

No. 18-1048

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IN THE  
**Supreme Court of the United States**

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GE ENERGY POWER CONVERSION FRANCE SAS, CORP.,  
A FOREIGN CORPORATION FORMERLY KNOWN AS  
CONVERTEAM SAS,  
*Petitioner,*

v.

OUTOKUMPU STAINLESS USA, LLC, ET AL.,  
*Respondents.*

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**On Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit**

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**JOINT BRIEF FOR RESPONDENTS**

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**QUESTION PRESENTED**

Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or “Convention”) authorizes a court to apply a unique U.S. “equitable estoppel” doctrine to compel arbitration between two businesses that are not consenting parties to a written agreement to arbitrate disputes between them.

## CORPORATE DISCLOSURE STATEMENT

Respondent Outokumpu Stainless USA, LLC is a single member limited liability company whose sole member is Outokumpu Americas, Inc. Outokumpu Americas, Inc. is a wholly owned subsidiary of Outokumpu Holding Nederland BV. Outokumpu Oyj of Finland is the corporate parent of Outokumpu Holding Nederland BV. Solidium Oy, a Finnish state-owned investment company, holds more than 10% of Outokumpu Oyj's stock.

Respondent Sompo Japan Insurance Co. of America, now known as Sompo American Insurance Co., is a wholly owned subsidiary of Sompo Americas Holdings, Inc. Sompo Holdings, Inc. is the corporate parent of Sompo Americas Holdings, Inc. No publicly traded corporation owns 10% or more of Sompo Holdings, Inc.'s stock.

Respondent Pohjola Insurance Ltd. is a wholly owned subsidiary of OP Insurance Ltd., which was formerly known as OP Corporate Bank PLC. OP Cooperative is the parent of OP Insurance Ltd. OP Cooperative is a member of the OP Financial Group.

Respondent AIG Europe Ltd. is a wholly owned subsidiary of AIG Europe Holdings Ltd. AIG Europe Holdings Ltd. is a wholly owned subsidiary of AIG Property Casualty International, LLC. AIG Property Casualty International, LLC is a wholly owned subsidiary of AIG Property Casualty, Inc. AIG Property Casualty, Inc. is a wholly owned subsidiary of AIUH, LLC. AIUH, LLC is a wholly owned subsidiary of American International Group, Inc. No publicly traded corporation owns 10% or more of

American International Group, Inc.'s stock.

Respondent Tapiola General Mutual Insurance Company is a subsidiary of LocalTapiola Group.

Respondent AXA Corporate Solutions Assurance SA UK Branch's parent company is AXA SA. No publicly traded corporation owns 10% or more of AXA SA's stock.

Respondent HDI Gerling UK Branch is a subsidiary of HDI Global SE. HDI Global SE is a wholly owned subsidiary of Talanx AG. HDI Haftpflichtverband der Deutschen Industrie V.a.G. holds more than 10% of Talanx AG's stock.

Respondent MSI Corporate Capital Ltd. is a wholly owned subsidiary of MSIG Holdings (Europe) Ltd. as sole Corporate Member of Syndicate 3210. MSIG Holdings (Europe) Ltd. is a subsidiary of Mitsui Sumitomo Insurance Co., Ltd. Mitsui Sumitomo Insurance Co., Ltd. is a subsidiary of MS&AD Insurance Group Holdings, Inc. No publicly traded corporation owns 10% or more of MS&AD Insurance Group Holdings, Inc.'s stock.

Respondent Royal & Sun Alliance, PLC is a subsidiary of Royal Insurance Holdings Ltd., which was formerly known as Royal Insurance Holdings PLC. Royal Insurance Holdings Ltd. is a subsidiary of Royal and Sun Alliance Insurance Group, PLC. No publicly traded corporation owns 10% or more of Royal and Sun Alliance Insurance Group, PLC's stock.

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## INTRODUCTION

The New York Convention rests on a simple premise: Contracting States should compel international businesses to arbitrate disputes only when they have consented to arbitrate with the other party, as evidenced by a written arbitration agreement between them. That rule is reflected in the Convention's plain text and drafting history, which reveal the Convention's intent to protect international businesses from varying domestic laws that could force them to forgo judicial remedies against their will. The Convention promises international businesses generally uniform and predictable standards for determining which commercial disputes will be subject to arbitration and which will not.

The alternative rule proposed by petitioner GE Energy Power Conversion France SAS Corp. ("GE France") would destroy that uniformity and contravene the Convention's protective purposes, leaving international businesses to the vagaries of domestic laws that could force them to forgo judicial remedies—including the protection of their own countries' courts and laws—when they never agreed to do so. GE France's argument for elevating domestic law over uniform international standards reduces to essentially two propositions, neither of which has merit.

First, GE France argues that the Convention creates only a "floor" on the conditions under which arbitration agreements *must* be enforced and does not impose a "ceiling" on the conditions under which a Contracting State *may* force unwilling parties to arbitrate. That counterintuitive argument is belied by

the very Convention provision on which GE France relies. GE France grounds its “no ceiling” hypothesis in Article VII(1)’s “more favorable laws” provision, but that clause only authorizes Contracting States to recognize arbitration *awards* more broadly than the Convention requires. No comparable provision appears in Article II, which governs enforcement of arbitration *agreements*. This difference makes sense: so long as two businesses have agreed in writing to arbitrate a given dispute between them, there is little reason to restrict a Contracting State’s efforts to enforce the resulting consensual award. But where the essential element of consent to arbitrate is missing, the Convention is supposed to protect the unwilling party from local laws forcing it into arbitration. Reading the Article VII “more favorable laws” provision into Article II would upset that important balance.

Second, GE France says the equitable estoppel doctrine it invokes must apply because other doctrines have been applied to bind entities to arbitration even when they did not literally sign an arbitration agreement. Those doctrines, however, are materially different: they are all privity-based doctrines that determine who qualifies as a consenting “party” to an agreement in the first place. And they are based on the same consent principle foundational to the Convention. By contrast, the estoppel doctrine GE France invokes is based *not* on consent—a principle GE France barely mentions—but on vague, ill-defined concepts of “equity” and “fairness” that Contracting States could impose according to their own local preferences.

Cases arising under Chapter 2 of the Federal Ar-

bitration Act (“FAA”) are governed by the Convention it implements, not by domestic laws that would strip international businesses of judicial remedies and protections they never agreed to relinquish. The Convention does not contemplate the non-consent-based estoppel doctrine GE France invokes. Nor does the law of Germany, which governs the arbitration agreement on which GE France relies. No applicable principle of law, in short, allows GE France to force Outokumpu to arbitrate a dispute with GE France it never agreed to arbitrate. The judgment should be affirmed.

## STATEMENT

### A. Legal Framework

This case is about the meaning of the New York Convention, a treaty implemented domestically by Chapter 2 of the FAA. *See Convention done at New York June 10, 1958*, T.I.A.S. No. 6997, 21 U.S.T. 2517 (Dec. 29, 1970) (“NY Conv.”).<sup>1</sup> It does not involve FAA Chapter 1. *See infra* at 10-13.

#### 1. Treaty Interpretation Principles

“As a general matter, a treaty is a contract, though between nations.” *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25, 37 (2014). Treaties “are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties.” *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921). As with contracts, courts must “give

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<sup>1</sup> The official English, French, and Spanish versions of the Convention are reprinted in full in the Addendum to this brief.

the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.” *Air France v. Saks*, 470 U.S. 392, 399 (1985). Courts examine “the text of the treaty and the context in which the written words are used,” as well as “the history of the treaty, the negotiations, and the practical construction adopted by the parties.” *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991) (quotation marks omitted).

Even more than most private contracts, “treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.” *Rocca v. Thompson*, 223 U.S. 317, 332 (1912). Courts therefore must adhere to clear treaty language, absent “extraordinarily strong contrary evidence” of some unexpressed intention. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

## 2. FAA Chapter 2

FAA Chapter 2 governs implementation of the Convention in U.S. courts. *See* 9 U.S.C. § 201 (“The Convention ... shall be enforced in United States courts in accordance with this chapter.”). Under FAA Chapter 2, any arbitration agreement arising out of a “commercial” legal relationship (e.g., non-consumer) “falls under the Convention,” *unless* the relationship (1) is “entirely between citizens of the United States” and (2) does not “involve[] property located abroad, envisage[] performance or enforcement abroad, or ha[ve] some other reasonable relation with one or more foreign states.” *Id.* § 202. A

“proceeding falling under the Convention” is deemed to arise under federal law. *Id.* § 203. Nevertheless, a court can refuse enforcement of an award only on “the grounds for refusal ... of recognition or enforcement of the award specified in the said Convention.” *Id.* § 207. Finally, Chapter 2 provides that Chapter 1—which governs domestic arbitration proceedings—“applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.” *Id.* § 208.

### **B. Factual Background**

Outokumpu Stainless USA, LLC (“Outokumpu”) operates a stainless-steel plant in Calvert, Alabama. JA23. ThyssenKrupp Stainless USA, LLC—Outokumpu’s predecessor-in-interest—owned the facility, and contracted with Fives ST Corp. (“Fives”) (formerly F.L. Industries) to build three different sized cold-rolling mills, with one Contract for each mill. JA21, JA41-42, JA78-185. The three Contracts contained narrow arbitration clauses limiting arbitration to “disputes arising between both parties” and specifying that arbitration would take place in Düsseldorf, Germany, applying German substantive law. JA171.

The Contracts contemplated Fives subcontracting some of its obligations and mentioned GE France’s predecessor Converteam, alongside ABB, Rockwell, and Siemens, as possible choices for the Contracts’ electrical subcontract work for the mills. JA184-85. All told, the Contracts mentioned roughly 70 potential subcontractors. No subcontractor—including GE France—signed or was a party to the Contracts. Pet.

App. 15a.

After the Contracts were executed, Fives entered into a separate contract—the Agreement for Consortial Cooperation (“Consortial Agreement”)—with GE France and a third entity. JA55-77. Outokumpu was neither party to, nor made aware of, the Consortial Agreement. D.Ct. Dkt. 38-2 ¶ 16. Under that agreement, Fives subcontracted the electrical work for the construction project to GE France. This electrical work included the design, manufacture, and supply of the motors for the mills. Pet. App. 5a. The Consortial Agreement contained its own arbitration provision providing that disputes between Fives and GE France would be arbitrated in France under French law. JA70-71. The arbitration clause acknowledged that GE France was a stranger to the arbitration clauses in the mill Contracts by purporting to grant Fives a right to bring GE France into an arbitration between Fives and Outokumpu should one arise. *Id.*

GE France built the motors, which were installed in Alabama in 2011-12. Pet. App. 5a. On June 13, 2014, one of the motors—which were expected to last decades—failed catastrophically after roughly 19 months of operation. D.Ct. Dkt. 38-2 ¶¶ 18, 20, 33. Following this catastrophic failure, the subject mill ceased operating for more than six months, resulting in millions of dollars of damage. JA27. Issues with the other motors followed. JA26-27. When Outokumpu contacted Fives about repairing or replacing the motors, Fives forwarded to Outokumpu a letter from GE France urging Fives to refuse the claims. Pet. App. 5a-6a. Only then did Outokumpu discover the Consortial Agreement. *Id.* 5a. Ou-

Outokumpu's insurers paid more than \$45 million related to damages stemming from the catastrophic motor failure. JA200, 208. Outokumpu suffered damages well beyond that amount. JA200.

Outokumpu and its insurers filed suit against GE France in Alabama state court asserting tort claims based on GE France's violation of non-contractual standards and duties in designing, manufacturing, and supplying the motors. JA22-37. No breach of contract claims were asserted. GE France removed, citing 9 U.S.C. § 205 and the arbitration clause in the Outokumpu-Fives Contracts. Pet. App. 6a. GE France filed a motion to compel arbitration, which the district court granted. *Id.* 23a-81a.

Outokumpu and its insurers appealed to the U.S. Court of Appeals for the Eleventh Circuit, which reversed the order compelling arbitration. Pet. App. 1a-19a. The Eleventh Circuit held that GE France was not a party or signatory to the Contracts, and it rejected GE France's efforts to compel arbitration through equitable estoppel. *Id.* 15a. The court reasoned that it could only compel arbitration based on "an agreement in writing within the meaning of the Convention," and GE France was not party to any such agreement with Outokumpu. *Id.* 14a (quotation marks omitted). Nor could GE France bypass the Convention's requirements and compel Outokumpu to arbitrate through equitable estoppel. *Id.* 17a.

GE France filed a petition for a writ of certiorari, which was granted. With no stay of the Eleventh Circuit's mandate or district court proceedings in place, the district court granted a motion to remand

the case to state court. D.Ct. Dkts. 107, 110. GE France has appealed the remand order to the Eleventh Circuit, D.Ct. Dkt. 111, but proceedings on the merits are ongoing in Alabama state court. As part of those proceedings, Outokumpu and the insurers have filed an amended complaint, in which they again assert tort claims against GE France for the motor failures. JA192-216.

### SUMMARY OF ARGUMENT

I. This international arbitration case is governed by FAA Chapter 2 and the multilateral Convention it implements. FAA Chapter 1, which governs domestic arbitration agreements, provides no substantive law applicable here. Chapter 1 does not incorporate common-law doctrines like estoppel, let alone require their application in cases arising under Chapter 2. Chapter 1 instead allows non-parties to enforce arbitration agreements through estoppel if otherwise relevant *state* law allows it, in part because Chapter 1 does not limit enforcement to “parties” to the agreement. Chapter 2, however, expressly provides (through the Convention) only for enforcement by the “parties” to the agreement. Chapter 2 thus fills the textual gap this Court relied on to construe Chapter 1 as allowing application of estoppel doctrines otherwise available under the relevant state law.

