No. 19-

IN THE

Supreme Court of the United States

INVERSIONES Y PROCESADORA TROPICAL INPROTSA, S.A.,
Petitioner,

v.

DEL MONTE INTERNATIONAL GMBH,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 205 of the Federal Arbitration Act confers subject-matter jurisdiction over a petition to vacate an arbitral award rendered under the New York Convention even though a petition to vacate is not an action or proceeding falling under the New York Convention as required by Section 203.

2. Whether the Eleventh Circuit erred in holding that the exclusive grounds for vacating a New York Convention award rendered in the United Sates are the Convention's enumeration of defenses to enforcement, and not the grounds for vacatur set forth in Chapter 1 of the Federal Arbitration Act, in conflict with four other circuit courts, and where this Court has expressly acknowledged the Chapter 1 grounds for vacatur in reviewing a similar award in *BG Group, PLC* v. *Republic of Argentina*, 572 U.S. 25 (2014).

PARTIES TO THE PROCEEDING

1. Inversiones y Procesadora Tropical INPROTSA, S.A., Petitioner here, was petitioner-appellant in the court of appeals.

2. Del Monte International GMBH, Respondent here, was respondent-appellee in the court of appeals.

RULE 29.6 DISCLOSURE STATEMENT

1. Inversiones y Procesadora Tropical INPROTSA, S.A., has no parent corporation, and no publicly held company owns 10% or more of Inversiones y Procesadora Tropical INPROTSA, S.A.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Inversiones y Procesadora Tropical INPROTSA, S.A. ("INPROTSA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 921 F.3d 1291. Pet. App. 1a-29a. The district court's order granting Del Monte's motion to dismiss and denying INPROTSA's motion for remand, and the district court's order granting Del Monte's cross-petition to confirm the arbitral award are unreported. *Id.* at 33a-34a, 35a-52a.

JURISDICTION

The Eleventh Circuit entered judgment on April 23, 2019, Pet. App. 1a-29a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Arbitration Act ("FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention") are reproduced in an appendix to this petition. Pet. App. 64a-110a.

INTRODUCTION

The issue in this case is fundamental to the role of federal courts under the New York Convention: Does the FAA confer federal jurisdiction over petitions to vacate arbitral awards, in addition to petitions to compel arbitration and to confirm or enforce arbitral awards? The text of Chapter 2 of the FAA authorizes original federal jurisdiction over an "action or proceeding falling under the Convention." Federal case law holds, and the plain text of the Convention provides, that a petition to vacate is *not* an action or proceeding falling under the Convention. Those actions and proceedings are limited to petitions to compel arbitration and petitions to confirm or enforce an arbitration award.

Consequently, the answer to the first question presented should be self-evident: Petitions to vacate are matters of domestic law that do not fall within the limited federal jurisdiction that Congress granted when it enacted the New York Convention. Because the district court lacked jurisdiction at the time of removal, these proceedings should have been dismissed and resolved in state court.

The Eleventh Circuit did not dispute that the scope of Section 203 ("Jurisdiction") and Section 205 ("Removal") of the FAA are not necessarily coextensive. Pet. App. 15a. Although Section 203 limits federal jurisdiction to "[a]n action or proceeding *falling under the Convention*," Section 205 permits removal "at any time before the trial" of any "action or proceeding pending in a State court [that] *relates to an arbitration agreement or award falling under the Convention*." 9 U.S.C. §§ 203, 205 (emphasis added). Opening the doors to federal jurisdiction for any action that merely relates to an arbitration agreement or award would greatly expand the jurisdiction explicitly conferred by Congress under Section 203.

The court below conflated these two independent sections of the FAA by stating that it makes "sense to conclude that Congress intended § 203 to be read consistently with § 205 as conferring subject-matter jurisdiction over actions or proceedings *sufficiently related to* agreements or awards subject to the Convention." Pet. App. 17a (emphasis added).

Such an expansive reading of the FAA would permit virtually any party to any action related to an agreement or award access to the federal courts. This is not what Congress intended as demonstrated by the fact that such a reading would render Section 203 superfluous.

