Case No.:_____

In The Supreme Court of the United States

CVG FERROMINERA ORINOCO, C.A.,

Petitioner,

v.

COMMODITIES & MINERALS ENTERPRISE LTD.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Second Circuit err in holding service of a Summons pursuant to Rule 4 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 4, upon a party covered by the Federal Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608, is not required in the context of a petition to confirm an arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. § 201 et seq.?

2. Did the Second Circuit err in holding that allowing enforcement of an arbitration award on a contract was not contrary to United States public policy, pursuant to Article V(2)(b) of the New York Convention, where the agreement was procured by means of a scheme of criminal bribery, corruption, and fraud already adjudicated and confirmed by the Venezuelan courts prior to the issuance of the arbitration award?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding in the court where the judgment sought to be reviewed was entered.

CORPORATE DISCLOSURE STATEMENT

Respondent-Appellant and Petitioner, CVG FERROMINERA ORINOCO, C.A. ("FMO"), has no publicly held corporate parents, affiliates, and/or subsidiaries.

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CITATIONS TO REPORTS OF THE OPINIONS AND ORDERS

The Order and Judgment of the United States District Court for the Southern District of New York confirming the subject arbitration award is not officially published. See, Commodities & Minerals Enterprise, Ltd. v. CVG Ferrominera Orinoco, C.A., No. 19 Civ. 11654, 2020 WL 7261111 (Dec. 10, 2020).

The Opinion of the United States Court of Appeals for the Second Circuit affirming in part and vacating in part the district court's order is officially published. See, Commodities & Minerals Enterprise, Ltd. v. CVG Ferrominera Orinoco, C.A., 49 F. 4th 802 (2d Cir. 2022).

JURISDICTIONAL STATEMENT

The Second Circuit issued its Opinion and Judgment on October 3, 2022 (A1). So this Petition for a Writ of Certiorari is timely under Rule 13 of the Rules of the Supreme Court of the United States. And this Court enjoys jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES IMPLICATED

9 U.S.C.A. § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Fed. R. Civ. 4(c)(1)

(c) Service.

(1) *In General.* A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

Fed. R. Civ. P. 4(j)(1)

(j) Serving a Foreign, State, or Local Government.

(1) *Foreign State.* A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

28 U.S.C.A. § 1608

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall

transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

9 U.S.C.A. § 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.

New York Convention, Article V, 21 U.S.T. 2517 (Dec. 29, 1970)

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.

STATEMENT OF THE CASE

FMO appeals from the district court's Order and Judgment confirming an arbitration award arising from a maritime contract. (Appx.1). Federal subject matter jurisdiction before the district court was thus founded upon 28 U.S.C. § 1331 and 28 U.S.C. § 1333, and the federal maritime law, including its conflicts-of-law analysis, applied. Norfolk S. Ry. Co. v. Kirby, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 1995 A.M.C. 913 (1995).

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("the New York Convention"), applicable to the courts of the United States pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201 et seq., also applied to the award. CBF Indústria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58 (2nd Cir. 2017) (citing Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983)).

Respondent COMMODITIES & MINERALS ENTERPRISE LTD. ("CME") "sells various commodities and minerals, including iron ore. FMO is a state-owned company organized and existing under the laws of the Bolivarian Republic of Venezuela that produces and exports iron ore." (Appx.B). Beginning in 2004, the parties entered into a series of contracts, pursuant to which CME agreed to supply financing, equipment, and services to FMO in connection with FMO's iron ore mining and sales operations in Guayana. CME alleges FMO breached several of these agreements, including two maritime contracts. (Appx.C).

These contracts included, inter alia, the so-called Transfer System Management Contract, ("TSMC") the Wagons Contract, the English Charter Parties, and the General Piar Charter. Id. The Miami-based TSMC arbitration was conducted jointly with the New York-based General Piar arbitration, and, accordingly, both arbitrations were addressed concurrently in the Panel's Final Award. See, generally, Appx. C. The Panel found that all the contracts were essentially "intertwined" in a kind of "barter system". Id. However, only so much of the Final Award as concerns the General Piar Charter was placed before the district court for review, the TSMC being properly before the United States District Court for Miami for any confirmation and enforcement proceedings. Id.

