NO. _____

In the Supreme Court of the United States

WALEED KHALID ABU AL-WALEED AL HOOD AL-QARQANI; AHMED KHALID ABU AL-WALEED AL HOOD AL-QARQANI; SHAHA KHALID ABU AL-WALEED AL HOOD AL-QARQANI; NAOUM AL-DOHA KHALID ABU AL-WALEED AL HOOD AL-QARQANI; AND NISREEN MUSTAFA JAWAD ZIKRI,

Petitioners,

v.

SAUDI ARABIAN OIL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a foreign sovereign or instrumentality of a state that is a signatory member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention Treaty") may assert the Foreign Sovereign Immunity Act ("FSIA") as a defense to enforcement of a foreign arbitral award?

2. Whether a foreign sovereign or instrumentality of a state that accepts and accedes the United Nations Conventions on Jurisdictional Immunities amounts to an express waiver of sovereign immunity under the New York Convention Treaty?

3. Whether a foreign sovereign or its instrumentality of a state that fails to timely file a Fed. R. App. P. 4(a)(3) cross appeal from a U.S. district court order that denied said sovereign's assertion of FSIA as a defense, amounts to waiver and bars a subsequent request for a jurisdictional dismissal on appeal that is based on the merits?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, Waleed Khalid Abu Al-Waleed Al Hood Al-Qarqani; Ahmed Khalid Abu Al-Waleed Al Hood Al-Qarqani; Shaha Khalid Abu Al-Waleed Al Hood Al-Qarqani; Naoum Al-Doha Khalid Abu Al-Waleed Al Hood Al-Qarqani; and Nisreen Mustafa Jawad Zikri, are, by Royal Decree, deed of title and Sharia Court Order, the current day landowners and concessionaires of land that is specifically identified in a historic 1933 Concession Agreement that Saudi Aramco occupies to date and that was the basis of a June 5, 2015 arbitral award issued by a panel of arbitrators from the International Arbitration Center in Cairo, Egypt.

Saudi Arabian Oil Company ("Saudi Aramco") is located in Dhahran, Saudi Arabia and is a publicly traded company on the Saudi Stock Exchange Tadawul that is purportedly owned 98.275% by the Kingdom of Saudi Arabia. As evidenced in its' Article of Incorporation, Saudi Aramco is a successor of Arabian American Oil Company ("ARAMCO") a U.S. subsidiary of Standard Oil Company of California ("SOCAL) which changed its named to Chevron Corporation. Based on public records, no other publicly traded corporation owns 10% or more of Saudi Aramco stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit

No. 21-20034

Al-Waleed Khalid Abu Al-Waleed Al Hood Al-Qarqani; Ahmed Khalid Abu Al-Waleed Al Hood Al-Qarqani; Naoum Al-Doha Khalid Abu Al-Waleed Al Hood Al-Qarqani; Eirs of Khalid Abu Al-Waleed Al Hood Al-Qarqani; Shaha Khalid Abu Al-Waleed Al Hood Al Qarqani; Nisreen Mustafa Jawad Zikri, *Plaintiffs-Appellants* v. Saudi Arabian Oil Company, *Defendant-Appellee.*

Date of Final Opinion: December 2, 2021

Date of Rehearing Denial: January 4, 2022

United States District Court for the Southern District of Texas

No. 4:18-CV-1807

Waleed Bin Al-Qarqani, et al., *Plaintiffs*, v. Arab American Oil Company, et al., *Defendants.*

Date of Final Order: January 17, 2022

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JURISDICTION

The Fifth Circuit denied Petitioners' Petition for Panel Rehearing and Petitioners' Petition for En Banc on January 4, 2022 (App.1a). Petitioners timely filed this petition within 90 days. The U.S. Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES, STATUTES AND OTHER PROVISIONS INVOLVED

Federal Rule of Civil Procedure 1
Scope and Purpose

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Federal Rule of Civil Procedure 81(a)6(B)
Applicability of the Rules in General;:

> (a) Applicability to Particular Proceedings.
>
> (6) Other Proceedings. These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:
>
> (B) 9 U.S.C., relating to arbitration;

Federal Rule of Appellate Procedure 4(a)(3)

> (a) Appeal in a Civil Case.
>
> (3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

9 U.S.C. § 6 of the Federal Arbitration Act (Application Heard as Motion)

> Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

9 U.S.C. § 16(a)3 of the Federal Arbitration Act (Appeals)

> (a) An appeal may be taken from-
>
> (3) a final decision with respect to an arbitration that is subject to this title.

9 U.S.C. § 201 of the New York Convention Treaty on the Recognition and Enforcement of Foreign Arbitral Awards

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 shall be enforced in United States courts in accordance with this chapter.

9 U.S.C. § 202 of the New York Convention Treaty on the Recognition and Enforcement of Foreign Arbitral Awards

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located.

9 U.S.C. § 203 of the New York Convention Treaty on the Recognition and Enforcement of Foreign Arbitral Awards (Jurisdiction; Amount in Controversy)

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

28 U.S.C. § 1605(a)(1) and (6) of the Foreign Sovereign Immunities Act (General Exceptions to the Jurisdictional Immunity of a Foreign State)

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver**;**
>
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under

> the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

Chapter 2, Article 9 of the Saudi Arabian Law on Arbitration

> . . . a reference in a contract or a mention therein of any document containing an arbitration clause shall constitute an arbitration agreement.

INTRODUCTION

وَلا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِنْ أَمْوَالِ النَّاسِ بِالإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

القرآن الكريم، سورة البقرة، الآية 188

> And do not consume one another's wealth unjustly or draw it in bribery to the rulers in order that they might aid you to consume a portion of the wealth of the people in sin, while you know it is unlawful.

