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Brief for Amici Curiae Andrea K. Bjorklund, Diane Desierto, and Franco Ferrari in Support of Petitioners-Appllants and Reversal

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NO DATE FOR ORAL ARGUMENT HAS BEEN SET

No. 20-7113

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HULLEY ENTERPRISES LTD.; YUKOS UNIVERSAL LTD.;
VETERAN PETROLEUM LTD.,

Petitioners-Appellants,

v.

RUSSIAN FEDERATION,

Respondent-Appellee.

On appeal from the United States District Court
for the District of Columbia, No. 14-1996 (BAH)

BRIEF FOR *AMICI CURIAE* ANDREA K. BJORKLUND, DIANE DESIERTO, AND FRANCO FERRARI IN SUPPORT OF PETITIONERS-APPELLANTS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* submit this certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

Except for *amici curiae* Andrea K. Bjorklund, Diane Desierto, and Franco Ferrari, all parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the Brief for Petitioners-Appellants Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioners-Appellants Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd.

C. Related Cases

References to related cases appear in the Brief for Petitioners-Appellants Hulley Enterprises Ltd., Yukos Universal Ltd., Veteran Petroleum Ltd. Counsel is not aware of any other related proceedings, as defined by Circuit Rule 28(a)(1)(C), currently pending before this or any other court.

Dated: June 1, 2021

/s/ James E. Berger
James E. Berger
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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases **Page(s)**

* Authorities upon which the *amici curiae* chiefly rely are marked with asterisks.

Statutes

Rules

Treaties

Other Authorities

GLOSSARY

Convention or New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed June 10, 1958
Geneva Convention	Convention on the Execution of Foreign Arbitral Awards signed September 26, 1927
Geneva Protocol	Geneva Protocol on Arbitration Clauses signed September 24, 1923
U.N.	United Nations

STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici curiae* are prominent professors of international arbitration and international law.[1] Their primary interest is in the accurate interpretation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**" or "**Convention**"), the mainstay of commercial and investment arbitration in the United States and around the world.[2]

The *amici* submit this brief to highlight several issues raised by the District Court's failure to properly interpret the United States' obligations under Article VI of the New York Convention.[3] The District Court's statement in its first stay decision[4] and its decision continuing the stay,[5] that it has "not ruled on its jurisdiction" and is "not in a position to issue a stay pursuant to the New York Convention," reveals the error in its decision: by declining to exercise its jurisdiction

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1 This brief has been prepared by individuals affiliated with McGill University Faculty of Law, Notre Dame Law School, and New York University School of Law, but does not purport to present the schools' institutional views, if any.

2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38 (June 10, 1958.)

3 New York Convention art. VI, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("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.").

4 *Hulley Enters. Ltd. v. Russian Fed'n*, 211 F. Supp. 3d 269, 286 (D.D.C. 2016).

5 *Hulley Enters. Ltd. v. Russian Fed'n*, No. 14-cv-1996 (BAH), 2020 WL 6822666, at *10 (D.D.C. Nov. 20, 2020) [hereafter, '*Hulley Enters. Ltd.*'].

to determine whether the Convention applies to this case, the District Court denied the benefits of the Convention to the Petitioners-Appellants and applied an erroneous standard to its stay determination. The District Court's ruling is contrary both to the purposes of the Convention (and the obligations arising thereunder) and to the United States' public policy favoring arbitration.

Amicus curiae **Andrea K. Bjorklund** is Associate Dean, Graduate Studies, the L. Yves Fortier Chair in International Arbitration and International Commercial Law, and a Full Professor at McGill University Faculty of Law. A graduate of Yale Law School (J.D.), she clerked on the U.S. Court of Appeals for the Fourth Circuit. Prior to entering the academy she worked, *inter alia*, as an attorney-adviser at the U.S. Department of State. An elected member of the American Law Institute, she was an adviser to the Project on Restating the U.S. Law of International Commercial Arbitration. She is a prolific author in investment law and arbitration and an active arbitrator and expert, as well as a member of the Bars of Maryland, the District of Columbia, and the U.S. Supreme Court.

Amicus curiae **Diane Desierto** (J.S.D., Yale Law School) is Professor of Law and Global Affairs and L.L.M. Faculty Director at Notre Dame Law School, jointly appointed to the Keough School of Global Affairs, and Faculty Fellow at five Institutes at the University of Notre Dame. She serves as editorial board member at European Journal of International Law (and EJIL:Talk! Editor), Journal of World

Investment and Trade, International Law Studies, Wolters Kluwer International Law monographs, various Asian law journals; arbitrator, British Virgin Islands Arbitration Centre; Academic Council Member, Institute of Transnational Arbitration; 2010-2011 Law Clerk, International Court of Justice; 2017 Faculty Director Hague Academy of International Law; and Expert, Association of Southeast Asian Nations (ASEAN) and the United Nations ("**U.N.**").