Notably for the present purposes, the award was then issued in favor of CME, even though the illegality of the charter party as a product of corruption, bribery, and fraud, while disputed by CME, had already been ruled upon by the Venezuelan courts. See, Appx D; Appx. E. While CME's principal, Mr. Serrao, has evaded the warrant issued for his arrest and has thus, unlike his alleged coconspirators, avoided a criminal conviction, CME's appeal of that arrest warrant and prayer for a declaratory judgment on the subject contract was heard and decided. (Appx.E). The July 25, 2018 Decision of the First Court of Contentious Administrative Jurisdiction of the Bolivarian Republic of Venezuela made clear, "this Court must declare that the Commercial Alliance Agreement entered into between CVG Ferrominera Orinoco and the Trading Company Commodities and Minerals Enterprise Ltd., is illegal."

See, Appx.E; see also, id. ("This First Court of the Contentious-Administrative Jurisdiction, administering justice in the name of the Bolivarian Republic of Venezuela and by authority of law, declares . . . As ILLEGAL the Commercial Alliance Agreement between CVG Ferrominera Orinoco and the Trading Company Commodities and Minerals Enterprise Ltd.") (emphasis in original). Indeed, Mr. Serrao's contract partners were convicted of crimes including embezzlement, collusion to commit a crime with a contractor, and aggravated misappropriation in connection with the signing of the contracts at issue. (Appx.D).

And these were no "kangaroo" proceedings. The petition for a declaratory judgment on the legality of the Commercial Alliance Agreement under which the charter party was executed was initiated by CME itself. And the determination concerned purely commercial agreements; no evidence has been presented of any interference for any nefarious political reasons. Moreover, those rulings in Venezuela concerning the corruption underpinning the contracts entered under the Commercial Alliance Agreement were supported by the prosecutor's detailed testimony and back-up documentation, which, aside from Mr. Serrao's denial of personal involvement, have always remained unrebutted.

CME then commenced its action in the district court to confirm the award but failed to cause a summons to be issued or served upon FMO. (Appx.A). Over FMO's opposition on grounds including, inter alia, the failure to obtain personal jurisdiction over FMO via service of a summons, as well as the public policy exception to enforcement of the award, the

district court confirmed the award, and the court of appeals affirmed. (Appx.A).

ARGUMENT

POINT I.

CERTIORARI IS WARRANTED TO DECIDE THE IMPORTANT AND UNRESOLVED QUESTION OF WHETHER THE FSIA'S SUMMONS REQUIREMENT SHOULD BE RENDERED INAPPLICABLE IN FAA CONFIRMATION PROCEEDINGS.

As the courts below have noted, FMO is owned by the Bolivarian Republic of Venezuela. As such, the Federal Sovereign Immunities Act [hereinafter "FSIA"] "provides the exclusive means by which service of process may be effected." See, generally, 28 U.S.C. § 1608; Seramur v. Saudi Arabian Airlines, 934 F. Supp. 48 (E.D.N.Y. 1996).

Being silent on the matter, the FAA does not provide otherwise and, in fact, provides that service should be "in like manner as other process of the court," 9 U.S.C. § 207, which courts have interpreted to mean that service on foreign parties should be "in accordance with Rule 4." Technologists, Inc. v. MIR's Ltd., 725 F. Supp. 2d 120, 126 (D.D.C. 2010); see also, Benny v. Pipes, 700 F.2d 489, 492 (9th Cir. 1986) ("A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4 .")

Rule 4 then generally states that "[a] summons must be served with the complaint," Fed. R. Civ P. 4(c)(1), and also confirms that "[a] foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608." Fed. R. Civ. P. 4 (j)(1); see also, Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994).

Whichever approved method is pursued, the FSIA plainly and in any event accordingly, requires service "by delivery of a copy of the summons and complaint." 28 U.S.C. 1608(b).