The Holy Qur'an, Surah Al-Baqara, Verse 188

Perched above the press seating area inside the U.S. Supreme Court chambers is a marble frieze depicting eighteen of greatest lawgivers of the world. The second frieze to the right features a person holding a copy of the Quran, the Islamic holy book. It is intended to recognize Prophet Muhammad as one of the greatest lawgivers in the world, along with Moses, Solomon, Confucius, and Hammurabi, among others. Through the passage of time this U.S. Supreme Court has embraced the doctrine of *jus gentium,* the law of nations*,* wherein the rule of law, as opposed to rule by law has been applied in construing both national and international law worldwide. To many, the U.S. Supreme Court is the Mecca of equal justice under the law and a writ of certiorari commences the pilgrimage.

The Petitioners in this case, by Islamic law, Sharia Court Order and Royal Decree from the first king from the House of Saud, King Ibn Saud Abdul-Aziz, are the current day landowners and titleholders

of lands located in Ras Tanura, Saudi Arabia, where one of the largest oil refineries in the world is located and where Saudi Arabian Oil Company ("Saudi Aramco") a successor to Chevron's subsidiary, Arabian American Oil Company (*aka*, Aramco) still occupies today.

The history of Saudi Aramco predates to 1933 wherein a small California oil company named Standard Oil Company of California (present day "Chevron") was contacted by the newly formed kingdom's First Minister of Finance, Abdullah bin Suleiman Al Hamdan and the King's Royal Advisor Khalid Qarqani, the father of Petitioners Waleed Qarqani, Ahmed Qarqani and Shaha Qarqani.

On May 29, 1933 Chevron signed the historically renowned 1933 Concession Agreement with the Kingdom of Saudi Arabia, effectively giving Chevron and its successors the license to come onto the lands for a period of sixty years. The principal parties and signatories of the 1933 Concession, the Kingdom of Saudi Arabia and Chevron, specifically identified private landowners in Article 25 of the principal contract and mutually agreed Chevron and its successors will be obligated to pay rents for the lands needed to execute the Concession. It also contained an agreement to arbitrate in Article 31 that reads:

> Should <u>any doubt, difficulty or difference arise</u> between the Government and the Company in interpreting this Agreement, the execution thereof <u>or</u> the interpretation or execution of any of it <u>or</u> with regard to <u>any matter that is related to it or the rights of either of the two parties *or* the consequences thereof</u>, and the two parties fail to agree on

> the settlement of the same in another way, then the issue shall be referred to two arbitrators with each party appointing one of the two arbitrators and with the two arbitrators appointing an umpire prior to proceeding to arbitration. *See*, App.108a-109a.

The foregoing language allows arbitration to commence arising out of any doubt, difficulty or difference from either the interpretation of the agreement or the execution of the agreement that concerns "any matter that is related to it" between the parties "or the consequences thereof."

As for Saudi Aramco, its liability for its continued use and occupation of these lands comes from Article 32 (App.109a-110a) of the Concession Agreement wherein it provides that any successor or affiliate company of Chevron shall become subject to the terms and conditions of the 1933 Concession Agreement; Saudi Aramco is a successor. In 1949, the Kingdom of Saudi Arabia gave ownership rights of four plots of the concessioned oil land to Sheikh Abdullah Al-Solaiman Al-Hamdan and Sheikh Khalid Abu Al-Sheikh Waleed Al Hood Al-Qarqani. The 1949 deed of concession, signed by Aramco and the landowners reads as follows:

> TRANSFER TO
> ARAB AMERICAN OIL COMPANY
>
> For the good and valuable consideration to be paid to us, we the undersigned, for our property under the Deed No. 124, in connection with the Plots of Land stated in such Deed, we hereby give and transfer, each for

> himself and on behalf of his heirs, guardians and lawful representative, to the Arab American Oil Company, being the Company referred to in the said Deed, its successor and whoever it appoints, the right to use and occupy the mentioned Plots of Land, for the purposes of the Saudi Arabian Concession, concluded on 4 Safar 1352 H, corresponding to 29 July 1933 G, and any additional agreements that may be annexed thereto. We hereby declare and affirm that the rights of the said Company, as to using and occupying the said Plots of Land, are based of the requirements of Article (25) of the said Concession, and we hereby further agree to safeguard the said Company, its successors and whomever it may appoint against all claims, the past or present and in future by any person claiming ownership or interest in any one of the said Plots of Land. Dkt. 9-4 at 6. *See*, App.194a.

This deed of concession contains a covenant that runs with the land. The covenant specifically addresses, "the Saudi Arabian Concession", specifically "Article 25" of the Concession Agreement that requires Aramco and, "its successor and whoever it appoints, the right to use and occupy" to make payments to private owners of the land. It not only stops there, the deed of concession unequivocally states that in addition to the Saudi Arabian Concession it also includes, "any additional agreements that may be annexed thereto" (*i.e.*, Article 31 – Agreement to Arbitrate).

Contrary to the December 2, 2021 published decision, the Petitioners' petition seeking enforce-

ment of a foreign arbitral award under the New York Convention against Saudi Aramco is a straightforward landlord-tenant matter wherein a case that should be resolved as a summary proceedings, has become more of a political case than a legal one. The irregularity of these proceedings stems back to the commencement of arbitration when on July 14, 2014, Saudi Aramco sent a letter to the International Arbitration Center in Cairo, Egypt indicating it would not participate in arbitration because there was no agreement to arbitrate and the Saudi government purportedly owned the land. Both these assertions are verifiably untrue as to date the deed of ownerships in the Saudi Recorder's Office evidences the Petitioners as the current day landowners. Moreover, Saudi Aramco's Article of Incorporation that it filed with the U.S. district court reflects that it expressly assumed this 1933 Concession Agreement.

Aside from the foregoing, in 1958 Saudi Aramco's admitted predecessor, using the same legal counsel that is representing them today, White & Case, LLP, invoked arbitration as a non-signatory in the internationally renowned arbitration proceeding between the Kingdom of Saudi Arabia (a foreign sovereign) and Aramco. While both sovereign immunity and non-signatory arguments were asserted by the Kingdom of Saudi Arabia, a panel of Egyptian arbitrators ruled against the foreign sovereign.