II. The Convention itself prohibits courts from compelling arbitration except between businesses that are parties to an agreement in writing to arbitrate disputes between them. The Convention’s text and drafting history establish that arbitration can be compelled under the Convention only where the par-

ties voluntarily relinquished their right to litigate disputes with each other in court, and did so in a written agreement to eliminate any uncertainty about their consent. Both Congress and the Executive Branch endorsed that interpretation when they ratified and implemented the treaty.

III. The non-consent-based estoppel doctrine invoked by GE France flouts the Convention's consent-through-written-agreement requirement. The doctrine also undermines the Convention's core purposes of encouraging consensual arbitration and promoting predictability and uniformity in international commercial transactions. No other country recognizes the kind of non-consent-based estoppel GE France invokes. Other nations instead generally compel arbitration only between entities legally deemed consenting parties to a written arbitration agreement.

IV. For all of these reasons, the Convention bars application of the non-consent-based equitable estoppel doctrine invoked by GE France. But the Court need not even reach that issue, because German law governs the arbitration agreement, and German law does not recognize GE France's idiosyncratic equitable estoppel doctrine. The Court could affirm on that alternative ground, or dismiss the writ as improvidently granted, because the case does not actually present the question on which certiorari was granted.

**ARGUMENT****I. FAA CHAPTER 1 IS RELEVANT HERE ONLY INsofar AS IT CONFIRMS THE ERROR IN GE FRANCE’S POSITION**

This case is governed by FAA Chapter 2 and the Convention it implements. GE France, however, starts its argument with FAA Chapter 1. Citing 9 U.S.C. § 208, GE France contends that FAA Chapter 2 simply “piggybacks” on Chapter 1, and because Chapter 1 ostensibly adopts “common-law doctrines like equitable estoppel,” they apply equally to international arbitration agreements governed by Chapter 2. Petr. Br. 14, 23; *see id.* at 28-29, 36.

That argument rests on a false premise: Chapter 1 does *not* incorporate any common-law doctrines, as this Court made clear in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). Chapter 1 instead merely *allows for* application of estoppel, *if* the underlying state law governing the arbitration agreement allows it. *Id.* at 630-32.

In *Arthur Andersen*, this Court rejected the contention that FAA Chapter 1 bars application of estoppel to compel arbitration in domestic cases, because nothing in Chapter 1 “purports to alter background principles of *state* contract law regarding the scope of agreements (including the question of who is bound by them).” *Id.* at 630 (emphasis added). In other words, “no federal law bars the State from allowing” enforcement of arbitration agreements through estoppel. *Id.* at 632. Accordingly, “state law” applies under Chapter 1 “to determine which contracts are binding ... and enforceable,” so long as the state law rules are arbitration-neutral, i.e., they

“govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Id.* at 630-31 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)). The Court thus remanded for a determination of whether “the relevant state contract law”—not federal common law or contract-law principles in the abstract—authorized application of estoppel in that particular case. *Id.* at 632; see *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citing “relevant state law,” not federal or general contract-law rules).

*Arthur Andersen* precludes GE France’s argument that FAA Chapter 1 by its own force compels application of estoppel doctrines. Under Chapter 1, such doctrines apply only if they would apply under arbitration-neutral state laws otherwise governing the arbitration agreement. Because the arbitration agreement here is governed by German law, not state law, see *infra* at 54-57, any estoppel doctrines found in particular U.S. states’ contract laws have nothing to do with the case.

FAA Chapter 1 is relevant, however, for a different reason. In *Arthur Andersen*, the Court addressed essentially the same question raised in this Chapter 2 case, except in the context of a purely domestic arbitration governed by Chapter 1. Citing 9 U.S.C. § 3—a provision of FAA Chapter 1 requiring a stay of a judicial action if the claims are “referable to arbitration under an agreement in writing”—the parties resisting estoppel contended that Chapter 1 barred its application because it would force them to arbitrate absent an “agreement in writing.” “Perhaps that [argument] would be true,” the Court responded, “if § 3 mandated stays only for disputes be-

tween parties to a written arbitration agreement.” *Arthur Andersen*, 556 U.S. at 631. “But that is not what the statute says,” the Court concluded—as used in § 3, “the term ‘parties’ ... refers to parties to the litigation rather than parties to the contract.” *Id.* at 631 & n.4. That is, instead of authorizing enforcement by parties to the agreement, § 3 states that claims need only be “referable”—i.e., by anybody authorized to refer them under state law—“under an agreement in writing.” *Id.* at 631. Under that passive-voice construction, “the statute’s terms are fulfilled” so long as “a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law.” *Id.*

GE France and its amici rely heavily on that passage from *Arthur Andersen*, but they overlook a crucial difference in the relevant language here: unlike § 3 in Chapter 1, the relevant Convention provision incorporated in Chapter 2 *does* explicitly authorize judicial enforcement only by a “party” to a written arbitration agreement. *See infra* at 13-15. By GE France’s own account, the term “parties” in that provision refers only to enforcement by parties *to the contract*, rather than parties to the litigation—exactly the opposite of § 3. *See id.* at 14-15. FAA Chapter 2 (through the Convention) thus fills the textual gap the *Arthur Andersen* Court found decisive in holding that Chapter 1 allows for enforcement by non-parties. Applied here, *Arthur Andersen*’s own logic compels the conclusion that Chapter 2 *does* preclude enforcement of arbitration agreements by non-parties. *See Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1002 (9th Cir. 2017) (emphasizing textual distinction between FAA Chap-

ter 1 and Convention in rejecting non-party enforcement).

## **II. THE CONVENTION AUTHORIZES CONTRACTING STATES TO COMPEL INTERNATIONAL ARBITRATION ONLY BETWEEN PARTIES TO A WRITTEN AGREEMENT EVIDENCING THEIR CONSENT TO ARBITRATE THEIR DIFFERENCES**

As just shown, GE France cannot rely on FAA Chapter 1 as the substantive basis for applying estoppel in this Chapter 2 case. Nor can GE France escape the terms and history of the Convention, which imposes two essential conditions on all international arbitration agreements within its purview: (1) a party's agreement to forgo access to courts in favor of arbitration must be voluntary, and (2) to eliminate doubt, the party's voluntary consent must be evidenced by a written agreement to arbitrate.

### **A. The Text Of Article II Allows Contracting States To Compel Arbitration Only Between Parties To A Written Agreement To Arbitrate Disputes Between Them**

GE France and its amici argue that the Convention's requirements do not displace domestic law because they are not actually requirements. Contracting States remain free, they say, to impose domestic laws forcing international businesses into arbitrations under whatever circumstances each Contracting State deems appropriate. GE France and its amici are wrong. According to "substantial judicial authority" in both civil-law and common-law juris-

dictions, the Convention “supersede[s] national laws” that authorize courts to compel arbitration under circumstances beyond those specified in Article II. 1 Gary B. Born, *International Commercial Arbitration* § 5.02[A][2][e], at 670-71 (2d ed. 2014) (“Born”).

1. Article II(1) of the Convention sets forth its basic “writing” requirement, mandating that each Contracting State “recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them.” GE France agrees that “parties,” as used here, refers to the parties to the arbitration agreement. Petr. Br. 52-53.

Article II(2) then prescribes the form of the required “agreement in writing,” defining it to “include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” Again, GE France agrees that “parties” here refers to the parties to a written arbitration agreement. Petr. Br. 52-53. Under this provision, an arbitration clause is enforceable if it appears in an otherwise valid contract signed by the parties or is exchanged in written communications between the parties. By contrast, an arbitration clause in an otherwise valid *oral* contract plainly could not be enforced under Article II. *See infra* at 21-33 (discussing “minimum form” requirement).

Article II(3) identifies the entities entitled to bring a judicial action to enforce a Convention-governed agreement. This provision states that a court “seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of

one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” NY Conv. art. II(3). Again, GE France agrees that all three uses of “parties” here refer to the parties *to the arbitration agreement*. Petr. Br. 27, 52-53. The first use refers to the parties who “have made an agreement within the meaning of this article,” i.e., an arbitration agreement. NY Conv. art. II(3). The other two uses refer back to the first, stating that “at the request of one of the parties,” the court must “refer the parties to arbitration.” *Id.*<sup>2</sup>

Read as a whole and together with Article II(1) and II(2)—as it must be—Article II(3) can only be understood as authorizing judicial enforcement when one of *the parties to the written agreement* requests enforcement of the agreement. *See Yang*, 876 F.3d at 1001 (“Article II makes clear that arbitration is permissible only where there is ‘an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between *them*’—not disputes

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<sup>2</sup> GE France inexplicably asserts (without citation) that respondents’ certiorari-stage briefing argued that the word “parties” in Article II(3) “refers to parties before the court,” not parties to the arbitration agreement. Petr. Br. 27, 51. Respondents’ brief argued the opposite: “A plain reading of Article II of the Convention shows that its use of the word parties always means parties to the arbitration agreement.” BIO 3; *see id.* at 19-23. The Solicitor General implausibly suggests that Article II(3)’s reference to the “parties” who may seek judicial enforcement might refer to parties *to the court action*, rather than to the parties *to the arbitration agreement*. U.S. Br. 17-19. The textual analyses here and in GE France’s brief demonstrate the Solicitor General’s error.

between a party and a non-party.”); *Concerie Est Partenio SpA - CEP (Italy) v. James Garnar & Sons Ltd. (UK)*, Corte di Appello [Salerno Court of Appeal], Dec. 31, 1990, reported in 1996 Y.B. Comm. Arb., Vol. XXI, at 576, 578-79 (Article II(3) precludes judicial enforcement of contractual arbitration clause by entity not party to contract). As the leading contemporaneous commentator on the Convention explained, “[t]he wording ‘at the request of one of the parties’ makes clear that a party to the arbitration agreement, usually the defendant in the court action, must request referral to arbitration.” New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958; Commentary, art. II, ¶ 270, at 176 (Reinmar Wolff, ed., 2012) (“Wolff”). Nowhere does the Convention authorize enforcement of a written arbitration agreement by an entity *other* than one of the parties to the written agreement. The Convention instead authorizes only parties to the agreement to seek its judicial enforcement.<sup>3</sup>

2. The foregoing analysis of Article II is confirmed by Article IV, which governs enforcement of arbitral awards at the end of the process. Article IV(1)(b) requires the party seeking enforcement of an award to “supply ... [t]he original agreement referred to in article II or a duly certified copy thereof.” In other words, the “party seeking enforcement of an arbitral award under Article IV must supply the court with an ‘agreement in writing’ within the

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<sup>3</sup> The “parties” who may enforce an arbitration agreement include their privities, as courts have consistently recognized. Pet. App. 16a; *see infra* at 38-39, 48.

meaning of Article II.” *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 293 (3d Cir. 2003) (Alito, J., concurring). As then-Judge Alito explained, the “agreement in writing” must be an agreement between the parties to the arbitral award: “To enforce the award granted by the arbitral tribunal, Minmetals was ... required to demonstrate to the District Court that it and Chi Mei had agreed to arbitrate any dispute arising out of the purported nickel contracts and that they had done so by means of either (1) a written contract *signed by both parties* or (2) an exchange of letters or telegrams *between them*.” *Id.* (emphasis added). Article IV thus reinforces the protection Article II secures, ensuring enforcement of arbitral awards only between parties who agreed in writing to arbitrate their disputes. *See Yang*, 876 F.3d at 1001 (citing Article IV as confirming that “only a ‘party’ or ‘parties to the agreement referred to in article II’ may litigate its enforcement”).

3. Article VII provides the final confirmation that Article II(3) permits judicial enforcement only by parties to the written agreement. Article VII(1) provides that the Convention shall not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied on.” This provision is known as the “more favorable laws” or “more favorable rights” clause because it allows parties to an award to seek enforcement on more favorable terms than authorized by the Convention itself, where permitted by domestic law. *See Albert Jan van den Berg, The New York Arbitration Con-*

vention of 1958: Towards a Uniform Judicial Interpretation 81 (1981) (“van den Berg”). But Article VII(1) is expressly limited to arbitral *awards*, and, unlike Article IV, Article VII does not refer back to “the agreement referred to in Article II” or otherwise authorize enforcement of arbitration *agreements* under “more favorable laws.” Neither does any other Convention provision. The glaring absence of such a provision from Article II confirms that it does not authorize courts to subject parties to arbitration on broader terms than those specified in Article II itself. As GE France’s amicus observes (Chamber Br. 13), “a matter not covered is to be treated as not covered.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012).<sup>4</sup>

GE France thus errs in relying on Article VII(1) to establish the premise—essential to its argument—that the Convention does not establish a “ceiling” on the circumstances under which international businesses may be compelled to arbitrate. Petr. Br. 5, 24, 31, 38, 47. GE France says Article VII(1) makes its “no ceiling” principle “explicit” (*id.* at 31), but the opposite is true: Article VII only makes the principle explicit as to *awards*, thereby confirming that Article II creates a ceiling on enforcement of *agreements*. *See also infra* at 21-33 (discussing “minimum form” requirement).

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<sup>4</sup> Contrary to the Solicitor General’s unsupported assertion (U.S. Br. 22), the fact that Article VII(2) abrogated a prior treaty governing arbitration agreements does not establish that the drafters intended to treat enforcement of agreements the same as enforcement of awards. The Convention’s markedly different textual treatment of the two shows the opposite.