In affirming the district court opinion, which had provided no analysis on the issue, the Second Circuit went to great lengths to differentiate between the "manner" of service and the predicate documents which must be served. But, as employed here, this is little more than a "distinction without a difference," which would effectively undermine the statutory summons requirement. The FSIA's provisions are, of course, separate and independent of those of the FAA. Whatever may be said for how the papers were delivered to FMO, both the Federal Rules of Civil Procedure and the FSIA quite clearly require delivery of a "summons" in addition to the complaint or petition. See, Fed. R. Civ. P. 4; 28 U.S.C. § 1608. And by no rule of statutory construction should the FAA's silence on the matter be said to somehow trump that express requirement, particularly with a sovereign extraterritorial respondent, such as FMO.

"Courts have long held that section 1608(a), which governs service upon a foreign state, requires strict adherence to the FSIA's literal terms

enumerated in Section 1608(a), not merely substantial compliance." Lovati v. Bolivarian Republic of Venezuela, 19 Civ. 4796, 2020 WL 6647423 (D.D.C. Nov. 11, 2020) ("Moreover, '[w]hether or not [defendant] received actual notice of the suit is irrelevant when strict compliance is required.'") (citing Hilaturas Miel, S.L. v. Republic of Iraq, 573 F. Supp. 2d 781, 796 (S.D.N.Y. 2008); Lewis & Kennedy, Inc. v. Permanent Mission of the Republic of Botswana to the U.N., 05 Civ. 2591, 2005 WL 1621342, at *3 (S.D.N.Y. Jul. 12, 2005) (collecting cases) (quoting Finamar Inv'rs, Inc. v. Republic of Tadjikistan, 889 F. Supp. 114, 118 (S.D.N.Y. 1995); see also, J. Cotola Constr., Inc. v. Avelar, No. 11 Civ. 2172, 2011 WL 5245206 (E.D.N.Y, Nov. 2, 2011) ("The service provision of the FSIA, § 1608(a), is the exclusive provision by which a plaintiff in a civil action may effect service of process on a 'foreign state.' Courts unequivocally hold that § 1608(a) 'mandate[s] strict adherence to its terms, not merely substantial compliance.'" (citations omitted) (compiling cases).

The FSIA took pains to call for the intervention of a court to the extent of issuing a summons. And for good reason, especially for foreign actors potentially unfamiliar with the judicial system, because issuance of a summons requires at least some minimal review and authentication by the court. See, generally, Fed. R. Civ. P. 4(b) ("If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant."); see also, Dynergy Midstream Serv's, LP v. Trammochem, 451 F.3d 89, 94 (2d Cir. 2006) (quoting Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 108 S. Ct.

404, 409, 98 L. Ed. 2d 15 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.") (citing Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444–445, 66 S. Ct. 242, 245–246, 90 L. Ed. 185 (1946) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served."))); Oklahama Radio Assoc's v. Federal Deposit Ins. Corp., 969 F.2d 940, 943 (10th Cir. 1992) ("Personal service under Rule 4 serves two purposes: notifying a defendant of the commencement of an action against him *and providing a ritual that marks the court's assertion of jurisdiction over the lawsuit*.") (emphasis added) (citing Hagmeyer v. United States Dep't of Treasury, 647 F. Supp. 1300, 1303 (D.D.C.1986) (citing 4 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1063))); Kramer v. Scientific Control Corp., 365 F. Supp. 780, 788 (E.D. Pa. 1973) ("One of the purposes of Rule 4(b) is to make sure that the summons is issued, as it was in this case, by the Clerk of Court and not by the plaintiff or his attorney.") (citing 2 Moore's Federal Practice (2d ed.) ¶ 4.07[1], p. 996 n. 2)). The drafters could have used broader or more generic language, but they did not. And that simple fact should have ended the inquiry in this case.

The Second Circuit's Opinion, basically holding that the FAA's requirements are more liberal by virtue of their lack of particularity as regards service and should take precedence over the FSIA's, is especially confounding, inasmuch as there really need not be any contradiction between the FAA and FSIA

read into this matter. "Notice of the application" under the FAA is undefined and might arguably take many forms, in addition to or possibly including a "summons" under the FSIA, such that the statutes may be construed in perfect harmony. Instead, the particular, repeated statutory requirements for issuance of a summons in FSIA cases have needlessly been judicially rendered nugatory.

