both the treaty and the statute, and it should be reversed.

This Court's review—or summary reversal—is warranted to avoid having the judiciary become a tool of the fraud. Kazakhstan does not seek to have this Court, or the court of appeals, measure the merits of its allegations and supporting evidence against U.S. public policy in the first instance. Rather, it asks this Court to confirm that the lower courts violated their clear obligation to do so before transforming the Award into a judgment of the United States.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD RESOLVE.

A. The Decision Below Undermines Judicial Integrity In A Highly Visible Case Of Exceptional International Importance.

This Court's review is also warranted because, in abandoning the longstanding legal principles set forth above, the decisions below contravened this Court's precedents in a manner that threatens the reputation of the federal courts. As noted, the district court refused to consider the Article V(2)(b) defense that was presented and substantiated in Kazakhstan's motion for reconsideration solely based on the court's conclusion that the defense was untimely, even though it was unquestionably presented 675 days before the district court ruled on the confirmation petition. *See* App. 21a-23a. That finding then formed the basis for the panel's cursory affirmance. App. 5a-6a. Those holdings, as noted, risk making the federal courts an accomplice in the alleged fraud and, consequently, of damaging their reputation in the international community.

That risk is heightened in this case, because the judiciaries of other countries have recognized Kazakhstan's right to present its public policy defense. As noted, the English High Court, when confronted with the evidence and argument Kazakhstan sought to introduce below, found Kazakhstan's fraud defense compelling enough to order a full trial on the merits. JA709-45. To reach that result, Kazakhstan needed to establish a prima facie case showing that the Statis deliberately deceived the tribunal, that their fraud was undetectable at the time it was committed, and that

their fraud would have influenced the proceedings even if it may not have been outcome-determinative. JA727-28, ¶¶ 11(4), 11(9)-(10). That standard is indistinguishable from the one that would have controlled in the courts below. *See Karaha Bodas Co.*, 364 F.3d at 306-07. And faced with a trial on the merits under that very standard, the Statis instead chose to dismiss their case on the condition that they never again seek to enforce the Award in England. *See Stati & Ors*, [2018] EWCA Civ 1896, 2018 WL 03777710 (Eng.), ¶ 67.

All courts in which the Stati Parties have attempted to enforce the Award under the New York Convention, other than courts in the United States, have allowed Kazakhstan to present its fraud defense. A Dutch court, for example, granted Kazakhstan a stay last year in order to give it time to present its fraud claims in light of thousands of pages of documents that the Statis had only recently produced. *See* Kazakhstan's Rule 28(j) Letter, *Stati* v. *Republic of Kazakhstan*, No. 18-7047 (D.C. Cir. filed Nov. 15, 2018). Proceedings there are ongoing, and a substantive hearing on Kazakhstan's fraud defense was held on August 27, 2019. Likewise, substantive hearings are scheduled in Luxembourg on the fraud defense for October 10, 2019, and in Belgium the court has scheduled three days of hearings on November 13, 14, and 15. *See* Decl. Supporting Mot. to Compel, ¶ 11, *In re Application of Republic of Kazakhstan for an Order Directing Discovery from Black River Emerging Markets Funds Ltd.*, No. 18-cv-413 (D. Minn. Aug. 6, 2019), ECF No. 21 (describing status of proceedings in Amsterdam and in other courts); *see also* Paige Long, *Kazakhstan Leans on Fraud Claims In Disputing $500M Award*, Law360 (Aug. 27, 2019),

https://www.law360.com/articles/1192821/kazakhstan-leans-on-fraud-claims-in-disputing-500m-award (discussing status of proceedings). Like the English High Court, the Amsterdam court recognized Kazakhstan's right to demonstrate that the Statis' Award was procured by fraud, and it consequently gave Kazakhstan the opportunity to do so.

These foreign courts have permitted examination into the very same evidence of fraud that was rejected as untimely in the courts below. In the face of these rulings and others like them, permitting the district court's judgment to stand without allowing Kazakhstan even to present its case threatens to undermine the federal judiciary's integrity with no corresponding benefit. *See*, *e.g.*, *Enron Nigeria*, 844 F.3d at 287-89.

Exacerbating the injury to the reputation of the United States judiciary, the D.C. Circuit affirmed the district court's forfeiture ruling in the face of black-letter precedent establishing that Kazakhstan's defense could not be forfeited where, as here, it was clearly raised prior to enforcement. That is the core principle established in *Enron Nigeria*, which involved a materially indistinguishable public policy defense based on fraud. *See id.* By ignoring *Enron Nigeria*, the court of appeals risks criticism not only for unwittingly helping the Statis to "carry out [their] illegal object," *id.* at 287 (quoting *Stone* v. *Freeman*, 298 N.Y. 268, 271 (1948)), but also for doing so in the face of binding precedent that required it to examine the wrongfulness of the Statis' conduct.

This Court has routinely granted certiorari in cases, such as this one, that "bear importantly" on the

foreign relations of the United States.[11] The Court should do so here as well, where the threat to the judiciary's integrity and reputation is heightened because of this case's international profile. Kazakhstan is an important ally and trading partner of the United States, and the award at issue is substantial. But the courts below enforced that half-billion-dollar award without even considering Kazakhstan's defense that the award was procured by fraud. In such circumstances, the reputational and integrity considerations of the U.S. courts are at their peak. Kazakhstan should be provided the kind of fair hearing that the United States government would expect in foreign courts.

B. This Court's Review Is Necessary To Clarify The Rules For Foreign Sovereigns Litigating In The United States Under The New York Convention.

Certiorari is also warranted because the district court's application of a draconian waiver rule highlights the intolerably unpredictable nature of litigating in United States courts under the New York Convention. The courts of appeals have interpreted the FAA to render most of the Federal Rules of Civil Procedure inapplicable to confirmation proceedings.

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[11] *See*, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964) ("We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations * * * ."); *see also*, *e.g.*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851, 855 (2009) (certiorari granted to decide scope of foreign sovereign immunity); *Sumitomo Shoji Am., Inc.* v. *Avaghano*, 457 U.S. 176, 177-78 (1982) (certiorari granted to consider whether treaty provides defense to discrimination suit); *Weinberger* v. *Rossi*, 456 U.S. 25, 26 (1982) (certiorari granted to consider whether statute's reference to "treaty" included executive agreement).

See, *e.g.*, *TermoRio S.A. E.S.P.* v. *Electranta S.P.*, 487 F.3d 928, 940 (D.C. Cir. 2007). But the rules that govern in their place—the procedures designed "for the making and hearing of motions," 9 U.S.C. § 6, rather than pleading rules to which parties are accustomed—provide scant guidance for the commencement and prosecution of enforcement actions, such as this one, that can reach into the hundreds of millions of dollars or more. Indeed, the absence of a coherent procedural regime has been a source of confusion for litigants, foreign and domestic, for more than forty years.[12]

That confusion manifested itself once again in this case. No rule of procedure specifically governs when or how a newly-discovered defense to confirmation of a foreign arbitral award may be raised, but the district court effectively invented its own rule—one that cannot be squared with the rule laid out in *Hazel-Atlas*, *see supra* at 23—and applied it to Kazakhstan after the fact. Even though Kazakhstan's initial motion followed standard pleading principles by merely seeking ***leave*** to present its newly-discovered fraud defense, *cf.* Fed. R. Civ. P. 15(d), the district court, without permitting Kazakhstan the opportunity to submit its supporting evidence and reasoning, denied that motion on the ground that raising the defense would be "futile" because "it is clear that the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their

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[12] *See*, *e.g.*, *TermoRio*, 487 F.3d at 939-41 (party erred by making arguments based on rules governing notice pleading); *Productos Mercantiles E Industriales, S.A.* v. *Faberge USA, Inc.*, 23 F.3d 41, 46 (2d Cir. 1994) (same); *O.R. Sec., Inc.* v. *Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 745-46 (11th Cir. 1988) (same).

decision." JA378. When Kazakhstan, only thirteen days after briefing on that motion concluded, made absolutely clear to the court that the arbitrators did, in fact, rely on the allegedly fraudulent evidence, the court still refused to even consider the evidence. It held instead that the evidence had been presented too late even though Kazakhstan had requested permission to submit precisely such evidence, neither side was prejudiced by the supposed delay, and the court would not rule on the merits of the Statis' Petition for nearly two more years.

The dearth of procedural clarity in this area independently justifies this Court's review. This Court has never considered what procedures apply to petitions to confirm arbitral awards under the New York Convention and the FAA. Article V of the Convention—which, as a treaty, is the Supreme Law of the Land, U.S. Const. art. VI, cl. 2—expressly allows Kazakhstan to present its public policy defense to confirmation. And the FAA provides that if such a public policy defense is established then the award cannot be confirmed. *See* App. 58a. Indeed, confirmation in such a case ***must*** be denied, since any other result would conflict with this Court's well-settled precedents by making domestic courts an instrument of such fraud. *See*, *e.g.*, *Hazel-Atlas*, 322 U.S. at 246; *see also Bonar*, 835 F.2d at 1385-86. Yet even though Kazakhstan presented its defense long before the district court ruled on confirmation, that court (affirmed by the court of appeals) invented its own rule to hold that the defense was presented thirteen days too late. This Court should therefore grant certiorari to provide clear guidance to district courts on the procedures that apply to foreign arbitral confirmation proceedings and to confirm that those

procedures do not permit a court to decline to adjudicate a fraud-based public-policy defense presented to the district court long before any ruling on confirmation.