Years following the arbitration of the 1950s, Petitioners also invoked arbitration under the 1933 Concession Agreement, and they prevailed. When the Petitioners, now arbitral award-creditors reached the shores of the United States to enforce their arbitral award under the New York Convention, hell broke

loose wherein upon the commencement of these recognition and enforcement proceedings, Petitioners residing in the Kingdom of Saudi Arabia were threatened and coerced into withdrawing from these proceedings. Now the only remaining Petitioners that come to the courthouse steps are those residing outside of Saudi Arabia.

Their arbitral award, despite the black letter law stating otherwise, has been disposed of on the premise that U.S. courts lack subject matter jurisdiction to enforce their arbitral award. As briefed herein, this legal theory doesn't hold water and it violates our separation of powers doctrine. The December 2, 2021 published opinion not only sparks a new conflict among the DC Circuit, Second Circuit and Eleventh Circuit, it is also so far departed from the accepted and usual course of judicial proceedings under the Convention that there is compelling reason to accept cert. under U.S. Supreme Court Rule 10(a).

To begin with the precedent that neither a U.S. district court nor circuit court has subject matter jurisdiction over a petition to enforce a foreign arbitral award under the Convention wherein the award debtor is a foreign sovereign or instrumentality thereof is non-sensical as 9 U.S.C. § 203 expressly confers U.S. courts with jurisdiction. More concerning is that for nearly 65 years, U.S. case law interpreting the Convention has ignored the applicability of Fed. R. Civ. P. 1 and Fed. R. Civ. P. 81(a)6(B). These two rules effectively bar jurisdictional dismissal predicated on subject matter jurisdiction, as well as the FSIA.

Despite the fact that the FSIA, an affirmative defense that is not one of the seven exclusive defenses under Article V of the New York Convention, the

December 2, 2021 published opinion engages in a lethargic legal analysis that disregards that:

(1) The Kingdom of Saudi Arabia expressly waived sovereign immunity on behalf of itself and its instrumentalities upon accepting and acceding the United Nations Conventions on Jurisdictional Immunities;

(2) The Kingdom of Saudi Arabia, a signatory member of the New York Convention, implicitly waived sovereign immunity as a signatory member of the New York Convention;

(3) The U.S. district Court denied Saudi Aramco's FSIA motion to dismiss; and

(4) Saudi Aramco did not cross-appeal the denial of the court order pursuant to Fed. R. App. P. 4.

As U.S. Supreme Court Justice John Marshall stated, "it is emphatically the province of the judicial department to say what the law is". The Fifth Circuit's opinion is a dangerous precedent that allows our Article III courts to overstep their judicial authority and violate the separation of powers doctrine by legislating new law.

STATEMENT OF THE CASE

In 1933, the Kingdom of Saudi Arabia and Standard Oil Company of California, SoCal (Chevron) signed a Concession Agreement to rent identified lands in Saudi Arabia for the purposes of oil exploration. SoCal formed a wholly-owned subsidiary, California-Arabian Standard Oil Company (Casoc), to handle its concession operation on the concessioned land, identified in Article 2 of the Concession Agreement. Casoc later changed its name to Arab American Oil Company (Aramco), the predecessor of Saudi Aramco. Pursuant to Article 25, the Concession Agreement governed public and private land. The Concession contains an express arbitration clause in Article 31, an agreement to arbitrate. Petitioners are private landowners and concessionaires of 4 plots of land (39,885,000 Thirty-Nine Million Eight Hundred Eighty-Five Square Meters) in Saudi Arabia identified in Article 2 of the Concession Agreement.

In 1949, after discovery of commercial quantities of oil, Aramco signed and recorded a deed of concession with Petitioners. This contractually obligated Aramco to compensate Petitioners' under Article 25 of the Concession Agreement and effectively created contractual privity between the parties in the form of a concessionary lease.

In 1958 the Kingdom of Saudi Arabia challenged Aramco's exclusive right under that Concession Agreement to export its oil production by awarding a contract to Aristotle Socrates Onassis for a right of priority to transport the concession's oil production

by tanker for a period of 30 years. Aramco was represented by same counsels for Saudi Aramco today, White & Case, LLP. The tribunal that included Egyptian arbitrators presiding over the case in Switzerland rejected the Saudi Government's assertion of sovereignty on the basis it was a party to the Concession.

On June 10, 1958, the New York Convention Treaty on the Recognition and Enforcement of Foreign Arbitral Awards was entered into by states (United States, Saudi Arabia, and the arbitral seat in Egypt are all signatories). Congress implemented the Convention into the United States Federal Arbitration Act ("FAA"), 9 U.S.C. § 201.

In 2005, the concessionary lease expired. Upon the expiration of the lease, Petitioners requested from Saudi Aramco to either renew the lease, vacate or purchase their lands. Despite Petitioners' attempts to resolve the matter amicably, Saudi Aramco failed to respond and have continued their occupation and benefit of the Petitioners' lands to date. Petitioners sought litigation, but the Saudi Government pulled the case out from courts stating that Saudi courts lacked jurisdiction.

In 2014, Petitioners commenced an international arbitration action before a three-member tribunal based out of Cairo, Egypt, claiming that Chevron and Saudi Aramco violated the Concession Agreement and failed to vacate their lands after the expiration of the concession and thus owed rental arrearage for the unauthorized use and occupation of their lands from 2005 to 2015. Chevron appointed an arbitrator and Saudi Aramco abstained objecting to having an agreement to arbitrate, a merit question presented before the arbitrators. The panel rejected the juris-

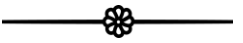
dictional challenge, finding that Petitioner's action was within the Article 31 of the 1933 Concession Agreement, awarding Petitioners approximately $18 billion based on the appraised market price of their land area that expanded approximately 40 million square meters (approximately 15 miles) for 10 years. Neither Chevron nor Saudi Aramco timely challenged the award within the arbitral seat rendering the award final.

In 2018, Petitioners petitioned the district court to enforce the arbitral award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. Saudi Aramco raised two arguments in opposition: (1) that the District Court lacked subject-matter jurisdiction under the FSIA as an instrumentality of the Kingdom of Saudi Arabia owning approximately 98% of its publicly traded shares; and (2) that confirmation should be denied under the New York Convention. The District Court denied Saudi Aramco's FSIA motion. Saudi Aramco failed to cross appeal the U.S. district court's order denying their FSIA motion.