Indeed, the Second Circuit's notion that the provisions of the FAA effectively overrule the requirement of the FSIA that a summons be issued is not only unsupported by any other authority in the Opinion itself, it is at odds with *all* of the several courts in other circuits known to have addressed this very question. See, Commodities & Minerals Enterprise Ltd. v. CVG Ferrominera Orinoco, C.A., 338 F.R.D. 664 (S.D. Fla. 2021) ("Petitioner's failure to serve the Petition [for confirmation under FAA] with a summons is fatal to its position."); Ballantine v. Dominican Republic, 19 Civ. 3598, 2020 WL 4597159 (D.D.C. Aug. 11, 2020) ("[W]hile the FSIA requires that "a copy of the summons" be served, 28 U.S.C. § 1608(a)(3), the Ballantines only requested summonses a week after the December 3, 2019, service deadline . . . Neither of the Ballantines' arguments solve their service problem. They argue that their efforts above provided the Dominican Republic with actual notice of their Motion on December 3, 2019, which they maintain is all that 9 U.S.C. § 12 requires. But that reading would eviscerate the FAA's language in Section 12 that service be 'in like manner as other process of the court,' 9 U.S.C. § 12, which—when applied to service on a foreign sovereign like the Dominican Republic—

refers to the process outlined in Rule 4 and, in turn, the FSIA.") (citations omitted); Berkowitz v. Republic of Costa Rica, 288 F. Supp. 3d 166 (D.D.C. 2018) ("The Berkowitz claimants argue that they were not required to comply with the FSIA because they properly served Costa Rica pursuant to Section 12 of the FAA. But the Supreme Court has made clear that the 'FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court.' And '[S]ection 1608(a) [of the FSIA] FSIA sets forth the exclusive procedures for service' on a foreign state.") (citations omitted) (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994)); Commodities & Minerals Enterprise Ltd. v. CVG Ferrominera Orinoco, C.A., No. 17 Civ. 20196, 2017 WL 11625759 (S.D. Fla. Apr. 4, 2017) ("The requirement of a summons is not only necessary under 1608(1), but it is also required under (b)(2) and (b)(3)."). Thus CME cannot satisfy any provision of the FSIA for service on FMO"); Americatel El Salvador, S.A. v. Compania de Telecomunicaciones de El Salvador, S.A., No. 07 Civ. 21940, 2007 WL 2781057 (S.D. Fla. Sep. 19, 2007) ("This Court holds that the FedEx Package to Mr. Anaya [containing a petition for confirmation under the FAA] did not conform with Rule 4 because it did not contain a summons.").

Just as these other courts in the Eleventh and District of Columbia Circuits have found, this question is quite simple and should not be so unreasonably parsed as to lead to an absurd, wholly artificial result. The statutes are clear. Since FMO is

an extraterritorial "sovereign" covered by the FSIA, CME's failure to cause a summons to be issued and served rendered the extension of personal jurisdiction over FMO patently improper. The Second Circuit opinion thus affects matters of important public policy and is at odds with courts in other circuits. The Court is urged to grant certiorari to settle the matter, accordingly.

POINT II.

CERTIORARI IS WARRANTED TO DECIDE THE IMPORTANT AND UNRESOLVED QUESTION OF WHETHER ARTICLE V(2)(b) OF THE NEW YORK CONVENTION MAY PREVENT ENFORCEMENT OF AN AWARD ON A CONTRACT PROCURED THROUGH A CONCLUSIVELY ADJUDICATED SCHEME OF BRIBERY, CORRUPTION, AND FRAUD.