C. This Case Presents An Excellent Vehicle For Resolving An Important Question Of International Arbitration Law.

Finally, this case presents an excellent vehicle for resolving the question of forfeiture because it is squarely presented and dispositive. The district court rejected Kazakhstan's fraud defense and hundreds of pages of supporting evidence because Kazakhstan had not presented that material in its motion for leave to present the defense. *See* App. 21a-23a. It did not matter to the district court that Kazakhstan had presented the defense nearly two years before the district court finally ruled on the Statis' confirmation motion. *Id.* And because the D.C. Circuit affirmed that holding in a single, unilluminating sentence, App. 5a, Kazakhstan has ***never*** been allowed to demonstrate that confirming the Award would violate United States public policy.

That defense is one of only seven that are enshrined in the New York Convention. *See* App. 56a-57a. Those defenses are to be adjudicated by "the competent authority where the recognition and enforcement" of the award "is sought." *Id.* When Congress codified the New York Convention, it similarly placed the impetus on the confirming court to evaluate the Convention's defenses. *See* App. 58a ("The ***court*** shall confirm the award unless ***it finds*** one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."). To deny Kazakhstan any opportunity to present its fraud defense to the authority tasked with adjudicating it,

as the courts below have done here, undercuts Congress's plain intent that courts not simply rubber-stamp foreign arbitrations that conflict with this country's longstanding public policy, including that which prohibits using the court of the United States as an instrument of fraud.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the judgment after plenary review or, in the alternative, summarily reverse.

Respectfully submitted,

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September 2019

APPENDIX

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7047 **September Term, 2018**

FILED ON: APRIL 19, 2019

ANATOLIE STATI, ET AL.,

Appellees

v.

REPUBLIC OF KAZAKHSTAN,

Appellant

Appeal from the United States District Court for the District of Columbia

(No. 1:14-cv-01638)

Before: WILKINS and KATSAS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

September Term, 2018

Filed On: April 19, 2019

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. After full review of the case, the Court is satisfied that appropriate disposition of the appeal

does not warrant an opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED and **ADJUDGED** that the decisions of the United States District Court for the District of Columbia be **AFFIRMED**.

From 1999 to 2000, Petitioners-Appellees Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. ("the Statis") acquired controlling shares in two Kazakh oil companies: Ascom purchased a 62 percent interest in Kazpolmunay LLP ("KPM"), and the Statis purchased 75 percent interest in Toklynneftagaz LLP ("TNG"). These companies owned subsoil use rights to the Borankol oil and Tolkyn gas fields and the Tabyl exploration block in Kazakhstan. By 2001, the Statis invested an estimated one billion US dollars exploring and developing these projects.

These developments stalled in 2008 when the President of Kazakhstan received a letter from the President of Moldova, the Statis' home country. The letter stated that Anatolie Stati invested in UN-sanctioned areas using proceeds from Kazakhstan's mineral resources and that he was concealing profits in offshore accounts. As a result, the Kazakh government began investigating Anatolie Stati and his companies.

For several reasons, Petitioners characterize this investigation as a "campaign of intimidation and harassment" to pressure the Statis to sell their investments to Kazakhstan's state-owned oil company at a substantially depreciated price. JA 21-22. They allege that Respondent-Appellant Kazakhstan publicly accused the Statis of fraud and forgery, which clouded their title to TNG. Moreover,

according to the Statis, Kazakhstan levied more than $70 million in back taxes against KPM and TNG, and it arrested and prosecuted KPM's general manager for "illegal entrepreneurial activity." JA 21-22. Kazakhstan defends the validity of its investigation and claims that the back taxes were properly assessed and KPM's general manager was justly prosecuted pursuant to a legitimate criminal investigation. On July 21, 2010, Kazakhstan terminated KPM and TNG's subsoil use contracts.

On July 26, 2010, the Statis filed a Request for Arbitration ("Request") with the Stockholm Chamber of Commerce ("SCC") in Sweden. The Request claims that Kazakhstan's actions violated its obligations as a signatory to the Energy Charter Treaty ("ECT"). The ECT is an international agreement that permits signatories to arbitrate disputes in foreign tribunals, such as the SCC. Under the ECT, the SCC rules governed the arbitral proceedings.

On December 19, 2013, the tribunal issued an award in favor of the Statis. The tribunal found that Kazakhstan's actions "constituted a string of measures of coordinated harassment," which constituted "a breach of [its] obligation to treat investors fairly and equitably, as required by Art. 10(1) ECT." JA 67. The tribunal awarded the Statis $497,685,101 for damages, and Kazakhstan was also required to pay the Statis $8,975,496.40 in legal costs.

On September 30, 2014, the Statis filed a Petition to Confirm Arbitral Award in the District Court under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which has been incorporated into the Federal Arbitration Act. *See* 9 U.S.C. §§ 201-208. On

April 5, 2016, after the parties had completed their merits briefings in this case, Kazakhstan filed a motion for leave to file "additional grounds" in support of its opposition to the petition to confirm the arbitral award. The District Court denied Kazakhstan's motion after considering whether justice required permitting it to add new grounds to its opposition to the petition to confirm the award. Kazakhstan then filed a motion for reconsideration of the District Court's denial of its motion to supplement. On March 23, 2018, the District Court issued a memorandum opinion denying the motion for reconsideration and confirming the arbitration award.

We affirm the District Court's grant of the Statis' petition to confirm the arbitral award. There is an "emphatic federal policy in favor of arbitral dispute resolution," thus district courts have "little discretion in refusing or deferring enforcement of foreign arbitral awards: the [New York] Convention is 'clear' that a court 'may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.'" *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), and *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007)). Kazakhstan has failed to show that any exceptions to enforceability under the New York Convention are appropriate here.

In its primary argument on appeal, Kazakhstan contends that the arbitral award is not enforceable under the New York Convention because the SCC appointed Kazakhstan's arbitrator on its behalf and without notice, in violation of the governing

arbitration rules. We defer to the SCC's interpretation of its own rules and hold that the SCC Board's appointment of the arbitrator was proper because Kazakhstan had notice and the opportunity to name an arbitrator but failed to do so.

Kazakhstan also claims that the District Court should have refused to enforce the arbitral award because the Statis failed to comply with the "cooling-off" provision that was an express condition of Kazakhstan's agreement to arbitrate. But their argument elides the fact that Kazakhstan received a stay – the precise remedy they sought. In January 2011, Kazakhstan sent a letter to the SCC objecting to the Statis' failure to comply with the cooling-off provision before commencing arbitration, and it proposed a stay of arbitration to cure the defect. Kazakhstan does not contest that, in response, the tribunal granted a three-month stay of the arbitral proceedings.

Kazakhstan's final argument is that the District Court erred by denying both its motion for leave to submit additional grounds in support of its opposition to the petition and its motion for reconsideration of that denial, because it had a right to present proof that the award was procured by fraud. We review the District Court's denial of Kazakhstan's motion for leave to submit additional grounds for defense for abuse of discretion, "requiring only that the court base its ruling on a valid ground." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996). We find that it was not an abuse of discretion for the District Court to deny Kazakhstan's motion because the District Court based its ruling on multiple valid grounds. We further agree with the District Court

that Kazakhstan improperly presented new facts in its motion for reconsideration that it had not introduced in its original motion to supplement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX B
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANATOLIE STATI; GABRIEL STATI; ASCOM GROUP, S.A.; TERRA RAF TRANS TRAIDING LTD., Petitioners	)	
v.	)	Civil Action No. 14-1638 (ABJ)
REPUBLIC OF KAZAKHSTAN, Respondent.	)	

MEMORANDUM OPINION

Petitioners, Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. ("Stati parties")[1] have brought this action to enforce an international arbitration award against the respondent, the Republic of Kazakhstan ("Kazakhstan"), in the United States. The matter is fully briefed and ripe for decision, but before the Court can turn to the merits of the dispute, it must address respondent's motion for reconsideration of the Court's May 11, 2016, Order denying

[1] Anatolie Stati is the father of Gabriel Stati. Both are citizens of Moldova and Romania. ASCOM Group S.A. is a joint stock company incorporated and located in Moldova and owned entirely by Anatolie Stati. Terra Raf Trans Traiding Ltd. is a limited liability company incorporated and located in Gibraltar and owned in equal shares by Anatolie Stati and Gabriel Stati. Pet. to Confirm Arbitral Award ("Pet.") [Dkt. # 1] ¶¶ 2–5.

respondent's motion for leave to submit additional defense grounds in opposition to the motion to confirm the arbitral award. For the reasons that follow, the Court will deny respondent's motion and it will confirm the award.[2]

BACKGROUND

A. Factual Background

Petitioners have been involved in the oil and gas business in Kazakhstan for approximately 17 years. Between 1999 and 2000, petitioners purchased controlling shares in two Kazakh companies, Kazpolmunay LLP ("KPM") and Tolkynneftagaz LLP ("TNG"). Pet. ¶¶ 28–30. The companies owned the subsoil use rights to the Borankol oil field, the Tolkyn gas field, and the Tabyl exploration block in Kazakhstan. *Id.* ¶¶ 29–30. Petitioners eventually came to own 100% of KPM and TNG, and in 2000, those companies obtained approval from Kazakhstan to explore and develop various oil and gas fields located in the country. *Id.* ¶ 31; Arb. Award [Dkt. # 2-1, 2-2, 2-3, 2-4] ("Award") ¶ 229. A year later, in 2001, petitioners, through KPM and TNG, invested more than one billion dollars in the development of the Borankol and Tolkyn fields, and the Tabyl Block. Pet. ¶ 32.