On August 2, 2021, oral argument was set before the Fifth Circuit Court of Appeals in New Orleans, Louisiana. The panel examined the merits of the case, and did not bring the FSIA, as FSIA was not an issue on appeal, and Saudi Aramco failed to cross appeal FSIA.

On December 2, 2021, the Fifth Circuit Court of Appeals in a published opinion dismissed the appeal for lack of subject matter jurisdiction under FSIA and remanded it to the District Court with instructions. On January 17, 2022, the District Court followed

the instruction of the Fifth Circuit and dismissed the case without prejudice.



REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

A. Pursuant to U.S. Supreme Court Rule 10(c), Cert. Should be Granted Because Both Fed. R. Civ. P. 1 and Fed. R. Civ. P. 81(a)6(B) are two Federal Rules that Have Been Dormant in U.S. Case Law Governing Subject Matter Jurisdiction Dismissals Under Fed. R. Civ. P. 12(b)1, but are Quintessential in Resolving a Recurring Dispute Concerning the Applicability of the FSIA to Jurisdictional Dismissals Under the New York Convention Treaty as Well as U.S. Federal Courts' Adherence to the Separation of Powers Doctrine.

For over half a century, the jurisdictional device employed by an award-debtor to dismiss a case under the New York Convention is Fed. R. Civ. P. 12(b)(1), a motion predicated on the proposition that a U.S. district court lacks subject matter jurisdiction under the New York Convention to confirm and enforce a foreign arbitral award. Applying the black letter law governing the Convention and Federal Rules of Civil Procedure promulgated by the U.S. Supreme Court, it is clear that the FSIA cannot be asserted as a

jurisdictional defense for a U.S district court or circuit court to deprive itself of jurisdiction under the New York Convention.

The fundamental a, b, c and 1, 2, 3s of our constitutional framework reveals that prior to any U.S. district or circuit court considering the applicability of any procedural rule or motion in relation to the confirmation and enforcement of foreign arbitral awards, it is quintessential that it consider the specific applicability of Federal Rules of Civil Procedure 1 and 81(a)6(B), and Title 28 U.S.C. § 2072 of the Rules Enabling Act. This exercise of judicial discretion is of particular significance to the case at bar as this specific international treaty involves all three branches of our U.S. government and their respective powers.

1. The Executive Power — U.S. President Signs International Treaty.

Our thirty-sixth President of the United States, Lyndon B. Johnson, as part of his executive power under Article II of the U.S. Constitution, signed the New York Convention Treaty in 1968 and referred it to Senate for advice and consent.

2. The Legislative Power — U.S. Congress Makes International Treaty a Federal Law

The U.S. Senate, as part of its legislative authority under Article I of the U.S. Constitution, unanimously consented to the treaty by a vote of 57-0 and in 1970, U.S. President Richard M. Nixon ratified Congress' incorporation the New York Convention into the U.S. Federal Arbitration Act ch. 2 ("FAA").

It is important to note several procedural components to the treaty that Congress legislated into the into the FAA. At the outset, Congress expressly conferred U.S. district courts with subject matter jurisdiction to confirm and enforce foreign arbitral awards pursuant to 9 U.S.C. § 203; thus, a motion or court order to dismiss the confirmation of a foreign arbitral award, based on a purported lack of subject matter jurisdiction, undermines constitutional jurisprudence as well as common sense.

Aside from the foregoing, Congress also amended the FAA under 9 U.S.C. § 207 by providing district courts with very clear-cut instructions concerning the treaty. That is that a "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." Article V of the New York Convention list the seven (7) exclusive grounds.

3. The Judicial Power — The U.S. Supreme Court Prescribes Procedural Limitation on the Applicability of the Federal Rules of Civil Procedure to International Treaty.

Our U.S. Supreme Court, embracing our system of checks and balances and recognizing the separation of powers doctrine, as well as the need for judicial restraint in relation to the imposition and applicability of the federal rules to an international treaty, designed the U.S. Federal Rules of Civil Procedure so as it does not circumvent our constitutional framework and the separation of powers doctrine. As Congress made law that stated that courts shall confirm an award unless otherwise provided in the treaty, our

U.S. Supreme court, through its authority under the Rules Enabling Act, 28 U.S.C. § 2072 and in accord with its Article III powers, expressly limited the federal rules of procedure as it applies to the New York Convention.

Although not commonly cited in legal briefings today when compared to other federal rules, the very first civil rule of federal procedure, Fed. R. Civ. P. 1 provides a starting point for any judicial analysis in assessing the scope and applicability of the federal rules to the New York Convention. Fed. R. Civ. P. 1 reads as follows:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

See, Fed. R. Civ. P. 1.

Turning to the exception provision contained Fed. R. Civ. P. 81, low and behold, it contains a critically important rule governing arbitration, specifically as it applies to the applicability of the federal rules of civil procedure's limits on the New York Convention. Fed. R. Civ. P. 81(a)6(B) states, in part, the following:

> Rule 81. Applicability of the Rules in General
>
> (a) Applicability to Particular Proceedings
>
> 6. These rules, to the extent applicable, govern proceedings under the following

> laws, except as these laws provide other procedures:
>
> (B) 9 U.S.C., relating to arbitration;

See, Fed. R. Civ. P. 81(a)6(B).

Fed. R. Civ. P. 81 makes sense. Courts nationwide and internationally having only secondary jurisdiction over the confirmation and enforcement of arbitral awards under the treaty treat such cases as a summary proceeding. What exactly is a summary proceeding? A summary proceeding is a court proceeding in which the formal rules of procedures normally applicable to matters such as lawsuits and civil claims are dispensed. For example, the imposition of heighten pleading standard contained in federal civil complaints does not apply to summary proceedings nor does the federal rule governing discovery. In fact, Fed. R. Civ. P. 26(a)1(B)ix, the federal discovery rule, expressly releases award-creditors from the application of the rule in proceedings to enforce arbitral awards.