4. GE France and its amici's argument rests largely on the word "include" in the official English version of Article II(2), which defines the required "agreement in writing" to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." GE France and its amici insist that "include" is not a limiting term, and thus "agreement in writing" can encompass any legal mechanism a Contracting State may adopt for allowing contracts to be enforced by and against non-parties. Petr. Br. 25-26, 46-47; U.S. Br. 9-10, 19. That argument is incorrect.

To start, this Court and others have long recognized that "include," in context, can be synonymous with "means." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 (1934); see *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (term "includes" in statutory context can denote exhaustive list); *Willheim v. Murchison*, 342 F.2d 33, 42 (2d Cir. 1965) (Friendly, J.) (same). So it is here. The key context is the official Spanish and French texts of the Convention, which use the Spanish and French words for "mean," rather than "include." van den Berg at 179. As GE France's own authority recognizes, the argument that "includes" is non-exhaustive thus is "not supported by the Convention's other official languages." U.N. Comm'n on Int'l Trade L. ("UNCITRAL"), Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/61/17, ¶ 53 n.271 (July 7, 2006) ("UNCITRAL Rec.").

The difference in texts arose after the Convention Conference at its 21st meeting adopted the official

text of Article II, which provided: “The expression ‘agreement in writing’ shall *mean* an arbitration agreement or an arbitral clause in a contract signed by the parties, or an exchange of letters or telegrams between those parties.” E/Conf.26/L.59, at 1 (emphasis added). That draft text was subject to modification by the Drafting Committee only for form, not substance. E/Conf.26/SR.23, at 4, 6-10. And the Drafting Committee changed only the *English* translation of Article II to substitute “include” for the word “mean”—the Spanish and French drafts were left untouched. Wolff, art. II, ¶ 105, at 126-27. This change of a single English word could not have had any substantive effect; otherwise, “the Drafting Committee’s editorial changes would amount to an unintended, and unauthorized, substantive amendment to article II, section 2.” *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999). In context, then, the phrase “shall include” does not entail an open-ended authorization for Contracting States to add their own doctrines to determine who may compel arbitration or be compelled to arbitrate under the Convention.

Further, regardless whether “includes” denotes an exhaustive or non-exhaustive list, the list *at least* defines the required “agreement in writing.” The specified items are a signed contract and exchanged letters or telegrams, and courts over the years have construed “agreement in writing” to include more technologically advanced methods of communication, such as faxes and email. These methods can easily be seen as modern “letters” and thus encompassed by Article II’s “agreement in writing” requirement, if the list is read as providing an exhaustive definition.

But even understood as additions to a non-exhaustive list, these communication methods at least reflect *written agreements to arbitrate*—the absolute minimum requirement for judicially-compelled arbitration under Article II. In other words, no matter what “includes” means specifically, it does not support requiring arbitration between parties who have no agreement in writing to arbitrate their disputes at all.

5. Leading commentators agree that the “agreement in writing” requirement specifies an irreducible “minimum form” that “supersedes national laws purporting to give effect to international arbitration agreements based on lesser form requirements.” Born § 5.02[A][2][e], at 670-71; see Wolff, art. II, ¶ 76, at 115-16; van den Berg at 178-79; Vera van Houtte, *Consent to Arbitration Through Agreement to Printed Contracts: The Continental Experience*, 16 Arb. Int’l 1, 1-6 (2000). In other words, Contracting States cannot enforce laws allowing courts to compel arbitration under the Convention between parties who have not entered into the “minimum form” of an agreement in writing to arbitrate their dispute. Under this principle, “national laws in the context of non-signatory issues should be subject to international limitations, forbidding discriminatory or idiosyncratic rules,” i.e., rules “out-of-step with the treatment of arbitration agreements in most developed jurisdictions.” Born § 10.05[C][3], at 1499.

According to GE France, Born and van den Berg take the opposite view and assert that Article II permits Contracting States to adopt their own “more favorable laws” for compelling parties to arbitrate their disputes under the Convention. Petr. Br. 34-

35, 43. Not quite. What Born and van den Berg argue is that Contracting States may enforce *separate* domestic laws allowing for arbitrations in other circumstances: “[I]f a state chooses to enforce, for example, oral arbitration agreements or unsigned arbitration agreements, it is free to do so—in such cases, however, the Convention will simply not apply and the validity of the arbitration agreement (and any award) will be governed solely by national law.” Born § 5.02[A][2][e], at 673; *see* van den Berg at 86.

That proposition is dubious on its face,<sup>5</sup> but this Court need not consider its merits, because it has no application here: the United States has enacted no separate law, outside of FAA Chapter 2 and the Convention, to govern international arbitration agreements like the agreement in this case. By the FAA’s express terms, Chapter 2 is the exclusive law governing international arbitration agreements. *See supra* at 4-5. To be sure, under 9 U.S.C. § 208, Chapter 1’s rules apply when they do not conflict with the Convention. But as shown above, Chapter 1 does not itself incorporate any common-law rules—it only allows for application of the U.S. *state-law* rules otherwise governing the contract, none of which apply here. *See supra* at 10-13. Further, nothing in Chapter 1 authorizes courts to compel arbitration outside the United States (reflecting Chapter 2’s exclusive domain over international arbitration agreements). Chapter 1 thus could not apply to

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<sup>5</sup> If a Contracting State could force international businesses into arbitration through separate domestic laws under whatever circumstances the State deems appropriate, the protections inherent in the Convention’s “minimum form” of an agreement in writing would be meaningless.

enforce the international arbitration agreement here, which requires arbitration in Düsseldorf, Germany. JA171.

Even if Congress could, consistent with its treaty obligations, enact a separate law governing enforcement of international arbitration agreements outside the Convention's terms, Congress has not done so. Congress instead has directed courts in all international cases to apply the Convention. And under the Convention, an arbitration can proceed only pursuant to the "minimum form" of an agreement in writing between the parties who would be compelled to arbitrate.

### **B. The Convention's Drafting History Confirms Its Plain Text**

The "negotiating and drafting history (*travaux préparatoires*)" of a treaty are meaningful interpretive aids. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996). The Convention's *travaux préparatoires* confirm its drafters' intent to make arbitration agreements enforceable only by the parties whose consent to arbitrate is evidenced by a written agreement to arbitrate disputes between them.

1. *The Drafters Intended To Limit Arbitration Under The Convention To Parties Who Consent In Writing To Arbitrate Disputes Between Them*

The *travaux préparatoires* show the Convention drafters' acceptance of two essential principles: (1) a party's agreement to forgo access to courts in favor of arbitration must be voluntary, and (2) to eliminate doubt, the party's voluntary consent must be evidenced by a written agreement to arbitrate.

An initial draft of the Convention was submitted to world governments and other interested bodies for comment. E/2822, Report, at 1. The responsive comments emphasized the fundamental principle that arbitration must be based on the consent of the parties, expressed in writing, to avoid any doubt about their intent to forgo their rights to judicial resolution of their disputes. Switzerland, in commenting on draft language providing “that the parties must have agreed to settle ‘their’ differences by means of arbitration,” suggested replacing the word “their” with “the,” because “it is obvious that when two or more parties insert an arbitral clause in a contract, that clause can apply only to differences between the parties.” *Id.* at 19. Likewise, addressing a draft article requiring parties to an award to be parties who agreed to arbitrate, Turkey observed that the article “laid down positive conditions which were of fundamental importance and which were easy to verify.” E/Conf.26/SR.11, at 11. And in commenting on the difficulty in resolving the precise form of an agreement in writing, France suggested that it would suffice “to stipulate simply that evidence in writing is required which proves the will of the two parties to settle their differences by means of arbitration.” E/2822, Annex I, at 18; *see id.* at 25 (Republic of Korea) (“recognition and enforcement of a foreign arbitral award shall be accepted only in a case where the parties named in the award have agreed upon in writing either by a special agreement or by an arbitral clause in a contract”); *see also id.*, Annex II, at 15 (Société Belge d’Etudes et d’Expansion); *id.* at 16-17 (Society of Comparative Legislation).

The International Chamber of Commerce's ("ICC") analysis is especially on point. "Since arbitration is always voluntary," the ICC explained, "it must be based on an agreement between the parties, evidence of which must be given so that the enforcement of the award can be granted." E/C.2/373, at 10. And because a properly evidenced agreement "is the basic principle," the ICC colorfully emphasized, "it would seem useless to open the irritating discussion on whether the arbitration agreement should be valid 'under the law applicable thereto.'" *Id.*; see E/2822, Annex II, at 12 (ICC).

The fundamental principle of consent, evidenced by a writing to remove doubt, remained central when the Convention itself convened to work on the draft articles. From the earliest meetings, the Drafting Committee stated that it must be "clearly understood that recourse to arbitration depended on the will of the parties." E/AC.42/SR.3, at 5. While there were differing views over the precise form an arbitration agreement might take, the working parties accepted the baseline requirement that "the parties must have agreed to settle their differences by arbitration." E/Conf.26/SR.11, at 11 (Italy); see E/Conf.26/SR.21, at 5 (Peru) ("The whole process of arbitration was based on voluntary agreement of the parties."). Less clear, however, was how to identify "prima facie proof that the parties had agreed to submit their dispute to arbitration." E/Conf.26/SR.11, at 12 (ICC) (emphasis omitted). The solution was the writing requirement: as the Drafting Committee's Chairman concluded, a main tenet of the treaty would be that the parties subject to the arbitration award must have agreed "validly"

and “in writing” to arbitrate their differences. E/Conf.26/SR.13, at 9.

The *travaux préparatoires* also reflect the rule of consent in the concept of “voluntary submission,” under which arbitration must be a matter of voluntary choice, not mandated by law. E/Conf.26/SR.8, at 5 (U.K.) (addressing propriety of sending parties to permanent arbitral body). This principle was invoked by President Lyndon B. Johnson’s message to the Senate seeking approval of the Convention, which explained that “conference delegates” operated on “the understanding that the arbitration had to be voluntary arbitration, not arbitration imposed by law.” Message from the President of the United States Transmitting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Adopted at New York on June 10, 1958, at 18 (Apr. 24, 1968) (“President’s Message”).

In contrast to this consistent and overwhelming emphasis on the twin principles of voluntary consent to abandoning judicial remedies, and of a written agreement evidencing that consent, the *travaux préparatoires* include no commentary from any nation suggesting that an arbitration agreement should be enforced by or against strangers to the agreement. The consistently expressed theme is the opposite: the Convention should not compel arbitration *except* by and against parties who have agreed in writing to abandon their rights to courts for resolution of their disputes, just as the Convention’s final text provides. See *Maximov v. United States*, 373 U.S. 49, 54 (1963) (“[I]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty ... when, as here, there is no

indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.”).

2. *The Drafters Intended The Requirement Of Consent Evidenced By Writing To Constitute A Mandatory Prerequisite For Compelling A Party To Arbitrate*

In addition to the specific rule of consent evidenced by a written agreement, the Convention’s drafters sought to establish a uniform standard to reflect and enforce that rule. Indeed, a central objective of the Convention was to displace varying local laws giving international businesses uncertainty about the conditions under which they could be compelled to arbitrate.

Governments “submitting their comments on the draft Convention[] stressed the importance of removing existing conflicts of law under which the validity of arbitration agreements is to be put to the test.” E/Conf.26/6, at 10. Likewise, “[n]early all the organizations which submitted their views regarding obstacles to the progress of arbitration” identified “differences in municipal legislation governing ... the validity of arbitration agreements” as “major impediments” to “an increase in the use and effectiveness of international commercial arbitration.” E/Conf.26/4, at 19; *see id.* at 25 (Society of Comparative Legislation “considered that the development of international commercial arbitration presupposes its liberation to the greatest possible extent from the fetters of national legislations so as to better assure enforcement”).

The Convention thus sought to provide international businesses with certainty by establishing a uniform standard for when arbitration could be compelled, overriding idiosyncratic domestic laws mandating arbitration when the Convention itself would not. Members stressed that “[i]n the present state of international relations, it was necessary to adopt common standards for the settlement of commercial disputes.” E/Conf.26/SR.6, at 5 (Guatemala). It was “most important that each signatory State should know exactly what the other States were undertaking to do,” and “[i]t was essential that an absolutely clear criterion, incapable of divergent interpretations, should be established.” *Id.* at 9 (Colombia). The goal “was to draw up a Convention that was clear, unequivocal and easy to put into practice.” *Id.* at 10 (Israel). The “business world” sought “perfectly clear criteria which would make it possible to know for certain and in advance which awards would be recognized and enforced.” *Id.* at 11 (Japan).

Given the uniformity objective, members recognized “that delegations could not expect an international convention to include all the provisions of their national legislations.” E/AC.42/SR.6, at 9 (Belgium). Indeed, the Conference had to be careful to combat “a certain tendency within the Conference to give consideration to the internal laws of various countries and to attempt to adapt the text of the Conference to them.” E/Conf.26/SR.15, at 4 (Ceylon). “Such a method was contrary to the very aim of the Convention, which should be to bring closer together the different national arbitration laws, thereby facilitating the recognition and enforcement of foreign awards.” *Id.* at 4-5. Participating nations acknowl-

edged that “the Convention need not conform to the domestic laws of States, but rather ... those laws should be adapted to the principles laid down in the Convention.” *Id.* at 6 (Turkey). As the leading contemporaneous commentator observed, the uniformity objective of Article II itself established its primacy over conflicting local laws: Article II’s “classification as uniform law ... already implies that form requirements are governed by Article II rather than by any national legislation, regardless of their rationale.” Wolff, art. II, ¶ 76, at 115-16.