This Court should now do what the Eleventh Circuit concluded it could not. Only this Court can definitively resolve the conflict between Sections 203 and 205. And until the Court itself draws those distinctions, federal courts will continue down the slippery slope of allowing jurisdiction in virtually any action involving an arbitration agreement.

Should the Court decide that jurisdiction does exist, it should resolve a remaining issue that has now become a conflict among the circuits: whether the grounds for vacatur under the New York Convention are limited to the defenses to enforcement set forth in Article V of the Convention, or whether they correctly include the express grounds for vacatur Congress set forth in Chapter 1 of the FAA. Here, the Eleventh Circuit determined that it was bound by its own precedent in *Industrial Risk Insurers* v. *M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998). Pet. App. 18a-20a. The Eleventh Circuit, however, remains the only circuit court to deny petitioners the grounds for vacatur set forth in Section 10 of the FAA. All four other federal appellate courts that have addressed the issue have come to the opposite conclusion.

Deciding this issue would resolve this conflict among the Circuits and provide much-needed guidance to lower courts in other cases concerning arbitral awards rendered domestically in the United States pursuant to the New York Convention.

For these reasons, this Court should grant certiorari to decide the questions presented.

STATEMENT

1. Del Monte initiated arbitral proceedings against INPROTSA through the International Chamber of Commerce. The arbitral tribunal issued its award in favor of Del Monte on June 10, 2016. Pet. App. 4a-5a.

2. INPROTSA timely filed a petition to vacate in Florida state court, seeking vacatur under the identical grounds set forth in both the Florida Arbitration Code and Section 10 of the FAA. Del Monte then

removed the case to the United States District Court for the Southern District of Florida. Pet. App. 9a. Del Monte's removal petition purportedly relied on both Sections 203 and 205, while at the same time in the third paragraph of its petition correctly noting that "[A] federal district court must have *both* removal jurisdiction [under 9 U.S.C. § 205] *and* subject-matter jurisdiction [under 9 U.S.C. § 203] in order to preside over a case removed from state court" under the New York Convention." Pet. App. 55a, ¶ 3 (emphasis added) (quoting *Holzer* v. *Mondadori*, No. 12 CIV. 5234 NRB, 2013 WL 1104269, at *6 (S.D.N.Y. Mar. 14, 2013)).

3. Del Monte then moved to dismiss the petition to vacate and cross-petitioned to confirm the arbitral award. Pet. App. 9a. INPROTSA, in turn, moved to remand the case back to Florida state court, asserting that the district court lacked subject-matter jurisdiction under Section 203 over the petition to vacate. *Id.* at 9a-10a. The district court granted Del Monte's motion to dismiss the petition to vacate and denied INPROTSA's motion to remand. *Id.* at 10a. After appeal and cross-appeal by the parties, the District Court later, on limited remand, confirmed the arbitral award. *Id.* at 10a, 30a-32a.

4. When INPROTSA's appeal continued, the Eleventh Circuit affirmed the district court. The appellate court held that the district court had subject-matter jurisdiction under 9 U.S.C. § 205. *Id.* at 16a-17a. The circuit court, based on earlier Eleventh Circuit precedent, then held that the only grounds for vacatur of a New York Convention arbitration award are not those grounds for vacatur set forth in Section 10 of the FAA, but are limited to those defenses against confirmation set forth in Article V of

the Convention. *Id.* at 18a-20a. This was despite multiple other circuits' contrary conclusions and this Court's own intervening authority suggesting otherwise. Finally, the circuit court held that INPROTSA had failed to raise valid grounds for vacatur in its petition to vacate filed originally in state court and removed to the district court. *Id.* at 20a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER SECTION 205 OF THE FEDERAL ARBITRATION ACT CONFERS SUBJECT-MATTER JURISDICTION OVER A PETITION TO VACATE AN ARBITRAL AWARD UNDER THE NEW YORK CONVENTION

A. The Ruling Below Cannot Be Reconciled With The Plain Reading Of The FAA And Expands The Narrow Grant Of Subject-Matter Jurisdiction That Congress Bestowed Upon Federal Courts In Section 203 Of The FAA

In light of the plain reading of the FAA, the ruling below is wrong. Federal subject-matter jurisdiction is lacking when the action is not one to either compel arbitration or confirm and enforce an arbitral award. Where the United States is the primary jurisdiction of the arbitration, and there is no diversity or federal question, actions to vacate should be resolved in state court. The explicit text of the New York Convention and its commentaries confirm that view.