In 2008, Kazakhstan began a government investigation of Anatolie Stati and his companies, including his compliance with export tax laws. Award ¶¶ 296–99. Petitioners and respondent

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[2] In its prior Memorandum Opinion, the Court found that it has subject matter jurisdiction over this action under the Federal Arbitration Act and the Foreign Sovereign Immunities Act. *See Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 181 (D.D.C. 2016).

disagree on what followed. According to petitioners, the government of Kazakhstan began to intimidate and harass petitioners into selling their investments to the state-owned company KazMunaiGas at a substantial discount. Pet. ¶ 33. Specifically, petitioners claim that Kazakhstan "baselessly" accused petitioners of fraud and forgery, levied more than $70 million dollars in back taxes, arrested KPM's general manager for "illegal entrepreneurial activity," and ultimately seized all of KPM and TNG's assets. *Id.* And on July 21, 2010, Kazakhstan terminated petitioners' subsoil use contracts. Award ¶ 611.

Kazakhstan's version of events is that the Kazakh Tax and Customs Committee properly assessed $62 million dollars in taxes to petitioners, and that a lawful criminal investigation by the Kazakh authorities led to the arrest and imprisonment of KPM's General Director. Award ¶¶ 394, 430, 440, 492. Respondent maintains that it was the investigation that led to the termination of KPM and TNG's subsoil use contracts on July 21, 2010, and it disputes the claim that Kazakhstan expropriated petitioners' assets. *Id.* ¶¶ 591–611. Instead, respondent takes the position that the Kazakh state oil company and its subsidiary placed petitioners' oil and gas fields into trust management on a temporary basis only. *Id.* ¶ 611.

B. Procedural Background

On July 26, 2010, petitioners filed a Request for Arbitration with the Stockholm Chamber of Commerce ("SCC") in Sweden. Req. for Arb., Ex. C. to Decl. of Charlene C. Sun [Dkt. # 2-6] ("Req. for Arb."). The request states:

> Over the past two years, Kazakhstan has engaged in a campaign of harassment and illegal acts against [petitioners] that culminated on July 21, 2010 with the State's notice of unilateral termination of the companies' Subsoil Use Contracts, the illegal expropriation of [petitioners'] Kazakh investments, and the subsequent commandeering of [petitioners'] offices by personnel of State-owned KazMunaiGas and the Kazakh Ministry of Oil and Gas.

Id. ¶ 4. Petitioners further alleged that Kazakhstan's harassment "clearly had expropriation as its ultimate goal, and it had the effect in the process of destroying both the market value and alienability of [petitioners'] investments." *Id.* ¶¶ 4, 8. The request invoked the Energy Charter Treaty ("ECT"), an international agreement signed by the respondent, which allows investors to submit disputes to the SCC for arbitration. Energy Charter Treaty, art. 26(4)(c), Dec. 17, 1994, 2080 U.N.T.S. 95, 121–22. Accordingly, the arbitral proceedings were governed by the SCC's Arbitration Rules. Pet. ¶ 22.

On December 19, 2013, the SCC tribunal issued an award in favor of petitioners and against respondent. Pet. ¶ 27. The tribunal determined that Kazakhstan breached its obligation to provide fair and equitable treatment under Article 10(1) of the ECT. Award ¶¶ 1085–95. It awarded petitioners $497,685,101 for the alleged expropriation of petitioners' assets in Kazakhstan. *Id.* ¶ 1859. This total included $277.8 million for the Borankol and Tolkyn oil and gas fields, $31.3 million for the subsoil use contracts,

$199 million for an unfinished liquefied petroleum gas plant ("LPG plant"), and $8,975,496.40 in legal costs. *Id.* ¶¶ 1856–61, 1885.[3]

On September 30, 2014, petitioners asked this Court to confirm the arbitral award in the United States pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201 *et seq.*, which codifies the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, commonly known as the "New York Convention." Pet. ¶ 1. The Stati parties sought to enforce the foreign arbitral award here on the grounds that Kazakhstan maintains assets in the United States. *Id.* ¶ 46. Respondent opposed the petition to confirm based on five grounds under the New York Convention, focusing primarily on the SCC's appointment of respondent's arbitrator and its alleged failure to enforce the requirement that there be a three-month settlement period prior to the initiation of an arbitration. Resp't's Opp. to Pet. [Dkt. # 20] ("Resp't's Opp."). Petitioners filed a reply, Pet'rs' Reply Mem. in Supp. of Pet. [Dkt. # 24] ("Pet'rs' Reply"), and the Court granted respondent leave to file a sur-reply. Resp't's Sur-Reply in Supp. of Resp't's Opp. [Dkt. # 28] ("Resp't's Sur-Reply"). By May 26, 2015, the parties had completed briefing on the merits.

1. Respondent's motion for leave to include additional defense grounds.

[3] In the Petition to Confirm the Award, petitioners assert that respondent must pay them "$506,660,597.40 plus (a) compound prejudgment interest as set forth in the Award from April 9, 2009 to the date that judgment is entered herein, and (b) post-judgment interest from the date that judgment is entered to the date of satisfaction." Pet. ¶ 48.

According to respondent, in June of 2015, it became aware of "new evidence" that petitioners had "obtained the [arbitral] [a]ward through fraud." Resp't's Mot. for Leave to Submit Additional Grounds in Supp. of Opp. to Pet. [Dkt. # 32] ("Initial Mot.") at 4, 6. Respondent waited till April 5, 2016, though – nearly a year after learning about the alleged fraud and completing the merits briefing in this case – to file a motion seeking leave to submit additional defenses to enforcement of the arbitral award. *Id.* at 1, 4.

In that motion, respondent argued that petitioners procured the award through fraud by submitting "false testimony and evidence to the SCC Arbitration tribunal" that "materially misrepresented the LPG Plant construction costs for which they claimed reimbursement in the [arbitration]." *Id.* at 4. Respondent contended that the newly discovered fraud afforded it two additional defenses under Article V(2)(b) and Article V(1)(b) of the New York Convention. *Id.* at 4–6. Under Article V(2)(b) the Court could refuse recognition of the award because enforcement of a fraudulently obtained arbitral award would be contrary to United States public policy. *Id.* at 4–5. And respondent also asserted that "the intentional giving of false evidence" during the arbitration "denied [respondent] the opportunity to present its case," thus rendering the arbitral award unenforceable under Article V(1)(b) of the New York Convention. *Id.* at 5–6.

In the absence of an applicable rule setting forth the standard to be applied to respondent's motion, the Court considered whether justice required permitting respondent to "add new grounds to its opposition to the petition to confirm the award, more

than a year after the original opposition was filed." Order (May 11, 2016) [Dkt. # 36] at 2–3 ("Order"). The Court reviewed the SCC arbitration award and denied the motion, reasoning that "it [would] not be in the interest of justice to conduct a mini-trial on the issue of fraud here when the arbitrators expressly disavowed any reliance on the allegedly fraudulent material." *Id.* at 4. In other words, the evidence respondent sought to discredit was not material to the decision.

The Court derived this conclusion based on its own detailed review of the award, which stated in relevant part:

> Regarding the value of damages caused by Respondent's action, the Tribunal has taken note of the various extensive arguments submitted by the Parties relying on their respective experts' reports. However, the Tribunal considers that it does not have to evaluate these reports and the very different results they reach. In the view of the Tribunal, the relatively best source for the valuation . . . are the contemporaneous bids that were made for the LPG Plant by third parties after Claimants' efforts to sell the LPG Plant . . . .

Award ¶ 1746. The panel concluded:

> [T]he Tribunal considers it to be of particular relevance that an offer was made for the LPG Plant by state-owned KMG at that time for USD 199 million. The Tribunal considers that to be the

> relatively best source of information for the valuation of the LPG Plant among the various sources of information submitted by the Parties regarding the valuation for the LPG Plant during the relevant period . . . . Therefore, this is the amount of damages the Tribunal accepts in this context.

Id. ¶¶ 1747–48.

Kazakhstan then filed the instant motion for reconsideration, Resp't's Mot. for Recons. of May 11, 2016, Order [Dkt. # 37] ("Mot. for Recons."), and petitioners opposed the motion. Pet'rs' Mem. of P. & A. in Opp. to Resp't's Mot. for Recons. [Dkt. # 38] ("Pet'rs' Opp."). Petitioners pointed out that Kazakhstan "has the opportunity to litigate the very same fraud allegations in the courts of Sweden, which is the seat of the arbitration and primary jurisdiction in this case." *Id.* at 5. Respondent confirmed that the parties were litigating the fraud issue in Sweden, where it was seeking to vacate the award, but it argued that the Swedish proceeding should not affect the Court's review of the petition to confirm, or the motion for reconsideration. *See* Reply in Supp. of Mot. for Recons. [Dkt. # 39] at 3–5.

2. The Swedish proceedings to vacate the arbitral award.

In light of the pendency of the Swedish proceedings to vacate the award, this Court exercised its discretion to stay this case pending the resolution of the proceedings before the Svea Court of Appeal in Sweden, noting that they "could have a dramatic impact on the petition to confirm the arbitration award." *Stati*, 199 F. Supp. 3d at 193. It observed

that if "respondent [was] successful in the set-aside proceeding [in Sweden], confirmation of the award [would] be unlikely" in the United States. *Id.*, citing New York Convention, art. V(1)(e) (providing that enforcement of an award may be refused when the "award . . . has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made"). In that same ruling, the Court found that it had subject matter jurisdiction over the dispute under the FAA and the Foreign Sovereign Immunities Act. *Id.* at 184–190.