The Convention’s members were not seeking uniformity in general, but uniformity particularly with respect to the standards for determining when businesses operating internationally could be compelled to arbitrate. The basic principle, as discussed above, was that arbitration could be mandated only when the party had expressed its consent in a written agreement. The Secretary General found general consensus that enforcement of an arbitral award should be refused “[i]f the parties have not agreed in writing to submit to arbitration the matters dealt with in the award.” E/Conf.26/2, at 8.

Convention members debated, however, whether further details of the “writing” requirement should be specified to reflect the party’s consent. The first effort to identify the standard form of agreement was reflected in a draft Article III(a), “set[ting] out the conditions which *must be fulfilled* if an award is to be enforceable.” E/2822/Add.4, Annex I, at 4 (U.K.) (emphasis added). That first proposed form required only a “writing,” which the U.K. considered “satisfactory evidence of the agreement.” *Id.* at 5; *but cf.* E/2822, Annex I, at 14-15 (Austria) (calling for ex-

pression with greater clarity that oral agreements will not suffice). The Federal Republic of Germany recognized that the initial draft Article III(a) was an attempt “to settle the question of the validity of an arbitral agreement,” but it objected that the draft had not “dealt explicitly with the form of the arbitration agreement.” E/Conf.26/SR.12, at 4. Germany reiterated the objection to a later draft, observing that while “[o]bviously there could be no recognition of a purely verbal agreement,” a definition of the phrase “in writing” would be a “very desirable improvement,” to establish more clearly what enforceable form would be required. E/Conf.26/SR.9, at 3.

Subsequent proposed amendments from Israel, Sweden, the U.K., and the Netherlands accepted the baseline requirement that any arbitral award could only be between parties to a written agreement reflecting their consent to arbitrate. *See* E/Conf.26/L.8 (Sweden); E/Conf.26/L.17 (Netherlands); E/Conf.26/L.18 (Israel); E/Conf.26/L.22 (U.K.).<sup>6</sup> And Convention members continued to address the validity of arbitration agreements in terms of common mandatory standards. Israel framed the issue as a determination of “whether the arbitration agreement had to be in writing.” E/Conf.26/SR.9, at 5. Bulgaria and Czechoslovakia likewise agreed with Turkey and Japan that “an agreement to submit a difference to

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<sup>6</sup> As the predecessor drafts concerning recognition and enforcement of arbitration agreements came into better focus, members of the Drafting Committee noted the overlap between Article III(a) and the suggested drafts on the validity of arbitration clauses. E/Conf.26/SR.9, at 3 (Belgium); *id.* at 6 (India). The draft Article III(a) was ultimately deleted given the overlap.

arbitration must be in writing.” E/Conf.26/SR.14, at 9 (Bulgaria); *see* E/Conf.26/SR.12, at 6 (Czechoslovakia). And when drafters tasked Sweden with drafting a provision addressing the validity of arbitration agreements, they requested a proposal that would clarify “what exactly was meant by submission to arbitration.” E/AC.42/SR.4, at 3 (U.K.).

The Convention drafters thus explicitly recognized that they were establishing mandatory uniform requirements, including the essential rule that a party’s consent to arbitrate *had* to be memorialized in a written agreement, as the Convention defined it.<sup>7</sup> Indeed, this feature of the Convention was affirmatively criticized by Turkey, E/Conf.26/SR.13, at 9, which complained that “the apparent aim” of an early proposal regarding recognition and enforcement of arbitration agreements was “to establish a uniform law,” E/Conf.26/SR.9, at 4. And when final proposals were being debated, Turkey objected to the draft Article II because “it was concerned with the unification of private law and, therefore, with the elimination of municipal law provisions relating to arbitration agreements and arbitral clauses.” E/Conf.26/SR.21, at 19-20; *see* E/Conf.26/SR.24, at 12 (Guatemala) (remarking on Conference’s final day that Guatemala voted against Article II because it “contained a provision on the validity of arbitra[tion]

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<sup>7</sup> The Drafting Committee’s 21st meeting further confirms this point. In that meeting, Belgium moved to delete the paragraph that included the definition of an “agreement in writing.” E/Conf.26/SR.21, at 21. France objected, warning that the deletion would permit countries to give overly broad meanings to the type of “agreement in writing” acceptable under the Convention. *Id.* The Committee rejected Belgium’s motion. *Id.*

agreements”).

These objections confirm the understanding among Contracting States that, like it or not, Article II would displace conflicting domestic laws forcing parties to arbitrate when the Convention would not allow it. Notably, Convention drafters did not respond to these objections either by reassuring the complainants that they were misunderstanding the scope of the draft Article II or by amending the draft language to assure the primacy of conflicting domestic laws. To the contrary, they left Article II as it was: a provision establishing a uniform rule ensuring that international businesses would not be forced into arbitrations against their will based on the vagaries of local laws.

GE France seeks to undermine the significance of Article II’s text and history—especially the omission of a “more favorable laws” provision comparable to Article VII’s—by asserting that Article II was hastily thrown together in the waning moments of the roughly three-week-long Convention. Petr. Br. 9, 53. The assertion is incorrect. First, by GE France’s own account of the timing, almost 25 percent of the Convention’s work period was devoted to Article II, just one of the Convention’s 16 articles. *Id.* at 8-10. Second, the drafters did not relegate this issue to the end of the proceedings. Articles establishing standards for enforcing arbitration agreements were proposed by Poland and Sweden during the Conference’s earliest days (*see* E/Conf.26/7 (dated May 21, 1958) (Poland); E/Conf.26/L.8 (dated May 22, 1958) (Sweden)); additional discussion occurred throughout the Conference (*e.g.*, E/Conf.26/SR.9); and Article II’s paragraphs were adopted by June 5 (*see*

E/Conf.26/SR.21) and available for consideration in conjunction with the other articles—including Article VII—in the remaining days before finalizing the treaty text. Participants had sufficient time to amend other articles to account for Article II, even after adopting Article VII. NY Conv. arts. IV(1)(b), V(1)(a). GE France cites no contemporaneous evidence that Convention participants lacked the time or the attention spans to write Article II the way they wanted.

All available evidence shows otherwise: the Convention’s drafters did not include a “more favorable laws” clause in Article II because they did not want domestic laws to control the circumstances under which international businesses can be forced to forgo judicial remedies. As shown above, the entire point of Article II was to *override* varying local laws creating uncertainties about arbitration and to impose a uniform standard requiring parties to arbitrate only when they agreed in writing to arbitrate disputes between them.

### **C. Contemporaneous Views Of The Political Branches Confirm The Text**

The Solicitor General in this case has advanced an interpretation of the Convention at odds with its text and history. It is not an interpretation that the Executive Branch has “unfailingly adhered to” over the years. *Medellin v. Texas*, 552 U.S. 491, 513 (2008). To the contrary, the Executive Branch expressed the opposite—and correct—view at the time of the Convention’s adoption. A report from the Attorney General submitted by the President to the Senate explained the Convention and urged its rati-

fication: “The convention, of course, applies only to arbitral awards in cases where the persons concerned have voluntarily accepted arbitration. Article II specifically requires a written agreement under which the parties have undertaken to submit differences to arbitration.” President’s Message, at 4. State Department officials testified to Congress that the Convention “applies only when parties to a dispute have agreed in writing to submit to arbitration any or all differences arising out of their legal relationship,” further explaining that “nothing in the convention ... imposes any burden on an individual which he had not voluntarily agreed to assume.” S. Exec. Rep. No. 90-10, at 3 (1968) (statement of Richard D. Kearney, Amb., Off. of Legal Adviser; accompanied by Robert Dalton, Dept. of State).

The Senate Report of the Congress that ratified the Convention expressed the same views. *See United States v. Stuart*, 489 U.S. 353, 366-68 (1989) (considering report relied on by Senate in ratifying treaty). The Report acknowledged that certain provisions of the Convention “were in conflict with some of our domestic laws.” S. Exec. Rep. No. 90-10, at 1. The Report then explained that the Convention “applies only in those cases where the persons involved have voluntarily accepted arbitration,” and, to this end, “specifically requires a written agreement under which *the parties* undertake to submit *their differences* to arbitration.” *Id.* (emphasis added).

The contemporaneously expressed views of the Executive and Legislative Branches cannot be reconciled with the Solicitor General’s current position that the Convention authorizes arbitration even where, as here, the parties have *not* entered a writ-

ten agreement to submit their differences to arbitration. This Court has not hesitated to reject the Executive’s interpretation of a treaty in litigation when that view was contrary to the treaty’s text or to the political branches’ previous understanding. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 136 (1989) (Brennan, J., concurring in judgment) (observing that Court was rejecting view of Warsaw Convention consistently adopted by Executive Branch and pressed by United States in that case); *Perkins v. Elg*, 307 U.S. 325, 328, 337-49 (1939); *Johnson v. Browne*, 205 U.S. 309, 318-21 (1907); *De Lima v. Bidwell*, 182 U.S. 1, 181, 194-99 (1901).

#### **D. The Post Hoc UNCITRAL Recommendation Provides Little Guidance**

GE France and its amici rely heavily on a 2006 UNCITRAL Recommendation for their interpretation of the Convention. Petr. Br. 5-6, 26, 33-34; U.S. Br. 19-22, 29. But UNCITRAL—which did not exist when the Convention was adopted—had nothing to do with its drafting. And Congress has never implemented the UNCITRAL Recommendation. *See Yang*, 876 F.3d at 1001. For these reasons, it “is nothing like the kind of evidence [courts] have found persuasive” in construing a treaty’s language. *Id.*

Even on its own terms, the UNCITRAL Recommendation provides little guidance. To start, the Recommendation acknowledges that Article II imposes “form requirements,” UNCITRAL Rec., at 1, thereby refuting GE France and the Solicitor General’s suggestion that Article II imposes no mandatory standards that override conflicting domestic laws. Further, the Recommendation proposes relaxing the

form requirements, but it does not address—and cannot override—Article II’s textual requirement of consent to arbitrate evidenced by a written agreement between those who would be sent to arbitration. Finally, the Recommendation proposes to extend Article VII’s “more favorable laws” clause to Article II, but it provides no text or drafting history supporting that extension. *See id.* at 1-2. If anything, UNCITRAL’s proposal to read a “missing” clause into Article II is a tacit admission that Article II, *as written*, precludes the application of domestic laws that would force a party to arbitrate even absent a written agreement with the other party to submit their differences to arbitration.<sup>8</sup>

### **III. THE EQUITABLE ESTOPPEL DOCTRINE INVOKED BY GE FRANCE IS UNRECOGNIZED IN OTHER NATIONS AND CONTRAVENES THE CONVENTION’S REQUIREMENT OF CONSENT EXPRESSED IN A WRITTEN AGREEMENT BETWEEN THE PARTIES**

#### **A. Other Nations Adhere To The Convention’s Consent And Written Agreement Requirements**

Decisions from foreign nations applying the Convention generally do not allow arbitration to be com-

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<sup>8</sup> The Restatement of the U.S. Law of International Commercial and Investor-State Arbitration (2019) (“Restatement”) also urges reading a “more favorable laws” clause into Article II (U.S. Br. 20), but it provides no better rationale for doing so than the UNCITRAL Recommendation. Further, the Restatement is a synthesis of *U.S. law*, as GE France’s academic amici recognize. Bermann Br. 1, 7, 15, 39-40.

pelled by or against entities who are not legally deemed parties to a written arbitration agreement. These decisions often arise at the end of the arbitration process, when a prevailing party seeks enforcement of an award, which is refused on the ground that the non-prevailing party was improperly subjected to arbitration against its will. *See, e.g., IMC Aviation Sols. Pty. Ltd. v. Altain Khuder LLC AS*, [Supreme Court of Victoria Court of Appeal], Aug. 22, 2011, S APCI 2011 0017 (refusing to enforce award against entity not party to agreement); *Javor v. Francoeur*, [British Columbia Supreme Court], Mar. 6, 2003, 2003 BCSC 350, ¶ 17 (refusing to enforce U.S. arbitration award against individual respondent who was “not a named party to the arbitration agreement”); *Dallah Real Estate & Tourism Holding Co. v Ministry of Religious Aff., Gov’t of Pak.*, [U.K. Supreme Court], Nov. 3, 2010, 2010 UKSC 46 (refusing to enforce award against entity joined to arbitration under “group of companies” doctrine); *Peterson Farms Inc. v. C&M Farming Ltd.*, [English High Court], Feb. 4, 2004, EWHC 121, ¶ 62 (refusing to enforce award against parent of Arkansas poultry farmer under “group of companies” doctrine that “forms no part of English law”); *Husmann (Eur.) Ltd. v. Al Ameen Dev. & Trade Co.*, [English High Court], Apr. 19, 2000, EWHC 210, ¶¶ 13, 15, 17, 20 (refusing to enforce award against assignee of party to arbitration agreement where assignment was ineffective under Saudi Arabian law governing agreement); *Glencore Grain Ltd. (UK) v. Sociedad Ibérica de Molturación, S.A. (Spain)*, Tribunal Supremo [Spanish Supreme Court], Jan. 14, 2003, 16508/2003, reported in 2005 Y.B. Comm. Arb., Vol. XXX, at 605-09 (refusing enforcement of award

against corporate affiliate of party to arbitration agreement); *Judgement of 19 Aug. 2008*, [First Civil Law Division of Swiss Federal Tribunal], Aug. 19, 2008, 4A\_128/2008, ¶ 4.1.2 (refusing to enforce award against non-party under “group of companies” doctrine; observing that “Swiss law sets some strict requirements as to the extension of an arbitration agreement to a third party not mentioned there”).