The FAA has two relevant chapters. Chapter 1 governs domestic awards and does not provide inde-

pendent grounds for federal subject-matter jurisdiction. Pet. App. 92a-105a. Chapter 2 governs international awards and provides limited jurisdiction. Pet. App. 106a-110a.

For international awards rendered in the United States, as in the instant case, domestic courts may vacate, assuming that they have personal and subject-matter jurisdiction. Because Chapter 2 does not contain express grounds for vacatur, federal courts (other than those within the Eleventh Circuit) acknowledge that Chapter 2's residual clause requires the application of the vacatur grounds set forth in Chapter 1. *See* 9 U.S.C. § 208 ("Chapter 1 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."). Pet. App. 110a.

The reason for this is that the New York Convention provides no grounds for vacatur. Courts in the "primary jurisdiction"—i.e., the jurisdiction of the place of arbitration—are the only courts permitted to vacate arbitral awards and do so under their domestic law. Courts in "secondary jurisdictions"—i.e., those outside the primary jurisdiction, where parties may seek to enforce or confirm arbitral awards—are not permitted to vacate awards issued elsewhere, only to refuse to confirm or enforce them under the standards of Article V of the New York Convention.

The Eleventh Circuit's holding that federal jurisdiction existed for INPROTSA's Petition to Vacate is wrong.

To begin, a federal court's jurisdiction is circumscribed and narrowly defined. "'Federal courts are courts of limited jurisdiction,' possessing 'only that

power authorized by Constitution and statute.'" *Gunn* v. *Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Congressional grants of original jurisdiction are strictly interpreted, and the jurisdiction of federal courts must be "carefully guarded against expansion by judicial interpretation." *Stoneridge Inv. Partners, LLC* v. *Sci.-Atlanta*, 552 U.S. 148, 164 (2008) (citation and internal quotation marks omitted).

The jurisdictional analysis of the FAA, therefore, must begin with the language of the statute. Congress enacted the FAA to restrict federal courts from countermanding proceedings where the parties have agreed to arbitrate, but Congress *did not* grant wholesale federal subject-matter jurisdiction over all matters related to arbitration. *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 581-82 (2008) ("As for jurisdiction over controversies touching arbitration, the Act does nothing, being something of an anomaly in the field of federal-court jurisdiction in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis." (citation and internal quotation marks omitted)). "Given the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden* v. *Discover Bank*, 556 U.S. 49, 59 (2009).

Chapter 2 of the FAA implements the New York Convention. *See Certain Underwriters at Lloyd's London* v. *Argonaut Ins. Co.*, 500 F.3d 571, 573 (7th Cir. 2007). "The goal of the Convention . . . was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which

agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

Under Section 203 of the FAA, titled "Jurisdiction; amount in controversy," Congress granted subject-matter jurisdiction only for "[a]n *action* or *proceeding* falling under the Convention." 9 U.S.C. § 203 (emphasis added). Pet. App. 107a. Only two proceedings arise under the New York Convention: "(1) an action to compel arbitration in accord with the terms of the agreement, and (2) at a later stage, an action to confirm an arbitral award." *Escobar* v. *Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1286 (11th Cir. 2015) (citation and emphasis omitted), *cert. denied*, 136 S. Ct. 1158 (2016); *Lindo* v. *NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1262-63 (11th Cir. 2011); *Czarina, L.L.C.* v. *W.F. Poe Syndicate*, 358 F.3d 1286, 1290-91 (11th Cir. 2004); *see also Base Metal Trading, Ltd.* v. *OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 212 (4th Cir. 2002) ("As a preliminary matter, the Convention and its implementing legislation, 9 U.S.C. §§ 201 *et seq.*, give federal district courts original jurisdiction over actions to compel or confirm foreign arbitration awards." (citing 9 U.S.C. §§ 203, 207)).