Amicus curiae **Franco Ferrari** is Professor of Law and Executive Director of the *Center for Transnational Litigation, Arbitration, and Commercial Law* at New York University School of Law. Professor Ferrari taught as full professor at Tilburg University (Netherlands), as well as Bologna University and Verona University (Italy). He has published around 300 research works on conflict of laws, forum shopping, international commercial arbitration, and international business transactions. Formerly Legal Officer at the U.N. Office of Legal Affairs, International Trade Law Division, Professor Ferrari is also an active international arbitrator in international commercial and investment disputes; member of the editorial board of various peer reviewed European law journals; and Co-Editor of the *Encyclopedia of Private International Law* (2017).

The *amici* are authorized to file this *amicus* brief by consent of the parties.

RULE 29(a)(4)(E) STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E) and D.C. Circuit R. 29(a)(4)(E), the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than the *amici curiae* contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Staying enforcement of an arbitral award pending a decision by a court in the place of arbitration is unusual; staying enforcement of an arbitral award for more than six years is almost unheard-of.[6] The continued stay of proceedings in this case ignores the fact that arbitral awards are presumptively enforceable; non-enforcement is the exception rather than the rule.

Thus, this case involves an issue of fundamental importance to the deliberate design of the Convention, which was also "the principal purpose underlying

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[6] *See Gold Reserve Inc. v. Bolivarian Republic of Venez.*, 146 F. Supp. 3d 112, 135 (D.D.C. 2015) [hereafter, '*Gold Reserve*'] ("The BIT, ICSID Additional Facility Rules, and New York Convention all require immediate satisfaction of arbitral awards. *Gold Reserve* first filed its request for arbitration in October 2009 — over six years ago — and the dispute with Venezuela involves investments made as far back as 1992. Given these delays, the goal of ensuring 'expeditious resolution of disputes' counsels against a stay.") (internal citations omitted).

American adoption and implementation of it,"[7] namely, "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."[8] The New York Convention overhauled the regime under the 1923 Geneva Protocol on Arbitration Clauses, and also the 1927 Convention on the Execution of Foreign Arbitral Awards ("**Geneva Convention**").[9] The Geneva Convention required confirmation of awards in the country where the arbitration took place before awards became enforceable in other jurisdictions. This double *exequatur* system produced lengthy delays in award creditors' abilities to enforce awards. The 1958 New York Convention—to which the United States is a party—was deliberately designed to eliminate double *exequatur*. The District Court's decision to further stay its proceedings to await resolution of set-aside proceedings in The Hague, in effect, judicially legislates the double *exequatur* requirement that the New York Convention eliminated. This reading of Article VI contradicts the text of Article VI

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7 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) [hereafter, '*Scherk*'].

8 *Id.*

9 Protocol on Arbitration Clauses, Geneva, Sept. 24, 1923, 27 L.N.T.S. 157 [hereafter, 'Geneva Protocol']; Convention on the Execution of Foreign Arbitral Awards, Geneva, Sept. 26, 1927, 92 L.N.T.S. 301 [hereafter, 'Geneva Convention'].

and the spirit of the Convention, as does any so-called presumption exempting a sovereign from providing security in the event a stay is granted.

ARGUMENT

In **Part I** of this brief, the *amici curiae* discuss (i) the historical background of the New York Convention, highlighting its eradication of the double *exequatur* requirement in the Geneva Convention, (ii) the deviation by way of the District Court's decision to perpetuate a *de facto* presumptive stay from United States courts' pro-enforcement stance, and (iii) the Court's duty to assess bases for granting a stay beyond the mere filing of a set-aside application in the country where the award was made, and in particular the likelihood of success of that set-aside petition. **Part II** demonstrates that the text and practice on Article VI of the New York Convention do not support provide for a presumption against a sovereign being obligated to provide security in the event a stay is granted.

I. The New York Convention's General Framework

At stake in this case is the New York Convention's pro-enforcement policy, in particular, the "policy of favoring enforcement of foreign arbitral awards"[10] underlying the Convention's Articles III *et seq.*

This "underlying [policy] of the New York Convention . . . to reduce the hurdles and produce a uniform, simple and speedy system for enforcement of foreign arbitral award"[11] distinguishes the New York Convention from its predecessors, the 1923 Geneva Protocol and 1927 Geneva Convention.[12] The New York Convention eliminated several hurdles to the seamless cross-border enforcement of arbitral awards by introducing improvements, including (i) establishing a presumption as to the binding nature of arbitral awards, (ii) reversing the burden of proving the validity or invalidity of awards from the award-creditor to the award-debtor,[13] (iii) mandating summary recognition procedures, and (iv) giving "the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security."[14]

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10 *Admart AG v. Stephen & Mary Birch Found., Inc*., 457 F.3d 302, 307 (3d Cir. 2006).