To be sure, foreign nations sometimes do allow enforcement of arbitration agreements by and against entities who did not themselves actually sign an agreement, but nevertheless are legally deemed to be parties to the agreement, under such familiar legal doctrines as agency, assignment, succession, and alter ego. See Born §§ 5.02[A][9], 10.02[A]-[P], at 713, 1418-84; van den Berg at 222-26; see also *The “Titan Unity”*, [High Court of the Republic of Singapore], Feb. 4, 2014, [2014] SGHCR 4, ¶¶ 24-45. These are privity-based doctrines consistent with the Convention’s consent principle—they determine who qualifies as a consenting party to a written agreement in the first place. See Born § 10.01[A]-[B], at 1406-12. Indeed, Outokumpu itself did not literally sign the arbitration agreement here, but became party to the agreement by consensually succeeding to the obligations of ThyssenKrupp. See *supra* at 5. Similarly, in an assumption, the non-party directly elects to assume the contract and thereby formally becomes party to it. And in a veil-piercing or alter ego situation, the non-party is deemed to be the party itself, based on its derogation of corporate separation formalities.

None of those privity-based doctrines is at issue here, and no question about their scope and limits is

presented. This case instead involves a distinct doctrine broadly referred to as “estoppel,” which stands on a different footing from privity-based doctrines.

As a general matter, estoppel “is uniquely an Anglo-American concept” that “is rarely applied in the arbitration context in Continental Europe.” James J. Sentner Jr., *Who is Bound by Arbitration Agreements? Enforcement by and Against Non-Signatories*, 6 Bus. L. Int’l 55, 65 (2005); see Rafael T. Boza, *Caveat Arbitrator: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories. Has Peru Gone Too Far?*, 17 Currents: Int’l Trade L.J. 65, 76 (2009) (“estoppel” is a “very controversial theor[y]” that “is rarely applied and mostly obscure in civil law jurisdictions”). GE France’s amici agree. Bermann Br. 23 (“Civil law countries do not generally recognize the common law doctrine of estoppel as such.”); Chamber Br. 28 (“continental courts typically do not apply a doctrine denominated estoppel”). As the Hong Kong Court of Final Appeal has explained: “Estoppel ... does not lie comfortably in the context of enforcing a Convention award. It is not a legal concept of universal currency among the contracting states to the New York Convention.” *Hebei Imp. & Exp. Corp. v Polytek Eng’g Co.*, [Hong Kong Court of Final Appeal], Feb. 9, 1999, FACV10/1998, slip op. ¶ 17; see *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50-53 (2d Cir. 2004); Irina Tymczyszyn, et al., *Joining Non-Signatories To An Arbitration*, Practical Law Arbitration (Aug. 6, 2014).

Civil-law nations do recognize a somewhat analogous doctrine known as *venire contra factum proprium*, see Born § 10.02[K], at 1473, 1476-77, which

means “no one is allowed to negate, or to go against—*venire contra*—the consequences of his own acts—*factum prop[r]ijum*,” Saúl Litvinoff, *Damages, Mitigation, and Good Faith*, 73 Tul. L. Rev. 1161, 1164-65 (Mar. 1999). Citing international cases applying versions of this doctrine—also known as the prohibition against inconsistent or contradictory acts—GE France and the Solicitor General simply assume the doctrine is the functional equivalent of common-law “estoppel.” Petr. Br. 26-27; U.S. Br. 41-42. It is not. See William W. Park, *Non-Signatories and International Contracts: An Arbitrator’s Dilemma*, in *Multiple Parties in International Arbitration* 14 (2009) (“Caution must be exercised in connection with estoppel, given the term’s promiscuous and sometimes confusing application.”). The foreign cases cited by GE France and its amici instead apply a principle analogous only to a *narrow* form of *traditional* estoppel that differs fundamentally from the idiosyncratic form of estoppel GE France invokes here.

Traditional estoppel historically has applied in the United States where one person “induced another ... to act in a certain way, with the result that the other person has been injured in some way.” Estoppel, Black’s Law Dictionary (11th ed. 2019). For traditional estoppel, “the same key elements are always required: a false statement, misleading action or material omission by a party to be estopped (wrongful act), and a change in position by the party seeking estoppel based on believing the false statement or wrongful act to be true (detrimental reliance).” Public Citizen Br. 7. Several U.S. cases cited by GE France reflect this narrow estoppel principle. See,

*e.g.*, *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-34 (1959); *McNeely v. Walters*, 211 N.C. 112, 115 (1937).

In the arbitration context, traditional estoppel applies when a person participates in an arbitration or takes similar actions manifesting an intent to arbitrate against another even absent contractual agreement to do so, and the other relies on those actions—in that situation, the first party may be estopped from later resisting the arbitration. *See, e.g.*, *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000) (participating party cannot “await the outcome and then later argue that the arbitrator lacked authority to decide the matter”). Traditional estoppel depends on acts manifesting actual consent to arbitrate, which become legally binding when relied upon by another party. *See Hirsch v. Amper Fin. Servs., LLC*, 71 A.3d 849, 860 (N.J. 2013) (“Reliance is critical when a party seeks to compel arbitration using [the equitable estoppel] doctrine. It underlies the rationale for applying equitable estoppel in the first place, namely ... to prevent a party’s disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience.” (quotation marks and brackets omitted)). In this respect, traditional estoppel in the arbitration context at least shares the essential feature of consent that is central to the Convention. *See Born* § 10.02[C], at 1430 (“A classic example of such consent is where a non-signatory party affirmatively invokes an arbitration clause or fails to object when another party invokes the clause against it (with this factual scenario often also being considered under principles of estoppel).” (footnotes omitted)).

The doctrine of *venire contra factum proprium* and similar foreign doctrines operate the same way as traditional estoppel. See *Sanders v. United Distribs., Inc.*, 405 So. 2d 536, 537-38 & n.2 (La. App. 1981) (*contra factum proprium* similar to traditional estoppel because both require misrepresentation and detrimental reliance); Shael Herman, *Detrimental Reliance in Louisiana Law—Past, Present, and Future(?)*: *The Code Drafter’s Perspective*, 58 Tul. L. Rev. 707, 714 (Jan. 1984) (similar). Several international cases recognize that a party who willingly participated in arbitration cannot later object to the proceeding. See *K Trading Co. (Syria) v. Bayerisches Motoren Werke AG (Germany)*, Bayerisches Oberstes Landesgericht [Higher Court of Appeal of Bavaria], Sept. 23, 2004, 4Z Sch 005-04, reported in 2005 Y.B. Comm. Arb., Vol. XXX, at 568-73 (“Where, in violation of good faith, the formal invalidity of the arbitration agreement is raised [by a party who has] participated in the arbitration without raising any objection, this objection is not to be examined.”); *Furness Withy (Australia) Pty Ltd v. Metal Distribs. (UK) Ltd.*, [English Court of Appeals], Nov. 10, 1989, 1990 WL 754806 (party cannot participate in arbitration then later object to arbitration); *China Nanhai Oil Joint Serv. Corp. Shenzhen Branch v. Gee Tai Holdings Co.*, [Supreme Court of Hong Kong], July 13, 1994, HCMP 2411/1992, reported in Int’l Arb.: Issues, Perspectives & Prac., at 325 (2018) (party’s “obvious policy of keeping this point up its sleeve to be pulled out only if the arbitration was lost, is not one that I find consistent with the obligation of good faith nor with any notions of justice and fair play”); *Titan Unity*, [2014] SGHCR 4, ¶ 35 (similar).

A German case cited by GE France’s amici is to the same effect. *See Werner Schneider as liquidator of Walter Bau A.G. v. Kingdom of Thailand*, Kammergerichtshof [BerKGZ] [Higher Regional Court of Berlin], June 4, 2012, 20 Sch 10/11. In that case, the Higher Regional Court of Berlin applied the “prohibition of contradictory behavior” to hold that the defendant, who had fully participated in the arbitration proceeding, could not later challenge the jurisdiction of the arbitration panel in a German court. *Id.*, slip op. ¶ 78. That holding is indistinguishable from traditional estoppel: the defendant’s willing participation in arbitration manifested its consent and induced the other party to expect that arbitration would resolve their differences.

Another case cited by GE France, *Titan Unity*, also applies a traditional estoppel principle. The issue in *Titan Unity* was whether shipowner Singapore Tankers should be joined to an arbitration being held pursuant to a contract between Portigon, a separate entity, and Oceanic, the demise charterer of Singapore Tankers’ ship. [2014] SGHCR 4, ¶¶ 2, 11. The court began by emphasizing the basic rule of explicit consent reflected in the Convention: “The terms of any arbitration reference must ultimately lie within the limits described by the arbitration agreement, save to the extent that it might be extended with the explicit consent of all the parties.” *Id.* ¶ 20. The court warned that deviating from that rule jeopardizes the benefits of arbitration because “the resulting arbitral award could be refused recognition and enforcement for having dealt with a dispute not contemplated within the terms of the submissions to arbitration.” *Id.* ¶ 23. A non-party can

be joined to an arbitration, the court observed, *only* where it is legally deemed “to be a contracting party to the arbitration agreement” (through assumption, alter ego, or agency), or the parties “have consented to extend the agreement” and the non-party “clearly and unequivocally” shows its “objective intention” to arbitrate disputes with the parties. *Id.* ¶¶ 24-25, 35.

Applying that principle, the court concluded that Singapore Tankers had expressed its consent to arbitrate with Portigon because it invoked and sought to enforce the arbitration agreement in response to Portigon’s claims against Singapore Tankers. *Id.* ¶ 36. Portigon likewise consented to arbitrate with Singapore Tankers because its claims against Oceanic asserted that Singapore Tankers was Oceanic’s alter ego and the true adverse party. *Id.* ¶ 37.

*Titan Unity* is thus consistent with traditional estoppel. If anything, the decision underscores the Convention’s foundational principle that a party cannot be compelled to arbitrate a dispute with another party unless it explicitly demonstrates its consent to arbitrate that dispute. As discussed below, the idiosyncratic version of estoppel invoked by GE France is *not* premised on consent to arbitrate, but on vague, malleable principles of equity foreign to the Convention.

### **B. The Equitable Estoppel Theory Invoked By GE France Reflects Neither Privity Nor Consent**

The equitable estoppel theory invoked by GE France differs fundamentally from traditional estoppel and the other consent-based doctrines. “[R]ather than posit consent,” this doctrine forces *non-*

consenting persons to arbitrate when a court thinks doing so would avoid “irrational or unfair” outcomes. Restatement § 2.3 cmt. a. As GE France puts it, this doctrine rests not on consent, but “notions of fairness.” Petr. Br. 4; *see Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (arbitration estoppel based on “equity” and “fairness”); Bermann Br. 2, 6, 13, 34 (distinguishing between “implied consent,” which involves actual but not explicit consent, and “imputed consent,” which involves no consent at all).

This non-consent-based estoppel doctrine actually has three different versions, each of which U.S. courts have applied to compel arbitration despite a lack of consent. *See generally* 1 Domke on Commercial Arbitration §§ 13:1-13:2, 13:9-13:13, at 13-2-13-15, 13-34-13-42 (3d ed. June 2019 update) (“Domke”); Michael A. Rosenhouse, *Annotation, Application of Equitable Estoppel to Compel Arbitration by or Against Nonsignatory—State Cases*, 22 A.L.R.6th 387 § 2 (2007). In the specific version invoked by GE France, U.S. courts have allowed a non-party to force arbitration with a signatory who never consented to arbitrate with the non-party, when the issues in their dispute “are intertwined with the contract providing for arbitration.” Domke § 13:2, at 13-10; *see, e.g., Grigson*, 210 F.3d at 528; *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988). A related theory allows a non-party to force arbitration even of claims wholly unconnected to the agreement, so long as the party to the agreement alleges “substantially interdependent and concerted misconduct” between the non-party and the other party to the agreement. *MS*

*Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); see Christopher Driskill, *A Dangerous Doctrine: The Case Against Using Concerted-Misconduct Estoppel To Compel Arbitration*, 60 Ala. L. Rev. 443, 453 (2009).

Unlike traditional estoppel, these two non-consent-based estoppel theories do not require detrimental reliance on acts manifesting consent to arbitrate. See *Hirsch*, 71 A.3d at 859-62. Indeed, they involve no form of consent to arbitrate with the non-party. To the contrary, compelling “arbitration of non-signatory claims—even those ‘inextricably intertwined’ with signatory claims—is *inconsistent* with the overarching rule that arbitration is ultimately a matter of agreement between the parties.” *Springfield Iron & Metal, LLC v. Westfall*, 349 S.W.3d 487, 490-91 (Mo. Ct. App. 2011) (emphasis added); see *Grigson*, 210 F.3d at 533 (Dennis, J., dissenting); see also Born § 10.01[E], at 1416 (“Arbitration is a matter of consent ... to arbitrate particular disputes with particular counter-parties, not consent to arbitrate generally or with the entire world.”)

The remaining theory runs in the other direction, allowing a party to a contract with an arbitration clause to force an unwilling non-party to arbitrate, where the non-party asserts “claims to enforce rights or obtain benefits that depend on [the] existence of [the] contract.” Domke § 13:1, at 13-8. This so-called “direct benefits” estoppel theory, too, operates absent consent to the arbitration agreement—the whole point is to force a non-party who received a contract’s benefits to arbitrate contract-related disputes, even though the non-party by definition never agreed to forgo its right to judicial adjudication of

such disputes. See *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 342-44 (11th Cir. 1984). This theory confuses “substantive rights to make a claim on the underlying contract” with an “intention to be bound by the imbedded arbitration agreement.” James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 Pepp. Disp. Resol. L.J. 469, 585 (2004). Indeed, the non-party's lack of consent is irrelevant—what matters is whether forcing it to arbitrate “would accomplish the purposes for which the parties designed their arbitration agreement.” Restatement § 2.3.