On December 9, 2016, the Svea Court of Appeal issued its decision upholding the Award and rejecting Kazakhstan's arguments, including the argument that the Award should be vacated in light of the alleged fraud. Svea Court of Appeal J., Exs. 1–3 to Joint Report (Dec. 30, 2016) [Dkt. # 45-1, 45-2, 45-3] § 5.3.1 ("Svea Court of Appeal Opinion"). Kazakhstan presented at least two theories of fraud before the Svea Court of Appeal. First, it argued, much as it had before this Court, that the Stati parties had submitted false evidence on the value of the LPG plant in the form of sworn testimony and expert reports during the arbitration. *Id.* § 3.1.2.1. Second, respondent argued that the award was tainted by fraud that took place prior to the start of the arbitration. *Id.* It alleged that representatives for the Stati parties presented financial statements that falsely inflated the amounts invested in the LPG plant to a third-party company, KMG, and that KMG was fraudulently induced into bidding $199 million for the LPG plant. *Id.* According to respondent, since it was the KMG bid that was used by the tribunal to value the LPG plant, the arbitral award was procured by fraud. *Id.*

Following a review of the full record, the Svea Court of Appeal rejected all of Kazakhstan's contentions. First, it concluded that "[s]ince the arbitral tribunal based its assessment [of the LPG plant] on the indicative bid" and not the allegedly false "witness testimony, witness affidavits, and expert reports" submitted by the Stati parties during the arbitration, this evidence did not have "immediate importance for the outcome." Svea Court of Appeal J., Ex. 3 to Joint Report (Dec. 30, 2016) [Dkt. # 45-3] at 45.[4] The Svea Court of Appeal recited the legal principle that "there can be no question of declaring an arbitral award invalid solely on the ground that false evidence or untrue testimony has occurred, when it is not clear that such have been directly decisive for the outcome." *Id.* Since "even if [the evidence] were proven to be false," it would not have changed the outcome of the arbitration, the court deemed it insufficient to invalidate the award. *Id.*

Second, the Svea Court of Appeal concluded that because the KMG indicative bid was made "prior to the initiation of the arbitration," the bid did not

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[4] In its August 5, 2016 Memorandum Opinion and Order, the Court directed the parties to file an English translation of the Svea Court of Appeal decision when it issued. *Stati*, 199 F. Supp. 3d at 193. Instead of submitting a single version, each of the parties submitted their own separate versions and averred that an agreed-upon translation of the entire decision would be "involved and likely controversial" and ultimately "unnecessary." Joint Status Report [Dkt. # 46] at 16–17. The Court has reviewed the sections it has referenced in its opinion and finds that they are not inconsistent. Compare petitioners' translation, Ex. 2 to Joint Status Report (Dec. 30, 2016) [Dkt. # 45-2] at 40–42, and respondent's translation, Ex. 3 Joint Status Report (Dec. 30, 2016) [Dkt. # 45-3] at 44–46.

constitute "*per se*" false evidence, even if "possibly incorrect information regarding the amount invested in the LPG plant was among the factors that KMG took into account when calculating the size of its offer." *Id.* at 46. It concluded that the allegedly false financial statements "did not directly constitute any basis for the arbitral tribunal's assessment of the value of the LPG plant." *Id.* In other words, any alleged dishonesty in business transactions that preceded the arbitration proceedings did not constitute a fraud on the tribunal and was too remote to warrant annulment of the award.

Kazakhstan then challenged the decision in the Swedish Supreme Court, arguing that the Svea Court of Appeal committed "grave procedural error" when it issued its decision. Ex. B. to Decl. of Alexander Foerster [Dkt. # 46-2] ¶ 3. This Court continued its stay pending the resolution of that proceeding, Min. Order (Apr. 3, 2017); Min. Order (Aug. 15, 2017), and petitioners moved to lift the stay on September 29, 2017. Pet'rs' Mot. to Lift Stay [Dkt. # 60]. Before this Court ruled on that motion, the Swedish Supreme Court ruled in favor of the Stati parties on October 24, 2017. Pet'rs' Suppl. Status Report Concerning Status of Proceedings in Sweden [Dkt. # 64]. This marked the end of Kazakhstan's efforts to set aside the arbitral award in the jurisdiction with the sole authority to vacate the arbitral award.

Since the Swedish award was now final and binding, the Court granted petitioners' motion to lift the stay on November 6, 2017, and it invited the parties to file supplemental briefs discussing what impact, if any, the decisions by the Swedish authorities should have on the resolution of

Kazakhstan's pending motion for reconsideration of the Court's May 11, 2016, Order denying respondent's request to introduce additional defense grounds based upon its fraud allegations. Min. Order (Nov. 6, 2017).

Kazakhstan argued that the decisions by the Svea Court of Appeal and the Swedish Supreme Court based on Swedish law should have no impact on the issue presented in its motion for reconsideration because "neither of these decisions made factual findings regarding the merits of Kazakhstan's fraud allegations, nor did they apply the New York Convention," as this Court is required to do. Kazakhstan's Resp. to Nov. 6, 2017, Min. Order [Dkt. # 65] ("Resp't's Resp. to Nov. 6 Min. Order"). Meanwhile, petitioners emphasized that respondent presented its "fraud case in full" to the Svea Court of Appeal, the seat of the arbitral award, which concluded "[t]hat the Award was not the product of fraud," and its ruling was left undisturbed by the Swedish Supreme Court. Pet'rs' Suppl. Submission in Opp. to Mot. for Recons. [Dkt. # 66] at 1–2. Petitioners also argued that the Court should deny respondent's motion based on the principles of preclusion and comity, *id.* at 3–10, and respondent argued in a sur-reply that the principles of preclusion and comity are inapplicable. Kazakhstan's Resp. to Pet'rs' Suppl. Submission in Opp. to Mot. for Recons. [Dkt. # 68] at 25.

I. THE MOTION FOR RECONSIDERATION STANDARD OF REVIEW

The Court evaluates respondent's motion for reconsideration under Rule 54(b) of the Federal Rules of Civil Procedure, which governs

reconsideration of non-final decisions. The rule states that "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). The Court may grant relief under Rule 54(b) "as justice requires." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011) (internal citations omitted); *see also Parker v. John Moriarty & Assocs.*, 221 F. Supp. 3d 1, 2 (D.D.C. 2016). While this standard "affords considerable discretion to the district courts," *Bldg. Indus. Ass'n of Superior Cal. v. Babbitt*, 161 F.3d 740, 743 (D.C. Cir. 1998), it is limited by the principle that once the parties have "battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 30–31 (D.D.C. 2013), quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 224 (D.D.C. 2011). "In this Circuit, it is well-established that 'motions for reconsideration,' whatever their procedural basis, cannot be used as 'an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier.'" *Loumiet v. United States*, 65 F. Supp. 3d 19, 24 (D.D.C. 2014), quoting *Estate of Gaither ex rel. Gaither v. Dist. of Columbia*, 771 F. Supp. 2d 5, 10 (D.D.C. 2011).

The "as justice requires" standard under Rule 54(b) involves concrete considerations of whether the court "has patently misunderstood a party, has made a decision outside the adversarial issues presented to

the [c]ourt by the parties, has made an error not of reasoning, but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the [c]ourt." *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) (internal citations omitted). Other courts in this district have read the standard to require that the court grant a motion for reconsideration "only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *Stewart v. Panetta*, 826 F. Supp. 2d 176, 177 (D.D.C. 2011), quoting *Zeigler v. Potter*, 555 F. Supp. 2d 126, 129 (D.D.C. 2008).

Here, respondent does not point to a change in the law. Nor does it argue that it discovered new evidence after it had already filed its motion. It simply repeats arguments made unsuccessfully before and couples them with arguments it chose not to raise at that time, and it suggests that the Court's ruling was erroneous. But none of the reasons advanced at this time requires a change in the outcome.

ANALYSIS

Respondent argues first that the Court's conclusion that the "arbitrators did not rely upon" the alleged fraud is "factually incorrect." Mot. for Recons. at 1. Second, it maintains that the Court applied the wrong legal standard when it interpreted respondent's public policy defense under Article V(2)(b) of the New York Convention. *Id.* at 10–11. And third, it contends that the May 11, 2016, Order failed to consider its alternate defense under Article V(1)(b) of the New York Convention. *Id.* at 11–12.

A. The Court did not err as a matter of fact.

The Court did not err as a matter of fact in its May 11, 2016, Order for the simple reason that respondent did not present the facts it now seeks to introduce in its motion for reconsideration. And because respondent does not claim that these facts were not available to it at the time it filed its initial motion to include additional defenses, they are improperly raised now. Furthermore, the Court did not err in evaluating the facts that *were* before it when respondent filed its initial motion, and accordingly reconsideration on this ground is denied.

In its initial motion to include additional defenses, respondent alleged that petitioners and their representatives had submitted false sworn testimony and expert reports "during the SCC Arbitration" that "fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed reimbursement." Initial Mot. at 3, 4. In other words, respondent accused petitioners of defrauding the tribunal directly. The Court found that since the arbitrators expressly disavowed reliance on either parties' valuations in determining the amount of the damages, the alleged fraud had no effect on the outcome of the arbitration. *See* Order at 3–4, citing Award ¶¶ 1746–48.

Kazakhstan attempts to discredit the Court's finding by positing, without support, that the Court simply "relied on the Stati party's representations in their Opposition Brief" when it reached its conclusion. Resp't's Resp. to Nov. 6 Min. Order at 4; Mot. for Recons. at 3. Since the Court's ruling was expressly based upon the language in the arbitral award, this hypothesis does not warrant serious consideration, much less a revision of the terms of

the Order. So the Court did not err as a matter of fact in this regard.[5]

In its motion for reconsideration, respondent now claims that the indicative bid the arbitrators did select as a measure of the value the LPG plant – the "KMG bid" – was itself the product of fraud. Mot. for Recons. at 3, 9–10. Kazakhstan alleges that prior to the start of the arbitration, representatives for the Stati parties presented KMG with false financial statements that inflated the value of the plant and fraudulently induced KMG to offer $199 million for the plant. *Id.* at 9. Since the bid was tainted by fraud, respondent argues that the fee award predicated on the amount of the bid was procured by fraud. *Id.* at 10.[6]

The problem is that none of these facts were presented to the Court in respondent's initial motion to include additional defenses. Indeed, there was not a single reference to "KMG" or the facts supposedly suggesting fraudulent inducement. So the Court did not err in failing to grant relief on this basis.