11 *Bharat Aluminium v. Kaiser Aluminium*, (2012) 9 SCC 552, ¶ 149 (India).

12 *See supra* n.9.

13 *See Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974) [hereafter, '*Parsons*'].

14 United Nations, Conference on International Commercial Arbitration, *Summary Record of the Twenty-Fifth Meeting*, U.N. Doc. E/CONF.26/SR.25,

More importantly, however, the drafters of the New York Convention eliminated the double *exequatur* requirement that had previously existed under the Geneva Convention. This may well be "the most important effect of the New York Convention."[15] As a consequence, "no leave for enforcement in the country of origin is required under the New York Convention"[16] before an award can be enforced in a secondary jurisdiction.

Furthermore, "[w]hile the Geneva Convention . . . did not circumscribe the range of available defenses [to the enforcement of an award] to those enumerated in the convention, the [New York] Convention clearly . . . limited [those] defenses to seven set forth in Article V."[17]

These improvements evidence the Convention's "basic thrust . . . to liberalize procedures for enforcing foreign arbitral awards."[18] In light of this, and the Convention's provisions regarding recognition and enforcement of arbitral awards,

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¶ 2 (Sept. 12, 1958), http://undocs.org/E/CONF.26/SR.25 (last visited on May 26, 2021, 12:17 PM) (summary of the Convention's improvements by Mr. Schurmann, the President of the Conference meeting at the Headquarters of the United Nations in New York from 20 May to 10 June 1958).

15 Richard Kreindler & Kristina van der Linden, *Arbitration, Recognition of Awards*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 117, 120 (J. Basedow et al. eds., 2017).

16 *Id*.

17 *Parsons*, at 973.

18 *Id.*

courts and commentators consider the New York Convention as being informed by a "general pro-enforcement bias."[19]

A. The New York Convention's Pro-Enforcement Bias and the Limited Grounds for Refusing Recognition and Enforcement

The Convention's general pro-enforcement stance is acknowledged by all Contracting States to the Convention.[20] It is derived mainly from the interplay between Articles III[21] and V of the Convention.[22] Article III of the New York Convention "sets forth the duty to 'recognize arbitral awards as binding and enforce them,' [which has been] construed . . . as an expression of the New York Convention's presumption in favour of recognition and enforcement of arbitral awards."[23] Article V, on the other hand, "sets forth the limited and exhaustive grounds on which recognition and enforcement of an arbitral award may be refused

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19 *Id.*

20 For case law overviews, *see*, *e.g.*, Angela T. Grahame & David R. Parratt, *The Recognition and Enforcement of International Arbitral Awards - Is there a "Pro-Enforcement Bias" in the English Courts?*, 1 J. Enforce. Arb. Awards 37 (2019); David Kwok, *Pro-enforcement Bias by Hong Kong Courts: The Use of Indemnity Costs*, 32 J. Int'l Arb. 677 (2015).

21 *See also Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120 (9th Cir. 2002) (referring to Article III as illustrative of the fact that "the Convention and its implementing legislation have a pro-enforcement bias").

22 *See* Cristina M. Mariottini & Burkhard Hess, *The Notion of 'Arbitral Award,' in* AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 27, 48 (F. Ferrari & F. Rosenfeld eds., 2021).

23 FRANCO FERRARI & FRIEDRICH ROSENFELD, INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE INTRODUCTION 222 (2021).

by a competent authority in the Contracting State where recognition and enforcement is sought."[24] These grounds[25] must be and are construed narrowly.[26] "This narrow interpretation of the Convention is in keeping with 9 U.S.C. § 207 which unequivocally provides that a court in which enforcement of a foreign arbitration award is sought 'shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention'."[27] This clearly promotes the Convention's pro-enforcement stance.

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24 UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (New York, 1958) 124 (G. Bermann & E. Gaillard eds., 2016) [hereafter, 'UNCITRAL SECRETARIAT GUIDE'].

25 *See*, *e.g*., the decision of the Supreme Court for the United Kingdom *in Dallah Real Estate & Tourism Holding Co. v Pakistan* [2011] 1 AC 763, ¶ 101, per Lord Collins ("The New York Convention does not require double exequatur and the burden of proving the grounds for non-enforcement is firmly on the party resisting enforcement. Those grounds are exhaustive"). *See also TermoRio S.A. E.S.P. v. Electranta S.P.,* 487 F.3d 928, 935 (D.C. Cir. 2007) (refusal of enforcement "only on the grounds explicitly set forth in Article V").