Why? Because an enforcement proceeding is summary in nature and district courts are constitutionally obligated to give judicial deference to an arbitrators' ruling and does not engage in draconian alter ego analysis nor for that matter allow award-debtors a second bite of the litigious apple to assert defenses that should have been raised during the award-debtors arbitration proceeding.

In fact, a U.S. court's review of an arbitration award is "among the narrowest known at law." A U.S. court reviewing the confirmation or denial of an arbitration award may determine only whether the arbitrators acted within the scope of their authority

and may not consider whether the arbitrators acted correctly or reasonably a U.S. court's "review of a foreign arbitration award is quite circumscribed," and a district court has "little discretion. Rather than review the merits of the underlying arbitration, a court reviewing the confirmation or denial of an arbitral award only considers whether the party established a defense under the New York Convention."

Applying the foregoing, it is clear that the FSIA is neither specified nor contemplated as a defense under Article V of the New York Convention. Moreover, because 9 U.S.C. § 203 procedurally confers U.S. courts with original jurisdiction under the Convention, Fed. R. Civ. P. 1 and 81(a)6(B) effectively bars any award debtor's assertion Fed. R. Civ. P. 12(b)1 motion to dismiss for lack of subject matter jurisdiction. While the obvious may be oblivious in court precedent, these dormant federal rules of procedure must receive U.S. Supreme Court judicial deference by granting cert. and pronouncing their applicability to U.S. district and circuit court judges presiding over the New York Convention.

B. Pursuant to U.S. Supreme Court Rule 10(c) this Court Must Grant Cert. to Provide Guidance to Both U.S. Courts as Well as Member Nations of the New York Convention Treaty as to Whether States and Their Instrumentalities Implicitly Waive Sovereign Immunity by Being Signatory Members to the Convention.

While patience is indeed a virtue, the relationship and applicability between the New York Convention and the FSIA has reached a boiling point that, as

Justice John Marshall stated in *Marbury v. Madison,* "it is emphatically the province of the judicial department to say what the law is". *See*, 5 U.S. 137 (1803). This case serves as a vehicle for this Court to assume it's historic judicial role in construing an international treaty that has become U.S. law and to provide guidance to lawyers, judges, and member nations and their citizens as to whether a sovereign member to the New York Convention, an international treaty that the U.S., the Kingdom of Saudi Arabia and Egypt are all signatories to, implicitly waives the assertion of sovereign immunity when a sovereign enters into an arbitration agreement and at the same time signs an international treaty that confers contracting states with secondary jurisdiction to "recognize arbitral awards as binding and enforce them". *See*, Article III of New York Convention.

The Fifth Circuit Court of Appeals December 2, 2021 published opinion has taken the discombobulated position that both U.S. circuit and district courts lack subject matter jurisdiction to preside over a case that seeks recognition and enforcement over a foreign arbitral award wherein the award debtor is a foreign sovereign or purported instrumentality. It does this by means of applying the FSIA as an affirmative defense[1] to the recognition and enforcement of a foreign arbitral award, despite the fact that FSIA is not specified as one of the seven exclusive defenses to opposing an award under Article V of the New York Convention.

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[1] The FSIA is not merely a jurisdictional defense, it is an affirmative defense. *See*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6605.

For over half a century, the jurisdictional device employed by an award-debtor to dismiss a case under the New York Convention is a Fed. R. Civ. P. 12(b)(1), a motion predicated on the proposition that a U.S. district court lacks subject matter jurisdiction. As previously addressed herein, this is a non-sensical application of a federal rule in consideration that 9 U.S.C. § 203 expressly confers U.S. district courts with subject matter jurisdiction under the New York Convention and Fed. R. Civ. P. 1 and 81(a)6B limit the applicability of said rule as a procedural challenge to jurisdiction.

Aside from the foregoing, the New York Convention is a summary proceeding wherein U.S. district and circuit courts only have secondary jurisdiction. It is not a lawsuit or even litigation for that matter as it specifically excludes the need to engage in discovery Fed. R. Civ. P. 26(a)1(B)ix and there is no trial or evidentiary burden placed upon the award-creditor. In fact, 9 U.S.C. § 6 of the FAA requires that U.S. courts to treat a petition under the Convention as a motion. The only recourse for challenging a petition for recognition and enforcement of an award under the Convention is contained in one of the seven defenses specified in Article V; respectfully, neither the FSIA nor contractual standing to enforce an arbitral award is recognized as one of those defenses.

While undersigned counsel will humbly coin the foregoing as the Chung litmus test, legal kudos goes more appropriately to the to the United States Court of Appeals for the Federal Circuit in Judge Douglas Ginsburg's July 2, 1999 opinion in *Creighton Ltd v. Govt St Qatar,* 181 F.3d 118, 122 (D.C. Cir. 1999*)* wherein the DC Circuit held that that a sovereign,

by signing the New York Convention, waives its sovereign immunity from arbitration-enforcement actions in other signatory states, such as the United States.

Here, Saudi Arabia is a sovereign member to the New York Convention. While the Fifth Circuit provides *sua sponte* case law, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), to support a jurisdictional dismissal on the basis that a waiver from the signing of an international agreement "contain[ing] no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."[2], it ignores that *Creighton* specifically distinguished *Amerada Hess* on the ground that signatories to the New York Convention contemplated arbitration-enforcement actions in other signatory countries, including the United States. Additionally, here, Saudi Arabia signed an express waiver upon accepting and acceding the United Nations Conventions on Jurisdictional Immunities.

The DC Circuit in May of 2019, both clarifies and reaffirms its position in *Pao Tatneft, v. Ukraine*, Case No. 18-7057 (D.C. Cir. May 29, 2019); *cert. denied,* wherein the Court explained in its judgment that FSIA legislation transitioned from an absolute sovereign immunity to a "restrictive" view of sovereign immunity that permits an implied waiver. *See*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–87 (1983). In the case at bar, Saudi Aramco's adoption of a 1933 Concession agreement in its 1988 Articles of Incorporation (App.19a), which contains an agreement to

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2 *Id.* at 442-443.

arbitrate with the concessionaire, the Petitioners named herein, also amounts to an implied waiver.