Respondent attempts to minimize its omission by characterizing these facts as mere "details" it planned to brief once it was granted leave by the Court. Mot. for Recons. at 1 n. 3. But it is apparent that these facts go to the very heart of respondent's current defense and that they support an entirely separate theory of fraud that respondent did not seek

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[5] Indeed, the Svea Court of Appeal arrived at the same conclusion when it was presented with the same fraud theory. Svea Court of Appeal Opinion § 5.3.1.

[6] The Svea Court of Appeal rejected respondent's attempt to invalidate the award on this basis as well. Svea Court of Appeal Opinion § 5.3.1.

leave to introduce. Since respondent is not claiming that the evidence of KMG's fraudulent inducement was not available to it at the time it filed its initial motion, but rather that it simply elected not to raise it, the Court finds that those facts are improperly raised now. A motion for reconsideration is not "an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Estate of Gaither ex rel. Gaither*, 771 F. Supp. 2d at 10, quoting *Secs. & Exch. Comm'n*, 729 F. Supp. 2d at 14 (D.D.C. 2010).

Accordingly, the Court did not commit an error of fact, and it denies reconsideration based on this ground.

B. The Court did not err as a matter of law.

Respondent argues in the alternative that the Court's conclusion that the alleged fraud was not "germane to the petition to confirm" because "the arbitrators did not rely upon the allegedly fraudulent evidence" is incorrect as a matter of law. Mot. for Recons. at 10. Respondent objects to what it characterizes as the Court's "outcome-determinative" approach; it argues that when considering a public policy defense under Article V(2)(b) of the New York Convention, evidence of fraud is "germane . . . whether or not the arbitral tribunal relied on the fraud," Mot. for Recons. 10–11, and "the submission of false evidence, in itself, constitutes a basis for non-recognition" of the arbitral award. Resp't's Resp. to Nov. 6 Min. Order at 6. Respondent mischaracterizes both the Court's ruling and the applicable legal standard.

In determining whether to enforce a foreign arbitral award in the United States, the Court must follow the FAA which codifies the New York Convention. The "Convention authorizes the recipient of a foreign arbitral award to seek confirmation and enforcement of the award in federal court." *In Re Arbitration of Certain Controversies Between Getma Int'l & Republic of Guinea*, 191 F. Supp. 3d 43, 48–49 (D.D.C. 2016), *aff'd sub nom. Getma Int'l v. Republic of Guinea*, 862 F.3d 45 (D.C. Cir. 2017), citing 9 U.S.C. §§ 202, 207. Under the FAA, courts "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007), quoting *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

Under Article V(2)(b) of the New York Convention, a court may refuse to enforce a foreign arbitral award if it "would be contrary to the public policy" of the country where enforcement is sought. *Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107, 1110–11 (D.C. Cir.), *cert. denied*, 138 S. Ct. 448 (2017), quoting New York Convention art. V(2)(b). The D.C. Circuit has recognized that an arbitral award obtained through fraud would be contrary to U.S. public policy under Article V(2)(b) of the New York Convention. *Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria*, 844 F.3d 281, 287 (D.C. Cir. 2016). However, the public policy defense is "construed narrowly," and it requires a respondent to meet the "heavy burden" of proving that the arbitral award "tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of

personal liberty or of private property." *Id.*, at 289, quoting *TermoRio S.A. E.S.P.*, 487 F.3d at 938. The evidence proffered in support of the motion for reconsideration does not rise to that standard.

When determining whether an arbitration award is so tainted by fraud that its recognition would violate U.S. public policy under Article V(2)(b) of the New York Convention, courts have applied the three-prong test used to determine whether an award should be vacated as fraudulently obtained under Section 10(a) of the FAA.[7] Under this test:

> (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration.

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004), citing *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir.1988) (collecting cases applying the three-prong test under Section 10(a) of the FAA).

Respondent complains that this Court placed undue emphasis on whether the fraud affected the outcome when it applied this test, and it states that "federal courts of appeals have held that . . . 'it is not necessary to establish that the result of the arbitration would have been different if the fraud

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[7] Under 9 U.S.C. § 10(a)(1), courts may vacate an arbitral award where "the award was procured by corruption, fraud, or undue means."

had not occurred.'" Mot. for Recons. at 10, quoting *Karaha Bodas Co.*, 364 F.3d. at 306–07. [8] But a review of the Court's Order reveals that it did not articulate or apply the standard recited by respondent, and that the holding was consistent with the well-established principle that a party seeking to resist enforcement of an award on the basis of fraud must demonstrate a connection between the alleged fraud and the decision.

Although the D.C. Circuit has not clearly articulated the materiality standard necessary to vacate or deny enforcement of an arbitral award due to fraud, the nexus requirement has been widely recognized in the appellate courts, including in the cases cited by respondent. *See Odeon Capital Grp. LLC*, 864 F.3d at 196 ("petitioner must demonstrate a nexus between the alleged fraud and the decision made by the arbitrators"); *Envtl. Barrier Co., LLC*, 540 F.3d at 608 ("[the court] must find a nexus between the purported fraud and the arbitrator's final decision"); *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1022 (5th Cir. 1990) ("requiring

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[8] While some courts have used that language, *see, e.g., Odeon Capital Grp. LLC v. Ackerman*, 864 F.3d 191, 196 (2d Cir. 2017) ("For fraud to be material . . . petitioner must demonstrate a nexus between the alleged fraud and the decision made by the arbitrators, although petitioner need not demonstrate that the arbitrators would have reached a different result."); *Bonar*, 835 F.2d at 1383 (holding that the legal standard "does not require the movant to establish that the result of the proceedings would have been different had the fraud not occurred"), at least one circuit has questioned its logic. *Envtl. Barrier Co., LLC v. Slurry Sys., Inc.*, 540 F.3d 598, 608 (7th Cir. 2008) (expressing skepticism over the "odd proposition that something might be material to an issue in an arbitration, but immaterial to the outcome").

a nexus between the alleged fraud and the basis for the panel's decision").

Courts in this district have consistently looked for proof of a nexus as well. As one court on this district summarized:

> Courts in this District have . . . demanded proof that the misconduct or fraud had some bearing on the arbitrator's final decision. *See Owen–Williams v. BB & T Inv. Servs., Inc.*, 717 F. Supp. 2d at 17–18 (D.D.C. 2010) (finding that even if party had made fraudulent misrepresentations in order to secure delay in arbitral proceedings, no proof that this changed outcome of arbitration and so conduct was immaterial); *Pigford v. Johanns*, 421 F. Supp. 2d 130, 135 (D.D.C. 2006) (unethical misrepresentation as to counsel's bar status not enough to satisfy nexus requirement because no showing that it led to different result); *Bryson v. Gere*, 268 F. Supp. 2d 46, 50 (D.D.C. 2003) (movant must prove that substantial misconduct actually prejudiced outcome of arbitration).

ARMA, S.R.O. v. BAE Sys. Overseas, Inc., 961 F. Supp. 2d 245, 255 (D.D.C. 2013).

So, even applying the case law identified by respondent, which recites the broadly recognized principle that a party seeking to invalidate an award based on fraud must be able to point to at least some connection between the complained-of fraud and the decision, the Court did not err in its initial ruling.

C. Respondent's alternate argument does not support reconsideration.

Respondent complains that the Court's May 11, 2016, Order "did not address Kazakhstan's alternate argument" that respondent was "denied the opportunity to present its case" before the arbitral panel because it had to "respon[d] to fraudulent evidence," and that this constitutes an independent ground on which to deny enforcement of the arbitral award under Article V(1)(b) of the New York Convention. Mot. for Recons. 11–12. While the Court's Order did not expressly address respondent's alternate argument under Art. V(1)(b) of the Convention, its conclusion that the evidence of alleged fraud that respondent sought to introduce was immaterial, disposed of this alternate argument, and thus, reconsideration on this ground is also unwarranted. Moreover, the arbitrators' decision reflects that respondent presented expert valuations of its own, and that it had a full and fair opportunity to present its case to the tribunal.

D. Reconsideration is not required by justice.

In the end, respondent has not established that reconsideration of the Court's May 11, 2016, Order is "required by justice" under Federal Rule of Civil Procedure 54(b). *Capitol Sprinkler Inspection, Inc.*, 630 F.3d at 227. This is particularly true since Kazakhstan does not deny that it had an opportunity to litigate the very issues it belatedly seeks to raise here in the jurisdiction where the arbitration took place. While the Court acknowledges that the legal standards to be applied in each situation are different, the fact that the Svea Court of Appeal heard and rejected respondent's fraud claims, and

that its ruling was upheld by the Swedish Supreme Court, lends force to this Court's view that it would not be contrary to the public policy of the United States, and it would not violate this country's "most basic notions of morality and justice," *see Belize Bank Ltd.*, 852 F.3d at 1111, to let the Court's May 11, 2016, Order stand and decline to hear the evidence again in the limited context of this enforcement proceeding. In other words, there is a difference between enforcing an award that is alleged to be tainted by fraud that has never been addressed and enforcing an award after the jurisdiction that issued it has heard and rejected the allegations. As noted earlier, the public policy defense is "construed narrowly" *Enron Nigeria Power Holding, Ltd.*, 844 F.3d at 289, and this heavy burden exists precisely because the public policy exception is not an invitation to re-try valid, final arbitral awards.

In sum, "[t]he Supreme Court has recognized an 'emphatic federal policy in favor of arbitral dispute resolution.'" *TermoRio S.A. E.S.P.*, 487 F.3d at 933, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). And since the United States became a signatory of the New York Convention in 1970, "that federal policy applies with special force in the field of international commerce." *Id.*, quoting *Mitsubishi Motors Corp.*, 473 U.S. at 631. This framework militates against re-examining the award and conducting a "mini-trial" on a substantive issue in the arbitration, especially in the context of a motion for reconsideration of a prior ruling of this Court.

