INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

**OPTIMA VENTURES LLC, OPTIMA 7171 LLC,
and OPTIMA 55 PUBLIC SQUARE LLC,**

Claimants,

v.

UNITED STATES OF AMERICA,

Respondent.

ICSID CASE NO. ARB/21/11

CLAIMANTS' OBSERVATIONS IN CONNECTION WITH RESPONDENT'S RULE 41(5) PRELIMINARY OBJECTIONS

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I. INTRODUCTION

1. Rule 41(5) "is intended to capture cases which are clearly and unequivocally unmeritorious, and as such, the standard that a respondent must meet under Rule 41(5) is very demanding and rigorous."[1] This "very demanding standard of proof" applies to both jurisdiction- and merits-based challenges.[2]

2. Rule 41(5) provides as follows:

> Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection.

3. *First*, under Rule 41(5), a claim must be "manifestly" without legal merit, requiring Respondent to establish that the claims are clearly and obviously baseless as a matter of law.[3] Therefore, "'Rule 41(5) can only apply to a clear and obvious case', or 'to patently unmeritorious claims.'"[4]

4. If a Claimant presents even minimally colorable legal arguments, Respondent's Rule 41(5) objections are not "sufficiently 'clear or certain' to justify passing summary judgment

[1] *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent's Objections under Rule 41(5), ¶ 88 (28 October 2014) (CL-0001).
[2] *Id.* at ¶ 91 (28 October 2014) (CL-0001).
[3] *Mainstream Renewable Power, Ltd., International Mainstream Renewable Power, Ltd., Mainstream Renewable Power Group Finance, Ltd., Horizont I Development, GmbH, Horizont II Renewable, GmbH and Horizont III Power GmbH v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), ¶¶ 81-82 (18 January 2022) (CL-0002).
[4] *Id.* at ¶ 82 (quoting *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, ¶ 92 (CL-0003).

on them."[5] Under this standard, even a "tenable arguable case" cannot be dismissed as "clearly and unequivocally unmeritorious."[6]

5. Indeed, the standard under Rule 41(5) is so demanding that, as of March 2021, the Rule had been invoked in only 40 of the 754 arbitrations registered with ICSID since the rule was introduced in 2006, amounting to approximately 5% of all "arbitration and post-award remedy proceedings."[7] Of the 37 objections that had been ruled upon as of March 2021, only seven awards upheld the objections in their entirety, and four decisions partially upheld the objections. The remainder dismissed the objections.[8]

6. <u>*Second*</u>, Rule 41(5) requires that any alleged defect be legal, not factual. "ICSID tribunals have found that objections should be based on legal impediments to claims, rather than factual ones."[9] Therefore, "the factual premise has to be taken as alleged by the Claimant. Only if on the best approach for the Claimant, its case is manifestly without legal merit, it should be summarily dismissed."[10]

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[5] *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), ¶ 46 (2 December 2014) (CL-0004) ("Whatever the merits or demerits of the Respondent's submissions . . . the Claimant has countered them in a way that makes it impossible for the Tribunal to regard the Respondent's objection as sufficiently 'clear and certain' to justify passing summary judgment on them now, at this preliminary stage . . .."); *see also PNG Sustainable Development*, Decision on the Respondent's Objections under Rule 41(5), ¶ 89 (CL-0001) ("Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts."); *Mainstream Renewable Power*, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), ¶ 83 (CL-0002) ("[T]he Rule 41(5) procedure is not intended, nor should it be used, as the mechanism to address complicated, difficult, or unsettled issues of law.").

[6] *PNG Sustainable Development,* Decision on the Respondent's Objections under Rule 41(5), ¶ 88 (CL-0001); *Mainstream Renewable Power*, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), ¶ 84 (CL-0002) ("Therefore, if the claimant […] can point to an arguable case, the claim should proceed.").

[7] *See In Focus: Objections that a Claim Manifestly Lacks Legal Merit (ICSID Convention Arbitration Rule 41.5))*, March 2021. Available at https://icsid.worldbank.org/resources/publications/focus-objections-claim-manifestly-lacks-legal-merit-icsid-convention.

[8] *Id.*

[9] *PNG Sustainable Development*, Decision on the Respondent's Objections under Rule 41(5), ¶ 90 (CL-0001); *see also Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 35 (20 March 2017) (CL-0005) ("[T]he parties agree that Rule 41(5) pertains only to legal defects, including those involving either jurisdiction or the merits, but not to factual defects.").

[10] *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, ¶ 61 (2 February 2009) (CL-0006).

7. Respondent does not dispute that, under Rule 41(5), an arbitration may be dismissed only if the objections "clearly and obviously" show that the claims "manifestly lack legal merit," with the claimants' alleged facts presumed true unless "incredible, frivolous, vexatious or inaccurate or made in bad faith."[11]

8. Respondent comes nowhere close to meeting this exacting standard. Nearly half of its Rule 41(5) Preliminary Objections (pages 1-3 and 6-23, out of 44 pages total) discuss disputed facts with reference to an incomplete and extraneous documentary record, essentially seeking an expedited decision not on the "*legal* merit[s]," but on the merits of the claims in their entirety, based on a self-curated narrative that is fundamentally inaccurate and vigorously disputed.

9. The extended presentation of disputed factual arguments—including averments that Claimants participated in an international criminal money laundering scheme[12]—is inappropriate under Rule 41(5).[13] "A tribunal at this early stage, without the benefit of a full presentation by all parties, cannot resolve contentious factual issues."[14] While there may exist certain, limited circumstances "on a Rule 41(5) application in which a tribunal might have to

[11] Respondent's Rule 41(5) Preliminary Objections ("Rsp's PO"), at 24-25.

[12] It is noteworthy that no court anywhere in the world has found that allegation to be true. After years of investigation, Respondent has not brought any criminal charges against any individual or entity arising out of this purported scheme. In fact, Ukrainian courts have expressly rejected allegations of a criminal money laundering scheme. *See* Section II(d), *infra*. At least one Respondent in a prior case has raised as a defense to an investment dispute generalized allegations of "money laundering" that were ultimately unfounded. *See Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014, ¶ 284 (CL-0007) ("the Respondent has simply failed to substantiate the allegations of unlawfulness and money laundering made by its officials and experts. No Kyrgyz court has rendered a guilty verdict against Manas Bank, the Claimant, or related individuals.") *but see Belokon v. Kyrgyz Republic*, Judgment of the Paris Court of Appeal 15/01650 (21 Feb 2017) (CL-0008) (refusing to enforce award and electing to allow "annulment" of award based on same allegations of money laundering).

[13] Rule 41(5) is limited to consideration of a purported "legal, not factual, impediment." *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Decision of the Ad hoc Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5) (21 July 2022), ¶ 152 (CL-0009); *see also Trans-Global*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008 ¶ 97 (CL-003) ("At this early stage of these proceedings, without any sufficient evidence, the Tribunal is in no position to decide disputed facts alleged by either side in a summary procedure.").

[14] *Dominion Minerals*, Decision of the Ad hoc Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5), ¶ 152 (CL-0009).

explore the essential factual premises of a claim," any such analysis "could only be a high-level enquiry, to establish whether the essential factual assertions could conceivably be susceptible of proof at all."[15]

10. Although Claimants respond to and address at a high-level the various factual arguments in Respondent's Rule 41(5) Preliminary Objections, the introduction of extraneous disputed facts is improper in the first instance. Rule 41(5) should not be used to weigh disputed facts but instead to evaluate legal arguments. In any event, Respondent's legal arguments in the Preliminary Objections manifestly lack merit and cannot meet the heavy burden for dismissal. For each of Respondent's Preliminary Objections, a "counter-argument is identified" and an "arguable" response is provided.[16]

11. Respondent's Rule 41(5) Preliminary Objections should be denied.

II. FACTUAL BACKGROUND[17]

A. The Civil Forfeiture Actions and Respondent's Violations of the Treaty

12. On August 6, 2020, Respondent, through the United States Department of Justice ("DOJ"), initiated two civil forfeiture lawsuits in the Southern District of Florida (the "U.S. Court"). The first lawsuit (the "Texas Action") targeted for forfeiture to Respondent a Dallas office park known as the former CompuCom Headquarters (the "CompuCom Campus").[18] The second

[15] *Id.* at ¶ 153.
[16] *Mainstream Renewable*, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) ¶ 84 (CL-0002)
[17] This factual background assumes the Tribunal's familiarity with the facts as set forth in Claimants' prior filings, including but not limited to Claimants' Requests for Arbitration, dated February 8, 2021 and February 22, 2021, and Claimants' Proposal to Disqualify Michael Chertoff as Arbitrator, dated July 15, 2022.
[18] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Compl. Forfeiture In Rem (S.D. Fla. Aug. 6, 2020) (the "Texas Compl." (C-0001).

lawsuit (the "Kentucky Action") targeted for forfeiture to Respondent a Louisville office tower known as PNC Plaza.[19]

13. The civil forfeiture complaints allege, among other things, that Ukrainian nationals Ihor Kolomoisky and Gennadiy Boholiubov, the former owners of Ukrainian financial institution PrivatBank, "used their control of PrivatBank to steal billions of dollars of the bank's funds" in violation of Ukrainian law.[20]

14. Contemporaneous with the initiation of the Texas and Kentucky Actions, Respondent issued a press release, published on its official government website, that proclaimed, among other things: "Ihor Kolomoisky and Gennadiy Boholiubov, who owned PrivatBank, one of the largest banks in Ukraine, embezzled and defrauded the bank of billions of dollars" then "laundered . . . the funds to the United States" and "purchased hundreds of millions of dollars in real estate and businesses across the country, including the properties subject to forfeiture: the Louisville office tower known as PNC Plaza, and the Dallas office park known as the former CompuCom Headquarters."[21]

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[19] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Verified Compl. Forfeiture In Rem (S.D. Fla. Aug. 6, 2020) (the "Kentucky Compl.") (C-0002). Although Respondent references the Kentucky Action at length in its Preliminary Objections, PNC Plaza is not at issue in this arbitration because it is not owned or controlled by Ukrainian nationals, and thus not subject to the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment (the "U.S.-Ukraine BIT," "BIT," or "Treaty"). The Kentucky Action is, however, addressed herein to the extent it is relevant to Claimants' claims in this arbitration.

[20] *See* Texas Compl. at ¶¶ 16, 64-73 (C-0001); Kentucky Compl. at ¶¶ 17, 67-76 (C-0002).

[21] *See* DEP'T JUST., OFF. PUB. AFFS., Press Release: Justice Department Seeks Forfeiture of Two Commercial Properties Purchased with Funds Misappropriated from PrivatBank in Ukraine (Aug. 6, 2020) (R-0048). Claimants vehemently deny Respondent's allegations and maintain that, contrary to Respondent, no illegal conduct occurred, and as will be shown, the funds invested in the properties at issue in this arbitration were legitimate and entirely appropriate. *See generally See Optima Ventures LLC and Optima 7171 LLC v. United States of America*, Request for Arbitration, ¶¶ 86-87 (Feb. 8, 2021); *Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America, Request for Arbitration*, ¶¶ 76-77 (Feb. 24, 2021).

15. On August 10, 2020, in the Kentucky Action, Respondent applied for an *ex parte* restraining order targeting PNC Plaza.[22] The application was filed under seal (available only to the court) and Respondent also submitted to the court, under seal, a 4-page proposed order granting the application.[23] On August 14, 2020, the U.S. Court entered an "*Ex Parte* Restraining Order" which did not deviate in any way from the form of Respondent's 4-page proposed order.[24]

16. Separately, on August 18, 2020, Respondent filed *lis pendens* in the Official Records of Dallas County, Texas relating to the CompuCom Campus, and in the Jackson County, Kentucky Clerk's Office relating to PNC Plaza.[25] The purpose of the *lis pendens* was to cloud title on the properties by, among other things, informing any potential buyers of the properties of the pendency of the civil forfeiture actions.

17. As in the Kentucky Action, on September 3, 2020, Respondent filed an application for an *ex parte* restraining order in the Texas Action, [26] along with a 3-page proposed order granting the application,[27] this time targeting the CompuCom Campus. Again, the application and proposed order were filed under seal. That same day, the application was approved and the U.S. Court signed the "*Ex Parte* Restraining Order," which was identical to Respondent's 3-page proposed order.[28]

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[22] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Ex Parte Application for Post-Compl. Restraining Order Pursuant to 18 U.S.C. § 983(j)(1)(A) and Mem. Law Supp. Thereof (S.D. Fla. Aug. 10, 2020) (C-0003).

[23] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Proposed *Ex Parte* Restraining Order (S.D. Fla. Aug. 10, 2020) (C-0004).

[24] *Compare United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Ex Parte Restraining Order (S.D. Fla. Aug. 14, 2020) (R-0057) *with* C-0004.

[25] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Notice of Lis Pendens (S.D. Fla. Aug. 18, 2020) (R-0054).

[26] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Ex Parte Application for Post-Compl. Restraining Order Pursuant to 18 U.S.C. § 983(j)(1)(A) and Mem. Law Supp. Thereof (S.D. Fla. Sept. 3, 2020) (R-0055).

[27] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Proposed Ex Parte Restraining Order (S.D. Fla. Sept. 3, 2020) (C-0005).

[28] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, *Ex Parte* Restraining Order and Order Directing Clerk to Unseal (S.D. Fla. Sept. 3, 2020) (R-0056) (Respondent dates this document Sept. 4, 2020 on its Index of Factual Exhibits, but that is when it was docketed by the clerk on the electronic system. The *Ex Parte* Restraining Order was signed by the court on Sept. 3, 2020 and is dated Sept. 3, 2020).

18. The *Ex Parte* Restraining Order issued in the Texas Action effectively seized the CompuCom Campus from Claimants and eliminated their ability to "transfer, sell, assign, pledge, distribute, encumber, attach or dispose[] of in any manner" the CompuCom Campus "unless approved in writing by [Respondent]."[29]

19. Claimants conferred repeatedly with Respondent regarding the *ex parte* restraining orders. At all times, Respondent maintained Claimants were "not entitled automatically to an evidentiary hearing," and consistently represented it would oppose any request by Claimants for such a hearing.[30]

20. On October 12, 2020, following conferral, Claimants filed a joint motion to vacate the *ex parte* restraining orders in both the Kentucky Action and the Texas Action.[31] In the joint motion to vacate, Claimants sought "a prompt, adversarial evidentiary hearing with respect to the basis for the restraining order," and noted that Respondent "asserts that the Claimants are not entitled to any post-restraint hearing[.]"[32]

21. On October 26, 2020, in response to the joint motion to vacate the *ex parte* restraining orders, Respondent argued that "[t]he restraining orders entered by this Court . . . should be upheld without a hearing," there is "no independent basis for a hearing under the Due Process clause," and the "court may impose th[e] restrictions without providing notice to potential claimants, much less a hearing."[33]

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[29] *Id.* (R-0056).
[30] Email Chain, Oct. 8, 2020 (C-0006)
[31] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants' Time-Sensitive Joint Mot. Vacate *Ex Parte* Restraining Order (S.D. Fla. Oct. 12, 2020) (R-0067).
[32] *Id.* (R-0067).
[33] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, United States' Response in Opposition to Claimants' Joint Motions to Vacate Restraining Orders (S.D. Fla. Oct. 26, 2020) (C-0007).

22. On November 2, 2020, Claimants filed a "Reply in Support of Joint Motion to Vacate Ex Parte Restraining Order and Request for Prompt Post-Seizure Hearing."[34] The reply in support of the joint motion to vacate urged the U.S. Court to grant a "prompt post-seizure hearing," and to provide Claimants "an opportunity to contest the basis for the seizure . . . prior to the scheduled closing of the sale of the [PNC Plaza], currently scheduled for November 14, 2020." [35]

23. The November 2020 sale date for PNC Plaza came and went without any ruling on the joint motion to vacate the *ex parte* restraining orders, and the sale was consummated. As later described by the U.S. Court, Respondent "not only oversaw the sale, it was intimately involved and coordinated closely with the parties – the title company, the purchaser, and the Claimants."[36] Pursuant to the restraining order, approximately $9.1 million from the sale of PNC Plaza was transferred by the buyer to the United States Marshals Service.

24. Because Respondent alleged in both the Kentucky Action and Texas Action that "funds misappropriated from PrivatBank" were used by Claimant Optima 55 Public Square, LLC "to acquire the building at 55 Public Square in Cleveland, Ohio"[37] on December 22, 2020, Claimants notified Respondent "in the spirit of full disclosure" that "Optima 55 Public Square LLC [had] executed an agreement of purchase and sale for the 55 Public Square building[.]"[38] On December 30, 2020, just one week after Respondent was notified of the sale contract, Respondent

[34] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants' Reply in Support of Joint Motion to Vacate Ex Parte Restraining Order and Request for Prompt Post-Seizure Hearing (S.D. Fla. Nov. 2, 2020) (C-0008).
[35] *Id.* (C-0008).
[36] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint (S.D. Fla. Sept. 28, 2022) (C-0009).
[37] Texas Compl., ¶ 86(c)(I) (C-0001); Kentucky Compl., ¶ 89(c)(i) (C-0002).
[38] Email Chain, Jan. 8, 2021 (C-0010).

commenced a third civil forfeiture action by filing a "Complaint and Notice," this time "for the forfeiture of 55 Public Square" (the "Ohio Action").[39]

25. Respondent also issued a new press release that same day, repeating its allegations of fraud and money laundering, and claiming that "Kolomoisky and Boholiubov, Mordechai Korf and Uriel Laber, operating out of offices in Miami, created a web of entities, usually under some variation of the name 'Optima,' to further launder the misappropriated funds and invest them . . . including the properties subject to forfeiture: the office tower known as 55 Public Square in Cleveland, Ohio, the Louisville office tower known as PNC Plaza, and the Dallas office park known as the former CompuCom Headquarters."[40]

26. As of February 2021, the joint motion to vacate the *ex parte* restraining orders remained *sub judice* with no hearing scheduled, the *lis pendens* remained on file in Texas, and Respondent's press releases claiming that the CompuCom Campus and 55 Public Square were traceable to a billion dollar bank fraud, embezzlement, and money laundering scheme remained published on Respondent's official website.

27. On February 8, 2021, six months and two days after the commencement of the Texas Action, Claimants filed their first Request for Arbitration, arising out of Respondent's violations of the Treaty with respect to the CompuCom Campus.

28. On February 24, 2021, six months and eighteen days after the commencement of the Texas Action, Claimants filed their second Request for Arbitration, arising out of Respondent's violations of the Treaty with respect to 55 Public Square.

B. Claimants' Efforts to Resolve the Disputes Through Consultation and Negotiation Were Futile

[39] *See id.* (C-0010); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Complaint for Forfeiture in Rem (Dec. 30, 2020) ("Ohio Compl.") (C-0011).
[40] DEP'T JUST., OFF. PUB. AFFS., Press Release: Justice Department Seeks Forfeiture of Third Commercial Property Purchased with Funds Misappropriated from PrivatBank in Ukraine (Dec. 30, 2020) (C-0012).

29. After Respondents filed the August 6, 2020 initial forfeiture complaints, Claimants repeatedly sought to resolve the disputes with Respondent through consultation and negotiation.

30. In order to maintain their ongoing businesses, from August through September 2020, Claimants sought to negotiate with Respondent the continued use and exploitation of the restrained CompuCom Campus and PNC Plaza, to no avail.