It is an accepted principle that an arbitral award has no legal effect without the stamp of judicial approval. Schlumberger Tech Corp. v. United States, 195 F.3d 216, 220 (5th Cir. 1999). The New York Convention acknowledges the right of the courts of each contracting state to "refuse" to lend the coercive authority of the State to an arbitral award if to do so would "be contrary to the public policy of that country." New York Convention, Art. V(2)(B). Accordingly, the United States policy promoting arbitration in large part rests on the understanding that, "[h]aving permitted the arbitration to go forward, the national courts of the United States will

have the opportunity at the award-enforcement stage to ensure that the legitimate [public policy] interest . . . has been addressed." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 638, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

In virtually any circumstance, "a court may refuse to enforce contracts that violate law or public policy." United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) ("That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.") (citing W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983); Hurd v. Hodge, 334 U.S. 24, 34–35, 68 S. Ct. 847, 852–853, 92 L. Ed. 1187 (1948); Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356–358, 51 S. Ct. 476, 477–478, 75 L. Ed. 1112 (1931); McMullen v. Hoffman, 174 U.S. 639, 654–655, 19 S. Ct. 839, 845, 43 L. Ed. 1117 (1899)); see also, Ministry of Defense & Support for the armed Forces of the Islamic Repub. Of Iran v. Cubic Defense Sys., Inc., 665 F.3d 1091, 1097 (9th Cir. 2011); Sarhank Group v. Oracle Corp., 404 F.3d 657, 661-62 (2d Cir. 2005) ("Article V(2) of the Convention provides that a United States court is not required to enforce . . . the arbitral award [if it] would be contrary to public policy.").

And this Court has directed district courts to substitute their own judgment for that of an arbitrator if the arbitration award, left unchanged, would violate public policy. See, W.R. Grace, 461 U.S. at 766 ("[T]he question of public policy is ultimately one for resolution by the court."); see also, Rintin Corp., S.A. v. Domar, Ltd., 476 F.3d 1254, 1258 (11th Cir. 2007); Changshou AMEC Eastern Tools and Equipment Co., Ltd., No. 11 Civ. 00354, 2012 WL 3106620, *4 (C.D. Cal. Jul. 30, 2012) (arbitrator's findings about the validity of the arbitration agreement could not control the district court's ruling "when considering whether the award contravenes public policy under Article V" of the New York Convention). In such instances, the reviewing court should resolve the issue by 'taking the facts as found by the arbitrator, but reviewing his conclusion de novo.*"* E.I. DuPont de Nemours v. Graselli Emp. Ass'n, 790 F.2d 611, 617 (7th Cir. 1986).

An arbitration award is against public policy when it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." TermoRio S.A.E.S.P. v. Electranra S.P., 487 F.3d 928, 938 (D.C. Cir. 2007). And the public policy in favor of arbitration is certainly not greater than the public policy against rewarding corruption and fraud. See, generally, Beauperthuy v. 24 Hour Fitness USA, Inc., No. 06-715SC, 2012 WL 3757481, *19 (N.D. Cal. May 7, 2012) ("While there exists a general policy favoring the enforcement of arbitration agreements, section 2 of the FAA provides that arbitration clauses may be invalidated based 'upon the same grounds as exist in law or in equity for the revocation of any contract,' such as fraud, duress or

unconscionability. The court applies ordinary state-law principles governing the formation of contracts to carry out this task.") (citations omitted); see also, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); Pokorny v. Quixtar, 601 F.3d 987, 994 (9th Cir.2010).

Allowing recovery on a contract procured by bribery of a foreign public official is surely repugnant to fundamental notions of decency and justice in the United States, and such a contract should not be enforced, whether in the first instance in an action for breach of contract or thereafter by a United States court asked to recognize and enforce the award. See, S.E.L. Maduro (Florida), Inc. v. M/V Santa Lucio, 116 F.R.D. 289, 297 (D. Mass. 1987) ("In sum, it is beyond doubt that commercial bribery clearly contravenes a strong public policy and that the Court, in due administration of justice, cannot enforce a contract which is obtained by that means."); see also, Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas, 314 F. Supp. 3d 95, 110 (D.D.C. 2018).

In the case sub judice, FMO adduced voluminous evidence, including testimony of the prosecutors and expert witness, demonstrating that CME procured all the agreements arising out of its alliance with FMO, including the General Piar Charter Party, through a criminal scheme of bribery, corruption, and fraud involving executives and directors at the highest levels. While CME never admitted culpability, there was never any factual dispute that, after discovering this massive fraud, the Venezuelan police and judiciary vigorously investigated and prosecuted those linked to the

arrangement, resulting in the conviction of several individuals and the indictment of CME's officers. (Appx.D; Appx.E). The FMO officers involved have all been criminally convicted in Venezuela for participation in the enterprise, which was part a far-reaching corruption scheme within FMO. Id. FMO thus respectfully submits that the illegality of the charter party upon which the award was issued should not have been viewed as a mere matter of opinion or factual debate; it should have been seen as an established matter of Venezuelan law, as to which there can be no better authority than the Venezuelan courts.