Articles II and III of the Convention set forth the procedures for signatory countries to enforce New York Convention agreements to arbitrate, and Articles IV and V govern recognition and enforcement of arbitral awards issued under the Convention. *See* New York Convention at arts. II-V, Pet. App. 77a-80a. The New York Convention authorizes no other proceedings related to either agreements or awards arising under the Convention. *See* 9 U.S.C. § 206

(authorizing district courts to compel arbitration under the Convention), Pet. App. 109a; 9 U.S.C. § 207 (authorizing district courts to confirm Convention awards), Pet. App. 109a.

Nowhere does the New York Convention authorize proceedings to vacate an arbitral award. *See Ingaseosas Int'l Co.* v. *Aconcagua Investing Ltd.*, No. 09-cv-23078, 2011 WL 500042, at *3 (S.D. Fla. Feb. 10, 2011) ("In light of the *plain text of the Convention*, and case law that *overwhelmingly confirms* that the Convention provides for causes of action *only* for recognition and enforcement of arbitral awards, the Court cannot agree with Ingaseosas that the Court has jurisdiction over Ingaseosas' Motion to Vacate pursuant to the Convention." (emphasis added)).

Thus, 9 U.S.C. § 203 only grants subject-matter jurisdiction for *specific types of proceedings* (not awards) arising under the New York Convention. Pet. App. 107a. An international arbitration agreement or award may be subject to the New York Convention, yet a federal court is not empowered to resolve every dispute related to that agreement or award. In the proceedings below, only a petition to vacate was pending at the time of removal, but petitions to vacate Convention awards do not confer federal subject-matter jurisdiction. The Eleventh Circuit's conclusion to the contrary expands federal jurisdiction beyond that clearly delineated by Congress.

Congress has not granted Article III, subject-matter jurisdiction to cases "related to" New York Convention agreements or awards.

Congress used the phrase "related to" in Section 205 as to removal but excluded that phrase from

Section 203 as to federal jurisdiction. 9 U.S.C. §§ 203, 205, Pet. App. 107a-108a. This Court must presume that choice was intentional and refuse to rewrite the FAA. "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (citation, internal quotation marks, and brackets omitted).

Under Section 205, titled "Removal of cases from State courts," Congress expanded the timing of removal for a broad class of actions "relat[ing] to an arbitration agreement or award," but did not expand the subject-matter jurisdictional requirements of Section 203. *Compare* 9 U.S.C. § 203 *with* 9 U.S.C. § 205, Pet. App. 107a-108a. Under normal removal procedures, a defendant may remove within thirty days. 28 U.S.C. § 1446(b). Further, the default removal statute places a one-year deadline for removal on diversity actions. *Id.* § 1446(c)(1).

Under the extended timeline of Section 205, however, a defendant in most actions relating to an arbitration agreement "may, at any time before the trial thereof, remove such action or proceedings to the district court." 9 U.S.C. § 205. Section 205 thus eliminates the default timeliness rules otherwise applicable to the removal of state-court actions to federal court. As Del Monte admitted in its removal papers, Section 205 does not broaden subject-matter jurisdiction governed by Section 203 that falls just two short paragraphs above. Pet. App. 53a-63a. Subject-matter jurisdiction under Section 203 must exist independently.

Further, the Eleventh Circuit's holding treating all actions that are related to New York Convention awards or agreements as establishing federal jurisdiction eviscerates any independent meaning for Section 203, as it would no longer serve any purpose in the face of the broader "related to" jurisdiction. Section 203, by its title and plain language, sets out the narrow confines of subject-matter jurisdiction applicable to actions or proceedings under the New York Convention. Section 205, on the other hand, through Congress's deliberate action, addresses—as its title suggests—only the procedure for removal of such actions.

This Court should not conflate the two provisions and render Section 203 meaningless because this Court has cautioned against such statutory constructions. "It is the "'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (citations omitted). "[C]ourts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992). The holding of the Eleventh Circuit would expose the federal judiciary to a flood of litigation beyond that authorized by Congress and would erase the jurisdictional boundaries clearly delineated in Article III of the Constitution.