GE France and its amici do not cite any foreign cases applying these non-consent-based estoppel theories to compel a business to arbitrate a dispute with another business that it did not expressly agree to arbitrate. See Hosking, 4 Pepp. Disp. Resol. L.J. at 530 (non-consent-based estoppel is unique to United States, and “threatens to undermine ‘consent’ as the keystone of arbitration”); Bernard Hanotiau, *Non-Signatories, Groups of Companies and Groups of Contracts: Do We Share a Common Approach?*, *Liber Amicorum* 186 (2019) (doctrines of intertwined-claims “equitable estoppel” and “direct benefit estoppel” are “limited to the United States”).<sup>9</sup>

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<sup>9</sup> Non-consent-based estoppel theories are arguably inconsistent with the international-law doctrine of “separability,” under which a contract's arbitration clause is presumed to be a separate agreement independent of the substantive provisions

They cite a handful of cases acknowledging or applying *traditional* estoppel, but as discussed above, those cases at least involve concrete acts clearly and unequivocally expressing the party's actual consent to submit a particular dispute to arbitration. GE France also cites two civil-law cases applying doctrines more analogous to consent-based privity doctrines, rather than to the non-consent-based estoppel theories GE France seeks to read into the Convention here.<sup>10</sup> To the extent these cases are fairly read

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of the contract in which it appears. Born §§ 3.01-3.03, at 349-471. Under that doctrine, “the decisive question is whether a non-signatory is bound by the arbitration agreement, not by the underlying contract.” *Id.* § 10.01[D], at 1413. Accordingly, benefits or claims related to the underlying contract should not create rights or obligations under a separate and independent arbitration clause.

<sup>10</sup> In *Bundesgericht*, [BGer] [Federal Supreme Court], Apr. 17, 2019, 4A\_646/2018, the Swiss high court examined the situation of a third party that “enmeshed” itself in the performance of a contract with an arbitration clause, where the “third party” was also part of the same “group of companies” as the contract signatory. *See id.*, slip op. ¶¶ A.a, A.c, 2.4. Under those circumstances, where the third party was operating in close connection with its own affiliates, the court held that the third party could be subjected to the arbitration clause in its affiliates' contract, similar to an agency relationship.

In *Alcatel Business Systems v. Amkor Technologies*, Cour de Cassation [Court of Cassation], Mar. 27, 2007, 04-20.842, in Fr. Int'l Arb. L. Reps., 1963-2007, at 531-38 (2014), a French court chiefly relied on a doctrine akin to assumption. The court held that a subcontractor could invoke an arbitration clause in the general contract, because an “arbitration agreement is automatically transmitted as an accessory to the right of action” in a “chain of contracts that transfer ownership” of a product. *Id.* at 536. That “ground alone” sufficed to justify the decision. *Id.* at 537. The court's further statement concerning application of an arbitration agreement to “parties that were directly involved

as applying a form of non-consent-based estoppel, they are outliers. They certainly do not demonstrate a consensus among international decisions that such doctrines properly apply to cases arising under the Convention.

### **C. GE France’s Position Would Frustrate The Policies Of The Convention And FAA Chapter 2**

In addition to conflicting with the text and history of the Convention and with international norms applied in cases under the Convention, applying the idiosyncratic, non-consent-based estoppel theory GE France invokes would contravene the Convention’s basic policies.

*First*, one purpose of the Convention is to encourage consensual arbitration,<sup>11</sup> yet by expanding a party’s arbitration obligations beyond the scope of the consent expressed in its written arbitration agreement, GE France’s position would undermine incentives to enter such agreements in the first place. “Ultimately, any blow against the requirement for each party’s consent as the foundation for arbitration might ... deter parties from choosing arbitration.” Stephan Wilske, et al., *The “Group of Companies Doctrine”—Where Is It Heading?*, 17 Am. Rev. Int’l Arb. 73, 87 (2006) (footnote omitted); see Mi-

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in the performance of the contract” was unnecessary, and an outlier in civil-law jurisprudence (the court notably cited no authority for the dictum). *Id.* at 538.

<sup>11</sup> GE France largely ignores the “consensual” element, as if any rule that maximizes the amount of arbitration, even absent consent of the parties, is consistent with the Convention’s “pro-arbitration” policies. It is not.

chael P. Daly, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. Miami L. Rev. 95, 122 (2007) (“Because arbitration is based on a contractual agreement, each party usually consents to use arbitration as a dispute-resolution mechanism before the dispute arises. Thus, extending arbitration agreements to include nonsignatories may weaken or even destroy this important foundation of the arbitration process.” (footnote omitted)).

*Second*, and relatedly, forcing parties to arbitrate against their will under controversial domestic-law doctrines creates costly uncertainty about whether awards will be enforced, further undermining the “predictability” that is “[o]ne of the attractive aspects of international commercial agreements.” Tae Courtney, *Binding Non-Signatories to International Arbitration Agreements: Raising Fundamental Concerns in the United States and Abroad*, 8 Rich. J. Global L. & Bus. 581, 593-94 (2009). Absent predictability, “parties will be more hesitant to enter into these types of agreements in the future.” *Id.* at 594.

Recent experience with the “group of companies” doctrine illustrates how forcing parties to arbitrate against their will under controversial domestic-law rules creates uncertainty about whether awards will be enforced. GE France invokes the group of companies doctrine favorably, lumping it in with other privity-based doctrines such as agency and alter ego. Petr. Br. 40.<sup>12</sup> But unlike those widely-recognized

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<sup>12</sup> The group of companies doctrine is sometimes described as akin to estoppel, rather than privity-based. *See Peterson*

and easily applied doctrines, experience with the group of companies doctrine under the Convention shows why courts should *not* apply idiosyncratic local doctrines to force unwilling businesses into international arbitration.

The group of companies doctrine expands principles of agency and corporate separateness beyond their generally recognized boundaries, forcing “subsidiary companies to one group of companies” to be bound to an arbitration agreement signed by an affiliate. *Sarhank*, 404 F.3d at 662. The Second Circuit’s decision in *Sarhank* illustrates why the doctrine obstructs the resolution of international disputes through arbitration. Faced with an arbitral award issued in Egypt against an unconsenting American business based solely on “the signature of its wholly owned subsidiary,” the Second Circuit refused to enforce the award, holding that an “American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law.” *Id.* (quotation marks omitted). English courts have also refused to enforce awards against non-consenting parties based on the group of companies doctrine because it “forms no part of English law.” *Peterson Farms*, EWHC 121, ¶ 62; see *Dallah*, 2010 UKSC 46; *Judgement of 19*

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*Farms*, EWHC 121, ¶ 55; Sentner, 6 Bus. L. Int’l at 65-66. Either way, the doctrine is not only unfamiliar to common-law jurisdictions, it is contrary to corporate-separateness principles fundamental to common-law jurisprudence. See *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005).

*Aug. 2008*, 4A\_128/2008, ¶ 4.1.2.<sup>13</sup>

There is no reason to expect a different fate if U.S. courts apply idiosyncratic estoppel doctrines to subject commercial enterprises to international arbitrations against their will. Courts in other countries whose laws—like the Convention itself—demand written consent to relinquish judicial remedies may decline to enforce equitable-estoppel-based awards, undermining incentives for parties to engage the process in the first place.

*Third*, adopting GE France’s position would undermine the uniformity objective so critical to the Convention’s drafters. *See supra* at 27-33; *see also Hebei*, FACV10/1998, slip op. ¶ 28 (“When a number of States enter into a treaty to enforce each other’s arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or when later incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.”). To be sure, the drafters expected

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<sup>13</sup> GE France’s amici try to defend the group of companies doctrine on the ground that Peru adopted it in a 2008 arbitration statute. Bermann Br. 24 n.9. Peru’s statute, however, was criticized precisely *because* it adopted “a hybrid group of companies theory, which has only been accepted in a handful of jurisdictions and rejected in many others.” Boza, 17 Int’l Trade L.J. at 76. The statute also adopted a version of so-called “direct benefits estoppel,” which likewise was condemned as “rarely applied and mostly obscure in civil law jurisdictions.” *Id.*

differences in the procedures for *enforcing awards*, as shown by the “more favorable laws” provision they wrote into Article VII. But they plainly expected uniformity in the standards for subjecting international businesses to arbitration in the first place, as shown in part by the omission of a “more favorable laws” provision from Article II. *See supra* at 17-18.

The Convention’s drafters sought to encourage arbitration by ensuring that international businesses would be governed by a common set of rules concerning when they would be subject to arbitration, and when they would not be. Allowing courts to force unwilling parties into arbitration based entirely on domestic-law preferences ensures differential treatment among similar businesses and disparate outcomes among similar business disputes. The Convention was written specifically to avoid that result.

#### **IV. THE ARBITRATION AGREEMENT IS GOVERNED BY GERMAN LAW, WHICH DOES NOT RECOGNIZE NON-CONSENT-BASED ESTOPPEL**

The Convention bars enforcement of international arbitration agreements by and against non-parties absent consent expressed in a written agreement. *See supra* Parts II & III. The Court need not reach that issue now, however, because no matter what result is dictated by the Convention, the estoppel doctrine GE France invokes is barred by German law, which governs the arbitration agreement. BIO 15-16; *cf.* U.S. Br. 34-35 (law governing arbitration agreement determines applicability of estoppel).

### A. German Law Governs Disputes Concerning The Arbitration Agreement

The FAA does “not confer a right to compel arbitration of any dispute at any time.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). The FAA instead “confers only the right to obtain an order directing that arbitration proceed *in the manner provided for in the parties’ agreement.*” *Id.* at 474-75 (quotation marks and brackets omitted); see 9 U.S.C. § 206. It is thus “the language of the contract” that “defines the scope of disputes subject to arbitration.” *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Parties likewise have “considerable latitude to choose what law governs” their agreement to arbitrate. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). And that choice must be given “full effect.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972).

The arbitration agreement here provides that “[a]ll disputes arising between both parties in connection with” the agreement shall be arbitrated “in Düsseldorf, Germany,” and that “[t]he substantive law of Federal Republic of Germany shall apply.” JA171. Under Article V of the Convention, a court reviews the validity of an award “under the law to which” the “parties to the agreement referred to in article II ... have subjected it or, failing any indication thereon, under the law of the country where the award was made.” NY Conv. art. V(1)(a). In other words, to decide whether an *award* is valid, the court must apply the law chosen to govern the arbitral agreement, if such a choice is expressed. van den Berg at 124, 126-28. The agreement here specifies

that German law will govern all disputes between the parties concerning the arbitration agreement. That specification alone is enough under Article V(1), but the parties also selected Germany as the seat of any arbitration, which would also compel application of German law under Article V(1)'s backup default rule. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 (5th Cir. 2004).

These expressed “intentions control.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985). “A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied” is “an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). Likewise, a “parochial refusal by the courts of one country to enforce” the parties’ choice of law “would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.” *Id.* at 516-17; *see Uzan*, 388 F.3d at 51.

At the same time, there is no domestic-law barrier to honoring the parties’ choice-of-law provision. It certainly would “not offend the rule of liberal construction” or “any other policy embodied in the FAA.” *Volt*, 489 U.S. at 476. Parties have substantial discretion to choose what law will govern FAA-governed arbitration agreements. *See DIRECTV*, 136 S. Ct. at 468; *Volt*, 489 U.S. at 470-78. The relevant “federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.” *Volt*, 489 U.S. at 476. “The ex-

pansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws.” *Bremen*, 407 U.S. at 9.

For all of these reasons, lower federal courts routinely apply the law of the country specified in an arbitration agreement to decide questions of arbitrability, including whether enforcement by or against a non-signatory is permissible. *See Uzan*, 388 F.3d at 50-53; *In re Oil Spill by Amoco Cadiz off Coast of France Mar. 16, 1978*, 659 F.2d 789, 794 (7th Cir. 1981); *Societe Generale de Surveillance, S.A. v. Raytheon Eur. Mgmt. & Sys. Co.*, 643 F.2d 863, 865 (1st Cir. 1981) (Breyer, J.). The same rule applies here.

In its certiorari-stage briefing, GE France agreed that German law would apply to the German arbitration, but asserted without elaboration that “federal substantive law” would determine whether GE France could compel arbitration in Germany. Cert. Reply 9. GE France is incorrect. As explained above, arbitrability is determined not by a federal common law of contracts, but by the substantive law that governs the arbitration agreement. *See supra* at 10-13. In this case, the controlling law is the German law chosen by the parties.

Applying German law also follows if the Court applies a federal common law with substance derived from international-law principles. Born, § 10.05[A], at 1492-94. International law recognizes that parties have autonomy to select which law will govern their agreements. *See, e.g., Sarah Laval, A Comparative Study of Party Autonomy and Its Limi-*

*tations in International Contracts: American and European Law, with Reference to the Hague Principles 2015*, 25 *Cardozo J. Int'l & Comp. L.* 29, 31 (2016); Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 *Am. J. Comp. L.* 873, 875 (2013). The international-law doctrine of “separability” does presume (absent contrary indications) that an international arbitration agreement is separate from the underlying contract in which it appears, which means that a contract’s general choice-of-law clause does not automatically extend to the arbitration provision itself. *See supra* at 47-48. That presumption is irrelevant here because the choice-of-law language is directed towards the arbitration provision in particular. Born §§ 3.01, 3.03[B], 4.02, at 349-53, 464-65, 475-76. The application of German law to the arbitration clause is further confirmed by the parties’ choice of Germany as the arbitral seat. Restatement § 2.7 cmt. f.<sup>14</sup>

**B. German Law Does Not Recognize The Equitable Estoppel Doctrine GE France Invokes**

As shown above, estoppel is a uniquely Anglo-

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<sup>14</sup> The choice-of-law rules of Alabama (where suit was filed) should be irrelevant to analysis of this international arbitration agreement, but even under those rules the parties’ contractual choice-of-law provision must be enforced. *See Lifestar Response of Ala., Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 213 n.3 (Ala. 2009); *cf.* Ala. Const. § 13.50(b)(6), (h) (constitutional provision barring application of foreign law by Alabama courts does not apply to a business entity that “contracts to subject itself to foreign law in a jurisdiction other than [Alabama] or the United States”).