II. THE PETITION TO CONFIRM THE ARBITRAL AWARD

STANDARD OF REVIEW

Under the FAA, a district court "shall confirm the [arbitral] award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207. "Consistent with the 'emphatic federal policy in favor of arbitral dispute resolution' recognized by the Supreme Court . . . the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012), quoting *Mitsubishi Motors Corp.*, 473 U.S. at 631. As noted earlier, courts "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *TermoRio S.A. E.S.P.*, 487 F.3d at 935, quoting *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 23; *see also Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 19 (D.D.C. 2011) (collecting cases).

Because "the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature." *Int'l Trading*, 763 F. Supp. 2d at 20, citing *Zeiler v. Deitsch*, 500 F.3d 157, 167 (2d Cir. 2007). The party resisting confirmation bears the heavy burden of establishing that one of the grounds for denying confirmation in Article V applies. *See* New York Convention, art. V; *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976); *see also Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) ("[T]he showing required to avoid summary confirmation is high.").

The New York Convention provides seven exemptions to recognition and enforcement of an

arbitral award. New York Convention, art. V(1)–(2). Respondent contends that the arbitration agreement is unenforceable under four of them: Article V sections 1(a), (b), (d), and 2(b).

ANALYSIS

A. Article V(1)(a) of the New York Convention is inapplicable.

Respondent argues first that the arbitral award is unenforceable under Article V(1)(a) of the New York Convention because petitioners failed to comply with a requirement in the Energy Charter Treaty that there be a three-month settlement period prior to the initiation of the arbitration. Resp't's Opp. at 27–35.

Under Article V(1)(a) of the New York Convention, an award may be refused if the "agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." New York Convention, art. V(1)(a).

The ECT, to which Kazakhstan is a signatory, provides that if a dispute cannot be solved "within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution" before an international arbitration. ECT, art. 26(2)–(3)(a). This provision is referred to by the parties as the "cooling-off period." Respondent claims that this requirement was a jurisdictional prerequisite to the tribunal's authority. Resp't's Opp. at 28. It asserts that the SCC's failure to enforce the cooling-off period prior to the arbitration means that Kazakhstan "made no valid offer to [p]etitioners to arbitrate and certainly did not consent to arbitrate" even though Kazakhstan

participated in the arbitration for nearly three years. *Id.* at 27.

The Court's prior Memorandum Opinion concerning its subject matter jurisdiction in this case addressed the arguments brought by respondent under this defense. *Stati*, 199 F. Supp. 3d at 184–90. Based on the language of the ECT, the Court concluded that Kazakhstan gave its unconditional consent to arbitrate subject only to two exceptions that do not relate to the cooling-off period. The Court reasoned:

> While it does appear that the contractual requirement to attempt to come to a negotiated resolution is mandatory [under the ECT], that provision does not serve as a condition precedent to the contracting parties' consent to international arbitration. Article 26(3)(a) of the ECT specifies: "[s]ubject *only* to subparagraphs (b) and (c), each Contracting Party hereby gives its *unconditional* consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article." *Id.* at 29-30, art. 26(3)(a) (emphasis added). Although respondent is correct that article 26(3) requires arbitration to proceed in accordance with article 26's provisions, including the three-month settlement period, the international arbitration provision does not act as a condition precedent to a party's consent, which is "[s]ubject *only* to subparagraphs (b) and (c).

Id. at 185–86. Accordingly, the Court ruled that the cooling-off period is a procedural requirement under the ECT, not a jurisdictional one.[9] *Id.* at 188. Under the Supreme Court's precedent "such procedural prerequisites are for the tribunal, not the Court, to interpret and apply." *Id.* at 189, *citing BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014). Therefore, this Court deferred to the tribunal's conclusion that the procedural hurdle had been satisfied, and found that there was a valid agreement to arbitrate between the parties. *Id.*; *see also* Award ¶ 830.

The Court sees no reason to depart from its prior ruling. In *BG Grp., PLC* the Supreme Court analyzed whether a precondition in an investment treaty between Argentina and the United Kingdom was procedural or jurisdictional in nature. 134 S. Ct. 1198. In that case, the provision required a claimant to submit a dispute to a local court and allow 18 months to lapse without a decision before submitting the dispute to arbitration. Argentina alleged that the arbitrators did not have jurisdiction because BG Group initiated arbitration without waiting the requisite 18 months. *Id.* at 1205. The Supreme Court found that the eighteen-month provision was procedural, not jurisdictional in nature, because it governed when the duty to arbitrate arose, rather than whether the duty existed at all. *Id.* at 1207. As a result, the Court held that satisfaction of the condition was for the arbitrators to decide, not the courts, because parties "normally expect a forum-

[9] The SCC tribunal also concluded that the cooling-off period was a procedural requirement, rather than a jurisdictional one, based on the express language of Article 26 of the ECT. Award ¶ 829.

based decision-maker to decide forum-specific procedural gateway matters." *Id.*, quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002).[10]

Respondent's separate defense under Article(1)(a) is equally unavailing. It argues that the tribunal lacked jurisdiction over petitioner Terra Raf Trans Traiding Ltd. ("Terra Raf") because it did not qualify as an "investor" under the ECT, and therefore that petitioner cannot seek to enforce the award. Resp't's Opp. 58–59.

Petitioner Terra Raf is a limited liability company incorporated and located in Gibraltar, a territory controlled by the United Kingdom. Resp't's Opp. 58; Pet. ¶ 5. Half of the company is owned by petitioner Anatolie Stati, and the other half is owned by his son, petitioner Gabriel Stati. Pet. ¶¶ 2–5.

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[10] The Court also notes that the tribunal's decision is worthy of deference given respondent's own actions during the arbitration proceedings. On January 18, 2011, Kazakhstan sent a letter to the SCC objecting to petitioners' failure to await the expiration of the three-month period, and it proposed a stay of the arbitration to cure the defect. Ex. 26 to Resp't's Opp. [Dkt. # 20-26] at 1. Specifically, Kazakhstan proposed that:

> [T]he Tribunal order Claimants to engage in amicable settlement discussions as required by Article 26 of the ECT, and that the proceedings be suspended during the three-month period in satisfaction of that jurisdictional requirement . . . notwithstanding the fact that this jurisdictional defect could result in dismissal after full briefing and hearing on the merits.

Id. at 3. With the consent of both parties, the tribunal granted the stay on February 22, 2011. Award ¶ 830. Because respondent proposed and obtained a means to cure the alleged procedural deficiency, its claim that the initial failure to wait still invalidates the arbitration is not persuasive.

Respondent argues that because Gibraltar is not a party to the ECT, Terra Raf does not qualify as an "investor" under the treaty, and therefore, Kazakhstan was not bound by a valid agreement to arbitrate with the company. Resp't's Opp. 58–59.

Respondent raised this argument before the tribunal. Award ¶¶ 733–38. The tribunal rejected it, finding that the ECT provides protections to investors from Gibraltar because Gibraltar is part of the "European Community," which is a party to the ECT. *Id.* ¶ 746. The Court finds no reason to second-guess the tribunal's conclusion since respondent itself acknowledges that "both the United Kingdom and the European Union are signatories of the ECT," Resp't's Opp. at 58, and the Court's review is "extremely limited." *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006); *see also Misco, Inc.*, 484 U.S. at 38. ("Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").

B. Article V(1)(b) of the New York Convention is inapplicable.

Respondent contends that the Court should reject confirmation of the award because it was not given adequate notice to appoint an arbitrator. Resp't's Opp. at 36–48. Article V(1)(b) of the New York Convention authorizes a court to refuse recognition and enforcement of an award if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator, or of the arbitration proceeding or was otherwise unable to present his case." Article V(1)(b) "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v.*

Avco Corp., 980 F.2d 141, 145–46 (2d Cir. 1992), quoting *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (Rakta)*, 508 F.2d 969, 975 (2d Cir. 1974).

1. The SCC's notices to respondent.

As noted earlier, on July 26, 2010, petitioners submitted a formal Request for Arbitration to the Stockholm Chamber of Commerce, claiming that Kazakhstan's actions violated its obligations under the Energy Charter Treaty, to which Kazakhstan is a signatory. Pet. ¶ 21. In its Request for Arbitration, petitioners proposed that the dispute be resolved by a tribunal composed of three arbitrators, with each party nominating one. Req. for Arb ¶¶ 111–12. Petitioners also proposed to Kazakhstan that the two party-appointed arbitrators select a chairman for the panel, and that if they could not agree, that the SCC would appoint the chairman pursuant to the SCC Arbitration Rules. *Id.* ¶ 113.

On August 5, 2010, the SCC Secretariat forwarded petitioners' Request for Arbitration to Kazakhstan by courier and attached its own cover letter which requested an answer from Kazakhstan by August 26, 2010. Ex. 2 to Resp't's Opp. [Dkt. # 20-3] at 2 ("First Notification"). The SCC letter explained, "[i]n accordance with Article 5 of the SCC Rules, you are requested to submit an Answer to the SCC," and indicated that the Answer "shall contain comment on the seat of arbitration and on the proposition of the Claimants that the Chairperson be selected by the party-appointed arbitrators." *Id.* The Kazakh Ministry of Justice received the SCC's letter on August 9, 2010, but it did not respond. Ex. 3 to Resp't's Opp. [Dkt. # 20-4] at 2–3; Resp't's Opp. at 22.