31. On October 5, 2020, Claimants Optima Ventures and Optima 7171 notified the United States of their intent to arbitrate in a filing with the U.S. Court, in which Claimants stated they:

> reserve[] any and all defenses and objections, including as to this Court's jurisdiction over the subject of this action, including that such claims should be submitted to arbitration pursuant to the Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, dated March 4, 1994.[41]

32. On October 6, 2020, Claimants advised Respondent by email that they were asserting that the Texas Action constituted an unlawful "expropriation or nationalization" in violation of the Treaty's "fair and equitable" treatment standard, and asked:

> whether the United States agrees that its requested relief (and the ex parte relief already obtained in Case Number 1:20-cv-23278-MGC) fall within the scope of the U.S.-Ukraine BIT such that this dispute is capable of submission to dispute resolution pursuant to Article VI of the U.S.-Ukraine BIT.[42]

33. On October 21, 2020, Claimants sent a follow up email stating:

> [O]n October 6, 2020, Claimants requested the position of the United States as to the arbitrability of the dispute in case number 20-cv-23278, as set forth in the Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment (the "U.S.-Ukraine BIT"). Please advise as to the United States' position regarding arbitration pursuant to the U.S.-Ukraine

[41] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Claim of Optima 7171, LLC (S.D. Fla. Oct. 5, 2020) (R-0058); *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Claim of Optima Ventures, LLC (S.D. Fla. Oct. 5, 2020) (R-0059).

[42] *See Optima Ventures LLC and Optima 7171 LLC v. United States of America*, Request for Arbitration, ¶ 98 (Feb. 8, 2021).

> BIT at the earliest opportunity. We are available to consult with the United States pursuant to Article VI(2). The position of the United States will inform the substance of the responsive motions. If the United States is unable to provide its position, Claimants reserve their right to initiate arbitration of their own initiative.[43]

34. These messages were sent to: Mary Butler, the Chief of the International Unit of the U.S. Department of Justice's Money Laundering and Asset Recovery Section ("MLARS"); Michael Olmsted, a Senior Trial Attorney at the International Unit of MLARS; and Shai D. Bronshtein, a Trial Attorney at the International Unit of MLARS.[44]

35. On October 27, 2020, the United States responded, taking the position that "[n]one of the measures referenced . . . constitute violations of the U.S.-Ukraine BIT."[45]

36. On November 19, 2020, Claimants and the United States submitted an unopposed motion for extension of time, which included the following language concerning the parties' positions as to the arbitrability of the dispute under the Treaty:

> Claimants maintain that the request for an extension of time to file responsive motions should not be construed as a waiver of any rights or the submission of the merits of the dispute to the courts or administrative tribunals of the United States. Claimants reserve their right at the appropriate time under the treaty to commence arbitration and to move to compel arbitration. The United States maintains that none of the measures taken constitute violations of the U.S.-Ukraine Bilateral Investment Treaty, the United States reserves all of its rights and does not consent to any arbitration, the United States does not waive any arguments in opposition to any contemplated motions, and the United States does not join the Claimants' characterizations in this paragraph.[46]

[43] *See id.* ¶ 99.
[44] "The responsibility for anti-money laundering enforcement efforts, including forfeiture cases, lies with the U.S. Department of Justice, and chiefly the Money Laundering and Asset Recovery Section (MLARS)." Rsp's PO, ¶ 18.
[45] *See Optima Ventures LLC and Optima 7171 LLC v. United States of America*, Request for Arbitration, ¶ 103 (Feb. 8, 2021).
[46] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants' Unopposed Motion for Extension of to File Responsive Motions or Answers (S.D. Fla. Nov. 19, 2020) (C-0013).

37. Respondent reaffirmed this position several times,[47] and consistently and exclusively took the position that "none of the measures taken constitute violations of the U.S.-Ukraine Bilateral Investment Treaty" and the United States "does not consent to any arbitration[.]"

C. Respondent's Actions Deprived Claimants of Fundamental Rights of Ownership

i. *The Sale of 55 Public Square*

38. On December 22, 2020, when Claimants "in the spirit of full disclosure" notified Respondent of a sale agreement concerning 55 Public Square,[48] the property was in dire financial condition and the remaining equity was minimal, such that any remaining equity would be eclipsed by debt unless there was a sale in short order.

39. In response to Claimants' December 22 notice, Respondent commenced a new forfeiture lawsuit on December 30, 2020, targeting 55 Public Square (the "Ohio Action").[49] Respondent also simultaneously issued a press release, which again accused Claimants of criminal money laundering and bank fraud, and specifically claimed that the investment in 55 Public Square was tainted by illicit funds.[50]

40. As soon as Respondent filed the new lawsuit and issued the new press release, Respondent sent a message to Claimants stating:

> We are willing to discuss an interlocutory sale of the property in the context of that action, assuming your clients intend to file a claim, but would insist that any proceeds remain with the Government pending the outcome of that action.[51]

[47] Even after the Requests for Arbitration were filed, Claimants repeatedly consulted with Respondent, including extensive consultations with Respondent's representatives remotely and also in person in 2021, 2022, and 2023. At no time has a resolution been reached or even offered.
[48] Jan. 8, 2021 Email Chain (C-0010).
[49] *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Complaint for Forfeiture in Rem (S.D. Fla. Dec. 30, 2020) (C-0011).
[50] DEP'T JUST., OFF. PUB. AFFS., Press Release: Justice Department Seeks Forfeiture of Third Commercial Property Purchased with Funds Misappropriated from PrivatBank in Ukraine (Dec. 30, 2020) (C-0012).
[51] Jan. 8, 2021 Email Chain (C-0010).

41. Given 55 Public Square's dire financial situation, and Respondent's actions targeting the property, Claimants had no alternative but to acquiesce to Respondent's demands in order to ensure the planned sale went through and any remaining equity in the investment would be preserved. Following telephonic conferral with Respondent on January 8, 2021, Respondent reiterated, "[a]s is the case with the other properties, we would require that all net proceeds from the sale be deposited with the US Marshals Service," and refused to agree to allow Claimants to access or use the proceeds from the sale in any way.[52]

42. The sale of 55 Public Square ultimately went through on February 12, 2021. Pursuant to Respondent's demands, the proceeds of the sale, which amounted to only $587,365, were deposited with the U.S. Marshals and have never been accessed by, or accessible to, Claimants.

ii. *The Sale of the CompuCom Campus*

43. Throughout the course of the extensive discussions and consultations Claimants had with Respondent regarding resolution of the disputes, including with respect to the sale of 55 Public Square, Respondent consistently maintained that any sale must be "subject to [Respondent's] diligence and final approval" and that any and all proceeds from any sale must "be held by the [United States Marshall Service] pending" the outcome of Respondent's forfeiture proceedings.[53]

44. Respondent's demands regarding the sale of the CompuCom Campus were further mandated by the *ex parte* restraining order Respondent obtained without Claimants having the opportunity to object or be heard in any way.[54] In fact, Claimants did not assent to the terms of the

[52] Jan. 8, 2021 Email Chain (C-0010).
[53] Nov. 24, 2020 Email Chain (C-0014).
[54] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, *Ex Parte* Restraining Order and Order Directing Clerk to Unseal (S.D. Fla. Sept. 3, 2020) (R-0056).

restraining order, and sought its vacatur.[55] In their motion to vacate the restraining order, Claimants sought "a prompt, adversarial evidentiary hearing" and argued that the "Government indisputably sought and obtained . . . an order that expropriates" the investments.[56]

45. Respondent's actions, including the filing of the civil forfeiture actions, the filing of *lis pendens*, the public accusations of criminality associated with the properties, and the restriction of Claimants' rights *via* the *ex parte* restraining orders Respondent obtained, deprived Claimants of their fundamental rights of ownership by making it impossible for Claimants to freely use and profit from their investments, and by subjecting Claimants' use and exploitation of their investments to Respondent's explicit review and approval.

46. For example, the First Amendment to Contract of Sale concerning the CompuCom Campus provided that:

> [T]he parties recognize and agree that the Property is currently subject to a forfeiture action filed by the United States of America . . . . therefore Seller shall obtain the consent and approval of the Department of Justice for the subject sale, including this Amendment, prior to Closing ("DOJ Approval"). In the event Seller shall be unable to obtain the DOJ Approval at or prior to Closing . . . Purchaser shall have the right to terminate the Agreement whereupon Seller shall return the Initial Earnest Money and the Additional Earnest Money to Purchaser.[57]

47. In addition, the First Amendment to Agreement of Purchase and Sale concerning 55 Public Square provided that:

> The parties recognize and agree that the Property is currently subject to a forfeiture action filed by the United States of America . . . (the "Forfeiture Case") and, as such, this Amendment is subject to the consent and approval of the Department of Justice.[58]

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[55] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants' Time-Sensitive Joint Mot. Vacate *Ex Parte* Restraining Order (S.D. Fla. Oct. 12, 2020) (R-0067).
[56] *Id.* (R-0067).
[57] Contract of Sale, First Amendment to Contract of Sale, and Second Amendment to Contract of Sale (CompuCom Campus), p. 31 (C-0015).
[58] Agreement of Purchase and Sale and First Amendment to Agreement of Purchase and Sale (55 Public Square), pp. 76-77 (C-0016).

48. Given Respondent's actions and the dire financial status of the CompuCom Campus (which was accruing fees related to taxes and maintenance expenses), Claimants had no choice but to acquiesce to Respondent's demands and conduct an interlocutory sale, subject to Respondent's approval, which required depositing any and all proceeds with Respondent. As Claimants expressed in an email to Respondent:

> [A]ttached please find our revised draft which reflects Claimants' position that, due to the existence of the forfeiture litigation including the *ex parte* order, agreeing to the terms of sale, including deposit with the USMS, is the only prudent course of action at this time.[59]

49. Claimants also reiterated that position in the revised draft attached to that email.[60]

50. The certificate of conferral in Respondent's motion for the interlocutory sale of the CompuCom campus contained the following language:

> In accordance with S.D. Fla. L.R. 7.1(a)(3), counsel for the United States conferred with Claimants' counsel, who does not oppose the relief sought here and has consented to the procedures for the sale, because *inter alia* the Court's *ex parte* order (ECF No. 6) and a *Lis Pendens* (ECF No. 4) are currently in effect and, in Claimants' view, prevent alternate use or disposition of the property. In Claimants' view, under the circumstances, this sale (and subsequent deposit of proceeds into the USMS) is the only way to preserve the property's value and mitigate damages at this time . . . . Claimants' non-opposition to this motion, however, should not be viewed as a waiver of any rights asserted in *Optima Ventures, LLC, Optima 7171, LLC, and Optima 55 Public Square, LLC v. United States of America* – ICSID Case No. ARB/21/11.[61]

51. Ultimately, the CompuCom Campus was sold and the proceeds were deposited with the U.S. Marshals Service as required by Respondent.

iii. *Respondent Seeks to Stay Forfeiture Actions Indefinitely*

[59] Sept. 20, 2021 Email Chain, (C-0017).
[60] Claimants' Revised Draft Expedited Unopposed Mot. to Authorize Interlocutory Sale in Case No. 1:20-cv-23278 (C-0018).
[61] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Expedited Unopposed Mot. to Authorize Interlocutory Sale in Case No. 1:20-cv-23278 (S.D. Fla. Sept. 20, 2021) (R-0082).

52. Respondent's claim that "[I]n any civil case brought in the United States, the matter then proceeds to discovery, further motions, and a trial,"[62] is not accurate. In civil cases other than forfeiture actions, following the commencement of the action, mutual discovery takes place and then, if the Respondent is the plaintiff, it must present a substantive case on the merits based on documentary and testimonial evidence.

53. The procedure is different in civil forfeiture cases, which Respondent may bring to a halt at the pleading stage before any discovery. Indeed, in civil forfeiture actions, "[u]pon the motion of the United States, the court *shall* stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation."[63]

54. U.S. courts have held that discovery and trial in a civil forfeiture action cause the kind of adverse impact on a criminal investigation that the statutory right to a stay is designed to avoid.[64] Thus, in a civil forfeiture action, Respondent can indefinitely avoid discovery and trial by seeking a stay based on a purported "ongoing" related criminal investigation.

55. When Respondent seeks to stay a civil forfeiture action based on claims that allowing the case to proceed will adversely impact an ongoing criminal investigation, U.S. courts do "not have discretion to deny the requested stay because the statute mandates that a stay be

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[62] Rsp's PO, ¶ 22.
[63] 18 U.S.C. § 981(g)(1) (C-0019).
[64] *See United States v. Funds, In Amount of $1,699,675.00 (U.S.)*, No. 1:13-CV-21459, 2014 WL 687553, at *3-4 (S.D. Fla. Jan. 16, 2014) (C-0020) ("If the case were to go to trial next month, then the United States would, for example, either have to call the informant as a witness or have its agents reveal the informant's identity. Moreover, it would need to elicit testimony from some (and perhaps many—and conceivably even all) witnesses involved in the criminal investigation. This type of scenario would also generate the type of adverse impact on the criminal investigation which the requested stay is designed to avoid."); *see also United States v. VIN:WP1AD2A26DLA72280*, No. 2:13-CV-636-FTM-38, 2014 WL 289379, at *1–2 (M.D. Fla. Jan. 27, 2014) (C-0021) ("The case is hereby STAYED pending the Government's criminal investigation").

entered in a civil forfeiture proceeding if the Government's related criminal investigation would be adversely affected," and the courts are "statutorily compelled to grant the stay."[65]

56. Civil forfeiture cases thus may linger in limbo indefinitely because criminal investigations have no time limit. As an instructive example, in the Kentucky Action, Respondent represents that, if the case proceeds past the pleading stage, it will move under 18 U.S.C. § 981(g)(1) for a mandatory stay, "so as not to affect an ongoing criminal investigation"[66] – even though that case was filed on August 6, 2020 and has been pending for over two and a half years. Contrary to Respondent's insinuations, no "trial" is forthcoming.

57. Respondent discusses at length its view of the U.S. civil forfeiture laws and its belief that those laws exclusively serve the salutary purpose of combatting crime. But the U.S. civil forfeiture laws have been criticized extensively,[67] and there have been numerous documented instances of abuse.[68] As recognized by U.S. Senator Chuck Grassley:

> Asset forfeiture authorities are effective tools for law enforcement, but we have seen time and again these tools are ripe for abuse. Too often Americans do not receive notice that their property was seized, or the civil seizure is never connected to any charged criminal conduct.[69]

D. Ukrainian Authorities and Courts Do Not Support Respondent's Allegations

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[65] *United States v. Funds, In Amount of $1,699,675.00 (U.S.)*, No. 1:13-CV-21459, 2014 WL 687553, at *4 (S.D. Fla. Jan. 16, 2014) (C-0020).

[66] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, United States' Supplemental Response to Claimants' Motion to Dismiss Per the Court's Order of August 20, 2022 (Dkt. No. 161) (S.D. Fla. Sept. 7, 2022), at 9 (C-0022).

[67] *See* How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture As A Tool of Criminal Law Enforcement, 131 Harv. L. Rev. 2387 (2018) (C-0023).; Civil Forfeiture: A Fiction That Offends Due Process, 13 Regent U. L. Rev. 259 (2001) (C-0024).

[68] Andrew Wimer, Institute For Justice, *The FBI Took Her Life Savings But Won't Say What She Did Wrong,* Forbes (Mar. 14, 2023) (C-0025); Jeremy Duda, *Trucking company owner finally gets cashseized through forfeiture,* Axios Phoenix (Mar. 23, 2023) (C-0026); Malinda Harris and Stephen Silverman, *Police abuse civil asset forfeiture laws while innocents pay the price,* usa today (Mar. 10, 2021) (C-0027).

[69] *See Optima Ventures LLC and Optima 7171 LLC v. United States of America*, Request for Arbitration, ¶ 83 (Feb. 8, 2021).

58. As described *supra*, and in Respondent's Preliminary Objections, the civil forfeiture actions arise out of an alleged scheme, purportedly orchestrated by Ukrainian nationals Kolomoisky and Boholiubov, to "st[eal] over $5 billion from PrivatBank," the Ukrainian bank they owned and controlled, by "us[ing] their control of the bank to obtain fraudulent loans," in Ukraine, "on behalf of [Ukrainian] companies they owned or controlled,"[70] allegedly in violation of Ukrainian law.[71]

59. Notwithstanding Respondent's allegations of a massive criminal scheme orchestrated in Ukraine, by Ukrainian citizens, against a Ukrainian bank, in violation of Ukrainian law, *the Ukrainian authorities have not brought any criminal charges, against any individual or entity, relating to the criminal Ukraine-based scheme alleged by Respondent*.

60. Respondent misleadingly notes that Ukrainian authorities "announced charges against three PrivatBank officials" in February 2021 and "two additional PrivatBank officials [] the following month."[72] Respondent fails to explain, however, that those charges had nothing whatsoever to do with the alleged criminal scheme upon which Respondent's civil forfeiture actions are based.[73]

61. In addition, further contradicting Respondent's claims, Ukrainian courts have expressly considered, and directly rejected, allegations that the loans at the heart of Respondent's alleged scheme were fraudulent, illegitimate, or unlawful in any way. After PrivatBank[74] and

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[70] Rsp.'s PO ¶ 38.
[71] *See* TX Compl. at ¶¶ 16, 64-73 (C-0001); Kentucky Compl. at ¶¶ 17, 67-76 (C-0002).
[72] Rsp.'s PO ¶ 35.
[73] *See* R-0049-0051.
[74] Respondent notes that, prior to the commencement of the civil forfeiture actions, PrivatBank filed suit in Delaware state court in May 2019, asserting claims based on the same allegedly fraudulent loan scheme "against Kolomoisky; Boholiubov; their U.S. associates Mordechai Korf, Chaim Schochet, and Uriel Laber; as well as their companies, which generally carried 'Optima' in the entities' name." Rsp's PO at ¶ 36. Respondent fails to note, however, that the Delaware court held that PrivatBank's allegations are dependent on the allegedly fraudulent nature of the Ukrainian loans, finding that "there is no way to excise the question of whether these loans were proper . . . without gutting

Respondent brought suit in the United States in 2019 and 2020, respectively, certain of the Ukrainian entities alleged to have fraudulently obtained loans from PrivatBank brought suit in Ukrainian courts against PrivatBank (the "Borrower Actions").

62. In the Borrower Actions, the Ukrainian borrowers seek judgments from the Ukrainian courts that, contrary to PrivatBank's (and Respondent's) allegations, the loans at the heart of the alleged "Optima Scheme" were not fraudulent, but demonstrably legitimate, properly performed, and consistent with Ukrainian law.

63. To date, every single Ukrainian court to issue a judgment in the Borrower Actions has found, without exception, that Respondent's allegations that the loans at issue were illegitimate and fraudulently obtained are unfounded, and that the loans were in fact legitimate and lawful. In their decisions, the Ukrainian courts in the Borrower Actions considered, and directly rejected, allegations concerning the purportedly fraudulent nature of the loans.

64. For example, in the Texas Action, Respondent claims that Claimants' investment in the CompuCom Campus is traceable, in part, to "four fraudulent loans" allegedly procured from PrivatBank in Ukraine by Ukrainian entities owned and controlled by Kolomoisky and Boholiubov: (1) Loan No. 4O10091D; (2) Loan No. 4Z10339D; (3) Loan No. 4Z10340D; and (4) Loan No. CY001K/2.[75]

65. Respondent alleges that Loan No. 4O10091D was fraudulently obtained because, among other things, the borrower "misrepresented the purpose of the loan" and "misrepresented

[PrivatBank's] claims." R-0034 at 22. The Delaware court further found "the propriety of the majority of the Optima Scheme Loans are directly at issue in the [Ukrainian] Borrower Actions" where Ukrainian courts will address allegations "that the Optima Scheme Loans were inappropriately sourced." R-0034 at 24 n.95. Respondent also ignores the Delaware court's finding that Ukrainian "courts held hearings and issued rulings against PrivatBank in all six actions rejecting its allegations that [the Borrower] misused loan proceeds and failed properly to repay loans." R-0034 at 15. For that reason, the Delaware court granted the defendants "motion to stay th[e] action pending adjudication of the [Ukrainian] Borrower Actions," and the Delaware court is now considering whether the Ukrainian Borrower Actions "will have a preclusive effect" on PrivatBank's claims. R-0034 at 38-39.