American doctrine largely unrecognized in civil-law jurisdictions. *See supra* at 36-44. And while some civil-law systems recognize consent-based theories akin to traditional estoppel, none resembles the unusual form of non-consent-based estoppel invoked by GE France in this case. *See id.* at 44-49.

Germany—a civil-law country—is no exception.<sup>15</sup> GE France has never argued in this case that German law recognizes any form of non-consent-based equitable estoppel. The best GE France’s amici can muster is a case from the Higher Regional Court in Berlin (later reversed by Germany’s Federal Court of Justice), discussed above, which applied *venire contra factum proprium*—an analogue to *traditional* estoppel, not the idiosyncratic non-consent-based theory GE France invokes. *See supra* at 42-43. The Court accordingly could affirm on the ground that no matter what the Convention allows, controlling German law does not permit application of estoppel here. The Court also could remand the choice-of-law issue for the lower courts to consider in the first instance. Cert. Reply 9; U.S. Br. 34-35. But the Court certainly need not do so. The issue is purely one of law, and the relevant legal principles are clear.

Alternatively, the Court could dismiss the writ as improvidently granted. The Court granted certiorari to answer the question whether the Convention

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<sup>15</sup> This point is confirmed by *Bundesgerichtshof*, [BGH] [Federal Court of Justice], May 8, 2014, III ZR 371/12, a German case cited by GE France. Petr. Br. 33. That case allowed enforcement of an arbitration agreement against a non-party through the controversial group of companies doctrine, *see supra* at 50-52, but only because the agreement was governed by *Indian* law, not German law.

“permits a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.” Pet. i. Because controlling German law does not recognize the particular “doctrine of equitable estoppel” GE France invokes, that question is not presented in this case. The more prudent course may be to await a case involving an arbitration agreement controlled by the law of a U.S. state that recognizes a non-consent-based estoppel doctrine, which would actually present the question GE France raised in its petition.

#### **CONCLUSION**

The judgment should be affirmed, or the petition dismissed.

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**ADDENDUM**

**CONVENTION ON THE RECOGNITION  
AND ENFORCEMENT OF FOREIGN ARBI-  
TRAL AWARDS**

*Article I*

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

*Article II*

1. Each Contracting State shall recognize an agreement in writing under which the parties under-

take to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

### *Article III*

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

### *Article IV*

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

#### *Article V*

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 arbitra-

tion, 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.

#### *Article VI*

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the

award, order the other party to give suitable security.

*Article VII*

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

*Article VIII*

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

*Article IX*

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

*Article X*

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Government of such territories.

*Article XI*

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

### *Article XII*

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

*Article XIII*

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

*Article XIV*

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

*Article XV*

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

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(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

*Article XVI*

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

**CONVENTION POUR LA RECONNAISSANCE  
ET L'EXECUTION DES SENTENCES ARBI-  
TRALES ETRANGERES**

*Article premier*

1. La présente Convention s'applique à la reconnaissance et à l'exécution des sentences arbitrales rendues sur le territoire d'un Etat autre que celui où la reconnaissance et l'exécution des sentences sont demandées, et issues de différends entre personnes physiques ou morales. Elle s'applique également aux sentences arbitrales qui ne sont pas considérées comme sentences nationales dans l'Etat où leur reconnaissance et leur exécution sont demandées.

2. On entend par "sentences arbitrales" non seulement les sentences rendues par des arbitres nommés pour des cas déterminés, mais également celles qui sont rendues par des organes d'arbitrage permanents auxquels les parties se sont soumises.

3. Au moment de signer ou de ratifier la présente Convention, d'y adhérer ou de faire la notification d'extension prévue à l'article X, tout Etat pourra, sur la base de la réciprocité, déclarer qu'il appliquera la Convention à la reconnaissance et à l'exécution des seules sentences rendues sur le territoire d'un autre Etat contractant. Il pourra également déclarer qu'il appliquera la Convention uniquement aux différends issus de rapports de droit, contractuels ou non contractuels, qui sont considérés comme commerciaux par sa loi nationale.

*Article II*

1. Chacun des Etats contractants reconnaît la convention écrite par laquelle les parties s'obligent à soumettre à un arbitrage tous les différends ou cer-

tains des différends qui se sont élevés ou pourraient s'élever entre elles au sujet d'un rapport de droit déterminé, contractuel ou non contractuel, portant sur une question susceptible d'être réglée par voie d'arbitrage.

2. On entend par "convention écrite" une clause compromissoire insérée dans un contrat, ou un compromis, signés par les parties ou contenus dans un échange de lettres ou de télégrammes.

3. Le tribunal d'un Etat contractant, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu une convention au sens du présent article, renverra les parties à l'arbitrage, à la demande de l'une d'elles, à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être appliquée.

### *Article III*

Chacun des Etats contractants reconnaîtra l'autorité d'une sentence arbitrale et accordera l'exécution de cette sentence conformément aux règles de procédure suivies dans le territoire où la sentence est invoquée, aux conditions établies dans les articles suivants. Il ne sera pas imposé, pour la reconnaissance ou l'exécution des sentences arbitrales auxquelles s'applique la présente Convention, de conditions sensiblement plus rigoureuses, ni de frais de justice sensiblement plus élevés, que ceux qui sont imposés pour la reconnaissance ou l'exécution des sentences arbitrales nationales.

### *Article IV*

1. Pour obtenir la reconnaissance et l'exécution visées à l'article précédent, la partie qui demande la

reconnaissance et l'exécution doit fournir, en même temps que la demande:

a) L'original dûment authentifié de la sentence ou une copie de cet original réunissant les conditions requises pour son authenticité;

b) L'original de la convention visée à l'article II, ou une copie réunissant les conditions requises pour son authenticité.

2. Si ladite sentence ou ladite convention n'est pas rédigée dans une langue officielle du pays où la sentence est invoquée, la partie qui demande la reconnaissance et l'exécution de la sentence aura à produire une traduction de ces pièces dans cette langue. La traduction devra être certifiée par un traducteur officiel ou un traducteur juré ou par un agent diplomatique ou consulaire.

#### *Article V*

1. La reconnaissance et l'exécution de la sentence ne seront refusées, sur requête de la partie contre laquelle elle est invoquée, que si cette partie fournit à l'autorité compétente du pays où la reconnaissance et l'exécution sont demandées la preuve:

a) Que les parties à la convention visée à l'article II étaient, en vertu de la loi à elles applicable, frappées d'une incapacité, ou que ladite convention n'est pas valable en vertu de la loi à laquelle les parties l'ont subordonnée ou, à défaut d'une indication à cet égard, en vertu de la loi du pays où la sentence a été rendue; ou

b) Que la partie contre laquelle la sentence est invoquée n'a pas été dûment informée de la désignation de l'arbitre ou de la procédure d'arbitrage, ou

qu'il lui a été impossible, pour une autre raison, de faire valoir ses moyens; ou

c) Que la sentence porte sur un différend non visé dans le compromis ou n'entrant pas dans les prévisions de la clause compromissoire, ou qu'elle contient des décisions qui dépassent les termes du compromis ou de la clause compromissoire; toutefois, si les dispositions de la sentence qui ont trait à des questions soumises à l'arbitrage peuvent être dissociées de celles qui ont trait à des questions non soumises à l'arbitrage, les premières pourront être reconnues et exécutées; ou

d) Que la constitution du tribunal arbitral ou la procédure d'arbitrage n'a pas été conforme à la convention des parties, ou, à défaut de convention, qu'elle n'a pas été conforme à la loi du pays où l'arbitrage a eu lieu; ou

e) Que la sentence n'est pas encore devenue obligatoire pour les parties ou a été annulée ou suspendue par une autorité compétente du pays dans lequel, ou d'après la loi duquel, la sentence a été rendue.

2. La reconnaissance et l'exécution d'une sentence arbitrale pourront aussi être refusées si l'autorité compétente du pays où la reconnaissance et l'exécution sont requises constate:

a) Que, d'après la loi de ce pays, l'objet du différend n'est pas susceptible d'être réglé par voie d'arbitrage; ou

b) Que la reconnaissance ou l'exécution de la sentence serait contraire à l'ordre public de ce pays.

*Article VI*

Si l'annulation ou la suspension de la sentence est demandée à l'autorité compétente visée à l'article V, paragraphe 1, e, l'autorité devant qui la sentence est invoquée peut, si elle l'estime approprié, surseoir à statuer sur l'exécution de la sentence; elle peut aussi, à la requête de la partie qui demande l'exécution de la sentence, ordonner à l'autre partie de fournir des sûretés convenables.

*Article VII*

1. Les dispositions de la présente Convention ne portent pas atteinte à la validité des accords multilatéraux ou bilatéraux conclus par les Etats contractants en matière de reconnaissance et d'exécution de sentences arbitrales et ne privent aucune partie intéressée du droit qu'elle pourrait avoir de se prévaloir d'une sentence arbitrale de la manière et dans la mesure admises par la législation ou les traités du pays où la sentence est invoquée.

2. Le Protocole de Genève de 1923 relatif aux clauses d'arbitrage et la Convention de Genève de 1927 pour l'exécution des sentences arbitrales étrangères cesseront de produire leurs effets entre les Etats contractants du jour, et dans la mesure, où ceux-ci deviendront liés par la présente Convention.

*Article VIII*

1. La présente Convention est ouverte jusqu'au 31 décembre 1958 à la signature de tout Etat Membre des Nations Unies, ainsi que de tout autre Etat qui est, ou deviendra par la suite, membre d'une ou plusieurs institutions spécialisées des Nations Unies ou partie au Statut de la Cour interna-

tionale de Justice, ou qui aura été invité par l'Assemblée générale des Nations Unies.

2. La présente Convention doit être ratifiée et les instruments de ratification déposés auprès du Secrétaire général de l'Organisation des Nations Unies.

*Article IX*

1. Tous les Etats visés à l'article VIII peuvent adhérer à la présente Convention.

2. L'adhésion se fera par le dépôt d'un instrument d'adhésion auprès du Secrétaire général de l'Organisation des Nations Unies.

*Article X*

1. Tout Etat pourra, au moment de la signature, de la ratification ou de l'adhésion, déclarer que la présente Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international, ou à l'un ou plusieurs d'entre eux. Cette déclaration produira ses effets au moment de l'entrée en vigueur de la Convention pour ledit Etat.

2. Par la suite, toute extension de cette nature se fera par notification adressée au Secrétaire général de l'Organisation des Nations Unies et produira ses effets à partir du quatre-vingt-dixième jour qui suivra la date à laquelle le Secrétaire général de l'Organisation des Nations Unies aura reçu la notification, ou à la date d'entrée en vigueur de la Convention pour ledit Etat si cette dernière date est postérieure.

3. En ce qui concerne les territoires auxquels la présente Convention ne s'applique pas à la date de la signature, de la ratification ou de l'adhésion, chaque Etat intéressé examinera la possibilité de prendre

les mesures voulues pour étendre la Convention à ces territoires, sous réserve le cas échéant, lorsque des motifs constitutionnels l'exigeront, de l'assentiment des gouvernements de ces territoires.

*Article XI*

Les dispositions ci-après s'appliqueront aux Etats fédératifs ou non unitaires:

a) En ce qui concerne les articles de la présente Convention qui relèvent de la compétence législative du pouvoir fédéral, les obligations du gouvernement fédéral seront les mêmes que celles des Etats contractants qui ne sont pas des Etats fédératifs;

b) En ce qui concerne les articles de la présente Convention qui relèvent de la compétence législative de chacun des Etats ou provinces constituants, qui ne sont pas, en vertu du système constitutionnel de la fédération, tenus de prendre des mesures législatives, le gouvernement fédéral portera le plus tôt possible, et avec son avis favorable, lesdits articles à la connaissance des autorités compétentes des Etats ou provinces constituants;

c) Un Etat fédératif Partie à la présente Convention communiquera, à la demande de tout autre Etat contractant qui lui aura été transmise par l'intermédiaire du Secrétaire général de l'Organisation des Nations Unies, un exposé de la législation et des pratiques en vigueur dans la fédération et ses unités constituantes, en ce qui concerne telle ou telle disposition de la Convention, indiquant la mesure dans laquelle effet a été donné, par une action législative ou autre, à ladite disposition.

*Article XII*

1. La présente Convention entrera en vigueur le quatre-vingt-dixième jour qui suivra la date du dépôt du troisième instrument de ratification ou d'adhésion.

2. Pour chacun des Etats qui ratifieront la Convention ou y adhéreront après le dépôt du troisième instrument de ratification ou d'adhésion, elle entrera en vigueur le quatre-vingt-dixième jour qui suivra la date du dépôt par cet Etat de son instrument de ratification ou d'adhésion.

*Article XIII*

1. Tout Etat contractant pourra dénoncer la présente Convention par notification écrite adressée au Secrétaire général de l'Organisation des Nations Unies. La dénonciation prendra effet un an après la date où le Secrétaire général de l'Organisation des Nations Unies aura reçu la notification.