On August 27, 2010, having not received an Answer, the SCC Secretariat sent a second letter by courier to Kazakhstan, extending the deadline. Ex. 4 to Resp't's Opp. [Dkt. # 20-5] ("Second Notification"). The second letter requested that Kazakhstan "submit an Answer in accordance with Article 5" by September 10, 2010 "at the latest," and it warned that "failure to submit an Answer does not prevent the arbitration from proceeding." *Id.* Kazakhstan received the second letter on August 31, 2010, but again, it did not respond by the deadline. Resp't's Opp. at 22.

On September 13, 2010, three days after the extended deadline to submit an Answer had passed, petitioners submitted a request to the SCC to appoint an arbitrator on behalf of Kazakhstan pursuant to Article 13(3) of the SCC rules. Ex. 6 to Resp't's Opp. [Dkt. # 20-7]. Although the SCC Secretariat forwarded the request to Kazakhstan on that day, the request was not delivered to the Kazakh Ministry of Justice until September 23, 2010 because it was sent by registered mail rather than by courier. *See* Ex. 7 to Resp't's Opp. [Dkt. # 20-8]; Resp't's Opp. 22. The SCC appointed an arbitrator on behalf of Kazakhstan on September 20, 2010, three days before Kazakhstan received petitioners' forwarded request. Ex. 8 to Resp't's Opp. [Dkt. # 20-9].

On September 23, 2010, the SCC Secretariat issued a letter to the parties notifying them that the SCC had appointed Professor Lebedev as the arbitrator on behalf of Kazakhstan. Ex. 9 to Resp't's Opp. [Dkt. # 20-10]. The letter further noted that the "Chairperson will be appointed shortly." *Id.* Kazakhstan received the letter via courier on

September 27, 2010. Ex. 10 to Resp't's Opp. [Dkt. # 20-11].

Approximately two months later, on December 2, 2010, respondent objected through its counsel to the SCC's appointment of Professor Lebedev and requested an opportunity to appoint its own arbitrator. Ex. 15 to Resp't's Opp. [Dkt. # 20-16]. Kazakhstan argued that it had not been given sufficient time to select an arbitrator due in part to bureaucratic hurdles involving the allocation of state funds for legal services and language barriers. *Id.*[11] Petitioners opposed respondent's request, arguing that respondent failed to invoke any of the grounds for challenging an arbitrator set forth in the SCC Arbitration Rules, which pertain to impartiality, independence, or lack of qualifications. Ex. 17 to Resp't's Opp. [Dkt. # 20-18]. On December 15, 2010, the SCC Board found no grounds to disqualify the arbitrator and dismissed Kazakhstan's challenge. Ex. 18 to Resp't's Opp. [Dkt. # 20-19].

2. Respondent received proper notice.

"Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Crooks v. Mabus*, 845 F.3d 412, 423 (D.C. Cir. 2016), quoting *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599 (D.C. Cir. 1993) (internal quotation marks omitted). A notice "must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those

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[11] *See also* Resp't's Opp. at 20. But respondent does not elaborate on how language issues interfered with its ability to respond or to make a timely request for additional time.

interested to make their appearance." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950). This standard was satisfied by the two letters sent by the SCC dated August 5, 2010, and August 27, 2010.

Respondent does not dispute that it received the two SCC letters. Instead it argues that the content of the communications was inadequate because the letters did not state explicitly that Kazakhstan was supposed to appoint an arbitrator by a specific deadline. Resp't's Opp. at 16–17, 40. This is not borne out by the documents themselves.

The first SCC letter dated, August 5, 2010, stated:

> In accordance with Article 5 of the SCC Rules, you are requested to submit and Answer to the SCC, by 26 August 2010 at the latest.[12]

First Notification at 2. Article 5(1)(v) of the SCC Arbitration Rules provides that an Answer:

> Shall include . . . if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by Respondent.

Ex. 1 to Resp't's Opp. [Dkt. # 20-2] ("SCC Arbitration Rules") at 7. So the notice plainly informed respondent of the date by which it was to name an arbitrator. In the event there was any ambiguity about that, the SCC included two attachments with the letter: the Arbitration Rules and petitioners'

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[12] The letter went on: "Your Answer shall contain comment on the seat of arbitration and on the proposition of the Claimants that the Chairperson be selected by the party-appointed arbitrators." First Notification at 2.

Request for Arbitration, which laid out petitioner's proposal on how to constitute the tribunal. *Id.*; Req. for Arb. ¶¶ 111–12.

Furthermore, Article 5(3) establishes that, "[f]ailure by the [r]espondent to submit an Answer shall not prevent the arbitration from proceeding." SCC Arbitration Rules at 8. Both provisions were plainly applicable in this situation and the Court finds that the first letter along with its attachments reasonably put respondent on notice of its obligation to submit an Answer and proffer an arbitrator. Furthermore, the respondent received a second opportunity to be heard, when the SCC sent a second notification and extended its deadline. In the second letter, the SCC again directed respondent to "submit an Answer in accordance with Article 5 of the SCC Rules" and warned that "failure to submit an Answer does not prevent the arbitration from proceeding." Second Notification at 2.

Faced with respondent's failure to respond, the SCC Board reasonably went ahead and appointed an arbitrator on respondent's behalf as it is permitted to do under the SCC's default rules. Under Article 12 of the SCC rules, "[w]here the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators . . . ." SCC Arbitration Rules at 9. Article 13(1) of the SCC Arbitration Rules allows the SCC to set the time period by which to appoint an arbitrator if the parties have not agreed to a time period. *Id.* And Article 13(3) further provides that "[w]here a party fails to appoint an arbitrator(s) within the stipulated time period, the Board shall make the appointment." *Id.* at 10.

Respondent later chose to object to the appointment of its arbitrator and the SCC took its arguments into consideration, along with petitioners' objections, and found that there were no grounds on which to disqualify the arbitrator appointed on behalf of respondent. Ex. 18 to Resp't's Opp. [Dkt. # 20-19].

Thus, the Court finds that respondent was "reasonably" informed of the proceeding and its obligation to appoint an arbitrator and given an "opportunity to be heard." *Mullane*, 339 U.S. at 314. Respondent's inability to appoint its arbitrator was not due to a lack of notice but rather a lack of timely participation on its part. *See Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 729 (5th Cir. 1987) ("[D]ue process is not violated if the hearing proceeds in the absence of one of the parties when the party's absence is the result of his decision not to attend.").

Respondent argues in the alternative that 32 days was simply not enough time to appoint an arbitrator and that this time period "constitutes a substantial deviation from the norm of international arbitration." Resp't's Opp. at 46–47. Respondent never sought an extension of time and the SCC gave it additional time on its own initiative. Moreover, the Court finds that the amount of time was reasonable particularly since the parties agreed to conduct the arbitral proceedings under the SCC rules, and respondent does not claim that the 32 day timeframe was inconsistent with those rules.

Given all of these reasons, the Court finds that respondent received "proper notice of the appointment of the arbitrator" and it rejects its defenses under Article V(1)(b) of the New York Convention.

C. Article V(1)(d) of the New York Convention is inapplicable.

Next, respondent asserts that that the arbitral award is unenforceable under Article V(1)(d) of the New York Convention which allows a court to deny enforcement of an arbitral award if:

> [T]he composition of the arbitral authority or the arbitral procedure was not in accordance with the alleged agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

New York Convention, art. V(1)(d).

Respondent makes three arguments under this provision, two of which simply repeat prior arguments. First, respondent argues that the SCC failed to comply with its own rules relating to the appointment of arbitrators. Second, it asserts that the SCC failed to enforce the cooling-off period as it was required to do under the ECT. Last, it maintains that the tribunal committed other procedural errors relating to the admission and weight of evidence during the proceeding.

The Court has already addressed the first two points in Sections II.A–B and finds that the same reasoning applies here. The Court finds that the SCC did not violate its rules when it appointed an arbitrator on respondent's behalf. The rules plainly allow for the SCC to do so when, as here, a party fails to appoint an arbitrator by the set deadline. And a party's failure to respond does not halt the proceedings, including the appointment of the arbitrator. As to the cooling-off period, the Court

defers to the tribunal's conclusion that this procedural requirement was satisfied when the tribunal imposed a three-month stay at respondent's request. Furthermore, the Court notes that when a "party's challenge involves an application of the arbitral institution's own rules, courts typically have deferred to the arbitral panel's interpretation of them." *Belize Bank Ltd.*, 191 F. Supp. 3d at 37, citing *York Research Corp. v. Landgarten*, 927 F.2d 119, 123 (2d Cir.1991).

Respondent also complains that the tribunal committed three types of procedural errors:

> (1) ignoring the submission of expert evidence and other evidence regarding almost every major disputed issues of the case; (2) failing to consider Kazakhstan's objections that certain deductions would need to be made from any eventual award to [p]etitioners; and (3) going beyond the submissions of the [p]arties and ignoring the [p]arties' submissions and the applicable law on multiple occasions.

Resp't's Opp. at 53–54. But respondent points to only one example of these alleged irregularities. It argues that the testimony of one of its expert witnesses on the value of the LPG plant was not afforded sufficient weight in deciding the amount of the award. *Id.* at 55–56.

This is not a basis to decline to enforce the award. It is not for this Court, given its limited scope of review, to second-guess the tribunal's weighing of evidence. Respondent's invitation to re-try the merits of the arbitration undermines the very purpose of the

New York Convention. *See TermoRio S.A. E.S.P.*, 487 F.3d at 934, quoting *Mitsubishi Motors Corp.*, 473 U.S. at 639 ("The utility of the [New York] Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own."); *see also Bosack v. Soward*, 586 F.3d 1096, 1105 (9th Cir. 2009) ("[The court] 'ha[s] no authority to re-weigh the evidence' presented to the arbitration panel.") (citations omitted).