[75] Texas Compl., ¶¶ 105, 110.

the source of repayment of the loan."[76] The other loans are alleged to have been "issued in the same manner as the other fraudulent loans," *i.e.*, that the borrower misrepresented the purpose of the loans and the source of funds for the repayment of the loans.

66. The Ukrainian First Instance Courts have issued decisions in the Borrower Actions with respect to Loan Nos. 4O10091D, 4Z10339D, and 4Z10340D. In each case, the Ukrainian courts considered and rejected allegations that the loans were fraudulently issued on the same grounds alleged by Respondent – namely, that the loan proceeds were not used for the purposes stated in the relevant loan agreements, and the loans were repaid using funds other than those identified in the relevant loan agreements. The Ukrainian courts found in each instance that the loans at issue were proper, legitimate, and entirely lawful.

67. With respect to Loan No. 4O10091D, the Ukrainian First Instance Court found that the loan was not fraudulent and not in violation of Ukrainian law.[77] The court specifically considered the twin bases for Respondent's allegations that the loan was fraudulent, *i.e.*, the use of the loan proceeds and the source of the funds used to repay the loan. The Ukrainian court found, contrary to Respondent's allegations, that the loan proceeds "were used by the [Borrower] in the manner and under the terms of these Loan Agreements, and for the purpose provided by the terms of the Loan Agreements, that is to finance the current activities of the Company" and the "repayment of the loan . . . occurred at the expense of funds received by the [Borrower] from business activities."[78]

68. Another Ukrainian First Instance Court similarly rejected allegations that Loan No. 4Z10339D was fraudulent, as Respondent alleges.[79] The First Instance Court noted allegations that

[76] Texas Compl., ¶¶ 105-109.
[77] Judgment of the Economic Court of Kiev in Case No. 910/4216/21 (Sept. 20, 2021) (C-0028).
[78] *Id.* (C-0028).
[79] Judgment of the Economic Court of Kiev in Case No. 910/1846/21 (Dec. 13, 2021) (C-0029).

Loan No. 4Z10339D is part of a "series of flagrant (brazen) fraudulent schemes allegedly organized by Ukrainian oligarchs Igor Valeryevich Kolomoisky and Gennadiy Borisovich Bogolyubov and their agents in the United States and abroad to acquire hundreds of millions of dollars-worth of U.S. assets through the laundering and misappropriation of corporate loan proceeds issued by PrivatBank."[80]

69. After "having examined all the evidence provided by the parties," the Ukrainian First Instance Court rejected allegations that the loan was fraudulent and found, contrary to Respondent's allegations, that "the loan proceeds . . . were used by the [Borrower] in the manner and conditions provided by these Loan Agreements, and for the purpose provided by the terms of the Loan Agreements, which is to finance the current activities of the company,"[81] and that the loan was repaid "by the [Borrower] from its business activities."[82]

70. Yet another Ukrainian First Instance Court considered and rejected allegations that Loan No. 4Z10340D was fraudulently obtained in violation of Ukrainian law.[83] Once again, rejecting allegations identical to those made by Respondent, the Ukrainian court found that "the loan funds received by the [Borrower] under the loan agreements were used by the Company in the manner and on the terms and conditions provided for in the loan agreements and for the purpose provided in the loan agreements, which is financing of the current activities of the Company,"[84] and that the loan was "repaid in the end by the Company's funds received by the [Borrower] from

[80] *Id.* (C-0029).
[81] *Id.* (C-0029).
[82] *Id.* (C-0029).
[83] Judgment of the Economic Court of Kiev in Case No. 910/12499/21 (Feb. 15, 2022) (C-0030).
[84] *Id.* (C-0030).

its business activities."[85] The First Instance Court concluded that the evidence "refutes [PrivatBank's] arguments" regarding alleged "money laundering by [the Borrower] . . . ."[86]

71. These Ukrainian judgments explicitly reject Respondent's allegations concerning a Ukrainian fraudulent loan scheme, refuting the basis for the Texas Action and Respondent's forfeiture of the CompuCom Campus.

72. PrivatBank appealed the First Instance Courts' decisions regarding Loan Nos. 4O10091D, 4Z10339D, and 4Z10340D. The Ukrainian Appellate Courts suspended the appellate proceedings pending the decision of the Grand Chamber of the Ukrainian Supreme Court (the country's highest court) in a related Borrower Action.

73. On October 19, 2022, the Grand Chamber issued its ruling in that Borrower Action. Like every other Ukrainian court to consider the issue, the Grand Chamber found in favor of the borrower, and affirmed the lower Ukrainian courts' decisions also finding in favor of the borrower.[87] Specifically, the Grand Chamber affirmed the lower courts' findings that, among other things: (i) the proceeds of the loan at issue were not fraudulently used for purposes other than those stated in the loan agreement, but instead were used for the purpose stated in the applicable loan agreement ("payment for ore under agreements…"); and (ii) "[t]he loan was repaid by [borrower] using funds received from the guarantor in connection with the performance by the latter of its obligations under" various agreements for payments related to ferroalloys.[88]

74. The latter finding by the Grand Chamber regarding the source of the funds used to repay the loan at issue in that case (Loan No. 4N09129D) directly contradicts Respondent's

[85] *Id.* (C-0030).
[86] *Id.* (C-0030). The borrower, Zaporizhzhia Ferroalloy Plant, is an economically significant ferroalloy plant. It produces ferrosilicon (48% of the Ukrainian market), carbon ferromanganese, and metallic manganese (100% of the Ukrainian market) which are used in the metallurgical industry for alloying of steel, alloys, and cast iron.
[87] Resolution of the Grand Chamber of the Supreme Court in Case No. 910/14224/20 (Oct. 19, 2022) (C-0031).
[88] *Id.* (C-0031).

allegation, in each of the civil forfeiture actions it has commenced, that the loan is an "example" of the overall fraudulent loan scheme, and the borrower fraudulently misrepresented the source of repayment of the loan.[89] The Grand Chamber reaffirmed its October 2022 decision in a March 1, 2023 ruling.[90]

75. To date, every single Ukrainian court to issue a decision in any of the Borrower Actions has considered and rejected allegations identical to those made by Respondent that the loans were fraudulently issued and in violation of Ukrainian law. Thus, the Ukrainian courts have expressly rejected Respondent's allegation of a fraudulent Ukrainian loan scheme. In every case, the Ukrainian courts have found that the loans at issue—in many cases the very same loans Respondent alleges were fraudulent in the civil forfeiture actions—were not fraudulent, and in fact were lawfully issued and properly performed. These judgments have been issued or upheld by nine Ukrainian trial-level judges and 41 Ukrainian appellate-level judges, including at the country's highest court, the Grand Chamber.

76. Notwithstanding that neither Ukrainian authorities nor any other law enforcement authorities in the world have charged any individual or entity with any crime in relation to the alleged fraudulent loan scheme underlying Respondent's civil forfeiture actions, Respondent maintains its allegations that Ukrainian law was violated in connection with the alleged fraudulent loan scheme underlying Respondent's claims.

77. In addition, Respondent maintains that the judgments issued by the Ukrainian courts in the Borrower Actions rejecting allegations that the Ukrainian loans were fraudulently issued in violation of Ukrainian law—including loans specifically referenced by Respondent in the civil forfeiture actions at issue here—are irrelevant to, and have no impact on, Respondent's

[89] Texas Compl., ¶¶ 47; Ohio Compl., ¶¶ 46; Kentucky Compl. ¶ 50.
[90] Ruling of the Grand Chamber of the Supreme Court in Case No. 910/12559/20 (Mar. 1, 2023) (C-0032).

allegations. Respondent at all times has asserted that the Ukrainian courts' rulings, which apply Ukrainian law to loans made in Ukraine, by a Ukrainian bank, to Ukrainian borrowers, do not matter.

78. Although it is not the subject of Claimants' claims here, the Kentucky Action is instructive because, among other reasons, Respondent's allegations in the Kentucky Action regarding a fraudulent Ukrainian loan scheme are substantively identical to the allegations in the Texas and Ohio Actions. The claimants in that case moved to dismiss the forfeiture complaint on the grounds that, *inter alia*, the Ukrainian courts in the Borrower Actions rejected Respondent's allegations and those decisions were entitled to deference by the U.S. Court under the doctrine of international comity. In response, Respondent cast aspersions on the Ukrainian courts and claimed that "principles of comity do not apply where the United States is a plaintiff suing to vindicate national legal and policy interests."[91]

79. The U.S. Court referred the motion to dismiss to the Honorable Magistrate Judge Jonathan Goodman to prepare a Report and Recommendation ("R&R"), which was issued on September 28, 2022.[92] While the R&R ultimately held the complaint was not subject to dismissal under the doctrine of international comity because that doctrine implicates political decisions properly left to the executive branch in the United States,[93] Judge Goodman found that "Ukrainian law enforcement authorities have not brought any charges concerning the loans at issue, no

[91] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, United States' Opposition to Claimants' Joint Motion to Dismiss Complaint for Forfeiture In Rem (S.D. Fla. Apr. 8, 2022) (C-0033).

[92] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint (S.D. Fla. Sept. 28, 2022) (C-0009).

[93] *Id.* at 26 ("It is improper for a court to second-guess the '[E]xecutive [B]ranch's judgment as to the proper role of comity concerns,' because the Executive Branch 'has already done the balancing in deciding to bring the case in the first place.'") (C-0009).

Ukrainian criminal court has determined any wrongdoing occurred, and Ukrainian courts have apparently validated the loans at issue as legitimate and not fraudulent."[94]

80. Judge Goodman also found "(1) the United States must, in order to prevail in [the Kentucky Action], establish that Ukrainian companies violated Ukrainian law when they obtained loans from a Ukrainian bank; (2) the Ukrainian borrowers accused by the United States of violating Ukrainian law filed lawsuits in Ukrainian courts against the Ukrainian bank from which they allegedly stole funds by fraud; (3) the Ukrainian borrowers sought judgments that the allegations are false (and that the loans at issue were not fraudulent); (4) the Ukrainian courts ruled in favor of the borrowers, finding the loans valid; and (5) the Ukrainian judgments (now on appeal) were based on much of the evidence which will be at issue in the instant lawsuit."[95] The R&R was ultimately adopted in its entirety by the U.S. Court, over Respondent's objection regarding, among other things, the foregoing findings.[96]

E. Internal Communications From the U.S. State Department Suggest that Respondent May Very Well Have Been Involved With the Decision to Nationalize PrivatBank

81. While Claimants do not yet have full disclosure of all relevant communications, records already produced by Respondent in response to Freedom of Information Act requests suggest that Respondent was involved in and may have pressured, and/or facilitated Ukraine to nationalize PrivatBank.

82. Email communications internal to Respondent demonstrate that Privatbank's nationalization was top of mind when preparing for a visit from high ranking Ukrainian diplomants

[94] *Id.* at 19 (C-0009).
[95] *Id.* at 34 n.12. (C-0009).
[96] Even though Respondent won the comity argument, Respondent still urged the U.S. Court to "reject" the R&R's "quasi-factual finding" that "the Ukrainian courts ruled in favor of the borrowers, finding the loans valid." D.E. 168 at 20-21. The District Judge denied that request but still adopted the R&R *in toto* and found that "abstention is not warranted" even though Ukrainian courts found the loans valid.

and suggest Respondent may have made its diplomatic priorities regarding the nationalization of the bank clear to the Ukrainian delegation.[97] Indeed, later emails suggest that, Victoria Nuland, Respondent's Assistant Secretary of State for European and Eurasian Affairs, was aware the nationalization was occurring, even as the Ukrainian President was saying publicly that there was no threat to PrivatBank and its liquidity was sufficient. [98] Correspondence between Ms. Nuland and the IMF indicate that Respondent took a "firm" position on nationalization.[99]

83. Correspondence between Respondent's ambassador to Ukraine and Ms. Nuland suggest that Respondent may have pressured Ukraine to nationalize PrivatBank, and for this reason Respondent's ambassador said Poroshenko "[f]ound his big boy pants" after he nationalized the bank, and which prompted Ms. Nuland to respond with "[g]ood."[100]

84. Correspondence post-dating the nationalization and leading up to Respondent's filing of the forfeiture actions Respondent filed, demonstate Respondent kept PrivatBank at the top of its priory list in relations with Ukraine, mentioning it at a July 3, 2019 meeting with Ukrainian President Volodymyr Zelenskyy, and having internal discussions on November 4, 2019 about the need for Ukraine to expel Kolomoisky or face "a Justice Department investigation of PrivatBank . . ."[101]

85. Nine months later, Respondent (through DOJ) filed the Texas Action.

III. RESPONDENT'S RULE 41(5) PRELIMINARY OBJECTIONS LACK LEGAL MERIT

A. **Jurisdictional Objection 1:** Respondent's First Jurisdictional Objection Lacks Merit Because Claimants Satisfied the Consultation Requirement

i. *Claimants Complied with Art. VI(2)*

[97] May 2016 - State Department Email (C-0034) (referring to an article about potential nationalization of PrivatBank as a "Scenesetter" a term of art in U.S. diplomacy used as a paper to demonstrate U.S. diplomatic priorities.)
[98] *Compare* June 2016 - State Department Email (C-0035) *with* October 2016 - State Department Email (C-0036)
[99] July 2016 - State Department Email (C-0037))
[100] December 2016 - State Department Email (C-0038).
[101] October 2019 – State Department Email (C-0039); November 2019 – State Department Email (C-0040)

86. Respondent contends that the Tribunal lacks jurisdiction over this arbitration because Claimants purportedly "did not wait the requisite six months prior to submitting their claims to ICSID,"[102] and thus the claims must be dismissed. This argument is premised on Respondent's erroneous claim that the purportedly mandatory six-month waiting period for commencing an arbitration begins "only when the claimant alleges a treaty breach."[103] That is incorrect under the plain language of the Treaty, which provides—with some relevant exceptions set forth below—a claim may be brought six months after an alleged breach of the Treaty *occurs*; not, as Respondent claims, six months after a breach is *alleged*.

87. Under the clear and unambiguous language of the Treaty, Claimants' initial claims were filed more than six months after the dispute at issue arose, and Claimants' subsequent claims also were properly filed because there is a "clear nexus" between the claims arising out of the Texas and Ohio civil forfeiture cases.[104] Accordingly, there is no basis to dismiss the claims under Rule 41(5).

88. Pursuant to Article VI(3)(a) of the Treaty, Claimants may submit claims to arbitration provided that "six months have elapsed from the date on which the dispute arose." In their Requests for Arbitration, Claimants expressly alleged that "[t]he dispute arose on August 6, 2020, when Respondent commenced forfeiture proceedings against the Texas property owned by Claimants."[105] Claimants filed their initial Request for Arbitration on February 8, 2021, more than six months after August 6, 2020, the date on which the dispute arose, and therefore consistent with the terms and conditions of the Treaty.

[102] Rsp's PO, ¶ 54.
[103] Rsp's PO, ¶ 56.
[104] *See infra*, Subsection 1, ¶¶ 100-102.
[105] *Optima 7171 LLC*, Req. Arb. ¶ 96; *Optima 55 Public Square LLC*, Req. Arb. ¶ 86.

89. Respondent correctly notes that the "dispute" referred to in Article VI(3)(a) is a reference to an "investment dispute," which is defined in Article VI(1) as "a dispute between a Party and a national or company of the other party arising out of or relating to . . . an alleged breach of any right conferred or created by this Treaty with respect to an investment." Thus, the plain and unambiguous language of the Treaty provides that a dispute arises between parties at the moment an alleged breach of the Treaty occurs—here, when Respondent expropriated Claimants' investment and failed to afford the investment the fair and equitable treatment required by the Treaty in the form of filing the civil forfeiture complaint on August 6, 2020.

90. In order to avoid this conclusion, Respondent improperly attempts to insert into the Treaty a notice requirement in order to trigger the pre-arbitration waiting period, but no such requirement exists. Specifically, Respondent claims that a dispute arises under the Treaty "only when the claimant *alleges* a treaty breach, and the 'six-month' waiting period shall run from the date of such allegation.'"[106] Respondent further contends that "[t]o initiate a dispute under the Treaty, Claimants *must provide notice* to Respondent of their belief that the forfeiture case violated the Treaty."[107] The Tribunal should reject Respondent's efforts to alter the plain language of the Treaty.

91. Respondent's contention is belied by the language of Article VI itself, which provides that "[i]n the event of an investment dispute, the parties to the ***dispute*** should ***initially*** seek a resolution through consultation and negotiation." This language demonstrates what is common sense: the "dispute" causes the parties to, thereafter, issue a notice so they may seek to resolve it through consultation and negotiation. This interpretation also accords with the historical interpretation of a "dispute" by international tribunals as "a ***conflict*** of . . . ***interests between two***

[106] Rsp's PO, ¶ 56 (emphasis added).
[107] Rsp's PO, ¶ 58 (emphasis added).

persons."[108] Respondent expressly acknowledges that conflict in the Texas Action complaint stating that "[t]he interests of Mordechai Korf, Uriel Laber, Ihor Kolomoisky, and Gennadiy Boholiubov may be adversely affected by these proceedings."[109] Plainly, the forfeiture complaint in the Texas Action created "a dispute . . . relating to . . . [the] alleged breach of . . . this Treaty with respect to an investment" as described by Article VI(1) and thereby started the six (or three) month clock.

92. Notably, Respondent cites no provision of the Treaty that includes any such notice requirement in order to trigger the pre-arbitration waiting period, because there is none, and the Tribunal should not rewrite the treaty to impose a requirement not agreed to by the state parties to the Treaty.

93. The absence of an explicit notice requirement in the Treaty is no accident. Where state parties intend to include a notice requirement in connection with BIT dispute resolution procedures, they do so. For example, the BIT between Turkey and Syria provides that disputes "shall be notified in writing" and arbitration may be commenced if there is no settlement "within six months following the date of the written notification."[110] Many other BITs,[111] ***including many***

[108] *The Mavrommatis Palestine Concessions case*, PCIJ, Series A, No.2 (1924) at 11. (CL-0010)
[109] Texas Compl., ¶ 15.
[110] Agreement Between the Republic of Turkey and the Syrian Arab Republic Concerning the Reciprocal Promotion and Protection of Investments (2004), Art. VII. (CL-0011).
[111] *See*, *e.g.*, Agreement Between the Belgo-Luxembourg Economic Union and Azerbaijan on the Reciprocal Promotion and Protection of Investments (2009), Art. 9(1)&(2) ("Any investment dispute … shall be notified in writing…. In the absence of an amicable settlement ... ***within six months from the notification***, the dispute shall be submitted, at the option of the investor, ... to international arbitration") (CL-0012); Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya on the reciprocal promotion and protection of investments (2009). Art. VIII ("If these disputes, cannot be settled in this way ***within ninety (90) days following the date of the written notification*** mentioned in paragraph I, the dispute can be submitted, as the investor may choose, to the competent court of the Contracting Party. . . .") (CL-0013); Bilateral Investment Treaty Between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore (2004), Art. XIII ("Either party to the dispute may only submit a dispute for conciliation or arbitration by the Center established by the ICSID Convention if the dispute cannot be resolved by negotiations or consultations . . . ***within nine months from the date of the notice*** given by the investor to the other Party. . . .") (CL-0014).