In the counterpart enforcement proceedings of the *Pao Tatneft v. Ukraine* that took place in the United Kingdom, the High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court, interpreted the New York Convention and recognized that the failure to raise a jurisdictional objection during the course of the arbitration operates as a waiver to object to the arbitral tribunal's jurisdiction on that point during enforcement proceedings.

As evidenced in the Court record, Saudi Aramco never objected to arbitration on sovereign immunity grounds, its' objection rested on the contention that no arbitration agreement existed. This position is verifiably false as its own Article of Incorporation that it filed with the U.S. district court plainly shows it adopted the terms of 1933 Concession Agreement which contained an Agreement to Arbitrate and unless history is re-written, Saudi Aramco's admitted predecessor, invoked arbitral proceedings against the Kingdom of Saudi Arabia in what may be one of the most internationally renowned arbitration cases of the twentieth century, *Aramco v. Kingdom of Saudi Arabia*.

In sum, cases involving the interplay between the New York Convention and FSIA are becoming more and more prevalent, and the stakes are high, oftentimes involving the expropriation of land and petroleum agreements with arbitral awards amounting to hundreds of millions to billions of dollars. A U.S. circuit court disposing of an arbitral award on a defense not recognized or permitted under an inter-

national treaty which specifically deals with countries availing itself to enforcement proceedings, defies the rule of law. Respectfully, the U.S. Supreme Court is the court of last resort to right a wrong and to re-align both national and international legal precedent wherein treatise are honor and the rule of law is preserved.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS PUBLISHED AN OPINION THAT CREATES A SIGNIFICANT CONFLICT WITH OTHER UNITED STATES COURT OF APPEALS AND THAT ALSO DIRECTLY CONFLICTS WITH U.S. SUPREME COURT PRECEDENT.

A. Pursuant to U.S. Supreme Court Rule 10(a), Cert. Should be Granted Because the Fifth Circuit's Published Opinion that the FSIA Bars Both Circuit Courts and U.S. District Courts from Presiding Over Cases Seeking Recognition and Enforcement of Foreign Arbitral Awards Under the New York Convention Treaty Conflicts with the United States Court of Appeals for the Federal Circuit, as Well as the Second and Eleventh Circuit Rulings that a Signatory Member to the Convention Implicitly Waives the Assertion of the FSIA as a Defense.

On March 11, 2022, the United States Court of Appeals for the D.C. Circuit clarified whether U.S. courts have jurisdiction under the Foreign Sovereign Immunities Act (FSIA) over actions to enforce arbitral awards that have been annulled by a foreign court. In *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, __ F.4th __ (D.C. Cir. Mar. 11,

2022), the court held that the FSIA's arbitration exception abrogates a foreign sovereign's immunity in an action to enforce an arbitration award against the sovereign—even if a foreign court has annulled the award. It should be noted that in the case at bar, on July 4, 2021 the Cairo Court of Appeals for the Fourth Circuit, Commercial Division A has denied a post-arbitration request to vacate the June 3, 2015 arbitral award ruling that the award it is *res judicata* and final. While the DC Circuit applied the arbitration exception under 28 U.S.C. § 1605(a)(6) as opposed to the waiver exception under 28 U.S.C § 1605(a)(1), the results are synonymous. In two prior opinions concerning the Convention, *Creighton Ltd v. Govt St Qatar*, 181 F.3d 118, 122 and *Pao Tatneft, v. Ukraine*; *cert. denied,* the DC Circuit clearly and unequivocally ruled that a signatory and member of the New York Convention waives sovereign immunity under the FSIA.

In *Creighton* the DC Circuit stated, "the New York Convention is exactly the sort of treaty Congress intended to include in the arbitration exception." 181 F.3d at 123 (internal quotations and citations omitted); *see also Matter of Chromalloy Aeroservic*es (Arab Republic), 939 F. Supp. 907 (D.D.C. 1996). It also noted, "[Section] 1605(a)(6) does not affect the contractual right of the parties to arbitration but only the tribunal that may hear a dispute concerning the enforcement of an arbitral award." 181 F.3d at 124 (*citing*, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 224 (1957)).

The *Pao Tatneft* decision from the Federal Circuit adheres to the Second Circuit Court of Appeals decision in *Seetransport Wiking Trader Schiffarht-*

sgesellschaft MBH v. Navimpex Centrala Navala, 989 F.2d 572 (2d Cir. 1993) and the Eleventh Circuit Court of Appeals in *S & Davis Int'l Inc. v. Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000). In *Seetransport*, the Second Circuit held that the FSIA's waiver exception applies if the foreign sovereign is a party to the New York Convention and has agreed to arbitrate in a Convention state. *In S & Davis International* the Eleventh Circuit, following *Creighton Ltd v. Govt St Qatar*, recognized the arbitration exception and denied Yemen sovereign immunity.

The Fifth Circuit's December 2, 2021 published opinion departs from a litany of case law and sparks a circuit split and dangerous legal precedent wherein countries and their instrumentalities may abrogate arbitration clauses and insulate themselves from liability of an arbitral award by merely asserting FSIA as a defense to enforcement of an adverse award; a defense not recognized within the international treaty. As previously addressed, this decision appears to not only conflict with national law, but also brethren courts worldwide who do not recognize the assertion of sovereign immunity following an arbitral award.

B. Pursuant to U.S. Supreme Court Rule 10(c), Cert. Should be Granted Because the Fifth Circuit's Published Opinion that Non-Signatories to an Agreement to Arbitrate Lacked Standing to Initiate Arbitration Conflicts with Relevant Decisions of this Court.