Vacatur actions, therefore, do not fall under the Convention, the title of which clearly evidences that it only relates to the "*Recognition* and *Enforcement* of Foreign Arbitral Awards" (emphasis added). Because the district court lacked jurisdiction, it should never have reached the merits of the case. *See Steel*

Co. v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (citation and internal quotation marks omitted)).

B. Only This Court Can Definitively Resolve The Jurisdictional Reach Of The FAA

There is a fundamental conflict between this Court's decisions regarding the narrow scope of federal jurisdiction and the expansive interpretation of that jurisdiction by the court of appeals below. Only this Court can definitively resolve this issue.

The circuit court erred in holding that Chapter 2 of the Federal Arbitration Act confers subject-matter jurisdiction over a petition to vacate an arbitral award under the New York Convention because a petition to vacate is not an action or proceeding falling under the New York Convention.

The circuit court, as a number of district and circuit courts have similarly done, improperly conflated Sections 203 and 205 of Chapter 2 of the FAA to arrive at its jurisdictional holding. Such a reading is inconsistent with the plain text of the FAA and the policy underlying the New York Convention.

The Second Circuit's consistent holdings in its "drive-by" jurisdictional rulings are further proof that this Court should resolve the jurisdictional issue raised by this Petition. *See Hagans* v. *Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound

when a subsequent case finally brings the jurisdictional issue before us.").

There is no definitive authority from this Court deciding whether a petition to vacate is an "action or proceeding" that "fall[s] under" the New York Convention. Given other federal authority in contrast to the Eleventh Circuit, this Court should resolve this issue. *See, e.g.*, *Virginia Sur. Co., Inc.* v. *Certain Underwriters at Lloyd's, London*, 671 F. Supp. 2d 996, 997-98 (N.D. Ill. 2009) ("[F]ederal courts have only such powers of decision as Congress has specifically conferred, and any express judicial power to entertain a vacatur of the award at issue here is conspicuously absent from the Convention . . . ."); *PDV Sweeny, Inc.* v. *ConocoPhillips Co.*, No. 14-CV-5183 AJN, 2015 WL 5144023, at *4-6 (S.D.N.Y. Sept. 1, 2015), *amended*, 2015 WL 9413880 (S.D.N.Y. Dec. 21, 2015), *aff'd*, 670 F. App'x 23 (2d Cir. 2016).

The Court should grant review here to establish a uniform application of international arbitration vacatur standards.

C. This Case Is An Ideal Vehicle For Deciding This Important And Recurring Question

Finally, certiorari should be granted because this case presents the correct opportunity to decide this important and recurring issue. INPROTSA pressed the issue below. Both the district court and the court of appeals squarely decided it. *See* Pet. App. 1a-29a; Pet. App. 33a-34a. And the issue is outcome-determinative: If there is no subject-matter jurisdiction over INPROTSA's vacatur petition, the district court would not have had jurisdiction at the time of Del Monte's removal of the action to federal court,

and these entire proceedings would have to be dismissed.

There can be no doubt that the question is significant. Whether the district court has subject-matter jurisdiction is a threshold issue in every case. *See Citizens for a Better Env't*, 523 U.S. at 94. Because the presence of subject-matter jurisdiction controls whether a federal court can even hear a dispute in the first instance, the practical consequences of the issue are substantial. Given the importance of the issue in the rapidly growing field of international commercial arbitration, the Court should grant the petition for certiorari.

II. THIS COURT SHOULD GRANT REVIEW TO SETTLE A CIRCUIT SPLIT OVER WHETHER THE NEW YORK CONVENTION'S DEFENSES TO CONFIRMATION PROVIDE THE EXCLUSIVE GROUNDS FOR VACATING A NEW YORK CONVENTION AWARD

A. This Court Has Previewed The Answer In *BG Group, PLC* v. *Republic of Argentina*, In Applying Chapter 1 Of The FAA To A Vacatur Analysis

The Eleventh Circuit held that it was bound by its previous decision in *Industrial Risk*. Pet. App. 18a-20a. There, the Eleventh Circuit held that the defenses against confirmation enumerated in Article V of the Convention provide the exclusive grounds for vacating an international arbitral award. *See Indus. Risk*, 141 F.3d at 1446.