26 *See China Minmetals Materials Imp. & Exp. Co., v. Chi Mei Corp.*, 334 F.3d 274, 283 (3d Cir. 2003); *see also Arbitration Between Exceed Int'l Ltd. v. DSL Corp*., No. H–13–2572, 2014 WL 1761264, at *3 (S.D. Tex. Apr. 30, 2014) (holding that "[c]ourts in the United States have held consistently that the Convention's Article V defenses are enumerated and narrowly construed, so as to encourage enforcement of arbitral awards in international commercial contracts").

27 UNCITRAL SECRETARIAT GUIDE, *supra* n.24, at 283.

B. Consequences of the New York Convention's Limited Grounds for Refusing Recognition and Enforcement

Because under the Convention courts may not refuse recognition and enforcement of awards on grounds other than those listed in Article V, supplementing the grounds for refusing recognition and enforcement would constitute a breach of the obligations under the Convention. Doing so would also disregard the fact that "[a]s a matter of judicial prudence, courts should resolve ambiguities in treaties in a way that minimizes the risk of friction with the nation's treaty partners. A desire to avoid inadvertent breaches of international law is all the more important for treaties, for which correction of judicial error can be a difficult enterprise."[28] It is in light of this and the pro-enforcement policy underlying the Convention that all provisions of the Convention have to be interpreted, including Article VI.

Article VI allows a secondary jurisdiction court, if it considers it proper, to adjourn the decision on the enforcement of the award if an application for the setting aside or suspension of the award has been made to a court in the primary jurisdiction, and to order, on the application of the party seeking enforcement, the other party to give suitable security.

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[28] Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for its Resurrection*, 93 Geo. L.J. 1885, 1934 (2005).

This provision grants the enforcement court discretion to adjourn the decision on enforcement; however, this discretion is not unfettered, despite occasional holdings to the contrary.[29] The discretion is limited by the Convention's general pro-enforcement attitude, which must guide the interpretation of all of the Convention's provisions. In other words, any decision to stay enforcement of an award must be "based on an ad hoc determination by the court, guided by the pro[-] enforcement attitude of the New York Convention."[30] This means that courts may not use their discretion to create even a rebuttable presumption[31] that a set-aside application automatically leads to an adjournment of the decision on the enforcement

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29 *See Ukrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc*., No. 95 Civ. 10278 (RPP), 1996 U.S. Dist. LEXIS 2827, *18 (S.D.N.Y. Mar. 12, 1996) [hereafter, '*Ukrvneshprom*'].

30 Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 Int'l Law. 487, 506 (1990). *See also* Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 Asian Int'l Arb. J. 69, 81 (2005) (suggesting that courts take a broad approach "in the assessment of an Art VI application by looking into the legal and factual circumstances before it, bearing in mind the objectives of the Convention, rather than looking at factors external to the award such as the likelihood of success in the pending proceedings to set aside.") [hereafter, 'Rico'].

31 Reading into Article VI of the Convention a presumption, albeit a rebuttable one, would reverse the burden of proof, which, in light of the Convention's pro-enforcement attitude, clearly rests on the party resisting confirmation; *see*, *e.g*., *Gold Reserve,* at 120 ("[t]he party resisting confirmation . . . bears the heavy burden of establishing that one of the grounds for denying confirmation in Article V applies.").

of the award.[32] Yet, such a presumption seems to be applied with increasing frequency by the federal courts in this Circuit.[33] The Convention's *travaux préparatoires* unequivocally show how inappropriate this presumption is: the drafters of the Convention introduced Article VI to abolish the Geneva Convention's requirement that a foreign court refuse enforcement upon the mere application to set aside the award in the country where it was issued. As explained by Mr. de Sydow, the Chairman of the Working Party drafting Article VI,

> to prevent an abuse of that provision by the losing party which may have started annulment proceedings without a valid reason purely to delay or frustrate the enforcement of the award, the enforcement authority should in such a case have the right either to enforce the award forthwith or to adjourn its enforcement only on the condition that the party opposing enforcement deposits a suitable security.[34]

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32 *See* Brian Sampson, *Staying The Enforcement of Foreign Commercial Arbitral Awards: A Federal Practice Contravening the Purposes of the New York Convention*, 26 Brook. J. Int'l L. 1839, 1853 (2001) (criticizing that "[t]he 'unfettered discretion' first articulated in *Fertilizer Corp. of India* is reduced to nothing more than an automatic stay, a policy, which if adopted unanimously by the federal courts, may spur all 'arbitral losers' to seek review by the competent authority in the jurisdiction of origin. A policy of an automatic stay is not endorsed by the language and purpose of the New York Convention. If it was, then a stay would be contingent merely upon the posting of security.").

33 *See, e.g.*, Addendum B to Appellants' Brief [pincite?] (illustrating that 73% of stay applications filed in the District of Columbia district court in the past three years have been granted).

34 United Nations, Conference on International Commercial Arbitration, *Summary Record of the Seventeenth Meeting*, E/CONF.26/SR.17, at 4 (Sept. 12, 1958), http://undocs.org/E/CONF.26/SR.17 (last visited on May 26, 2021, 5:17 PM).