Based on the record on appeal, the parties do not challenge to the validity of the agreement to arbitrate contained in Article 31 of the 1933 Concession Agree-

ment. Furthermore, it is undisputed from reading the 1949 deed of concession that Petitioners and Aramco it specifically refers to the 1933 Concession Agreement as a whole and also identifies both the land owned by the Petitioners and their specific right to compensation under Article 25 of the Concession Agreement as private landowners. Despite the fact that the International Arbitration Center's panel of arbitrators, applying Chapter 2, Article 9 of the Saudi Arabian Law on Arbitration that states,

> . . . a reference in a contract or a mention therein of any document containing an arbitration clause shall constitute an arbitration agreement.

See, Chapter 2, Article 9 of the Saudi Arabian Law on Arbitration

The Fifth Circuit's December 2, 2021 published opinion makes a rather blasé ruling that because the parties do not specially identify the arbitration clause in the 1949 deed of concession, there is no agreement to arbitrate and the arbitration exception under 28 U.S.C. § 1605(a)6 does not apply. This lethargic legal reasoning involving an $18 billion-dollar arbitral award not only disregards the court's secondary jurisdiction, it wholly ignores Petitioners' legal briefing in the U.S. district and circuit court addressing how U.S. legal doctrines of (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; as well as (6) third-party beneficiary standing coincide with the arbitration panel's decision of Petitioners' rights to have invoked arbitration.

More concerning is that prior to the issuance of the Fifth Circuit's published opinion, the judicial

panel's ruling both ignores and omits U.S. Supreme Court precedent that the Petitioners apprised the Court of in their Fed. R. App. P. 28(j) letters. These critically important cases concerning the rights of non-signatories under the New York Convention were binding on the Fifth Circuit as it addressed Justice Antonin Scalia's May 4, 2009 opinion in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), Justice Clarence Thomas' June 1, 2020 decision in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 590 US ___ (2020) and this Court's June 8, 2020 Order Vacating the Ninth Circuit Court's Decision *in Setty v. Shrinivas Sugandhalaya LLP*, 2021 WL, 2817005. Despite these cases being directly on point, the Fifth Circuit's published opinion disregards its secondary jurisdiction role and the doctrine of *stare decisis* by releasing an oil cartel from an arbitral debt without citation to any legal authority nor reasoning how foreign or state law somehow vindicates an oil cartel from an arbitral debt. Pursuant to U.S. Supreme Court Rule 10(c) cert. should be granted for this judicial intransigence.

C. This Court has Repeatedly Held that an Appellee's Duty to Cross-Appeal is "Inveterate and Certain" Wherein the Fifth Circuit Court's Jurisdictional Dismissal on a Merits Appeal Oversteps its Appellate Authority by Vacating a U.S. District Court's Denial of a FSIA Motion to Dismiss Wherein the Appellee Failed to Timely File a Fed. R. App. P. 4(a)(3) Cross Appeal.

After extensive briefing concerning how Saudi Aramco waived sovereign immunity under the FSIA, on November 17, 2020 the U.S. District Court for the

Southern District of Texas, denied the oil cartels Fed. R. Civ. P. 12(b)1 motion for subject matter jurisdiction dismissal. *See*, App.20a. The Petitioners, following a post-judgment Motion for Reconsideration, timely appealed the merits decision that denied their Petition for Enforcement of the June 3, 2015 arbitral under the New York Convention; Saudi Aramco, filed no Fed. R. App. P. 4(a)(3) cross appeal nor any motion to dismiss the appeal with the Fifth Circuit.

This Court has held that the cross-appeal rule provided for in Fed. R. App. P. 4(a)(3) is "inveterate and certain." *See*, *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191 (1937). It reaffirmed this precedent in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) wherein it stated,

> . . . absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, but may not attack the decree with a view either to enlarging his own rights thereunder or lessening his adversary's rights.

Id. at 497; *quoting*, *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924); *see also*, *Greenlaw v. United States*, 554 U.S. 237 (2008) ["there is and has in no case ordered an exception to it*, El Paso Natural Gas Co. v. Neztsosie holding*, 526 U. S. 473, 480."]

In 2015, the U.S. Supreme revisited Fed. R. App. P. 4(a)(3) in *Jennings v. Stephens*, 574 U.S. 271 (2015). In Justice Robert's opinion, he addresses the meaning of an enlargement of rights on appeal. In *Jennings*, a Texas inmate won a federal habeas case overturning his death sentence. The state appealed

and the inmate defended the appeal on two grounds that he had prevailed on in the trial court, as well as on a third ground on which he had lost. The Fifth Circuit reversed on the two grounds that the trial court had relied on and also ruled that it did not have jurisdiction to decide the third ground because the inmate failed to take a cross-appeal as to that. In a 6-3 decision, the Supreme Court reversed. The court reasoned that the inmate was not required to cross-appeal as to the third ground because that did not enlarge his rights or lessen the state's rights under the judgment.

Applying this Court's analysis on the enlargement of rights on appeal, it is imperative to reiterate the FSIA is not one of the exclusive defenses under Article V of the New York Convention nor is it merely a jurisdictional defense, it is an affirmative defense. *See*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6605. As evidenced in the lower court record, Saudi Aramco's opposition to enforcement consisted of only a five (5) page opposition that limited its defenses to: Article V1(c), Article V1(d) and Article V2(b). As briefed herein, these defenses are the only appealable defenses that was before the Fifth Circuit. When Saudi Aramco re-asserted FSIA defense in its Answering Brief, Petitioners properly objected in their Reply brief, properly objected that the denial of Saudi Aramco's motion for dismissal was never cross-appealed and was outside of the merits.

It should be noted that upon completion of the briefing, the Fifth Circuit invited the parties to present oral argument. At oral argument there was not a single question presented concerning the appli-

cability of the FSIA. Nevertheless, the Fifth Circuit converted the case from a merits appeal to a jurisdictional dismissal and issued a December 2, 2021 order to the U.S. district court to modify the judgment from a denial of an award to a subject matter jurisdictional dismissal. The publish opinion, pursuant to U.S. Supreme Court Rule 10(c) conflicts with applicable U.S. Supreme Court precedent wherein the granting of Appellants' cert. is proper.