That previous Eleventh Circuit decision (*Industrial Risk*), however, is at odds with this Court's interven-

ing decision in *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014). In *BG Group*, this Court considered a petition to vacate under Section 10(a)(4) of Chapter 1 of the FAA, without any mention of the inapplicability of the Chapter 1 grounds for vacatur under the Convention. *Id.* at 44.

Although the petitioner was ultimately unsuccessful, this Court applied a vacatur standard that *Industrial Risk* would otherwise have forbidden. *See id.* (reviewing a party's petition to vacate a New York Convention award under Section 10 of the FAA, but finding under those grounds for vacatur that "we cannot agree with Argentina that the arbitrators 'exceeded their powers' in concluding they had jurisdiction" (quoting 9 U.S.C. § 10(a)(4)).

In short, *Industrial Risk* can no longer be relied upon to limit the grounds for vacatur to the defenses to confirmation after *BG Group*, and the Eleventh Circuit's decision to the contrary was erroneous. *See also Bamberger Rosenheim, Ltd., (Israel)* v. *OA Dev., Inc., (U.S.)*, 862 F.3d 1284, 1286 (11th Cir. 2017), *cert. denied sub nom. Bamberger Rosenheim, Ltd.* v. *OA Dev., Inc.*, 138 S. Ct. 654 (2018) ("We assume, without deciding, that § 10 applies to the award in the present case." (comparing *Industrial Risk* with *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 20-21 (2d Cir. 1997) and *BG Group*)).

The defenses to enforcement are not merely the flip-side of the grounds Congress enacted to support *vacating* an award. The Convention only regulates post-award proceedings to confirm or enforce a Convention award. Accordingly, the Convention only provides *defenses* a party may raise in *opposition* to a *petition to confirm*. *See* New York Convention at art.

V, Pet. App. 79a-80a. The Convention expressly leaves actions to "set aside" or vacate awards to the local law of the country of primary jurisdiction. *See* New York Convention at art. V(1)(e), Pet. App. 80a (stating that actions to "set aside" Convention awards are to be made under "the law of [the country] that award was made").

As neither the Convention nor Chapter 2 of the FAA provides grounds for vacating an arbitral award, courts apply Chapter 1 of the FAA as the local law governing actions to set aside Convention awards rendered in the United States. *See BG Grp.*, 572 U.S. at 44. The only provision in the FAA providing grounds for vacatur is 9 U.S.C. § 10, set forth in Chapter 1 of the FAA. These are distinct from the enumerated defenses in Article V. Instead, these are the grounds upon which "a competent authority" may "set aside or suspend[]" an award, that might then later be used as a defense under Article V. *See* New York Convention at art. V(1)(e), Pet. App. 80a.

Chapter 2's own terms provide that "Chapter 1 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." 9 U.S.C. § 208, Pet. App. 110a. Chapter 1's vacatur proceedings are not in conflict with Chapter 2, as neither Chapter 2 nor the Convention provides standards for vacatur. Indeed, Article V(1)(e) explicitly delegates such power for vacatur to the "competent authority of the country in which, or under the law of which, that award was made." New York Convention at art. V(1)(e), Pet. App. 80a; *see also Ario* v. *Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of*

Account, 618 F.3d 277, 292 (3d Cir. 2010) ("[T]here is no conflict between the Convention and the domestic FAA because Article V(1)(e) of the Convention incorporates the domestic FAA."). That authority to vacate is codified in Chapter 1 of the FAA. This Court should give full effect to the FAA and the Convention by acknowledging the consistency between the provisions and recognizing that *Industrial Risk* is no longer good law.