BITs entered into before Respondent and Ukraine entered into the Treaty here,[112] also include express notification requirements in order to trigger pre-arbitration waiting periods.

94. Thus, it is clear that when state parties enter into a BIT desiring to include a notice requirement in order to trigger the pre-arbitration waiting period, they do so explicitly. As relevant here, Respondent and Ukraine chose not to include a notice requirement. That decision was knowing and intentional, as evidenced by the fact that many BITs already in existence at the time the Treaty was entered into included express notice requirements.

95. Claimants' interpretation of the plain language of the Treaty is consistent with the holding in *Link Trading v. Moldova*.[113] In that case, like the Treaty here, the applicable BIT between Respondent and Moldova required a "waiting period of six months 'from the date on which the dispute arose' before an aggrieved company may submit an arbitrable dispute under the BIT to binding arbitration."[114] Moldova argued that the "dispute arose only when Claimant submitted its formal complaint on November 25, 1999," and thus its claims were barred because they were filed November 25, 1999, well short of the six-month period.[115] The *Link Trading* tribunal rejected that assertion, finding instead that the "dispute in question arose at the latest" with

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[112] *See*, *e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic (1992), Art. X (""If such disputes cannot be settled according to the provisions of paragraph (1) of this article within a period of three months ***from the date on which either party to the dispute requested amicable settlement***, either party may submit the dispute to the administrative or judicial organs of the Contracting Party in the territory of which the investment has been made.")(CL-0015); Agreement Between the State of Israel and the Government of the Republic of Hungary for the Protection and Promotion of Investments (1991), Art. VIII ("If any other such dispute should arise and cannot be resolved, amicably or otherwise, ***within 18 months from written notification of the existence of the dispute***") (CL-0016); Agreement Between the Government of the State of Israel and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments (1991), Art. VIII (If any such dispute should arise and cannot be resolved, amicably or otherwise, ***within three months from written notification of the existence of the dispute***, then the Investor affected may institute conciliation or arbitration proceedings") (CL-0017); Agreement between the Government of the Republic of Chile and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments (1993), Art. IX ("If these negotiations do not result in a solution ***within six months from the date of request for settlement***, the investor may submit the dispute. . . .") (CL-0018).

[113] *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, Award on Jurisdiction, (16 February 2001) (CL-0019).

[114] *Id.* at ¶ 8.6 (citation omitted).

[115] *Id.*

the August 1998 passing by the Moldovan government of a law, and the implementation of that law, that formed the basis of claimant's claims of indirect expropriation in violation of the BIT.[116] Thus, the *Link Trading* tribunal found that a dispute arises under a BIT when the alleged breach of the BIT occurred, not, as Respondent claims, when the allegation of the breach is made.[117]

96. In support of its attempt to insert a notice requirement into the Treaty, Respondent relies on *Murphy v. Ecuador*.[118] That case is inapposite for a number of reasons, including that the claimant in *Murphy* first raised its dispute with the Government of Ecuador on February 29, 2008, and commenced arbitration just three days later on March 3, 2008.[119]

97. Here, Respondent acknowledges Claimants provided notice of the dispute that arose on August 6, 2020, no later than October 5, 2020. As demonstrated below, even if the six-month waiting period began on that date, that waiting period was excused when Respondent made clear that it had no interest in negotiating a resolution and took the position that there had been no violations of the Treaty and it would not consent to arbitration.

98. In any event, Claimants respectfully submit the *Murphy* tribunal's interpretation of the BIT in that action and the similar language to the Treaty here is wrong. As is evident from the inclusion of express notice provisions in myriad other BITs, had the parties intended to make notice of an alleged breach of the Treaty the trigger for the six-month waiting period, they could have included such a requirement.

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[116] *Id.* at ¶¶ 2, 8.6.
[117] This distinction is also recognized in practitioners' guides to international arbitration. *See* L. Reed, J. Paulsson & N. Blackaby, GUIDE TO ICSID ARBITRATION 97 (2011) ("The period is usually three or six months from the date the dispute arises ***or*** is notified by the investor to the host State.") (CL-0020); *id.* at 97 n.198 ("Some BITs require investors to submit written notification of a dispute []. Others do not[].")
[118] *Murphy Exploration and Production Company International v. Ecuador (I)*, ICSID Case No. ARB/08/4, Award on Jurisdiction ¶ 97 (Dec. 15, 2010) (RL-0017).
[119] *Id.* at ¶¶ 124-25 (RL-0017).

99. Accordingly, the Tribunal should interpret the Treaty consistent with its plain language—which does not include a notice requirement in order to trigger the pre-arbitration waiting period as Respondent contends—and overrule Respondent's objection to jurisdiction on that basis.

1. *Arbitration May Not Be Delayed By Exacerbating the Dispute*

100. Respondent also asserts that the claims arising out of the Ohio Action and the expropriation of Claimants' property, 55 Public Square, should be dismissed because the Ohio Action was commenced on December 30, 2020, and Claimants filed their related request for arbitration on February 24, 2021.[120] Respondent is wrong.

101. It is well established that, where there is a "clear nexus" between the conduct that gave rise to the original breach and subsequent, related, measures resulting in further similar or substantively identical breaches, "the Tribunal should be able to exercise its jurisdiction over the [r]elated [m]easures," and it would "be inefficient to require repetition of [] pre-arbitration formalities."[121] Indeed, many international tribunals have held a second waiting period is not required as long as the initial dispute and any subsequent disputes "relate to the same dispute having the same subject-matter."[122]

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[120] *See* Rsp.'s PO ¶¶ 59-62.

[121] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 329 (9 September 2021) (CL-0021).

[122] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, ¶ 454 (4 April 2016) (CL-0022); *see also Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 67 (30 August 2000) (CL-0023) (permitting amendments to claims arising out of subsequent fact and events "particularly where the facts and events arise out of and/or are directly related to the original claim" and finding that "A contrary holding would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity."); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, ¶ 138 (6 July 2012) (CL-0024) ("decisions or judgments" taken after filing of initial claim are "part of the issues presented" in request for arbitration, "enter within the subject matter of the original claim . . . and may be presented without requiring further consultations between the Parties"); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, ¶¶ 122-23 (21 December 2012) (CL-0025) (disputes are "sufficiently related" where they concern the same "subject matter").

102. Here, there indisputably is a "clear nexus" between the Texas Action and the Ohio Action, and Claimants' claims that Respondent breached the Treaty by expropriating Claimants' properties by commencing those actions certainly "relate to the same dispute having the same subject-matter." The claims are based on the same obligations Respondent undertook in the Treaty, arise out of the same transactions and occurrences (alleged "laundering" of funds "stolen" from PrivatBank), and are fundamentally the same dispute.[123] Indeed, the 55 Public Square property is identified in the original August 2020 complaint as traceable to the same Ukrainian fraudulent loan scheme as the CompuCom Campus.

103. Respondent has acknowledged the indisputable fact that the Texas Action and the Ohio Action are "related measures" and there is a "clear nexus" between Respondent's conduct that breached the Treaty in both instances. Specifically, Respondent agreed to Claimants' proposal to consolidate the formerly separate arbitrations (ICSID Case No. ARB/21/12 and ICSID Case No. ARB/21/11) commenced by Claimants arising out of the Texas Action and the Ohio Action, respectively, "***given the substantive identity of the claims*** that arise under the same instrument (the U.S.-Ukraine BIT) and ***given the substantive similarity of the alleged facts***."[124]

104. In addition, Respondent cites no authority in support of its position that Claimants should be required to engage in serial efforts (which, in any event, would be futile as set forth *infra*) to amicably resolve disputes Respondent itself concedes are based on substantively identical claims and similar alleged facts. Adopting Respondent's position would be illogical and inefficient, in that it "would allow a state to continue to adopt new measures with a view to

[123] *See Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, ¶ 317 (4 May 2017) (CL-0026) ("Accordingly, this case involves a single dispute: Claimants' contention that through an evolving series of measures changing the economic regime for CSP plants, Respondent violated its obligations under the ECT.").
[124] U.S. Response to Optima Claimants' Proposals, 15 April 2021 (C-0041) (emphasis added).

triggering new notices and amicable settlement requirements … which would raise supplemental procedural issues (e.g., consolidation, relationship between the two proceedings if not consolidated, etc.). Such a result cannot be what the notice and amicable settlement requirements in the Treaty reasonably entail."[125]

105. "It would be unreasonable and inefficient in [a] case like this, involving an evolving situation, to interpret [the Treaty] to require the dispute to be carved into multiple slices, with each new development requiring" the following of repeated procedural steps.[126] The Treaty, and logic, "do not require additional piecemeal requests for amicable settlement of new issues or elements arising in the course an ongoing dispute."[127] Accordingly, Respondent's contention that the claims arising out of the Ohio Action should be dismissed should be rejected and the claims should proceed.

ii. *The Treaty's Most-Favored Nation ("MFN") Clause Eclipses the Treaty's Six-Month Waiting Provision in Light of Other U.S. BITs That Have A Shorter Waiting Period*

106. As shown, Claimants complied with Article VI(2) by filing their claims more than six months after the dispute at issue arose. But Claimants were not even required to wait six months after Respondent commenced the Texas Action to bring their claims. Rather, the Most Favored Nation ("MFN") provision in Article II(1) of the Treaty operates to reduce the six month pre-arbitration waiting period in Article VI(2) to only three months, consistent with waiting periods in other BITs to which Respondent is a party. Since Respondent acknowledges that the waiting period began to run no later than October 5, 2020, more than four months prior to Claimants'

[125] *Crystallex* (CL-0022) at ¶ 456.
[126] *Eiser* (CL-0026) at ¶ 318.
[127] *Id.*

commencement of this arbitration on February 8, 2021,[128] Claimants satisfied the applicable three month waiting period, and Respondent's objection lacks merit.

107. The MFN provision in Article II(1) of the Treaty states: "Each Party shall permit and treat investment, and activities associated therewith, on a basis ***no less favorable*** than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, ***whichever is the most favorable***, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty."

108. Respondent is party to several BITs with dispute resolution provisions identical to those in the Treaty, except they provide for a three-month waiting period, rather than the six-month waiting period in Article VI(3)(a) of the Treaty. Those BITs include, by way of example, the BITs between Respondent and: Albania,[129] Azerbaijan,[130] Bahrain,[131] Bolivia,[132] Croatia,[133] Georgia,[134] Honduras,[135] and Mozambique.[136]

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[128] Rsp.'s PO at 28-29.
[129] Art. IX(3)(a), Treaty Between the Government of the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, adopted on 11 January 1995. (CL-0027).
[130] Art. IX(3)(a), Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, adopted on 1 August 1997. (CL-0028).
[131] Art. 9(3)(a), Treaty between Bahrain and the Government of the United States of America BIT, adopted on 29 September 1999. (CL-0029).
[132] Art. IX(3)(a), Treaty between the Government of the United States of America and the Government of the Republic of Bolivia concerning the Encouragement and Reciprocal Protection of Investment, adopted on 17 April 1998. (CL-0030).
[133] Art. X(3)(a), Treaty Between the Government of the United States of America and the Government of the Republic of Croatia Concerning the Encouragement and Reciprocal Protection of Investment, adopted on 13 July 1996. (CL-0031).
[134] Art. IX(3)(a), Treaty Between the Government of the United States of America and the Government of the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment, adopted on 7 March 1994. (CL-0032).
[135] Art. IX(3)(a), Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, With Annex And Protocol, Signed at Denver on July 1, 1995, adopted on 1 July 1995. (CL-0033).
[136] Art. IX(3)(a), Treaty Between the United States of America and the Republic of Mozambique Concerning The Encouragement and Reciprocal Protection of Investment, adopted on 1 December 1998. (CL-0034).

109. It is well established that "MFN clauses allow circumventing access restrictions to investor-State arbitration, ***in particular less favorable waiting periods***, if third-country BITs offer more favorable conditions."[137] Thus, by virtue of the Treaty's MFN clause, the three-month waiting period of the other BITs to which Respondent is party must be applied to the Treaty here, shortening the six-month waiting period to only three months.

110. There is nothing in the Treaty that excludes dispute resolution provisions from MFN treatment. In fact, while the Treaty does contain specific exclusions from the MFN provisions,[138] dispute resolution is not on the exceptions list.[139] Tribunals regularly apply MFN clauses to override "less favorable waiting periods,"[140] where, like here, dispute resolution is not a listed exception.

111. The leading case is *Maffezini v. Spain*, which held that "the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty" and thus claimant could rely on the "more favorable arrangements contained in the Chile-Spain BIT" concerning pre-arbitration requirements.[141] The *Maffezini* tribunal based its conclusion

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[137] S. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27(2) Berkely J. Int'l L 496, 566 (2009) (emphasis added) (CL-0035).

[138] *See* Treaty Article II(10) ("The most favored nation provisions of this Treaty shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of: (a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or (b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.").

[139] *See*, *e.g.*, *UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary,* ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 186 (3 March 2016) (CL-0036) ("the MFN clause . . . is rather wide [and] does not contain any express exclusion to the effect that it does not apply to dispute settlement"); *National Grid PLC v. The Argentine Republic*, Decision on Jurisdiction, ¶ 82 (20 June 2006 (CL-0037) ("dispute resolution is not included among the exceptions to the application of the clause. As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius*"); *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011), ¶ 74 (CL-0038) ("Article 3 paragraphs (3) and (4) explicitly exclude certain matters from the scope of the MFN clause, but dispute settlement is not among them").

[140] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, at 566 (CL-0035).

[141] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) ¶ 64. (CL-0039).

on the plain language of the treaty and the fact that "dispute settlement arrangements are inextricably related to the protection of foreign investors."[142]

112. Many tribunals have followed *Maffezini's* holding because a treaty's "MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad."[143] Because the dispute resolution procedures offered by BITs are "part of the protection offered" by such treaties, those procedures are necessarily "part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause."[144] If dispute resolution processes were not covered by a treaty's MFN provision, "investors making a claim under" the Treaty here would "be at a competitive disadvantage compared to investors claiming under" one of Respondent's many other BITs with more favorable dispute resolution procedures.[145]

113. In addition to the above-cited cases, a non-exhaustive list of other arbitral decisions following *Maffezini* and allowing a claimant to import a more favorable dispute resolution provision includes *Vivendi v. Argentina*,[146] *Suez v. Argentina*,[147] *Krederi Ltd. v. Ukraine*,[148] and *RosInvestCo UK Ltd. v. The Russian Federation*.[149]

114. Scholarly writing also strongly supports the interpretation that MFN clauses apply to dispute resolution procedures:

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[142] *Id.* at ¶ 54.
[143] *National Grid PLC*, Decision on Jurisdiction at ¶ 92 (CL-0037).
[144] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) ¶ 102. (CL-0040).
[145] *Garanti Koza LLP v, Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (18 May 2011) ¶ 94 (CL-0041).
[146] ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, ¶ 59 (CL-0042) ("dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime").
[147] ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006 ¶ 55 (CL-0043) ("the ordinary meaning of ["treatment"] within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty").
[148] ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 341 (CL-0044) (agreeing with *Garanti Koza*, *supra*).
[149] SCC Case No. 079/2005, Award on Jurisdiction, 5 October 2007, ¶¶ 132-33 (CL-0045)

> [A]bsent any clear indications to the contrary, MFN clauses should be applied broadly to incorporate any more favorable treatment, independent of whether it concerns substantive or procedural matters.... ***Excluding MFN clauses from applying to questions of jurisdiction also contravenes the rationale of MFN treatment to create a level playing field for investors from different home States*** and creates tensions with the object and purpose of investment treaties. Rather, the importance of investor-State arbitration as a dispute settlement and compliance mechanism for the promotion and protection of foreign investment militates for the broad application of MFN clauses to encompass matters of jurisdiction.[150]
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> ***
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> In the context of investment protection treaties, the effect of a most-favoured nation clause is to make accessible the better treatment a State decides to offer to other investors, including in relation to dispute resolution mechanisms. ***A State is undeniably at liberty not to offer better treatment to other investors or not to enter into a most-favoured-nation clause. However, once it has freely embarked on both paths, it must abide by its obligations.***[151]
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> ***
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> To continue to encourage and increase the flow of foreign direct investment, however, continued favorable treatment towards investors is absolutely necessary. ***The MFN clause should therefore be treated as a valuable tool that ensures that investors receive the highest available level of treatment***.... [T]ribunals can aptly protect investors with the current source available to them: the [Vienna Convention]. The [Vienna Convention] allows arbitrators to generally provide claimants access to more favorable dispute settlement provisions in third-party treaties when the MFN clause allows.[152]

115. Given the clear and unambiguous language of the Treaty, and the extensive precedent applying MFN clauses to dispute resolution procedures in BITs, the Tribunal should find that Claimants were subject to a three month waiting period, which Respondent itself acknowledges was satisfied. Accordingly, Respondent's objection lacks merit and should be rejected.

iii. *Article VI(2)'s Consultation Provision is Not Jurisdictional*

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[150] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, at 566-67 (CL-0035).
[151] Y. Banifatemi, *The Emerging Jurisprudence on the Most-Favoured Nation Treatment in Investment Arbitration*, Investment Treaty Law: Current Issues III (Bjorkland et al eds.) 241, 273 (2009). (CL-0046).
[152] S. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, 2 The Arbitration Brief 30, 62-63 (2012). (CL-0047).

116. Assuming *arguendo* Claimants did not comply with Article VI of the Treaty (they did), Respondent's objection based on the six-month waiting period should be rejected, because, as many tribunals have held, the waiting period is not jurisdictional. In addition, dismissing the claims at this point in time and this stage of the proceedings would do nothing to further the purpose of pre-arbitration waiting periods and would be inefficient and a needless waste of party and ICSID resources.