"It is well established that United States courts are not obliged to recognize judgments rendered by a foreign country . . . but may choose to give *res judicata* effect to foreign judgments on the basis of comity." Alesayi Beverage Corp. v. Canada Dry Corp., 947 F. Supp. 658, 663 (S.D.N.Y. 1996), aff'd, 122 F.3d 1055 (2d Cir. 1997); see also, generally, JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) ("International comity has been described by the Supreme Court as 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'") (quoting Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895)); see also, Leopard Marine & Trading, Ltd. v. Easy Street Ltd., 896 F.3d 174, 190 (2d Cir. 2018) ("'[P]arallel proceedings in the same in personam claim should ordinarily be allowed to proceed

simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other.'" (quoting Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006)).

"If the foreign forum provided the plaintiff with a full and fair trial before a court of competent jurisdiction, under a system likely to secure an impartial administration of justice, then the foreign action should not be tried afresh." Mosha v. Yandex Inc., No. 18 Civ. 5444, 2019 WL 5595037 (S.D.N.Y. Oct. 30, 2019) (citing Hilton, 159 U.S. at 202-03); see also, Cunard S.S. Co. Ltd. v. Salen Reefer Services AB, 773 F.2d 452, 457 (2d Cir.1985) ("Comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.") (citations omitted); Italverde Trading, Inc. v. Four Bills of Lading, No. 04 Civ. 2793, 2009 WL 499502, *6 (E.D.N.Y. Feb. 27, 2009) ("If a foreign court's judgment is final and enforceable in the forum state, it can be used to preclude a claim or issue in a domestic court.") (citing Alesayi Beverage Corp., 947 F. Supp. at 664 (citing Scheiner v. Wallace, 832 F. Supp. 687, 693 (S.D.N.Y.1993)); Voreep v. Tarom Romanian Air Transport, No. 96-cv1384, 1999 WL 311811, at *3 (S.D.N.Y. May 18, 1999)); Koehler v. The Bank of Bermuda Ltd., No. 18 Civ. 302, 2004 WL 444101, *10 (S.D.N.Y. Mar. 20, 2004) ("While in *Trensky* a New York court gave res judicata effect to a declaratory judgment rendered by another New York court, there is no principled difference between that policy of preclusion and the policy of international comity

which gives recognition and preclusive effect to a foreign declaratory judgment.").

To appreciate FMO's perspective, one need only imagine the reaction here were a contract formed between U.S. residents, for the performance of services in the U.S., and found by a U.S. court to be the product of bribery, corruption, and fraud nonetheless to then be deemed valid and enforceable by a foreign country arbitration panel pursuant to the terms of that very illegal contract. CME's principal, Mr. Serrao, appeared by counsel and saw the issues concerning the corrupt procurement of the contract appealed and decided in Venezuela only to then see that declaratory judgment finding effectively undone by way of arbitration on another continent. The most basic principles of contract law, as well as comity, have been completely ignored here.

And the result, if left unchecked, would be to lend the U.S. courts' imprimatur to allowing that corrupt arrangement to be consummated and ultimately succeed. The alleged innocence of Mr. Serrao notwithstanding, the contract containing the arbitration provision was undisputedly the product of bribery, corruption, and fraud and should have been deemed illegal and void ab initio. The courts below erred in turning a "Nelson's eye" to the question by deferring to the arbitrators, even though public policy considerations under Article V had been invoked. Allowing the Second Circuit Opinion to "lend its aid to one who found a cause of action upon an immoral and illegal act," Misco, 484 U.S. at 42, would thus quite egregiously offend United States public policy against the criminal conduct upon which the award was necessarily founded.

CONCLUSION

FMO urges the Court to grant this Petition and issue a Writ of Certiorari.

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Respectfully submitted,

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