From this it follows that "the risk that the power to stay could be abused by disgruntled litigants . . . argues more for a cautious and prudent exercise of the power,"[35] as acknowledged by those courts that do not routinely stay recognition and enforcement proceedings when set-aside proceedings are commenced in the primary jurisdiction.[36] Such a presumption would be tantamount to reintroducing the double *exequatur* requirement that the New York Convention deliberately eliminated.

The limits on an enforcing court's discretion to stay enforcement also cannot be evaded by relying on domestic law or doctrines, as the District Court sought to do when it specified that "the New York Convention provision expressly authorizing a stay with posting of a bond . . . is not applicable here since the Court is relying on its inherent authority to control its docket by issuing a second stay."[37] In relation to

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35 *Ukrvneshprom,* at *19-20 (quoting *Hewlett-Packard Co. v. Berg,* 61 F.3d 101, 106 (1st Cir. 1995)).

36 *See*, *e.g.*, *Dunav Re A.D.O. Beograd v. Dutch Marine Ins. B.V.*, Court of Appeal, The Hague, Netherlands, No. 200.223.489/01, April 17, 2018, XLIII YB Comm. Arb. 535, ¶ 17 (2018) ("DMI bases its request for a stay only on the fact that a proceeding is pending in Serbia for the annulment of the arbitral award. Taking also into account that the Convention is based on a presumption of enforcement, that circumstance is insufficient to justify a stay. This request shall therefore be denied."); *Pavan s.r.l. v. Leng d'Or SA*, Court of First Instance, Rubi, Spain, no. 3, *Exequatur* No. 584/06, June 11, 2007, XXXV YB Comm. Arb. 445, ¶ 19 (2010) ("Hence, it may be concluded that the fact that an annulment action is pending is not a sufficient ground for an automatic refusal to recognize the arbitral award.").

37 *Hulley Enters. Ltd.*, at *13.

Convention awards, to the extent that the Convention addresses an issue, it preempts domestic law, unless the Convention itself provides otherwise, as it does, for example, in Article VII(1). This also holds true as regards Article VI of the Convention, with the effect that the discretion courts enjoy is limited in the sense identified earlier.[38]

An exercise in the discretion granted without taking into account the Convention's regime set out above, which clearly limits that discretion, violates the United States' obligations under the New York Convention.[39] Therefore, courts condsidering a stay may resort only to criteria established in the New York Convention context, such as those specified in *Europcar*,[40] "the first federal appellate opinion to subject the adjournment clause to a sustained analysis."[41] Resort to different criteria, such as those relied upon by U.S. courts when exercising their domestic "inherent authority" to stay, is unwarranted and violates the United States' obligations under the Convention, as well as the Convention's very spirit.

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38 *See*, *e.g.*, *Nedagro B.V. v. Zao Konversbank*, No. 02 Civ. 3946 (HB), 2003 WL 151997, at *6 (S.D.N.Y. Jan. 21, 2003) ("[A] district court should not automatically stay enforcement proceedings on the ground that parallel proceedings are pending in the originating country.").

39 *See supra* Argument Section I(B).

40 *Europcar Italia, S.p.A. v. Maiellano Tours Inc.*, 156 F.3d 310, 318 (2d Cir. 1998) [hereafter, '*Europcar*'].

41 *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 879 (D.C. Cir. 2021) [hereafter, '*Stileks*'].

C. The Court's Discretion to Stay Enforcement of a New York Convention Award Must Be Exercised Reasonably, So as to Balance the Interests of Competing Parties and Consider the Likelihood of Success of Any Pending Set-Aside Application

While Article VI does not expressly specify the criteria upon which a court should make the determination that it is "proper" to grant a stay, it is clear that the assessment must be more than simply asking whether a decision to set aside "is within the realm of possibility," as the District Court did.[42] If the only standard were whether the motion for set-aside is within the realm of the possible, it would simply serve as another avenue by which a court would effectively reintroduce a double *exequatur* requirement.

Individual courts, including courts in the United States, have assessed various factors in deciding whether or not to grant a stay. While those factors vary somewhat, one consistent consideration is whether the set-aside application has a "likelihood" or "probability" of success.[43] As one commentator noted after a thorough review of case law in multiple jurisdictions, including the United States: "[u]nder current case law, it appears that suspension of enforcement of an arbitral award which is subject to proceedings to set aside in the court of origin is dependent

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42 *Hulley Enters. Ltd.*, at *9.