117. "Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."[153] This is the majority view and the more thoughtful and better reasoned approach that focuses on substance over form, and therefore best furthers the greater interest of public international law as a whole.[154]

118. Thus, "pre-arbitration procedural requirements should not ordinarily constitute jurisdictional bars to the initiation of arbitral proceedings, but should instead be regarded as matters of admissibility or procedure . . . whose breach does not ordinarily preclude resort to arbitration."[155] Any other result would be "inconsistent with the fundamental objectives and aspirations of the arbitral process [and] also inconsistent with the parties' desire, in virtually all cases, to ensure access to prompt, binding, and neutral means of resolving their disputes—which is the fundamental object of international arbitration agreements, whether in commercial contracts

[153] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (6 August 2003) ¶ 184. (CL-0048).
[154] *See* L. Reed, J. Paulsson & N. Blackaby, GUIDE TO ICSID ARBITRATION 97-98 (2011) ("Most" ICSID tribunals have construed waiting periods as non-jurisdictional) (collecting cases in n. 199). (CL-0049).
[155] Born & Šćekić, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', 14 D. Caron et al. (eds.), Practising Virtue – Inside International Arbitration 227, 228 (2015). (CL-0050).

or investment treaties."[156] There are many decisions adopting the majority view that a waiting period is procedural and non-jurisdictional.[157]

119. Respondent's objection proposes a burdensome and inefficient remedy that contravenes the very purpose of the cooling off period: to foster the efficient resolution of disputes without unnecessary proceedings.[158] In furtherance of this goal, Tribunals recognize the inequitable effect of dismissing a dispute based on non-compliance with a pre-arbitration negotiation period when, as here, such negotiations would be futile and the purpose of the provision would not be served. Rather, as one commentator has noted, "[b]y the time the tribunal makes a decision on this issue, any waiting period is likely to have elapsed. Under these circumstances insistence on the compliance with the waiting period before the institution of

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[156] *Id.*

[157] Indeed, in *Western NIS Enterprise Fund v. Ukraine*, an arbitration likewise arising under the U.S.-Ukraine BIT, the tribunal held that proper notice of a claim and failure to comply with the waiting period "does **not**, in and of itself, affect the Tribunal's jurisdiction" and concluded that "[t]he Claimant should be given an opportunity to remedy the deficient notice." *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order taking note of the discontinuance issued by the Tribunal, pursuant to Arbitration Rule 43(1) (16 March 2006) ¶ 7 (CL-0051). The tribunal in *Western NIS* ultimately suspended the proceedings to allow for compliance with the treaty, but the *Western NIS* Tribunal did not dismiss the arbitration because the defect was not jurisdictional. Unlike *Western NIS*, as set forth in paragraphs 86-115, *supra*, in this case Claimants waited the requisite length of time from the date the dispute arose (whether 3 months or 6 months) and Claimants provided proper notice by initially seeking to resolve the dispute through consultation and negotiation. Numerous other tribunals have also concluded that the waiting period is not jurisdictional. *See, e.g., Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction (29 June 2018), ¶ 280 (CL-0052) (waiting periods not jurisdictional unless "formulated clearly as conditions precedent for the respondent State's consent"); *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award (19 December 2013), ¶ 829 (CL-0053) (finding cooling off period to be "a procedural requirement rather than one of jurisdiction"); *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), ¶ 496 (CL-0054); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), ¶ 343 (CL-0055) ("six-month period is procedural and directory in nature, rather than jurisdictional and mandatory"); *Ronald S. Lauder v. Czech Republic*, Award (3 September 2001), ¶¶ 187, 190 (CL-0056) (treating the notice provision as jurisdictional would "amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties"); *Mr. Franz Sedelmayer v. The Russian Federation*, Arbitration Award (7 July 1998), ¶ 322 (CL-0057) ("the consequence [of regarding the waiting period as jurisdictional] would … be too far-reaching if, solely on this ground, the Tribunal would be prevented from examining the case"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I),* ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), ¶ 100 (CL-0058) ("to require a formal notice would simply mean that [Claimant] would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage").

[158] *Born & Šćekić*, *supra* at 2 (CL-0050) ("These provisions are designed to enhance the efficiency of the arbitral process, by encouraging amicable dispute resolution and avoiding unnecessary proceedings and expense.")

proceedings would make little sense and would merely compel the claimant to start proceedings anew."[159]

120. Here, the six-month period imposed by Article VI has long since elapsed since Claimants submitted their Notices of Arbitration, and any additional consultations would be a futile endeavor (*see infra*). Thus, Respondent's objections seek a result with "curious effects"—the arbitration would be only temporarily impeded, and because it is beyond dispute that six months of consultations have failed to result in a resolution between the parties, Claimants would be forced to simply refile the very same proceedings again.[160] Respondent provides no basis for the Tribunal to take such action. Respondent does not suggest, nor could it, that its interests have been unfairly prejudiced by Claimants' purported non-compliance with the six-month period. Nor does Respondent suggest that an additional period of negotiations would resolve the dispute at issue. The Tribunal should thus reject Respondent's objections in the interest of ensuring an orderly and cost-efficient resolution of this dispute.[161]

121. Against the above decisions and scholarly writings, Respondent cites only *Murphy Exploration v. Ecuador*.[162] The *Murphy* tribunal acknowledged that its decision was contrary to other decisions such as *SGS v. Pakistan* and *Lauder v. Czech Republic*.[163] The tribunal deemed the waiting period to be a "fundamental requirement," even though in the BIT it was not described as

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[159] C. Baltag, *Not Hot Enough: Cooling Off Periods and the Recent Developments Under the Energy Charter Treaty*, at 196 & n.34 (CL-0059).

[160] *Biwater Gauff v. Tanzania* ¶ 343 (CL-0055); *see* Baltag, *Not Hot Enough: Cooling Off Periods and the Recent Developments Under the Energy Charter Treaty*, 6(1) Indian J. Arb. L. 190, 196 & n.34 (2017) (quoting R. Dolzer & C. Schreuer, Principles of International Investment Law 248-249 (2008)) ("By the time the tribunal makes a decision on this issue, any waiting period is likely to have elapsed. Under these circumstances insistence on the compliance with the waiting period before the institution of proceedings would make little sense and would merely compel the claimant to start proceedings anew.") (CL-0059).

[161] *SGS v. Pakistan* ¶ 184 (Aug. 6, 2003) (CL-0048) ("Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal.").

[162] *See* Rsp.'s PO at 27-28.

[163] *Murphy Exploration and Production Company International v. Ecuador (I)*, ICSID Case No. ARB/08/4, Award on Jurisdiction ¶¶ 147-48 (Dec. 15, 2010) (RL-0017).

jurisdictional requirement or a condition precedent. The tribunal ignored the fact that its formalistic approach would do nothing except delay the proceedings and would not further the interests of the parties, as there is nothing to prevent negotiations after an arbitration has been commenced. This Tribunal should follow the tribunals and scholars that have rejected *Murphy*.[164]

122. Moreover, *Murphy* is distinguishable on its facts. In that case, the Tribunal determined that the claimant filed its notice of arbitration only one business day after notifying Ecuador of the existence of an investment dispute, leaving "no possibility that the Parties could have availed themselves of a time frame in which they could have tried to resolve their disputes amicably."[165] Such blatant disregard of the consultation requirement in the applicable BIT, in the Tribunal's view, completely denied Ecuador of its right to attempt to reach a negotiated solution to the investment dispute at issue. This, however, constitutes a unique factual situation that can be readily distinguished from the investment dispute at issue here, as well as those in the "majority" line of decisions. Accordingly, this Tribunal should follow the tribunals and scholars that have rejected *Murphy*.

123. In any event, regardless of how the panel views *Murphy*, Claimants' position accords with the majority of arbitral decisions and the writings of distinguished scholars. Therefore, the waiting period is at least "arguably" non-jurisdictional and Claimants' position is not "clearly and unequivocally unmeritorious." As such, there is no basis for a Rule 41(5) dismissal.

iv. *The Futility Exception Applies*

[164] *See* Baltag, *Not Hot Enough: Cooling Off Periods and the Recent Developments Under the Energy Charter Treaty*, 6(1) Indian J. Arb. L. 190, 196 & n.34 (2017) (quoting R. Dolzer & C. Schreuer, Principles of International Investment Law 248-249 (2008)) ("The voices expressing the view that the cooling-off provision is of jurisdictional nature remain isolated," and the "view that periods foreseen for negotiations are not of jurisdictional nature is preferable.") (CL-0059).

[165] *Murphy v. Republic of Ecuador* ¶ 109 (RL-0017).

124. Respondent's assertion that Claimants' claims must be rejected on jurisdictional grounds also fails because any obligation imposed by the Treaty on Claimants to seek an amicable resolution of their dispute with Respondent was waived because, prior to commencement of the arbitrations, Respondent expressed no willingness to come to such resolution.[166] In fact, Respondent initially and consistently took the position—a position it maintains to this day—that Claimants have no valid claims under the Treaty and it would not consent to any arbitration of Claimants' claims.

125. "ICSID tribunals have held that waiting periods may be waived when further negotiations would be futile."[167] This is so regardless whether the waiting period is found to be jurisdictional, and regardless how long the claimant actually waits before commencing an action. Numerous tribunals have been "unwilling to hold the Claimant to the full extent of a settlement period which would have been futile—*i.e.*, a period in which the Respondent State would not have taken action to resolve the dispute consensually."[168] A claimant simply does not need to wait to file an arbitration if the respondent nation "exhibit[s] no interest in negotiating."[169] The futility exception applies in this case because Respondent "exhibited no interest in negotiating" from the outset of this dispute.

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[166] Not only was Respondent notably unwilling to reach a resolution, as set forth in section (A)(i)(1), Respondent took additional steps that exacerbated the dispute between the parties, including the commencement of the Ohio Action shortly after Claimants sought an amicable resolution through consultation.

[167] *Teinver S.A,* Decision on Jurisdiction at ¶ 127 (CL-0025).

[168] *Zaza Okuashvili v. Georgia*, SCC Case No. V 2019/058, Partial Final Award on Jurisdiction and Admissibility (Aug. 31, 2022) (collecting cases) ¶ 266 (CL-0060).

[169] *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Judgment of the Svea Court of Appeal (Dec. 9, 2016) ¶ 95 (CL-0061); *See also*, *e.g.*, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) ¶ 347 (CL-0055); *Ronald S. Lauder v. Czech Republic*, Award (Sept. 3, 2001) ¶¶ 188-90 (CL-0056); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Jurisdiction (Sept. 9, 2008) ¶ 94 n.10 (CL-0062) ("A number of tribunals have confirmed that where negotiations are bound to be futile, there is no need for the waiting period to have fully lapsed").

126. Claimants first raised the obligations of the Treaty with Respondent on October 5, 2020, when, in their first claims filed in the Texas Action, Claimants notified Respondent they "reserved any and all objections and defenses, . . . including that such claims should be submitted to arbitration pursuant to the Treaty []."[170]

127. The next day, October 6, 2020, Claimants wrote to Respondent to notify it that the filing of the civil forfeiture action by DOJ "constitute[d] a breach of the [Treaty]," including that the conduct constituted an unlawful expropriation and a violation of the fair and equitable treatment guaranteed by the Treaty. Claimants asked whether Respondent agreed that "this dispute is capable of submission to dispute resolution pursuant to Article VI of the [Treaty]" and advised they were "available to consult promptly with the United States to resolve this dispute or to discuss any matter relating to the interpretation or application of the [Treaty]."

128. Respondent did not immediately provide a substantive response despite follow up emails from Claimants in which reiterated they were "available to consult with the United States pursuant to Article VI(2)." Respondent ultimately provided a response on October 27, 2020, taking the position that "None of the measures referenced in that email constitute violations of the [Treaty]."

129. On November 19, 2020, Claimants and Respondent negotiated the form of an unopposed motion for extension of time. That filing included the following language, approved by Respondent: "The United States maintains that none of the measures taken constitute violations of the [Treaty]," and noted Respondent's position that it "does not consent to any arbitration."[171]

130. Respondent has maintained its position—that Claimants have no valid claims under the Treaty, and that it does not consent to arbitration of Claimants' claims—throughout the entirety

[170] R-0058; R-0059.
[171] Nov. 19, 2020 Email Chain, (C-0042).

of this dispute, and even into this arbitration. In similar circumstances, the tribunal in *Zaza Okuashvili v. Georgia* held that where, like here, the "procedural record . . . shows that [respondent] had every intention of firmly contesting each aspect of the [c]laimant's claims, starting with jurisdiction" there was no basis "to hold the [c]laimant to the full extent of a settlement period which would have been futile. . . ."[172]

131. Even after they commenced this arbitration, Claimants tried further to consult with Respondent to resolve the investment disputes but to no avail. Claimants have repeatedly consulted with Respondent, including with Respondent's representatives remotely and also in person in 2021, 2022, and 2023.[173] Respondent, however, has never acknowledged the validity of Claimants' claims, and has not offered or reached a resolution. For years now, Claimants have exhausted consultation efforts and Claimants and Respondent have been unable to reach a resolution. Thus, the futility exception applies, and Respondent's objection should be overruled.

132. Because Respondent has consistently exhibited "no interest in negotiating," the futility exception applies, and Respondent's objection should be overruled. In any event, the futility exception at least "arguably" applies, Claimants' position is not "clearly and unequivocally unmeritorious," and there is no basis for a Rule 41(5) dismissal.

B. Jurisdictional Objection 2: Respondent's Second Jurisdictional Objection Misapprehends Claimants' Art. VIII References

133. Respondent contends that this dispute is beyond the jurisdiction of the Tribunal because Claimants invoke Article VIII of the Treaty, which does not provide an independent basis for a claim. This position is meritless as it mischaracterizes Claimants' claims and allegations and fails to acknowledge that Article VIII may be relevant to the claims Claimants actually have

[172] *Zaza Okuashvili v. Georgia*, ¶ 266. (CL-0060).
[173] *See* note 47, *supra*.

asserted, regarding expropriation and failure to provide fair and equitable treatment, affirmative obligations under Articles II and III of the Treaty. Accordingly, Respondent's arguments with respect to Article VIII fail to establish the claims in dispute are manifestly without legal merit, and the objection should be overruled.

134. Respondent submits that Article VIII "does not itself create or confer any affirmative obligation on the host State to provide investments with any particular treatment" and thus "cannot form the basis for an 'investment dispute' as defined in Article VI(1)[.]"[174] However, Claimants have never argued (and do not argue) that Article VIII provides independent grounds for an "investment dispute" that may be subject to the jurisdiction of the Tribunal. Nor do Claimants intend to bring an independent claim under Article VIII arising out of the investment dispute at issue here. Article VIII is, however, relevant to this investment dispute, specifically regarding Respondent's breaches of Articles II and III of the Treaty.

135. While the Notices of Arbitration reference Article VIII,[175] Claimants separately and independently allege that Respondent is violating its own domestic law, simultaneously disregarding Ukrainian law, and fundamentally overstepping customary international law's limits on state jurisdiction.[176]

136. Those allegations are relevant, not because Article VIII provides an independent, standalone basis for an investment dispute, but instead because "municipal law and the way it is enforced by State organs may well be relevant to the merits."[177] "[M]unicipal law is not the 'governing' law, but it constitutes a factual circumstance to be considered for ascertaining whether

[174] Rsp.'s PO ¶ 64.
[175] *Optima 7171 LLC*, Req. Arb. ¶¶ 20, 45; *Optima 55 Public Square LLC*, Req. Arb. ¶¶ 26, 51.
[176] *Optima 7171 LLC*, Req. Arb. ¶¶ 21-63; *Optima 55 Public Square LLC*, Req. Arb. ¶¶ 28-64.
[177] *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award ¶ 197 (Mar. 5, 2011) (CL-0063).

the host State committed a breach of its international duties in the enforcement of its own law."[178] That is particularly relevant here, because "[e]specially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility."[179]

137. For example, Claimants' allegations regarding violations of municipal law may be germane to the claim for breach of Article II(3)(a). In *Total S.A. v. Argentine Republic*, the Tribunal found that Argentina breached the fair and equitable treatment clause of the Argentina-France BIT because it breached its own law when it interfered with Claimant's export contracts.[180] Likewise, in *Limited Sirketi v. Republic of Turkey*, the Tribunal found that certain "inconsistent acts might be unlawful under Turkish law, but in light of the provisions of the Treaty they are also in breach of the standard of fair and equitable treatment."[181] Of course, if Respondent "willfully disregarded the fundamental principles of the regulatory framework in force at the time . . . such a disregard would amount to a breach of international law."[182] Such conduct may also be "arbitrary and breach[] elementary standards of due process."[183]

138. For the same reasons, municipal law may be relevant to the claims asserted under Article III, which:

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[178] *Id.* (citing ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001, Fifty-Third Session, Supp. No. 10 (A/56/10), United Nations, New York, Commentary to Article 3 (hereafter "ILC Articles") (CL-0064-ENG)); *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment ¶ 97 (July 3, 2002) (CL-0065) (quoting the same).

[179] ILC Articles, Commentary to Article 3, p. 38 ("In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard."). (CL-0064)

[180] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability ¶ 460 (Dec. 27, 2010) (CL-0066).

[181] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award ¶ 249 (Jan. 19, 2007) (CL-0067).

[182] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award ¶ 481 (Dec. 19, 2013) (CL-0068).

[183] *Id.* at ¶ 711.

> bars all expropriations or nationalizations except those that are for a public purpose, carried out in a non-discriminatory manner; subject to prompt, adequate, and effective compensation; subject to due process; and accorded the treatment provided in the standards of Article II (3). (These standards guarantee fair and equitable treatment and prohibit the arbitrary and discriminatory impairment of investment in its broadest sense.)[184]

139. An expropriation that does not "accord[]" with the "guarantee [of] fair and equitable treatment" or is otherwise "arbitrary and discriminatory" is the proper subject of an investment dispute under the Treaty. Reference to municipal law is therefore relevant for the same reasons set forth in paragraphs 136-137, *supra*.[185]

140. Moreover, Respondent misconstrues the import of the reference to Article VIII in the Claimants' Notices of Arbitration. Article VIII provides:

> This Treaty shall not derogate from:
>
> (a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;
>
> (b) international legal obligations; or
>
> (c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

141. Claimants do not dispute that Article VIII "does not entitle investors of either State party to invoke such more favorable treatment accorded in other legal instruments, decisions, or

[184] U.S. - Ukraine BIT, S. TREATY DOC. No. 103-37, Letter of Submittal, comments to Article III (Expropriation) (Sept. 7, 1994) (CL-0069).

[185] While here referencing United States municipal law doctrines of "prescriptive" and "adjudicatory" comity, Claimants reserve their rights regarding Respondent's further breach of the customary international law doctrine of prescriptive jurisdiction. This doctrine, tempered by the rule of territoriality, places a firm limit on a state's ability to regulate conduct occurring outside its borders. Respondent violated this doctrine by infringing upon Ukrainian judicial sovereignty by commencing the Texas and Ohio Actions in which Respondent's claims are premised on violations of Ukrainian criminal law—by Ukrainian citizens, against a Ukrainian bank, in Ukraine—that Ukrainian authorities themselves have not alleged and which have been rejected repeatedly and unanimously by Ukrainian courts.

practices; it merely confirms that they are preserved and not derogated from by the BIT."[186] Rather, as Claimants expressly recognized, Article VIII "ensures that the [Treaty] will not be interpreted to ***limit*** entitlement to such more favorable treatment."[187] In this manner, Article VIII guarantees the Treaty does not displace the rights afforded to investors pursuant to Ukrainian law, United States law, and international legal obligations.

142. At bottom, so long as the "[t]ribunal correctly identifie[s] the applicable law under Article 42 as the ICSID Convention, the BIT and applicable international law," it is then "open to the Tribunal to find that the treaty standard ha[s] been violated in circumstances where [Claimants] ha[ve] been denied a right that [they] ha[ve] under [applicable] municipal law."[188]

143. Given the relevance of municipal law, Claimants cited to Article VIII to show that the substance of the Treaty does not derogate from or lessen any rights provided under relevant municipal law. Claimants have otherwise set out allegations of Respondent's breach of the Treaty, including Articles II and III, that have apparent legal merit and cannot be dismissed per Rule 41(5).

C. **Merits Objection 1:** Respondent's First Merits Objection Lacks Legal Merit Because the Claims are Authorized by the Treaty and The Challenged Measures Plainly Amount to an Expropriation

144. Respondent's first merits objection is divided into two subparts: (i) the claim that judicial finality is a prerequisite to this investment dispute; and (ii) the claim that any potential expropriation in this case cannot possibly be adequately permanent as a matter of law. As set forth in greater detail below, both objections themselves lack merit and should be denied because: (i) the Treaty authorizes the instant investment disputes regardless of judicial finality; and (ii)

[186] *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award ¶ 331 (8 March 2016) (CL-0070).
[187] *Optima 7171 LLC*, Req. Arb. ¶ 20, 45; *Optima 55 Public Square LLC*, Req. Arb. ¶ 26, 51; *see also* U.S. - Ukraine BIT, S. TREATY DOC. No. 103-37, Letter of Submittal, comments to Article VIII (Preservation of Rights) (Sept. 7, 1994) (CL-0069).
[188] *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic ¶ 169 (Sept. 1, 2009) (CL-0071).