2. Tout Etat qui aura fait une déclaration ou une notification conformément à l'article X pourra notifier ultérieurement au Secrétaire général de l'Organisation des Nations Unies que la Convention cessera de s'appliquer au territoire en question un an après la date à laquelle le Secrétaire général aura reçu cette notification.

3. La présente Convention demeurera applicable aux sentences arbitrales au sujet desquelles une procédure de reconnaissance ou d'exécution aura été entamée avant l'entrée en vigueur de la dénonciation.

*Article XIV*

Un Etat contractant ne peut se réclamer des dispositions de la présente Convention contre d'autres

Etats contractants que dans la mesure où il est lui-même tenu d'appliquer cette convention.

*Article XV*

Le Secrétaire général de l'Organisation des Nations Unies notifiera à tous les Etats visés à l'article VIII:

- a) Les signatures et ratifications visées à l'article VIII;
- b) Les adhésions visées à l'article IX;
- c) Les déclarations et notifications visées aux articles premier, X et XI;
- d) La date où la présente Convention entrera en vigueur, en application de l'article XII;
- e) Les dénonciations et notifications visées à l'article XIII.

*Article XVI*

1. La présente Convention, dont les textes anglais, chinois, espagnol, français et russe font également foi, sera déposée dans les archives de l'Organisation des Nations Unies.

2. Le Secrétaire général de l'Organisation des Nations Unies remettra une copie certifiée conforme de la présente Convention aux Etats visés à l'article VIII.

**CONVENCION SOBRE EL RECONOCIMIENTO  
Y LA EJECUCION DE LAS SENTENCIAS AR-  
BITRALES EXTRANJERAS**

*Artículo I*

1. La presente Convención se aplicará al reconocimiento y la ejecución de las sentencias arbitrales dictadas en el territorio de un Estado distinto de aquel en que se pide el reconocimiento y la ejecución de dichas sentencias, y que tengan su origen en diferencias entre personas naturales o jurídicas. Se aplicará también a las sentencias arbitrales que no sean consideradas como sentencias nacionales en el Estado en el que se pide su reconocimiento y ejecución.

2. La expresión “sentencia arbitral” no sólo comprenderá las sentencias dictadas por los árbitros nombrados para casos determinados, sino también las sentencias dictadas por los órganos arbitrales permanentes a los que las partes se hayan sometido.

3. En el momento de firmar o de ratificar la presente Convención, de adherirse a ella o de hacer la notificación de su extensión prevista en el artículo X, todo Estado podrá, a base de reciprocidad, declarar que aplicará la presente Convención al reconocimiento y a la ejecución de las sentencias arbitrales dictadas en el territorio de otro Estado Contratante únicamente. Podrá también declarar que sólo aplicará la Convención a los litigios surgidos de relaciones jurídicas, sean o no contractuales, consideradas comerciales por su derecho interno.

*Artículo II*

1. Cada uno de los Estados Contratantes reconocerá el acuerdo por escrito conforme al cual las partes se obliguen a someter a arbitraje todas las diferencias o ciertas diferencias que hayan surgido o puedan surgir entre ellas respecto a una determinada relación jurídica, contractual o no contractual, concerniente a un asunto que pueda ser resuelto por arbitraje.

2. La expresión “acuerdo por escrito” denotará una cláusula compromisoria incluida en un contrato o un compromiso, firmados por las partes o contenidos en un canje de cartas o telegramas.

3. El tribunal de uno de los Estados Contratantes al que se someta un litigio respecto del cual las partes hayan concluido un acuerdo en el sentido del presente artículo, remitirá a las partes al arbitraje, a instancia de una de ellas, a menos que compruebe que dicho acuerdo es nulo, ineficaz o inaplicable.

*Artículo III*

Cada uno de los Estados Contratantes reconocerá la autoridad de la sentencia arbitral y concederá su ejecución de conformidad con las normas de procedimiento vigentes en el territorio donde la sentencia sea invocada, con arreglo a las condiciones que se establecen en los artículos siguientes. Para el reconocimiento o la ejecución de las sentencias arbitrales a que se aplica la presente Convención, no se impondrán condiciones apreciablemente más rigurosas, ni honorarios o costas más elevados, que los aplicables al reconocimiento o a la ejecución de las sentencias arbitrales nacionales.

*Artículo IV*

1. Para obtener el reconocimiento y la ejecución previstos en el artículo anterior, la parte que pida el reconocimiento y la ejecución deberá presentar, junto con la demanda:

a) El original debidamente autenticado de la sentencia o una copia de ese original que reúna las condiciones requeridas para su autenticidad;

b) El original del acuerdo a que se refiere el artículo II, o una copia que reúna las condiciones requeridas para su autenticidad.

2. Si esa sentencia o ese acuerdo no estuvieran en un idioma oficial del país en que se invoca la sentencia, la parte que pida el reconocimiento y la ejecución de esta última deberá presentar una traducción a ese idioma de dichos documentos. La traducción deberá ser certificada por un traductor oficial o un traductor jurado, o por un agente diplomático o consular.

*Artículo V*

1. Sólo se podrá denegar el reconocimiento y la ejecución de la sentencia, a instancia de la parte contra la cual es invocada, si esta parte prueba ante la autoridad competente del país en que se pide el reconocimiento y la ejecución:

a) Que las partes en el acuerdo a que se refiere el artículo II estaban sujetas a alguna incapacidad en virtud de la ley que es aplicable o que dicho acuerdo no es válido en virtud de la ley a que las partes lo han sometido, o si nada se hubiera indicado a este respecto, en virtud de la ley del país en que se haya dictado la sentencia; o

b) Que la parte contra la cual se invoca la sentencia arbitral no ha sido debidamente notificada de la designación del árbitro o del procedimiento de arbitraje o no ha podido, por cualquier otra razón, hacer valer sus medios de defensa; o

c) Que la sentencia se refiere a una diferencia no prevista en el compromiso o no comprendida en las disposiciones de la cláusula compromisoria, o contiene decisiones que exceden de los términos del compromiso o de la cláusula compromisoria; no obstante, si las disposiciones de la sentencia que se refieren a las cuestiones sometidas al arbitraje pueden separarse de las que no han sido sometidas al arbitraje, se podrá dar reconocimiento y ejecución a las primeras; o

d) Que la constitución del tribunal arbitral o el procedimiento arbitral no se han ajustado al acuerdo celebrado entre las partes o, en defecto de tal acuerdo, que la constitución del tribunal arbitral o el procedimiento arbitral no se han ajustado a la ley del país donde se ha efectuado el arbitraje; o

e) Que la sentencia no es aún obligatoria para las partes o ha sido anulada o suspendida por una autoridad competente del país en que, o conforme a cuya ley, ha sido dictada esa sentencia.

2. También se podrá denegar el reconocimiento y la ejecución de una sentencia arbitral si la autoridad competente del país en que se pide el reconocimiento y la ejecución, comprueba:

a) Que, según la ley de ese país, el objeto de la diferencia no es susceptible de solución por vía de arbitraje; o

b) Que el reconocimiento o la ejecución de la sentencia serían contrarios al orden público de ese país.

*Artículo VI*

Si se ha pedido a la autoridad competente prevista en el artículo V, párrafo 1 e), la anulación o la suspensión de la sentencia, la autoridad ante la cual se invoca dicha sentencia podrá, si lo considera procedente, aplazar la decisión sobre la ejecución de la sentencia y, a instancia de la parte que pida la ejecución, podrá también ordenar a la otra parte que dé garantías apropiadas.

*Artículo VII*

1. Las disposiciones de la presente Convención no afectarán la validez de los acuerdos multilaterales o bilaterales relativos al reconocimiento y la ejecución de las sentencias arbitrales concertados por los Estados Contratantes ni privarán a ninguna de las partes interesadas de cualquier derecho que pudiera tener a hacer valer una sentencia arbitral en la forma y medida admitidas por la legislación o los tratados del país donde dicha sentencia se invoque.

2. El Protocolo de Ginebra de 1923 relativo a las cláusulas de arbitraje y la Convención de Ginebra de 1927 sobre la ejecución de las Sentencias Arbitrales Extranjeras dejarán de surtir efectos entre los Estados Contratantes a partir del momento y en la medida en que la presente Convención tenga fuerza obligatoria para ellos.

*Artículo VIII*

1. La presente Convención estará abierta hasta el 31 de diciembre de 1958 a la firma de todo Miembro de las Naciones Unidas, así como de cualquier otro

Estado que sea o llegue a ser miembro de cualquier organismo especializado de las Naciones Unidas, o sea o llegue a ser parte en el Estatuto de la Corte Internacional de Justicia, o de todo otro Estado que haya sido invitado por la Asamblea General de las Naciones Unidas.

2. La presente Convención deberá ser ratificada y los instrumentos de ratificación se depositarán en poder del Secretario General de las Naciones Unidas.

*Artículo IX*

1. Podrán adherirse a la presente Convención todos los Estados a que se refiere el artículo VIII.

2. La adhesión se efectuará mediante el depósito de un instrumento de adhesión en poder del Secretario General de las Naciones Unidas.

*Artículo X*

1. Todo Estado podrá declarar, en el momento de la firma, de la ratificación o de la adhesión, que la presente Convención se hará extensiva a todos los territorios cuyas relaciones internacionales tenga a su cargo, o a uno o varios de ellos. Tal declaración surtirá efecto a partir del momento en que la Convención entre en vigor para dicho Estado.

2. Posteriormente, esa extensión se hará en cualquier momento por notificación dirigida al Secretario General de las Naciones Unidas y surtirá efecto a partir del nonagésimo día siguiente a la fecha en que el Secretario General de las Naciones Unidas haya recibido tal notificación o en la fecha de entrada en vigor de la Convención para tal Estado, si esta última fecha fuere posterior.

3. Con respecto a los territorios a los que no se haya hecho extensiva la presente Convención en el momento de la firma, de la ratificación o de la adhesión, cada Estado interesado examinará la posibilidad de adoptar las medidas necesarias para hacer extensiva la aplicación de la presente Convención a tales territorios, a reserva del consentimiento de sus gobiernos cuando sea necesario por razones constitucionales.

#### *Artículo XI*

Con respecto a los Estados federales o no unitarios, se aplicarán las disposiciones siguientes:

a) En lo concerniente a los artículos de esta Convención cuya aplicación dependa de la competencia legislativa del poder federal, las obligaciones del gobierno federal serán, en esta medida, las mismas que las de los Estados Contratantes que no son Estados federales;

b) En lo concerniente a los artículos de esta Convención cuya aplicación dependa de la competencia legislativa de cada uno de los Estados o provincias constituyentes que, en virtud del régimen constitucional de la federación, no estén obligados a adoptar medidas legislativas, el gobierno federal, a la mayor brevedad posible y con su recomendación favorable, pondrá dichos artículos en conocimiento de las autoridades competentes de los Estados o provincias constituyentes;

c) Todo Estado federal que sea Parte en la presente Convención proporcionará, a solicitud de cualquier otro Estado Contratante que le haya sido transmitida por conducto del Secretario General de las Naciones Unidas, una exposición de la legislación

y de la prácticas vigentes en la federación y en sus entidades constituyentes con respecto a determinada disposición de la Convención, indicando la medida en que por acción legislativa o de otra índole, se haya dado efecto a tal disposición.

*Artículo XII*

1. La presente Convención entrará en vigor el no-nagésimo día siguiente a la fecha del depósito del tercer instrumento de ratificación o de adhesión.

2. Respecto a cada Estado que ratifique la presente Convención o se adhiera a ella después del depósito del tercer instrumento de ratificación o de adhesión, la presente Convención entrará en vigor el no-nagésimo día siguiente a la fecha del depósito por tal Estado de su instrumento de ratificación o de adhesión.

*Artículo XIII*

1. Todo Estado Contratante podrá denunciar la presente Convención mediante notificación escrita dirigida al Secretario General de las Naciones Unidas. La denuncia surtirá efecto un año después de la fecha en que el Secretario General haya recibido la notificación.

2. Todo Estado que haya hecho una declaración o enviado una notificación conforme a lo previsto en el artículo X, podrá declarar en cualquier momento posterior, mediante notificación dirigida al Secretario General de las Naciones Unidas, que la Convención dejará de aplicarse al territorio de que se trate un año después de la fecha en que el Secretario General haya recibido tal notificación.

3. La presente Convención seguirá siendo aplicable a las sentencias arbitrales respecto de las cuales se haya promovido un procedimiento para el reconocimiento o la ejecución antes de que entre en vigor la denuncia.

*Artículo XIV*

Ningún Estado Contratante podrá invocar las disposiciones de la presente Convención respecto de otros Estados Contratantes más que en la medida en que él mismo esté obligado a aplicar esta Convención.

*Artículo XV*

El Secretario General de la Naciones Unidas notificará a todos los Estados a que se refiere el Artículo VIII:

- a) Las firmas y ratificaciones previstas en el artículo VIII;
- b) Las adhesiones previstas en el artículo IX;
- c) Las declaraciones y notificaciones relativas a los artículos I, X y XI;
- d) La fecha de entrada en vigor de la presente Convención, en conformidad con el artículo XII;
- e) Las denuncias y notificaciones previstas en el artículo XIII.

*Artículo XVI*

1. La presente Convención, cuyos textos chino, español, francés, inglés y ruso serán igualmente auténticos, será depositada en los archivos de la Naciones Unidas.

2. El Secretario General de la Naciones Unidas transmitirá una copia certificada de la presente Convención a los Estados a que se refiere el artículo VIII.