43 For an overview of cases, *see* Nicola C. Port et al., *Article VI*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415 (H. Kronke et al. eds., 2010); Rico, *supra* n.30, at 69.

on the probable success of the latter proceedings."[44] Here, however, the District Court failed to make any assessment of the likelihood of success: "[t]he Shareholders' assessment of the merits of the Russian Federation's appeal may be correct but this Court is not the appropriate forum to make that call, let alone make it first, before the Dutch Supreme Court has opined."[45] With respect, the enforcing court is absolutely the appropriate forum to "make that call" under the New York Convention.[46] The D.C. Circuit itself has so noted:

> We agree with the *Europcar* court that a district court would abuse its discretion if it failed to consider the first and second factors. We think these factors directly implicate the court's responsibility to "balance the

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44 Rico, *supra* n.30, at 70. Rico's conclusion is especially noteworthy given that she argues against a likelihood-of-success criterion.

45 *Hulley Enters. Ltd.*, at *9.

46 The England and Wales Court of Appeal has noted the importance of the court's making a judgment about the proceedings pending in the foreign court:

> > The first [factor] is the strength of the argument that the award is invalid, as perceived on a brief consideration by the court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; *and the Judge must be guided by his preliminary conclusion on the point*.
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> *Soleh Boneh Int'l Ltd. v. Uganda et al.*, [1993] 2 Lloyd's Rep. 208, 212 (emphasis added) (internal citations omitted).

> Convention's policy favoring confirmation of arbitral awards against the principle of international comity embraced by the Convention."[47]

This approach is consistent with those taken in foreign New York Convention jurisdictions. The Swiss Federal Supreme Court has noted:

> The circumstances of the concrete specific case are to be considered, namely also the prospects of success of the recourse proceeding. It would be inadmissible to deny the enforcement of a 'binding' arbitral award on the sole ground that there is a still pending recourse proceeding in the state of rendition.[48]

The Swiss Court thus emphasized the obligation to base the decision about staying enforcement on something more than the mere fact that a set-aside application is pending.

The Supreme Court of Austria emphasized that:

> A guideline for this discretionary decision is an examination whether the means of recourse in the country of origin has a prospect of success. . . . The commencement of annulment proceedings alone does not suffice. Besides, the party resisting enforcement must explain

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47 *Stileks*, at 880. While the D.C. Circuit has not yet endorsed *Europcar* in its totality, it has been widely followed by D.C. district courts and by courts across the United States. *See*, *e.g.*, *Gold Reserve*, at 134-35; *Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas*, 314 F. Supp. 3d 95, 105-108 (D.D.C. 2018) [hereafter, '*Hardy Expl.*']; *Compania de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 970 F.3d 1269, 1299 (10th Cir. 2020); *Devas Multimedia Private Ltd. v. Antrix Corp.*, No. C18-1360 TSZ, 2020 WL 5569782, at *3 (W.D. Wash. Sep. 17, 2020) [hereafter, '*Devas Multimedia Private Ltd.*'].

48 *X SA v. Y GmbH*, Federal Supreme Court, Switzerland, Case No. 5A_165/2014, Sept. 25, 2014, XLI YB Comm. Arb. 564, ¶ 22 (2016) (internal citations omitted).

> concretely that its grounds for annulment (and recourse) actually should succeed, and why.[49]

In The Netherlands, the jurisdiction where the set-aside petition is pending in connection with this case, courts are of a similar view: "[t]his Court starts from the premise that the likelihood of success of [the request for] annulment or revocation is of great importance for (not) granting the request for suspension."[50]

In sum, the text of the Convention and the practice of courts in the United States and other Convention Contracting States all point to the obligation of an enforcing court to make a reasoned determination about whether to grant a stay, including by weighing the likelihood of success of any set-aside application against the interests of the award creditor and the overarching policy in favor of arbitration endorsed by the United States and by the world community in their embrace of the New York Convention. Granting a stay without making such an assessment is contrary to the Convention, undermines its effectiveness, and departs not only from U.S. practice but from the practice of courts around the world.

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49 *C Ltd. v. M GmbH, Supreme Court*, Austria, Case No. 30b65/11x, Aug. 24, 2011, XXXVIII YB Comm. Arb. 317, ¶ 56(2) (2013) (internal citations omitted).

50 *Russian Fed'n v. Everest Estate LLC et al.*, Court of Appeal, The Hague, Netherlands, Case No. 2019200.250.714-01, June 11, 2019, XLIV YB Comm. Arb. 633, ¶ 25 (2019).

II. Article VI of the New York Convention Does Not Allow a Presumption Exempting Sovereign Parties from Giving Suitable Security

Article VI of the New York Convention does not provide for any so-called "presumption." Article VI also does not distinguish between "parties" who are sovereign or non-sovereign. Article I of the Convention makes the Convention applicable to the recognition and enforcement of arbitral awards arising out of "differences between persons, whether physical or legal," thereby including States.[51] The plain text of Article VI of the New York Convention thus recognizes—without any limitation or qualification as to the nature of the "party"—that the party seeking an adjournment may also be ordered to give suitable security upon application by the party claiming enforcement.