Respondent's measures in this case plainly amount to an expropriation (*at least* an indirect expropriation) and the recovery of the property right or access to it does not replace ownership in its initial situation.

i. *The Claims Are Authorized by the Treaty's Lex Specialis*

145. Respondent's first merits objection is based upon its proposition that "the obligation to accord 'fair and equitable' (FET) treatment in Article II(3)(a) of the U.S.-Ukraine BIT 'sets out a minimum standard of treatment based on customary international law,'" under that minimum standard, "[j]udicial measures" only amount to a "breach . . . when they result in a denial of justice," and a claim for denial of justice requires judicial finality. But the initial proposition from which Respondent's argument proceeds is not correct and misconstrues the Treaty's specific language and distinct protections.

146. *First*, Respondent's fundamental proposition from which its first merits objection proceeds is simply not correct: the FET standard under Article II(3)(a) of the Treaty is not limited to the customary international law minimum standard of treatment. Under Article II(3)(a) of the Treaty, the customary international law minimum standard of treatment "should not operate as a ceiling, but rather as a floor" for the FET standard.[189] Under the Treaty's FET standard, the "actions or omissions of the [Respondent] may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith."[190] The scope of the applicable FET standard is broader than the customary minimum standard of treatment.

[189] *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability ¶ 253 (Jan. 14, 2010) (CL-0072).
[190] *Id.* at ¶ 254.

147. *Second*, under Article II(3)(b) of the Treaty, "[f]or purposes of dispute resolution under Article 3 VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party." This phrase goes beyond merely waiving a procedural requirement to exhaust local remedies; it modifies the definition of arbitrary or discriminatory measures and renders the status of judicial review substantively irrelevant in any dispute claiming that a specific measure is arbitrary or discriminatory. "The literal meaning of this phrase could not be clearer: even if a party has had (and has not exercised), or has exercised (with whichever outcome) the right to judicial review, such action or omission is irrelevant in an investment arbitration deciding whether the measure is arbitrary or discriminatory."[191] Because Claimants challenge the measures taken by Respondent and, in particular DOJ, as arbitrary, the status of judicial review is irrelevant.

148. *Third*, it is the actions of the U.S. Department of Justice – not the U.S. judiciary – that are primarily at issue in this arbitration. If "the State . . . could [] organize [a] taking via the judiciary," Respondent could "inflict on the investor an obligation to exhaust local remedies, save for a narrow futility exception, and a higher threshold for liability in relation to the merits of the decision or the amount of compensation."[192] Where it is "obvious that the judicial deprivation resulted from the conduct of legislative or executive organs" tribunals have not found "it necessary to decide separately on the propriety of judicial conduct, treated the question of propriety as

[191] *Id.* at ¶ 277.
[192] H. Gharavi, DISCORD OVER JUDICIAL EXPROPRIATION, ICSID Review, Vol. 33, No. 2 (2018), p. 354. (CL-0073).

immaterial, or even upheld an expropriation claim despite the lack of any wrongdoing on the part of the courts."[193]

149. *Fourth*, the FET standard and its accompanying prohibition against expropriation are specific protections rooted in the particular language of the Treaty. These protections are not "confined to matters covered by the customary law of denial of justice" and the "breaches of such promises may not require the exhaustion of local remedies."[194] "A national court's breach of . . . treaties, is not a denial of justice, but a direct violation of the relevant obligation imputable to the state like any acts or omissions by its agents."[195] And "court decisions may deprive investors of their property rights 'just as surely as if the State had expropriated [them] by decree.'"[196] "In the same vein, judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice."[197] In sum, the applicable FET standard and prohibition against expropriation allow for distinct investment disputes – separate and apart from a denial of justice.

150. *Fifth*, Article II(7) of the Treaty requires that "[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment." The "effective means" clause creates a "distinct and potentially less demanding test, in comparison to denial of justice in customary international law [and] the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case," and therefore "a claimant alleging a breach of the standard does not need to prove that it has exhausted

[193] Vid Prislan, JUDICIAL EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW, ICLQ 70 Jan. 2021, at 176 (collecting cases). Likewise, "where the impugned judicial conduct formed part of a composite wrongful act comprised of a series of acts or omissions attributable to different State organs, tribunals refrained from separately reviewing the propriety of such conduct, or even upheld expropriation claims in the absence of any judicial misconduct." *Id.* (same). (CL-0074)
[194] J. Paulsson, DENIAL OF JUSTICE UNDER INTERNATOINAL LAW p. 111, n. 35 (2005). (CL-0075)
[195] *Id.* at p. 98.
[196] *Infinito Gold Ltd. v. Republic of Costa Rica,* ICSID Case No. ARB/14/5, Award ¶ 359 (June 3, 2021) (CL-0076).
[197] *Id.*

local remedies."[198] Moreover, even without Article II(7), and even if limited to claim for a denial of justice, a litigant need not exhaust local remedies if such exhaustion would be ineffective, e.g., pursuit of the available remedy would be futile, or the remedy on offer is theoretical.[199] Because, as set forth in paragraphs 52-57, *supra*, Respondent can indefinitely avoid discovery and a trial by seeking a stay based on a purported "ongoing" related criminal investigation, and because Respondent can avoid the limits imposed on its jurisdiction by international law because "[i]t is improper for a court to second-guess the '[E]xecutive [B]ranch's judgment,"[200] pursuit of available remedies is futile as the remedies available are (at best) theoretical.

151. For all of the reasons set forth in paragraphs 146-150, *supra*, and as expounded upon in greater detail below, Respondent's Rule 41(5) Preliminary Objections should be denied.

1. *Customary International Law's Minimum Standard of Treatment is The Floor, Not the Ceiling*

152. The scope of Article II(3) is unequivocally not limited to the minimum standard of treatment based on customary international law. In the first place, Article II(3)(a) provides that "[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and *shall in no case be accorded treatment less than that required by international*

[198] *White Industries Australia Limited v. The Republic of India*, Final Award (30 November 2011), para. 11.3.2 (CL-0077) (interpreting *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits (30 March 2010), (CL-0078)).

[199] In the Draft Articles on Diplomatic Protection, the International Law Commission explained that local remedies need not be exhausted where "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress." International Law Commission Draft Articles on Diplomatic Protection (2006), adopted by General Assembly Resolution 62/27, Article 15(a) (CL-0079). "This reflects Sir Hersch Lauterpacht's opinion in the Norwegian Loans case, that the requirement of previous exhaustion of local remedies would be inoperative if one could 'rule out, as a matter of reasonable possibility, any effective remedy before Norwegian courts.'" *Certain Norwegian Loans* [1957] ICJ Reports 9, dated July 6, 1957, p. 39 (CL-0080).

[200] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint (S.D. Fla. Sept. 28, 2022) at 26 (C-0009).

law."[201] In other words, the Article II(3)(a) FET standard *includes* the international law minimum, but it is not confined to that minimum.

153. Addressing the US-Ukraine BIT in *Lemire v. Ukraine*, the Tribunal expressly found that the Treaty was intended to utilize international customary law as a floor, and to offer investors greater protection consistent with the fair and equitable treatment standard.[202]

> The [U.S.-Ukraine] BIT was adopted in 1996, and was based on the standard drafting then proposed by the US. The words used are clear, and do not leave room for doubt: '*Investments shall at all times be accorded fair and equitable treatment . . . and shall in no case be accorded treatment less than that required by international law*.' What the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of protection could and should be transcended if the FET standard provided the investor with a superior set of rights.[203]

154. In light of this, the Tribunal in *Lemire v. Ukraine* noted that the fair and equitable treatment standard could be met with allegations that would not otherwise support a claim under the minimum standard of treatment based on customary international law. "In view of the drafting of Article II.3 of the BIT . . . the actions or omissions of the [Respondent] may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith."[204]

155. The scope of the FET protection provided by Article II(3)(a) is greater than customary international law's minimum standard of treatment.

2. *Disputes Based on Arbitrary or Discriminatory Measures Are Not Burdened by a Requirement to Appeal to National Courts*

[201] U.S.-Ukraine BIT, Article II(3)(a) (CL-0069).
[202] *Joseph Charles Lemire*, Decision on Jurisdiction and Liability at ¶ 253 (CL-0072).
[203] *Id.*
[204] *Id.* at ¶ 254.

156. Second, in addition to Article II(3)(a)'s FET protections, Article II(3)(b) also provides that:

> *Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Article 3 VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.*[205]

157. Collectively, Article II(3) is "a rule of Delphic economy of language, which manages in just three sentences to formulate a series of wide ranging principles: FET standard, protection and security standard, international minimum standard and prohibition of arbitrary or discriminatory measures."[206]

158. Respondent ignores the plain language of Article II(3)(b) which "deviates from the standard US Model BIT in only one point, the insertion of the following phrase:

> "*[...] For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party*".[207]

159. This phrase goes beyond merely waiving any procedural requirement to exhaust local remedies, it modifies the definition of an arbitrary or discriminatory measure and renders the status of judicial review substantively irrelevant in any dispute claiming that a specific measure is arbitrary or discriminatory. "The literal meaning of this phrase could not be clearer: even if a party has had (and has not exercised), or has exercised (with whichever outcome) the right to judicial review, such action or omission is irrelevant in an investment arbitration deciding whether the measure is arbitrary or discriminatory."[208] "The consequence is that in an arbitration under the US-

[205] U.S.-Ukraine BIT, Art II(3). (CL-0069).
[206] *Joseph Charles Lemire*, Decision on Jurisdiction and Liability at ¶ 246 (CL-0072).
[207] *Id.* at ¶ 276.
[208] *Id.* at ¶ 277.

Ukrainian BIT, the possibility to file a claim against a specific measure, is not burdened by any requirement to previously appeal to the national Courts."[209]

160. Respondent may be held liable for arbitrary or discriminatory measures regardless of the status of judicial review because Article II(3)(b) imposes an affirmative obligation not to engage in arbitrary or discriminatory measures and Respondent violated that obligation:

> A national court's breach of . . . treaties, is not a denial of justice, but a direct violation of the relevant obligation imputable to the state like any acts or omissions by its agents.
>
> . . .
>
> It is possible that the actions of a lower court may breach international obligations under a treaty . . . . For example, a treaty may contain promises of 'fair and equitable treatment' which are held not to be confined to matters covered by the customary law of denial of justice; breaches of such promises may not require the exhaustion of local remedies. . . . . Such grievances must find their basis in the *lex specialis* of the treaty; for want of the exhaustion of local remedies, they have not matured as claims of denial of justice.[210]

161. Accordingly, the plain language of Article II(3)(b) of the Treaty provides that the Tribunal may decide whether Respondent's actions amounted to arbitrary and discriminatory conduct, regardless of whether Claimants have sought domestic judicial review. Respondent may not substitute any requirement to exhaust judicial remedies pursuant to the minimum standard of treatment based on customary international law in place of Article II(3)(b)'s literal language.[211]

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[209] *Id.*

[210] Paulsson, DENIAL OF JUSTICE UNDER INTERNATOINAL LAW at pp. 98, 111 n.35 (CL-0075).

[211] Tribunals have rejected attempts to read limiting or qualifying terms into the language of treaty provisions that were not supported by the text of the provisions or their context. *See, e.g., Teinver S.A.*, Decision on Jurisdiction dated at ¶ 212 (CL-0025) ("The tribunals explicitly rejected the notion that there is any 'default' under international investment law that restricts what kinds of claims can be brought.") (emphasis in original) (citing *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction dated 16 May 2006 ¶ 49 (CL-0043); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction dated 3 Aug. 2006 ¶ 49 (CL-0042)); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016 ¶ 178 (CL-0081) ("[I]f Montenegro and the Netherlands had wished to limit the application of the BIT to legal persons having a genuine link with one of the Contracting States, they could have done so. In fact, the aim of the parties to the BIT seems to have been the opposite: to afford wide

162. Indeed, the plain and literal meaning of the Treaty must be enforced. Pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties (the "VCLT"), the Treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article II(3)(b) must be enforced in accordance with its "literal meaning" which "could not be clearer" and provides that the status of judicial review in a dispute challenging measures as arbitrary or discriminatory is irrelevant. [212]

163. In addition to Article II(3)(b)'s clear textual language, its context, object, and purpose also support Claimants' position. Respondent argues that the claims are not cognizable because "[j]udicial finality is plainly lacking in this case" and "[r]ather than use the remedies available to them under U.S. law . . . Claimants chose to initiate arbitration prematurely before this Tribunal."[213] But the arbitrary and discriminatory measures sentence in Article II(3)(b) of the Treaty was first inserted in the 1991 U.S. Model BIT "in reaction to the decision of the International Court of Justice in the [*Elettronica*] *Sicula* case, in which the court held that the actions of the Mayor of Palermo with respect to U.S. investment did not violate the corresponding

protection with only the requirement of incorporation."); *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction dated 30 Apr. 2010 ¶ 158 (CL-0082) ("[H]ad the Parties wished to limit the definition of investment to particular types of assets or, to exclude certain assets such as loans, they could have embodied such restriction in this provision.") (citation omitted); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated 29 Apr. 2004, ¶¶ 36, 52, 77 (CL-0083) ("[I]t is not for tribunals to impose limits on the scope of BITs not found in the text . . . we do not believe that arbitrators should read in to BITs limitations not found in the text . . . . The Respondent requests the Tribunal to infer, without textual foundation, that the Ukraine-Lithuania BIT requires the Claimant to demonstrate further that the capital used to make an investment in Ukraine originated from non-Ukrainian sources. In our view, however, neither the text of the definition of 'investment,' nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. The requirement is plainly absent from the text."); "It is not the prerogative of tribunals to rewrite the treaty standards agreed on by States." H. Gharavi, DISCORD OVER JUDICIAL EXPROPRIATION, ICSID Review, Vol. 33, No. 2 (2018), p. 353 (CL-0073).

[212] *Joseph Charles Lemire*, Decision on Jurisdiction and Liability at ¶ 277 (CL-0072).

[213] Rsp's PO, ¶¶ 70, 73.

clause of the U.S. [Treaty of Friendship, Commerce, and Navigation ('FCN')] with Italy because they were reviewable under local law."[214]

164. "In that case, the United States had alleged that the requisitioning by the Mayor of Palermo of an Italian subsidiary of an American company was an 'arbitrary or discriminatory' measure in violation of the FCN treaty between the United States and Italy."[215] Specifically, the Mayor of Palermo had issued a requisition order for an Italian subsidiary company owned by Raytheon Company, which essentially nationalized the company. The requisition order was appealed as of right on April 19, 1968 and the appeal to the Prefect of Palermo was ultimately successful – on August 22, 1969, "[t]he decision of the Prefect was to uphold the appeal and thus to annul the requisition order made by the Mayor of Palermo."[216] However, while the appeal was pending, Raytheon's Italian subsidiary company entered bankruptcy and was sold for far less than book value to a State-owned company.

165. On June 16, 1970, the subsidiary company's trustee in bankruptcy brought proceedings in the Tribunale di Palermo ("the Court of Palermo") against the Minister of the Interior of Italy and the Mayor of Palermo for damages resulting from the requisition.[217] The Court of Palermo dismissed the action for damages caused by the requisition order, ruling that the trustee "was not entitled to compensation for the requisition, either in respect of the alleged decrease in value of the plant and equipment, or of the alleged lack of disposability thereof."[218] On appeal, the Court of Appeal of Palermo "upheld the conclusion of the lower court as regards the damages

[214] Kenneth J. Vandevelde, U.S. International Investment Agreements, Oxford University Press, 2009 p. 260 (CL-0084) (discussing 1991 U.S. Model BIT) (quoting *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989) [1989] ICJ Reports 15, p. 32 (CL-0085); *see also id.* at p. 262 (the 1994 U.S. Model BIT "deleted the language inserted after the judgment was issued in the Electronica Sicula (ELSI) case.")
[215] Kenneth J. Vandevelde, U.S. Bilateral Investment Treaties: The Second Wave, 14 Mich. J. Int'l L. 621 (1993) (CL-0086), p. 651.
[216] *ELSI*, Judgment at ¶ 41 (CL-0085).
[217] *See id.* at ¶ 42.
[218] *Id.* at ¶ 43.

claimed for the alleged decrease in value of the plant and equipment" but awarded damages "for loss of use and possession of [the] plant and assets during the six-month requisition period . . . in effect, a 'rental' payment of some 114 million lire, computed as half the annual rate of 5 per cent of the total value of the assets."[219] The bankruptcy trustee had sought $2 billion Lire due to the loss of book value caused by the requisition, but this request for damages was deemed non-compensable and dismissed by the Court of Appeal of Palermo and only a fraction of the claimed damages (114 million lire) was awarded.[220] This decision was further upheld by the Court of Cassation in 1975.[221] Thereafter on February 6, 1987, the United States filed an application in the International Court of Justice instituting proceedings against the Republic of Italy, claiming damages and challenging the requisition order as arbitrary.

166. In rejecting the U.S. argument, the International Court of Justice observed with respect to the requisition order that:

> here was an act belonging to a category of public acts from which appeal on juridical grounds was provided in law (and indeed in the event used, not without success). Thus, the Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and local courts. These are not at all the marks of an "arbitrary" act.[222]

167. "The United States was concerned that, as a result of this decision, an arbitral panel formed pursuant to the investor-to-State or State-to-State dispute procedures of the BIT might conclude that the act of a host State which impaired investment was not an arbitrary and discriminatory act in violation of the BIT, because the act was subject to review or appeal under

[219] *Id.* at ¶ 43.
[220] *Id.* at ¶ 42-43.
[221] *Id.* at ¶ 43.
[222] *Id.* at ¶ 129.

local law."[223] "Such an interpretation, of course, would rob the prohibition on arbitrary and discriminatory measures of much of its force."[224]

168. The United States wanted to ensure that arbitrary actions such as those purportedly taken by the Mayor of Palermo could be the subject of investment disputes challenging those actions as arbitrary – regardless of what might happen (or what might have already happened) in any system of judicial review. It therefore inserted the arbitrary and discriminatory measures sentence in Article II(3)(b) in the 1991 U.S. Model BIT so that whether "a party has had (and has not exercised), or has exercised (with whichever outcome) the right to judicial review . . . [would be] irrelevant in an investment arbitration deciding whether the measure is arbitrary or discriminatory."[225] The United States ensured that Claimants could challenge such measures without being "burdened by any requirement to previously appeal to the national Courts."[226]

169. Akin to the Mayor of Palermo in the *Elettronica Sicula* case, in this case, DOJ unilaterally requestioned the Claimants' investments based on grounds that are arbitrary. DOJ initiated the forfeiture action by filing the forfeiture complaint, DOJ publicly announced that the properties are allegedly criminally tainted (which prevented any meaningful use of the investments), DOJ conditioned any sale on depositing the sale proceeds with the U.S. Marshals Service, DOJ filed a lis pendens on the property register, DOJ filed an application for an *ex parte* restraining order and proposed order (which was granted that same day), and DOJ then sequestered the proceeds from the sale of the properties for over two years. DOJ did all of this despite the fact that "Ukrainian law enforcement authorities have not brought any charges concerning the loans at

[223] Kenneth J. Vandevelde, U.S. Bilateral Investment Treaties: The Second Wave, 14 Mich. J. Int'l L. 621 (1993), p. 651 (CL-0086).
[224] *Id.*
[225] *Joseph Charles Lemire*, Decision on Jurisdiction and Liability at ¶ 277 (CL-0072).
[226] *Id.*

issue, no Ukrainian criminal court has determined any wrongdoing occurred, and Ukrainian courts have . . . validated the loans at issue as legitimate and not fraudulent[.]"[227] These measures taken by DOJ are seemingly politically motivated[228] – and they are fundamentally arbitrary.[229]

170. Although Respondent now argues that "[j]udicial finality is plainly lacking in this case" and that "[r]ather than use the remedies available to them under U.S. law . . . Claimants chose to initiate arbitration prematurely before this Tribunal,"[230] the United States ignores that the very purpose of Article II(3)(b)'s "literal language" which "could not be clearer"[231] is to render the status of judicial or appellate review irrelevant in a dispute challenging arbitrary measures.