The New York Convention provides fewer and more limited grounds for courts to refuse to enforce (or confirm) a Convention award than the grounds provided for vacatur pursuant to Chapter 1 of the FAA. *See* New York Convention at art. V, Pet. App. 79a-80a. The holding of *Industrial Risk* restricts the grounds for vacatur to only these more limited Convention defenses to confirmation. A principal problem with this interpretation is that Article V itself contains a unique defense against confirmation for awards that have previously been vacated. Specifically, Article V(1)(e) provides the defense that "[t]he award . . . *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." (emphasis added), Pet. App. 80a. This cannot be a ground for vacatur, as vacatur must have already occurred for this defense to apply. Following the reasoning of *Industrial Risk*, however, would lead to illogical and circular reasoning and render Article V(1)(e) meaningless as a grounds for vacatur.

In line with the plain text of the New York Convention, four federal courts of appeals, and this Court's recent decision in *BG Group*, the defenses to confirmation set forth in the New York Convention do not provide the grounds to vacate Convention awards.

The Eleventh Circuit holding to the contrary should be reversed.[1]

B. The Decision Below Is Contrary To The Holdings Of Four Courts Of Appeals, Thus Creating A Split Among The Circuits

Moreover, even if *BG Group* did not abrogate *Industrial Risk*, the holding below conflicts with four other courts of appeals, thus creating a split among the circuits. These other circuits hold that the New York Convention does not provide the exclusive grounds to move for vacatur of arbitral awards

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[1] The circuit court also erred in deciding, in dicta, that INPROTSA's petition to vacate warranted denial on the merits. Pet. App. 20a-25a. Assuming that Chapter 1 of the FAA applies, vacatur was warranted here because, among other reasons, the arbitral tribunal exceeded its authority by awarding damages in excess of, and under a different model than permitted by, what is allowed under Florida state law, which the parties agreed would apply to the arbitral proceeding. *See HCA Health Servs. of Fla., Inc.* v. *CyberKnife Ctr. of Treasure Coast, LLC*, 204 So. 3d 469, 472 (Fla. 4th DCA 2016).

Indeed, the tribunal contrived its own measure of damages, exceeding the parties' grant of authority to follow Florida law. This Court recognizes such exceedance of authority as a valid basis for vacatur under Section 10 of the FAA. *See Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-72 (2010) ("It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable. In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator exceeded his powers, for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." (citations, internal quotation marks, and brackets omitted)).

rendered in the United States, such as the arbitral award here, but merely the grounds to defend against confirmation.

The Second, Third, Fifth, and Sixth Circuits have expressly held that the New York Convention does not provide the grounds to move for vacatur of arbitral awards rendered in the United States. *See Yusuf Ahmed Alghanim & Sons* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 20-21 (2d Cir. 1997) (holding that the FAA's grounds for vacatur apply to international arbitral awards rendered in the United States); *Ario* v. *Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 290-91 (3d Cir. 2010) ("[B]ecause the arbitration took place in Philadelphia, and the enforcement action was also brought in Philadelphia, we may apply United States law, including the domestic FAA and its vacatur standards."); *Karaha Bodas Co., L.L.C.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003) ("By its silence on the matter, the Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary-jurisdiction's local law the decision whether to set aside an award."); *Jacada (Europe), Ltd.* v. *Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 709 (6th Cir. 2005), *abrogated on other grounds by Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576 (2008) ("Because this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award.").

The Court should resolve this circuit split and agree to decide the merits of this important issue.

C. This Case Is An Ideal Vehicle For Deciding This Important And Recurring Question

Finally, certiorari should be granted because this case will present the opportunity to correct a significant misreading of the law that could have profound effects for future aggrieved parties. INPROTSA pressed the issue below. Both the district court and the court of appeals squarely decided it. *See* Pet. App. 1a-29a; Pet. App. 33a-34a.

This case presents the ideal vehicle for deciding the question. The issue of what grounds may be relied upon to set aside or vacate international arbitral awards is a potentially recurring issue in every post-arbitration case. Because the proper analysis of these petitions is central to the role of federal courts in hearing these disputes, the practical consequences of the issue are far reaching. Given the importance of the matter for international commercial arbitration, the Court should grant the petition for certiorari. *See BG Grp.*, 572 U.S. at 32.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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