The Supreme Court has held that "[c]herry-picked generalizations from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text."[52] In this instance, however, the *travaux préparatoires* are fully consistent with the text of the Convention and support the need for giving suitable security to safeguard against abusive, dilatory, or frivolous set-aside proceedings.[53]

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51 United Nations Economic and Social Council, *Report of the Committee on the Enforcement of International Arbitral Awards,* E/2704, E/AC.42/4/Rev.1, at 6-7, ¶ 20-24 (March 1955).

52 *GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA, LLC,* 140 S. Ct. 1637, 1646 (2020).

53 UNCITRAL SECRETARIAT GUIDE, *supra* n.24, at 280.

Accordingly, courts in foreign jurisdictions such as the United Kingdom,[54] The Netherlands,[55] Hong Kong,[56] and the Cayman Islands,[57] have applied to sovereigns the Article VI clause on giving suitable security, even if they differ as to what is suitable. No "presumption" against ordering a sovereign to post security has been recognized in any foreign jurisdiction we are aware of that has interpreted Article VI of the New York Convention.

United States courts also do not recognize any "presumption" against issuing orders for suitable security when the party seeking to stay enforcement is a sovereign. Notably, the Second Circuit did not recognize any such presumption in *Europcar* when discussing the "suitable security" a party seeking enforcement may receive if enforcement is postponed under Article VI of the Convention.[58] The emphasis on security is a calibrating or balancing mechanism responsive to the counterpart hardship that results from staying enforcement of an arbitral award:[59]

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54 *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria,* [2010] EWHC 780 (Comm).

55 *S. Pac. Properties v. Arab Republic of Egypt,* Dist. Court, Amsterdam, Netherlands, 12 July 1984, 24 ILM 1040 (1985).

56 *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (otherwise known as Pertamina)*, [2003] 2 HKLR 381.

57 *The Republic of Gabon v. Swiss Oil Corp.,* Grand Court of Cayman Islands, June 17, 1988, XIV YB. Comm. Arb. 621 (1989).

58 *Europcar*, at 318.

59 *See, e.g., Hardy Expl.,* at 108; *Alto Mar Girassol v. Lumbermens Mut. Cas. Co.,* No. 04–CV–7731, 2005 WL 947126 (N.D. Ill. Apr. 12, 2005); *Spier v. Calzaturificio Tecnica S.p.A.,* No. 86 CIV. 3447 (CSH), 1988 WL 96839

"[t]he purpose of the Article VI stay provision pursuant to the New York Convention, 'when coupled with the Article VI bond provision,' is to 'provide a judicially effective way of allowing litigation attacking an award to continue without endangering the financial interests of the award recipient.'"[60] Foreign courts such as the United Kingdom Supreme Court uphold this rationale for Article VI: "[s]ecurity pending the outcome of foreign proceedings is, in effect, the price of an adjournment which an award debtor is seeking . . ."[61]

This Court[62] set as its own policy that "[a]s a general matter, we will enforce an arbitration award unless given a compelling reason to suspect that the award resulted from an unfair process,"[63] and thus will even "enforce an annulled award . . . if the annulment is 'repugnant to fundamental notions of what is decent and just' in the United States."[64] Consistent with its own pro-enforcement policy, this

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(S.D.N.Y. Sept. 12, 1988); *Inversiones Samekh, Sociedad Anonima v. Hot Springs Inv. LLC,* No. 10-24000-CV-ALTONAGA/BROWN, 2011 WL 13221000 (S.D. Fla. Feb. 7, 2011); *Aperture Software GMBH v. Avocent Huntsville Corp.,* No. 5:14-cv-00211-JHE, 2015 WL 12838967 (N.D. Ala. Jan. 5, 2015).

60 *Nexteer Auto. Corp. v. Korea Delphi Auto. Sys. Corp.,* No. 13-CV-15189, 2018 WL 1291132, at *3 (E.D. Mich. Mar. 13, 2018).

61 *IPCO (Nigeria) Ltd. v. Nigerian Nat'l Petroleum Corp.* [2017] UKSC 16, ¶ 28.

62 *Diag Human, S.E. v. Czech Republic – Ministry of Health,* 824 F.3d 131 (D.C. Cir. 2016).

63 *Republic of Argentina v. AWG Grp. Ltd.,* 894 F.3d 327, 332 (D.C. Cir. 2018).

64 *Getma Int'l v. Republic of Guinea,* 862 F.3d 45, 48 (D.C. Cir. 2017).