171. Claimants allege that the measures taken by Respondent, and particularly DOJ, violate the FET standard and are fundamentally arbitrary.[232] Because Claimants challenge the measures taken by Respondent as arbitrary, there is a viable investment dispute and it is "irrelevant" whether any Claimant "has had or has exercised the opportunity to review such measure[s] in the courts[.]"[233] There is therefore no basis for dismissal under Rule 41(5) as these claims do not "manifestly lack legal merit" and present (at least) a "tenable arguable case."

3. *The Measures Were Initiated by the U.S. Department of Justice – A Non-Judicial Branch of Respondent*

[227] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint (S.D. Fla. Sept. 28, 2022) (C-0009).
[228] *See* Section II(e), *supra*.
[229] "Arbitrariness has been described as *'founded on prejudice or preference rather than on reason or fact'; '...contrary to the law because... [it] shocks, or at least surprises, a sense of juridical propriety',* or *'wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety'*, or conduct which *'manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination.'" Lemire*, Decision on Jurisdiction and Liability, ¶ 262 (quotations and citations omitted) (CL-0072). A measure is also arbitrary "if the administration of justice were corrupted by measures clearly prompted by political aims." *Asylum (Colombia v. Peru)*, Judgment, 20 November 1950, I.C.J Reports 1950, p. 284 (CL-0087).
[230] Rsp's PO, ¶¶ 70, 73.
[231] *Joseph Charles Lemire*, Decision on Jurisdiction and Liability at ¶ 277 (CL-0072).
[232] "Any arbitrary or discriminatory measure, by definition, fails to be fair and equitable. Thus, any violation of subsection [Art. II(3)](b) seems ipso iure to also constitute a violation of subsection (a). The reverse is not true, though. An action or inaction of a State may fall short of fairness and equity without being discriminatory or arbitrary. The prohibition of arbitrary or discriminatory measures is thus an example of possible violations of the FET standard." *Id.* at ¶ 259.
[233] *Id*. at ¶ 277.

172. Claimants reiterate that it is the actions of DOJ that are primarily at issue in this arbitration. DOJ first published a press release entitled, "Justice Department Seeks Forfeiture of Two Commercial Properties Purchased with Funds Misappropriated from PrivatBank in Ukraine,"[234] which states that the CompuCom Campus in Texas was "acquired using funds misappropriated from PrivatBank in Ukraine" and is "subject to forfeiture based on violations of federal money laundering statutes." That publication immediately rendered the Claimants' investments inalienable and destroyed their commercial value. Investments could not be sold because any buyer performing due diligence would invariably be frightened off by the prospect of association with an investment alleged by DOJ to be inextricably intertwined with and tainted by criminal "money laundering" – even if those aspersions lack basis in law or fact.

173. DOJ also initiated the forfeiture proceeding against the Claimants' investments, obtained an *ex parte* restraining order granting Respondent complete control over the investments, and recorded *lis pendens* on the property register, which constitute public notice that the investments are subject to forfeiture based on alleged connections to crime.

174. This arbitration is not purely about an *ex parte* restraining order. Even if the *ex parte* restraining order entered by a U.S. court (the same day DOJ submitted its application) were to be vacated, the investments would still be rendered essentially valueless by the public allegations of criminal taint. Prospective buyers invariably require authorization from DOJ prior to any purchase offer. DOJ allows a sale under such circumstances only if the purchase money is deposited into a bank account controlled by U.S. Marshals' service.

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[234] *See* Press Release, U.S. Dep't of Justice, Justice Department Seeks Forfeiture of Two Commercial Properties Purchased with Funds Misappropriated from PrivatBank in Ukraine (Aug. 6, 2020), available at https://www.justice.gov/opa/pr/justice-department-seeks-forfeiture-two-commercial-properties-purchased-funds-misappropriated (R-0048).

175. Where it is "obvious that the judicial deprivation resulted from the conduct of legislative or executive organs," tribunals have not found "it necessary to decide separately on the propriety of judicial conduct, treated the question of propriety as immaterial, or even upheld an expropriation claim despite the lack of any wrongdoing on the part of the courts."[235]

176. Judicial decisions that are "not given in isolation but" instead form part of a "complex network of [governmental] acts that led one way or another to the courts' determinations" may be considered as component parts in a creeping expropriation, especially if the judicial acts at issue involved the "role of the Respondent's government in their genesis and development."[236] For example, if (as in this case) there is an "unequivocal . . . role of the Prosecutor in the" challenged judicial acts, and "the judicial decisions relevant in th[e] dispute originated in . . . proceedings directly or indirectly initiated" by the prosecutor, then the investment dispute need not necessarily be constrained by the requirements applicable to a denial of justice claim, but instead may potentially proceed as a FET claim or an expropriation claim.[237]

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[235] Vid Prislan, JUDICIAL EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW, ICLQ 70 Jan. 2021, at 176 (collecting cases). Likewise, "where the impugned judicial conduct formed part of a composite wrongful act comprised of a series of acts or omissions attributable to different State organs, tribunals refrained from separately reviewing the propriety of such conduct, or even upheld expropriation claims in the absence of any judicial misconduct." *Id.* (same). (CL-0074).

[236] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, (29 July 2014) ¶ 465 (CL-0088)

[237] *Id*. ¶¶ 465; 475-81; *see also id.* at ¶ 404 ("This situation is in itself contrary to the fairness that could be expected in terms of the treatment of a foreign investor, irrespective of whether such acts might originate in the judiciary or the government itself, including the role of the Prosecutor therein, particularly in light of the Prosecutor's office being an executive organ under the authority of the Presidential Administration"); *id* at 479. ("For the most part, the explanation given by the courts in support of their findings have not been convincing and appear rather as an endorsement of the Prosecutor's arguments, not unrelated to those of the interests behind such arguments. This does not necessarily mean that bad faith might have intervened, at least not in all cases, but it certainly requires that the standard of deference be appropriately qualified."); *see also RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Final Award, (12 September 2010) ¶ 620 (CL-0089) ("Though the Tribunal did not find the bankruptcy auctions to be conducted contrary to Russian law, this does not change the general impression from the evidence on file for the Tribunal, since the application for bankruptcy by the SocGen Group was also conducted by association with the State-controlled company, Rosneft, and that they fitted into the obvious general pattern and obvious intention of the totality of the scheme to deprive Yukos of its assets."); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶ 707 (CL-0090) ("In this connection the Tribunal does however consider that it is relevant that the court process which culminated in the expropriation was instigated by the decision of the State, acting through the Investment Committee, to terminate the

177. Respondent quotes from an article by Professor Christopher Greenwood for the proposition that the Claimants are "short-circuiting the domestic process" and "engag[ing] in . . . 'extraordinary forum shopping.'"[238] But Respondent ignores that Professor Greenwood also "suggested that a distinction should be made between two different situations."[239] "In the first scenario, the investor is the victim of an act that is in and of itself contrary to international law."[240] "This would be the case of an illicit expropriation, or of a governmental measure such as the revocation of a license."[241] "In the second scenario, the harm suffered by the investor originates from an act that is not in itself contrary to international law (such as, for example, the breach of the obligations contained in a commercial contract), which in turns gives rise to litigation in the context of which a denial of justice occurs."[242]

178. "In both cases, the State's responsibility is of course direct because the acts of the judiciary are directly attributable to the State."[243] "There is however an important difference between the two scenarios."[244] "As Professor Greenwood rightly suggests:

> 'In the second case, the original cause of harm is not imputable to the respondent State and cannot, therefore, constitute a cause of action against that State in international law. If there is to be a cause of action at all, it can only be denial of justice, arising either because the respondent State denies the alien access to the courts or because those courts behave in a way that is discriminatory or manifestly

Investment Contract. . . . it is beyond doubt that expropriation *was* the intended consequence of the court orders for compulsory redemption of Claimants' shares."); Vid Prislan, JUDICIAL EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW, ICLQ 70 Jan. 2021, at 176 (CL-0074) (Where it is "obvious that the judicial deprivation resulted from the conduct of legislative or executive organs" tribunals have not found "it necessary to decide separately on the propriety of judicial conduct, treated the question of propriety as immaterial, or even upheld an expropriation claim despite the lack of any wrongdoing on the part of the courts.").

[238] Rsp.'s PO, ¶ 73.

[239] Alexis Mourre, *Expropriation by Courts: Is It Expropriation or Denial of Justice?*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011 60, ¶ 20 (Arthur W. Rovine, eds., 2012) (CL-0091).

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.* at ¶ 21.

[244] *Id.*

contrary to international standards of behaviour. In this case it is ***only*** the action of the courts which is imputable to the State.' "[245]

179. By contrast, in the first scenario, a non-judicial branch of the respondent state is the initiator of the original harm. "Accordingly, in the first scenario, the international wrong cannot be characterized as exclusively or primarily based on denial of justice, for the judicial system's failure to guarantee due process is only an ancillary element of the breach of the State's obligations."[246]

180. Professor Greenwood expressly states that "[a] waiver of the local remedies rule will affect the first case but not the second."[247] Meaning, if the local remedies rule is waived, (which it is here),[248] and the original cause of harm is not caused by a private party but instead by

[245] *Id.* (emphasis added). In other words, in the second scenario, the judicial "miscarriage of justice is the primary basis of the State's responsibility, and any claim directed against the State could ***only*** be based on denial of justice with the consequence that such claim will be subject to the substantive condition of exhaustion, unless exercising domestic avenues of redress was impracticable or unreasonably burdensome." *Id.* (emphasis added).

[246] *Id.* For this reason, Respondent's reliance on cases where claimants expressly asserted denial of justice claims is misplaced. *See Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 240 (RL-024) (May 31, 2016) (Claimaints position was that state conduct amounted to a denial of justice) ; *Chevron and TexPet v. Ecuador* PCA Case No. 2009-23, Second Partial Award on Track II ¶ 7.23 (Aug. 30, 2018) (noting features of Claimants' denial of justice claim); *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Cyprus,* ICSID Case No. ARB/13/27, Award ¶ 1269 (July 26, 2018) (claimants asserted a denial of justice in judicial proceedings) (RL-027). Further, Respondent's reliance on *Lion v. Mexico*, is unavailing, as that matter involved a claim of "judicial expropriation" where judicial decisions resulted in the expropriation of the investment, ICSID Case No. ARB(AF)/15/2, Award ¶ 187 (Sept. 20, 2021) (RL-20).

[247] *See* Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 56, 64 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (RL-026).

[248] Article 26 of the ICSID Convention contains an express waiver to the local remedies rule in its first sentence, while preserving a State's right to require local remedies in its second sentence. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted on 18 March 1965, Art. 26 (CL-0078) ("Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."); *see EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 1127 (CL-0092) ("Having elected not to incorporate a provision mandating the exhaustion of remedies prior to arbitration into the France BIT, Respondent cannot now argue that one implicitly exists. To hold otherwise would conflict with the plain reading of Article 26, as well as invite States to mandate the exhaustion of local remedies without giving fair warning of such a stipulation to investors who enter a treaty expecting a clear path to arbitration.").

a non-judicial governmental branch, (e.g., DOJ), the respondent state cannot then avoid liability by laundering its non-judicial governmental activity through the judiciary.

181. In such a scenario, the article by Professor Greenwood suggests that the investors are not limited to a denial of justice claim and need not await a final decision from the judiciary because "the original cause of harm ***is*** . . . imputable to the respondent State." If it were otherwise, States could engage in the most egregious expropriation and unfair and inequitable treatment of foreign investments, so long as the offending branches of government simultaneously seek judicial imprimatur for their international delicts. That cannot be – and is not – the law.

182. If "the State . . . could [] organize [a] taking via the judiciary," the respondent state could "inflict on the investor an obligation to exhaust local remedies, save for a narrow futility exception, and a higher threshold for liability in relation to the merits of the decision or the amount of compensation."[249] As Mr. Gharavi explains, that would impermissibly lead to results that are "manifestly absurd or unreasonable."[250]

183. At bottom, as acknowledged by the Tribunal in *Standard Chartered Bank v. Tanzania*, "judicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its, property or property rights, can still amount to" a treaty violation, including a prohibited expropriation.[251]

4. *The Treaty's Lex Specialis Authorizes the Investment Dispute*

[249] Gharavi, DISCORD OVER JUDICIAL EXPROPRIATION, at p. 354. (CL-0073).
[250] *Id.*
[251] *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award (11 October 2019), ¶ 279. (CL-0093). Likewise, in *Rumeli v. Kazakhstan*, the tribunal found a creeping expropriation involving the State's executive and judicial organs. *Rumeli*, Award at ¶ 707 (CL-0090) ("In this connection the Tribunal does however consider that it is relevant that the court process which culminated in the expropriation was instigated by the decision of the State, acting through the Investment Committee, to terminate the Investment Contract."). And, in *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, because "the loss allegedly suffered by the Claimant derive[d] primarily from the actions taken by" a non-judicial branch "rather than from the decisions made by the [Respondent's] judiciary," there was "no need for the Claimant[s] to establish a denial of justice in order to find the State in breach of its international obligations as a consequence of the actions taken by the [non-judicial branch]." *TECO Guatemala Holdings*, Award at ¶ 484. (CL-0068).

184. As discussed in section (i), *supra*, "the actions of a lower court may breach international obligations under a treaty."[252] Certain treaties "may contain promises of 'fair and equitable treatment' which are held not to be confined to matters covered by the customary law of denial of justice; breaches of such promises may not require the exhaustion of local remedies."[253] The Treaty at issue in this arbitration is one such treaty.

185. Pursuant to Article II(3), the level of protection provided by the international customary minimum standard merely acts as the "floor" not the "ceiling" of the Treaty's FET protections.[254] "In view of the drafting of Article II.3 of the BIT . . . the actions or omissions of the [Respondent] may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith."[255]

186. "As Dr. F.A. Mann, one of the twentieth century's leading authorities on the interaction between municipal law and public international law wrote in 1981:

> 'the terms 'fair and equitable treatment ' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A Tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by any other words is likely to be material. The terms are to be understood and implied independently and autonomously.'"[256]

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[252] Paulsson, DENIAL OF JUSTICE UNDER INTERNATIONAL LAW 111 at n. 35; *see also id.* ("A national court's breach of . . . treaties, is not a denial of justice, but a direct violation of the relevant obligation imputable to the state like any acts or omissions by its agents."). (CL-0075).
[253] *Joseph Charles Lemire*, Decision on Jurisdiction and Liability at ¶ 253 (CL-0072).
[254] *Id.*
[255] *Id.* ¶ 254.
[256] *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award II, (20 August 2007) ¶ 7.4.8 (CL-0094).

187. "To the extent that Respondent contends that the fair and equitable treatment obligation constrains government conduct only if and when the state's courts cannot deliver justice, this appears to conflate the legal concepts of fair and equitable treatment on the one hand with the denial of justice on the other."[257]

188. "But if this Tribunal were to restrict the claims of unfair and equitable treatment to circumstances in which Claimants have also established a denial of justice, it would eviscerate the fair and equitable treatment standard."[258] "Although the standard is commonly understood to include a prohibition on denial of justice, it would be significantly diminished if it were limited to claims for denial of justice."[259]

189. Of course, "[j]udicial measures 'emanat[e] from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.'"[260] "The BIT does not distinguish between the acts of different Government branches."[261] When Respondent "committed itself to treating the Claimant's investments fairly and equitably, it did not exclude the acts of the judiciary from this obligation."[262] "Nor did it specify that breaches of the FET standard were limited to instances of denial of justice or other forms of manifest arbitrariness or lack of due process."[263]

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[257] *Id.* at ¶ 7.4.10.
[258] *Id. at* ¶ 7.4.11
[259] *Id.* Fundamentally, "in assessing whether the standard has been transgressed, a tribunal must determine whether, in all of the circumstances of the particular case, the conduct properly attributable to the state has been fair and equitable, or unfair and inequitable." *Id.* at ¶ 7.4.12. This "is an objective standard" which is fact specific and must be assessed on a case by case basis. *Id.* This standard is itself inconsistent with Rule 41(5), which "at this early stage, without the benefit of a full presentation by all parties, cannot resolve contentious factual issues." *Dominion Minerals*, Decision of the Ad hoc Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5), ¶ 152 (CL-0009).
[260] *Infinito Gold,*, Award at ¶ 358 (CL-0076).
[261] *Id.*
[262] *Id.*
[263] *Id.*

190. "[T]here is no principled reason to limit the State's responsibility for judicial decisions to instances of denial of justice."[264] "Holding otherwise would mean that part of the State's activity would not trigger liability even though it would be contrary to the standards protected under the investment treaty."[265] "[C]ourt decisions may deprive investors of their property rights 'just as surely as if the State had expropriated [them] by decree.'"[266] "In the same vein, judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice."[267]

191. "[A]cts or measures of the judiciary can [. . .] be found in violation of the FET standard irrespective of a finding of a denial of justice."[268] "[T]he judiciary could violate one of the stand-alone components of the independent FET standard, irrespective of a denial of justice[.]"[269]

192. Likewise, with respect to judicial expropriation, Article III,

> bars all expropriations or nationalizations except those that are for a public purpose, carried out in a non-discriminatory manner; subject to prompt, adequate, and effective compensation"; subject to due process; and accorded the treatment provided in the standards of Article II (3). (These standards guarantee fair and equitable treatment and prohibit the arbitrary and discriminatory impairment of investment in its broadest sense.)[270]

193. Because Article III's prohibitions on expropriation overlap with Article II(3)'s protections, measures taken by the judiciary may amount to judicial expropriations under Article III, (unconfined by matters covered by the customary law of denial of justice), for many of the same reasons already discussed.

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[264] *Id.* ¶ 359.
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] Gharavi, Discord Over Judicial Expropriation, at, p. 355. (CL-0073).
[269] *Id.*
[270] U.S. - Ukraine BIT, S. TREATY DOC. No. 103-37, Letter of Submittal, comments to Article III (Expropriation) (Sept. 7, 1994) (CL-0069).

194. First, there is nothing in the relevant provisions of the Treaty governing expropriation that justifies drawing any distinction between executive, legislative, and judicial measures insofar as an evaluation of whether or not they amount to expropriatory acts is concerned. Indeed, there is no basis to impose a higher burden to establish expropriatory conduct when implemented through a State's judicial arm, as Respondent contends.[271]

195. As Mr. Gharavi explains:

> Legal instruments do not distinguish judicial expropriation from other forms of expropriation, or subject it to different or stricter norms than legislative or executive expropriation. Similarly, no such distinction is made for purposes of attribution between the judiciary, executive or the legislative branches of power, nor with regards to the position of the State organ in the hierarchy under Article 4.1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.[272]

196. Moreover, an indirect expropriation may take one or several steps and, therefore, may be deemed a "creeping" expropriation, which occurs through a series of acts or omissions in the aggregate. The acts and omissions of any State organ, including the judiciary, may constitute part of a creeping expropriation. Where that is the case:

> [T]ribunals did not find it necessary to decide separately on the propriety of judicial conduct, treated the question of propriety as immaterial, or even upheld an expropriation claim despite the lack of any wrongdoing on the part of the courts. Likewise, in circumstances where the impugned judicial conduct formed part of a composite wrongful act comprised of a series of acts or omissions attributable to different State organs, tribunals refrained from separately reviewing the propriety

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[271] *See, e.g., Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 347 (CL-0095) ("[A]s a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made). Respondent's argument that there can be no international wrongful act or Treaty dispute arising from a court decision until the entire justice system has heard the case is therefore rejected."); *Saipem S.p.A v. The People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, ICSID Case No. ARB/05/07, ¶ 151 (CL-0096) ("As a matter of principle, exhaustion of local remedies does not apply in expropriation law.").