III. THE FIFTH CIRCUIT DECISION IS WRONG.

A. The Fifth Circuit's December 2, 2021 Published Opinion that Both the Circuit Court and the U.S. District Court Lacked Subject Matter Jurisdiction to Preside Over a Case Under the New York Convention Because no Exception to FSIA Exists is Wrong Because: (1) The Kingdom of Saudi Arabia Expressly Waived Sovereign Immunity on Behalf of Saudi Aramco Upon Acceding and Accepting the United Nations Convention on Jurisdictional Immunities of States; (2) Saudi Aramco's Articles of Incorporation Expressly Adopts the Terms of the 1933 Concession Agreement; and (3) Aramco, Saudi Aramco's Predecessor and Non-Signatory Previously Invoked Arbitration under Article 31 of the Concession Agreement in the Onassis Arbitration.

The Fifth Circuit Court of Appeals December 2, 2021 published opinion that under the FSIA a circuit court and a U.S. district court lack subject matter jurisdiction to preside over case under the New York Convention Treaty wherein the award debtor is either

a foreign sovereign or instrumentality thereof is wrong; especially when said award debtor expressly waived sovereign immunity, implicitly waived immunity and has previously invoked arbitration under the very agreement to arbitrate that was the subject matter of these summary proceedings.

Addressing first the Fifth Circuit's ruling that neither a circuit court or U.S, district has subject matter jurisdiction to preside over a FAA or New York Convention appeal, it is important to point out that as a matter of law, Congress has expressly conferred both district and circuits with jurisdiction under 9 U.S.C. § 16(a)3, 9 U.S.C. § 203 and 28 U.S.C. § 1331. Secondly, the opinion fails to address that the U.S. district court denied Saudi Aramco's FSIA motion to dismiss but concerning fails to address in its opinion Saudi Aramco's express waiver of sovereign immunity; the lynchpin as to why the lower court had no choice but to deny a FSIA motion.

It is undisputed from the lower court record that the Kingdom of Saudi Arabia accepted and acceded to the United Nations Convention on Jurisdictional Immunities of States on September 1, 2010. According to Article 2, 10, 13 and 17 of the United Nations Convention on Jurisdictional Immunities of States, which the Kingdom of Saudi Arabia has expressly waived sovereign immunity on behalf of itself and all of "instrumentalities" as it relates to commercial activity, use and possession of land and arbitration; a virtual trifecta waiver of sovereign immunity under the FSIA.

To add more fuel (no pun intended) to the legal flame, the Kingdom of Saudi Arabia is a signatory to the New York Convention which, if we apply U.S.

case law, leads to a finding that there has been an implied waiver of sovereign immunity. In two prior opinions concerning the Convention, the DC Circuit, following both the Second and Eleventh Circuits have held *in Creighton Ltd v. Govt St Qatar*, 181 F.3d 118, 122 and *Pao Tatneft, v. Ukraine*; *cert. denied*, that the, "the New York Convention is exactly the sort of treaty Congress intended to include in the arbitration exception." 181 F.3d at 123 (internal quotations and citations omitted). The holdings are clear and unequivocal which is that a signatory and member of the New York Convention waives sovereign immunity under the FSIA.

In analyzing the 28 U.S.C. § 1605(a)6, the arbitration exception under the FSIA, the circuit court's lethargic analysis of the underlying record is unacceptable. Why? Because contrary to Saudi Aramco's representations that it is not subject to the 1933 Concession Agreement and it has no affiliation with Aramco, the Articles of Incorporation that Saudi Aramco filed with the U.S. district court reveals that it expressly assumed the 1933 Concession Agreement. Additionally, it did not address that in 1954 Aramco, Saudi Aramco's admitted predecessor and not a signatory to the New York Convention, invoked Article 31 of the New York Convention in perhaps what is the most internationally renowned arbitration cases of the twentieth century. *See*, *Kingdom of Saudi Arabia v. ARAMCO* (1963) 27 ILR 117 at 169. Arbitration was before Egyptian arbitrators and the law firm that represented and invoked arbitration proceedings against the Kingdom of Saudi Arabia, White & Case, LLP, is the same law firm that represented Aramco during arbitration. Ergo, it is curious

how Saudi Aramco can take the position in good faith that both the 1933 Concession Agreement did not apply to the oil cartel or how a non-signatory, such as it was could not invoke arbitration. Unless time travel is possible, Saudi Armco cannot engage in reconstruction of history; it is bound by its actions and what it has signed.

B. The FSIA, an Affirmative Defense, is not Recognized as one of the Seven Exclusive Defenses that may be Asserted by an Award Debtor Under the New York Convention Treaty Wherein Application.

Pacta Sunt Servanda is a Latin phrase and legal doctrine jurist employ within the field of international law, it means "treaties shall be complied with," and describes a significant general principle of international law that underlies the entire system of treaty-based relations between sovereign states. Specifically adhering to the terms as contained within the treaty. This Court is not only confronted with an International treaty, it is asked to construe an international treaty that both the Legislative and Executive branches of our U.S. government has been made into law.

A U.S. court adding language to or not adhering to the express terms of a treaty where the United States is a signatory is a breach of said treaty and a violation of the Separation of Powers Doctrine. Courts should engage in judicial restraint before seeking to add a defense to treaty that does not exist. While there may be good intention, 9 U.S.C. § 207 of the New York Convention is very clear, a "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." Article V of the New York Convention.

The Fifth Circuit's December 2, 2021 decision, on its face, violates 9 U.S.C. § 207 of the Convention because it seeks to add additional affirmative defenses to an award debtor not expressly provided within the law. The FSIA is an affirmative defense. *See*, H.R. Rep. No. 1487, 94th Cong., 2d Sss. 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6605. There is no case law or statutory authority where, as done here, a Court may assert an additional defense not contained within the legislation. Moreover, dismiss a case on purported lack of contractual standing, another affirmative defense not in Article V, but that the Court employs to invoke a subject matter jurisdiction dismissal in violation of 9 U.S.C. § 207 and Fed. R. Civ. P. 1 and 81(a)6B.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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