Court held in *Belize Social Development Limited*[65] that a district court "exceeded the bounds of any inherent authority" when it issued a stay of enforcement that was "not in conformity with federal law and international commitments [under the New York Convention]."[66]

Giving suitable security is one such commitment expressly provided for in Article VI of the New York Convention, one that tempers the hardships of a stay of enforcement in its deviation from the default rule in the United States that "enforcement of the arbitral award is fully consistent with the public policy of the United States . . . the 'emphatic federal policy in favor of arbitral dispute resolution.'"[67] It is even more urgent when " . . . the delayed enforcement of the Award, particularly given the amount of money at issue, has burdened Petitioner, which to date has not received any 'suitable security.'"[68] Thus, "[t]he implication of Article VI is that a party who fails to post bond (and thus fails to protect its proceedings to vacate in the primary jurisdiction) risks losing the benefit of any superior force the primary jurisdiction would otherwise have had, and takes its chances in the secondary-jurisdiction court."[69]

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65 *Belize Soc. Dev. Ltd. v. Gov't of Belize,* 668 F.3d 724, 733 (D.C. Cir. 2012).

66 *Id*.

67 *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador,* 795 F.3d 200, 209 (D.C. Cir. 2015).

68 *Devas Multimedia Private Ltd*., at *4.

69 *Ingaseosas Int'l Corp. v. Aconcagua Investing Ltd.,* 479 F. App'x 955, 961 (11th Cir. 2012).

The Supreme Court does not lightly infer "[p]resumptions of law", which bear the high threshold of "suppositions or opinions previously formed on questions of frequent occurrence, being found, from experience, to be generally accordant with truth, and remain of force until repelled by contrary evidence."[70] No such "presumption" against issuing an order for suitable security to a sovereign party seeking to stay enforcement under Article VI of the New York Convention has ever been established under United States law or recognized in federal jurisprudence, or by any foreign court jurisdiction we are aware of that has interpreted Article VI of the New York Convention. Courts in this Circuit, however, "generally have not required foreign sovereigns to post security because they are 'presumably . . . solvent and will comply with legitimate orders issued by courts in this country or in [their home jurisdiction.].'"[71] This practice as a matter of principle has no basis in the New York Convention and therefore should not be applied. The difficulty of judicial determinations about a sovereign's solvency and compliance records explains why other district courts and the Courts of Appeals in other Circuits instead require

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70 *Rhode Island v. Massachusetts,* 45 U.S. 591, 599 (1846).

71 *CEF Energia, B.V. v. Italian Republic,* No. 19-cv-3443 (KBJ), 2020 WL 4219786, at *7 (D.D.C. Jul. 23, 2020), citing *Novenergia II – Energy & Env't (SCA) v. The Kingdom of Spain*, No. 18-cv-01148 (TSC), 2020 WL 417794, at *6 (D.D.C. Jan. 27, 2020) (quoting *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 76 (D.D.C. 2011)).

sovereigns to post suitable security pursuant to Article VI of the New York Convention.[72]

In other contexts, this Court has specifically declined to read alleged "doctrines" into the text of the New York Convention.[73] It should likewise decline to create a "presumption" that is nowhere present in the text of Article VI of the New York Convention. Creating by judicial fiat this so-called "presumption," without any basis whatsoever in the text of Article VI of the Convention or in the law and jurisprudence of the United States, introduces considerable uncertainty to the whole New York Convention. This rekindles a "dicey atmosphere of such a legal no-man's-land [as] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."[74]

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72 *Skandia Am. Reinsurance Corp. v. Caja Nacional de Ahorro y Segoro,* No. 96 Civ. 2301 (KMW), 1997 WL 278054, at *5 (S.D.N.Y. May 23, 1997) ("In light of the purpose of the New York Convention and the Second Circuit's instruction to interpret the New York Convention broadly, I find that Article VI of the New York Convention allows me to require sovereigns to post pre-judgment security if they move to set aside or suspend an arbitration award . . . "); *Caribbean Trading and Fid. Corp. v. Nigerian Nat'l Petroleum Corp.,* 948 F.2d 111, 114-115 (2d Cir. 1991).

73 *BCB Holdings Ltd. v. Gov't of Belize,* 650 F. App'x 17, 19 (D.C. Cir. 2016).

74 *Scherk*, at 517.

CONCLUSION

The Judgment below is contrary to the collective and individual post-ratification understandings of Article VI of the New York Convention by its Contracting States, including the United States. The Court should reverse and remand for further proceedings on whether a stay of enforcement is warranted, and whether such a stay should be accompanied by an order of security for costs.

Respectfully submitted,

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Dated: June 1, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

Pursuant to Fed. R. App. P. 32(g)(1) and D.C. Circuit R. 29(a)(4)(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and D.C. Circuit R. 32(e)(3). According to the count of Microsoft Word, this brief contains 6456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit R. 32(f). I further certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

Dated: June 1, 2021

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I hereby certify that, on June 1, 2021, I electronically filed the foregoing Brief of *Amici Curiae* Andrea K. Bjorklund, Diane Desierto, and Franco Ferrari with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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