The Court finds that the tribunal acted within its authority when it chose to disregard *both* parties' experts, and to instead value the LPG plant using a contemporaneous third-party bid. *See Slaney v. The Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001), quoting *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997) ("The extent of an arbitrator's latitude is such that an "arbitrator is not bound to hear all of the evidence tendered by the parties . . . [H]e must [merely] give each of the parties to the dispute an adequate opportunity to present its evidence and arguments."). Based on the single example that respondent provides, it is apparent that the issue is not that respondent was not given an adequate opportunity to be heard but rather that it takes issue with the result. This is precisely what the Court is not allowed to consider in an enforcement proceeding under the New York Convention.

D. Article V(2)(b) of the New York Convention is inapplicable.

Finally, respondent argues again, this time under Article V(2)(b) of the New York Convention, that the arbitral award is unenforceable because it was not

given notice of its opportunity to appoint its arbitrator. Article V(2)(b) of the New York Convention prevents the enforceability of an arbitral award when the arbitral award "would be contrary to the public policy" of the country where enforcement is sought, *Belize Bank Ltd.*, 852 F.3d at 1110–11, quoting New York Convention, art. V(2)(b), and respondent asserts that the lack of notice contravenes public policy in the United States. As noted earlier, "[t]he public-policy exception under the New York Convention is construed narrowly and applied 'only where enforcement would violate the forum state's most basic notions of morality and justice.'" *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 69 (D.D.C. 2013), quoting *Parsons*, 508 F.2d at 974; see also *TermoRio S.A. E.S.P.*, 487 F.3d at 938. Since the Court has already concluded that respondent received adequate notice, respondent has certainly not met this high burden.

CONCLUSION

For the reasons set forth above, respondent's motion for reconsideration pursuant to Federal Rule of Civil Procedure 54(b) is denied. It is further ordered that the petition to confirm the arbitral award is granted because none of the grounds for refusal or deferral of the award set forth in the New York Convention apply. A separate order will issue.

/s/ Amy Berman Jackson
AMY BERMAN JACKSON
United States District Judge

DATE: March 23, 2018

APPENDIX C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANATOLIE STATI; GABRIEL STATI; ASCOM GROUP, S.A.; TERRA RAF TRANS TRAIDING LTD., Petitioners,	)	
v.	)	Civil Action No. 14-1638 (ABJ)
REPUBLIC OF KAZAKHSTAN, Respondent.	)	

ORDER

Pursuant to Federal Rules of Civil Procedure 54(b) and 58, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that respondent's Motion for Reconsideration of the Court's May 11, 2016, Order [Dkt. # 37] is **DENIED**. It is **FURTHER ORDERED**

that petitioners' Petition to Confirm the Arbitral Award [Dkt. # 1] is **GRANTED**. This is a final and appealable order.

SO ORDERED.

/s/ Amy Berman Jackson
AMY BERMAN JACKSON
United States District Judge

DATE: March 23, 2018

APPENDIX D
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANATOLIE STATI, *et al.*, Petitioners, v. REPUBLIC OF KAZAKHSTAN, Respondent.	)	Civil Action No. 14-1638 (ABJ)

ORDER

On September 30, 2014, petitioners Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd., filed a petition to confirm a December 19, 2013 arbitration award that they obtained against respondent, the Republic of Kazakhstan, related to Kazakhstan's alleged violation of the Energy Charter Treaty. Pet. to Confirm Arbitral Award [Dkt. # 1] ("Pet.") ¶¶ 34, 36; Arb. Award [Dkt. # 2-1, 2-2, 2-3, 2-4] ("Award"). The petition to confirm the arbitration award is fully briefed, and the Court has taken the matter under advisement.

On April 5, 2016, respondent filed a motion for leave to supplement the record and supply new grounds for its opposition. Mot. by Resp't for Leave to Submit Additional Grounds in Supp. of Opp. to Pet. [Dkt. # 32] ("Mot."). In the absence of any authority setting forth the standard to be applied to such a motion, respondent references Federal Rule of Civil

Procedure 15(d) "[b]y analogy." *Id.* at 5. The rule states: "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d).

The motion asserts that respondent has "new evidence" that petitioners "obtained the [arbitration award] through fraud." Mot. at 4, 6. It explains that, of the approximately $498 million awarded to the petitioners, $199 million "represented compensation for a liquefied petroleum gas plant (the 'LPG Plant')." Mot. at 2. Respondent argues that the supplemental evidence will prove that "Petitioners fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed reimbursement in the [arbitration]." *Id.* at 4. Respondent has apparently obtained this "new evidence" in connection with a proceeding it filed in Sweden to set aside the arbitral award. *Id.* at 2–3.

Petitioners oppose the motion. They invoke the principles that would apply when a party seeks to amend a complaint and maintain that the proposed amendments would be futile. Pet.'rs' Mem. of P. & A. in Opp. to Resp. Mot. [Dkt. # 34] at 5–10. Quoting language from Rule 15(d), they also complain that supplementing the record at this time will not foster the economic and speedy disposition of the case, that the motion was brought with undue delay, and that it would cause undue prejudice. *Id.* at 10–13. According to petitioners, respondent gained access to the "new evidence" in June of 2015, and it presented the same information to the Swedish court in October of 2015, approximately six months before it

sought leave to supplement its opposition here. *Id.* at 8, 12–13.

In its reply, respondent notes that when a court assesses a proposed amendment to a pleading that has been opposed on futility grounds, the court considers whether the proposed amendment would survive a motion to dismiss. Reply in Supp. of Mot. [Dkt. # 35] at 1–4. It states that under that standard, its motion should be granted. *Id.* at 3–4.

But the analogy does not quite fit. We are not dealing with a proposed amended complaint here, and it is not even petitioners who are seeking leave to amend. Instead, respondent is seeking to add new grounds to its opposition to the petition to confirm the award, more than a year after the original opposition was filed.

Neither party has cited any authority applying Rule 15 to this type of proceeding. But the rule respondent invoked is plainly discretionary ("the court may"), and both Rule 15(d) and Rule 15(a)(2) – the rule that would apply if a party was seeking to amend a complaint at this juncture – turn on what is "just" or whether "justice so requires." Fed. R. Civ. P. 15(a)(2), (d).

Respondent argues that its supplemental submission will prove that "[p]etitioners fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed reimbursement in the [arbitration]." Mot. at 4. But the Court concludes that it would not be in the interest of justice to broaden the scope of this proceeding to consider whether petitioners did or did not mislead the foreign arbitration panel when it presented evidence related to the value of the plant

in question. The Court has not come to any conclusions about the legitimacy of the evidence presented to the arbitrators on this issue. But it has reviewed the arbitration award, and it is clear that the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision, so respondent's proposed submissions would not be germane to the petition to confirm the award.

In attempting to establish the value of the LPG Plant and the costs incurred in constructing it, both sides submitted testimony and expert reports. *See* Award ¶¶ 1693–1711 (petitioners' arguments); *id.* ¶¶ 1712–42 (respondent's arguments). But the arbitrators ultimately declined to credit either set of experts:

> Regarding the value of damages caused by Respondent's action, the Tribunal has taken note of the various extensive arguments submitted by the Parties relying on their respective experts' reports. However, the Tribunal considers that it does not have to evaluate these reports and the very different results they reach. In the view of the Tribunal, the relatively best source for the valuation . . . are the contemporaneous bids that were made for the LPG Plant by third parties after Claimants' efforts to sell the LPG Plant . . . .

Id. ¶ 1746. The panel concluded:

> [T]he Tribunal considers it to be of particular relevance that an offer was made for the LPG Plant by state-owned

> KMG at that time for USD 199 million. The Tribunal considers that to be the relatively best source of information for the valuation of the LPG Plant among the various sources of information submitted by the Parties regarding the valuation for the LPG Plant during the relevant period . . . . Therefore, this is the amount of damages the Tribunal accepts in this context.

Id. ¶¶ 1747–48.

Under those circumstances, and given the fact that the issue has already been presented to the Swedish authorities, it will not be in the interest of justice to conduct a mini-trial on the issue of fraud here when the arbitrators themselves expressly disavowed any reliance on the allegedly fraudulent material. For those reasons, it is hereby **ORDERED** that respondent's motion for leave to submit additional grounds in support of its opposition to the petition to confirm the arbitral award is **DENIED**.

The Court also notes that it has reviewed all of the pleadings concerning subject matter jurisdiction. *See* Min. Order (Oct. 21, 2015); Pet'rs' Mem. of Law Submitted in Accordance with the Court's Order of 10/21/2015 [Dkt. # 30]; Resp't's Mem. on Subject Matter Jurisdiction [Dkt. # 31]. It has concluded that it has jurisdiction to consider the pending petition, and it will set forth the reasons underlying that determination in its opinion addressing the merits of the petition. The Court has the matter under advisement, and it will schedule a hearing on the petition if and when it deems it necessary to do so.

SO ORDERED.

/s/ Amy Berman Jackson
AMY BERMAN JACKSON
United States District Judge

DATE: May 11, 2016

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7047 **September Term, 2018**

1:14-cv-01638-ABJ

FILED ON: JUNE 4, 2019

Anatolie Stati, et al.,

Appellees

v.

Republic of Kazakhstan,

Appellant

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; Randolph, Senior Circuit Judge.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX F

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7047 **September Term, 2018**

1:14-cv-01638-ABJ

Filed On: June 4, 2019

Anatolie Stati, et al.,

Appellees

v.

Republic of Kazakhstan,

Appellant

BEFORE: Wilkins and Katsas, Circuit Judges;
Randolph, Senior Circuit Judge.

ORDER

Upon consideration of appellant's petition for panel rehearing filed on May 20, 2019, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX G

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, June 10, 1958, 330 U.N.T.S. 38

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

APPENDIX H

9 U.S.C. § 207

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.