[272] Gharavi, DISCORD OVER JUDICIAL EXPROPRIATION at 353 (CL-0073) (emphasis added); *see also* Prislan, JUDICIAL EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW at 166 (CL-0074) ("from the perspective of contemporary international law, there is nothing to suggest that taking of property could not be the result of judicial action"); Csaba Kovács, ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW 56 (Kluwer Law International 2018), at 102 (CL-0097) ("Equally uncontroversial is the attribution of the conduct of the court to the State in cases involving a judicial expropriation.").

of such conduct, or even upheld expropriation claims in the absence of any judicial misconduct.[273]

197. For example, in *Rumeli v. Kazakhstan*, the tribunal found a creeping expropriation involving the State's executive and judicial organs.[274] Also, in *Sistem v. Kyrgyz Republic*, the claimant lost its rights in its hotel by virtue of court decisions. The tribunal found an expropriation, holding that "[t]he Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree."[275]

198. Ultimately, because there is no exhaustion of local remedies clause, "there is no obligation to exhaust local remedies when there is a BIT breach, be it FET or expropriation, and this is irrespective of whether it was at the hands of the executive, legislative or judiciary."[276]

199. The claim that Respondent cannot be held liable for the acts of its judiciary absent a finding of denial of justice is simply not correct.

5. *The Treaty Requires Effective Means of Enforcing Rights and The Claimants Need Not Exhaust Local Remedies Because Such Exhaustion Would Be Ineffective*

200. Article II(7) of the U.S.-Ukraine BIT requires the contracting States to "provide effective means of asserting claims and enforcing rights with respect to investment," and thereby creates a "distinct and potentially less demanding test, in comparison to denial of justice in customary international law [and] the standard requires both that the host State establish a proper

[273] Prislan, JUDICIAL EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW at 176 (166) (CL-0074).
[274] *Rumeli*, Award at ¶¶ 702-708.(CL-0090).
[275] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award dated 9 Sept. 2009 ¶ 118 (CL-0098); *see also Saipem*, Award at ¶¶ 128-129 (CL-0096) (finding that actions of the judiciary constituted an indirect expropriation, without requiring that such actions amount to a denial of justice); *id.* ¶ 181 ("While the Tribunal concurs with the parties that expropriation by the courts presupposes that the courts' intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice."); *Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award dated 11 Oct. 2019 ¶ 279 (CL-0093) ("[J]udicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its[] property or property rights[] can . . . amount to expropriation. While denial of justice could in some case result in expropriation, it does not follow that judicial expropriation could only occur if there is denial of justice").
[276] Gharavi, DISCORD OVER JUDICIAL EXPROPRIATION at p. 355. (CL-0073).

system of laws and institutions and that those systems work effectively in any given case." [277] Therefore, "a claimant alleging a breach of the standard does not need to prove that it has exhausted local remedies."[278]

201. Moreover, even in an ordinary denial of justice case without an "effective means" provision, a litigant need not exhaust local remedies if such exhaustion would be ineffective – e.g., pursuit of the available remedy would be futile, or the contemplated remedy is theoretical.[279] The test is not one of obvious futility but rather, as Judge Lauterpacht articulated in the *Norwegian Loans* case: "reasonable possibility of an effective remedy."[280]

202. *First*, as set forth in paragraphs 52-57, *supra*, in a civil forfeiture action, the DOJ can indefinitely avoid a trial by seeking a stay based on an "ongoing" related criminal investigation. The U.S. courts do "not have discretion to deny the requested stay because the statute mandates that a stay be entered in a civil forfeiture proceeding if the Government's related criminal investigation would be adversely affected" – the U.S. courts are "statutorily compelled to grant the stay." This is the exact circumstance in which local remedies have been found to be ineffective and futile: there is "a consistent and well-established line of precedents adverse to the" Claimants and "the local courts do not have the competence to grant an appropriate and adequate remedy."[281] Respondent continues to seek a stay of the Kentucky Action, which was filed at the same time as the Texas Action and involves substantively identical claims, even though that case has been

[277] *White Industries Australia Limited v. The Republic of India*, Final Award (30 November 2011), para. 11.3.2 (CL-0077) (interpreting *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits (30 March 2010) (CL-0078)).
[278] *Id.*
[279] Paulsson, *Denial of Justice in International Law* at 118 (CL-0075).
[280] Paulsson, *Denial of Justice in International Law* at 118 (CL-0075) (citing *Certain Norwegian Loans* [1957] ICJ Reports 9, dated July 6, 1957, p. 39 (CL-0080).
[281] Paulsson, *Denial of Justice in International Law* at 118-19 (CL-0075) (citing Dugard, J., Third Report on Diplomatic Protection, 7 March 2002, A/CN.4/523, at ¶¶ 38-44 (CL-0099)).

pending for two years and nine months. Thus, there is no effective remedy available to Claimants, as they would be unable proceed to discovery or a trial on the merits in the Texas and Ohio Actions.

203. *Second*, the Respondent's judiciary cannot "second-guess the '[E]xecutive [B]ranch's judgment as to the proper role of comity concerns,' because the Executive Branch 'has already done the balancing in deciding to bring the case in the first place.'"[282] According to the U.S. Court, under U.S. law if "the executive branch has decided that a forfeiture action is in the interests of the United States, declining jurisdiction out of deference to the interests of a foreign nation would be inappropriate."[283] Accordingly, "there is a consistent and well-established line of precedent adverse to the [Claimants]," "[t]he courts of the respondent State do not have the competence to grant an appropriate and adequate remedy to the [Claimants]," and/or "the local courts have no jurisdiction over the dispute" regarding the limits on Respondent's jurisdiction imposed by international law, and this is a classic category of a case in which local remedies are ineffective.[284]

204. As noted in paragraph 201, *supra*, whether effective measures are provided is contingent about upon reasonableness and reasonableness is dependent on the circumstances of the case. Questions regarding the effectiveness of the available remedies in U.S. civil forfeiture lawsuits must be developed on a full record, considering not just the individual evidence of the case, but the effectiveness of the applicable system of remedies as a whole. Claimants have shown genuine questions exist and the determination of those questions is not appropriate at this stage.

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[282] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint (S.D. Fla. Sept. 28, 2022) , at 26 (C-0009).
[283] *Id.*
[284] Dugard, J., Third Report on Diplomatic Protection, 7 March 2002, A/CN.4/523, at ¶¶ 38, 42-43 (CL- 0099).

205. At bottom, Claimants are not only able to meaningfully respond to Respondent's first preliminary objection on the merits pursuant to Rule 41(5), but Claimants further submit that, in the circumstances of this case, Respondent's first merits objection itself manifestly lacks merit. "Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts."[285] As for the first merits objection, at minimum "counter-argument is identified" and an "arguable" response is provided.[286] Because Respondent has not clearly or obviously shown that any and all conceivable claims "manifestly lack legal merit," the first merits objection itself lacks merit and should be denied.

ii. *Expropriation Occurs from an Even Temporary Deprivation Because the Recovery of the Property Right or Access to It Does Not Replace Ownership in its Initial Situation*

206. Respondent argues that its actions—the forfeiture action, the sequestering of the proceeds from the sale of the property for over two years, and the public announcement that the properties are allegedly criminally tainted (which prevented any meaningful use of the investments), among others—do not constitute an expropriation because a final judgment of forfeiture has not been issued and thus there has not been a permanent expropriation of the investment. Respondent's argument is unavailing, as the definition of expropriation under international law does not require permanent dispossession in the manner Respondent suggests.

207. While there is no dispute that expropriation requires a deprivation or destruction of an investment that is "enduring" and "not merely ephemeral," the requisite duration of the

[285] *PNG Sustainable Development*, Decision on the Respondent's Objections under Rule 41(5) at ¶ 89 (CL-0001).
[286] *Mainstream Renewable*, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) at ¶ 84 (CL-0002).

deprivation is a question of fact.[287] Tribunals have consistently determined that "creeping expropriation" does not have a particular temporal requirement, for it "may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions" and need "not necessarily take place gradually or stealthily."[288] Since creeping expropriation "may take place by means of a broad number of actions," any determination as to the requisite amount of time it takes for expropriatory effects to manifest must necessarily "be examined on a case-by-case basis…"[289]

208. Expropriation may occur without a permanent deprivation contrary to Respondent's contention. Article III of the Treaty authorizes claims for "creeping" expropriations by expressly applying to direct or "indirect[]" state measures "tantamount to expropriation or nationalization," thus authorizing investment disputes for "creeping expropriations" that result in a substantial deprivation of the benefit of an investment investment short of a state party seizing the investment entirely. A conclusion that property has been expropriated "is warranted whenever events demonstrate that the owner was deprived of the fundamental rights of ownership and it

[287] *See* Andrew Newcombe & Lluis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 345 § 7.16 (2009) (CL-0100) ("The deprivation in question must amount to a lasting removal of the ability of an owner to make use of its economic rights. The deprivation must be intense and enduring. The degree of permanence required is fact specific."); *see also Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, IUSCT Case No. 7, Award (June 29, 1984), reprinted in 6 IRAN-U.S. CL. TRIB. REP. 219, 226 ¶ 22 (1986) (CL-0101) ("While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."); *see also Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award ¶ 77 (Feb. 17, 2000) (CL-0102) (quoting same). Here, there is no genuine dispute that the intent is to permanently deprive the Claimants of their investments, because the very purpose of the civil forfeiture lawsuits is to do exactly that.

[288] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 114 (May 29, 2003) (CL-0103).

[289] *Id*.

appears that this deprivation is not merely ephemeral."[290] Indeed, the terms of typical BITs "do not require that dispossession be permanent in the sense of continuing *ad infinitum*, although deprivation must possess a character which is more than transitory."[291] "State measures, even if temporary, can have an effect equivalent to expropriation if their length and impact on the investment are sufficiently important."[292]

209. Accordingly, tribunals have found expropriation where claimants were deprived of their investment temporarily. Deprivations as short as four months have been held to be improper expropriations. In *Middle East Cement v. Egypt*, for example, the tribunal held that a ban on imports of cement, which was subsequently rescinded, constituted a permanent, indirect expropriation of the claimant's investment, a license to import cement.[293] The tribunal found that the ban had deprived the claimant of selling cement to its primary customer for a four-month period, which indirectly expropriated the claimant's investment, although it retained possession of some of its physical possessions, including an onshore installation and ship.[294]

210. *Wena Hotels v. Egypt* also illustrates the expropriatory effect that a temporary measure may have on an investment. There, the State seized the claimant's two hotels for one year, before returning them "stripped of much of their furniture and fixtures."[295] The tribunal found Egypt liable for an expropriation, holding that "to seize and illegally possess the hotels for *nearly*

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[290] *Tippetts v. Iran*, Award ¶ 22 (CL-0101); *accord*, *e.g.*, *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award ¶ 99 (Dec. 8, 2000) (one-year deprivation was "more than an ephemeral interference") (CL-0104); *see also* Sebastian Lopez Escarcena, EXPROPRIATIONS AND OTHER MEASURES AFFECTING PROPERTY RIGHTS IN THE CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL, 31(2) Wis. J. Int'l L. 177, 177 (2013) (CL-0105) ("Expropriations were conceptualized [by the Iran-U.S. Claims Tribunal] as non-ephemeral and unreasonable interferences amounting to a deprivation of the use and control of property.").

[291] *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, PCA Award ¶ 577 (Feb. 14, 2012). (CL-0106).

[292] *Olin Holdings Ltd. v. State of Libya*, ICC Case No. 20355/MCP, Final Award ¶ 165 (May 25, 2018) (CL-0107).

[293] *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award ¶¶ 108-111 (Apr. 12, 2002) (CL-0108).

[294] *Id.* ¶ 107 ("at least for a period of 4 months, Claimant was deprived, by the Decree, of rights it had been granted under the License [and] such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT.").

[295] *Wena Hotels* at ¶ 99 (CL-0104).

a year is more than an ephemeral interference in the use of that property or with the enjoyment of its benefits."[296] Thus, contrary to Respondent's position, expropriation does not require a permanent taking of an investment, but rather may exist even where the deprivation of the investment is temporary.

211. Likewise, in *Olin v. Libya*, even though the court of appeal cancelled an expropriation order that had been issued against the claimant's factory more than four years earlier, the State was found liable for an expropriation, because the "four years and a half of uncertainty" generated by that expropriation order lasted "a significant period of time for a business that had just started its operations."[297]

212. Here, as demonstrated earlier, Respondent's acts and omissions, taken by DOJ and blessed by the courts, have had the effect of depriving Claimants of all or substantially all of the value of their investment, and, therefore, constitute an indirect expropriation. By virtue of Respondent's actions, the investment could not be sold without the Government's approval, Claimants cannot obtain the proceeds of any sale, and the value of the investment is permanently impaired by the public allegations of criminal taint.

213. Respondent cites (Rsp.'s PO at 38 & nn. 150-51) five decisions, none of which stands for the categorical notion that an expropriation must be "permanent" ad infinitum. It cites *Generation Ukraine v. Ukraine*, which held specifically (¶ 20.23) that permanence is not required: it found that expropriation occurs whenever an "owner [i]s deprived of the fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."[298] That case further noted

[296] *Id*. (emphasis added).
[297] *Olin Holdings* at ¶ 165 (CL-0107).
[298] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award ¶ 20.23 (Sept. 16, 2003) (CL-0109).

that while a claimant's failure to challenge a dispossession may provide grounds for a Tribunal to disqualify the dispute, there is no requirement that a claimant exhaust their local remedies.[299]

214. Respondent also cites *Burlington Resources Inc. v. Ecuador*, which did state in dicta that "a State measure constitutes expropriation under the Treaty if . . . the deprivation is permanent," but in that case there was no issue on this point, and the deprivation at issue (the cancellation of contracts on two hydrocarbon drilling blocks) was undisputedly permanent.[300] The same is true with respect to *Busta v. Czech Republic*, where the issue was whether goods had been improperly taken from claimant. Respondent's police removed goods from claimant's warehouse; claimant alleged most of the goods had not been returned, respondent alleged all goods had been returned, and the only issue was whether the goods had been returned.[301]

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[299] *Generation Ukraine* at ¶ 20.30 (CL-0109) (noting a tribunal could dismiss a claim where a claimant failed to avail themselves of any local remedies, "not because there is a requirement of *exhaustion* of local remedies" and that a claim would require "*reasonable* – not necessarily exhaustive – effort by the investor to obtain correction.") (emphasis in original). Here, Claimants sought, *inter alia*, vacatur of the restraining orders in the civil forfeiture lawsuits and repeatedly consulted with the highest level officials "[r]esponsib[le] for anti-money laundering enforcement efforts, including forfeiture cases[.]" Rsp's PO, ¶ 18. These were hardly the sort of "low . . . level" administrative or clerical staff discussed by the Tribunal in *Generation Ukraine*. *See Generation Ukraine* at ¶¶ 20.27-20.33 (CL-0109). At bottom, Respondent cannot "do by the back door that which the Convention expressly excludes by the front door." *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee (14 June 2010), ¶ 47 (distinguishing *Generation Ukraine*) (CL-0110). "Many national legal systems possess highly developed remedies of judicial review." *Id.* "Yet it would empty the development of investment arbitration of much of its force and effect, if, despite a clear intention of States parties not to require the pursuit of local remedies as a pre-condition to arbitration, such a requirement were to be read back in as part of the substantive cause of action." *Id.* "The consequences of the adoption of the approach of the [Respondent] in question in investment treaty law could be serious." *Id.* at ¶ 52. "It would inject an unacceptable level of uncertainty into the way in which an investor ought to proceed when faced with a decision on behalf of the Executive of the State, replacing the clear rule of the Convention which permits resort to arbitration." *Id.*

[300] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability ¶ 506 (Dec. 14, 2012). (CL-0111).

[301] *I.P. Busta & J.P. Busta v. Czech Republic*, SCC Arbitration Case V 2015/014, Final Award *Id*. ¶ 390 (Mar. 10, 2017). (CL-0112). Respondent also cites *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), (CL-0113), which held there was no "permanent, severe deprivation" of claimant's investment rights because the measures at issue "did not deprive the investors of the right to enjoy their investment" and caused only a temporary drop in the value of "the investment's asset base, the value of which has rebounded since the economic crisis of December 2001 and 2002." *Id*. ¶¶ 198-200. And Respondent cites *Anglia Auto Accessories Limited v. Czech Republic*, SCC Case No. 2014/18, Final Award (Mar. 10, 2017), (CL-0114) which rejected a claim that Czech courts had unjustly refused to enforce an arbitral award, not because of any "permanence" requirement but because the Tribunal was "not convinced that the deficiencies in the enforcement process could be said to be systematically attributable to the Czech Courts," particularly in light of claimant's own procedural errors. *Id*. ¶ 296. The Tribunal explicitly declined to determine "the specific legal standards that apply to creeping expropriation." *Id*. ¶ 302.

215. To the extent that any degree of permanence has been required, it is that expropriation requires permanent *effects* – e.g., the loss of specific profits, or business opportunities – rather than a permanent deprivation of property or property rights. As stated in Respondent's own case, even if expropriation "generally" requires a permanent deprivation, a temporary deprivation qualifies if "the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations."[302] Even if reversible, an expropriation occurs where "no possibility exists to undo the negative impact" and the claimant's project is unlikely to be "brought to economic viability with an adequate return on the investment."[303]

216. In summary, expropriation occurs from a temporary deprivation because the "recovery of the property right or access to it does not replace ownership in its initial situation…. Consequently, it is not a matter of how long the measure itself lasts but of how long the adverse effects endure on the investment."[304]

217. Under these standards, Respondent's measures in this case plainly amount to an indirect expropriation. Respondent has taken Claimant's real property and has, in effect, permanently deprived Claimants of the full economic rights and value of the investment, without compensation. Respondent has also harmed Claimants' U.S. businesses more broadly, because the taking of the assets has frustrated opportunities and the measures taken have gravely harmed the Claimants' ability to continue operating businesses. The extent of the damage[305] caused by this

[302] *LG&E* at ¶ 193 (CL-0113).
[303] *Bahgat v. Egypt*, PCA Case No. 2012-07, Final Award ¶ 228 (Dec. 23, 2019) (CL-0115); *see also Olin Holdings* at ¶ 166 (CL-107) (finding expropriation where temporary seizure allowed claimant to be "overtaken by its competitors" and caused severe "economic consequences").
[304] Suzy H. Nikièma, BEST PRACTICES: INDIRECT EXPROPRIATION, IISD Best Practices Series, at 14 (March 2012) (quotation omitted). (CL-0116).
[305] In addition to compensatory damages, the Tribunal also has the power to award declaratory relief. "An obligation imposed by an award that is expressed not in monetary terms but in terms of an obligation to perform a particular act

indirect expropriation is a question of fact that is wholly inappropriate for resolution at the Rule 41(5) stage.[306] Claimants' allegations of expropriation are thus not manifestly without merit and Respondent's objection should be overruled.

D. **Merits Objection 2:** Measures that Exceed the Limits of Prescriptive Jurisdiction Under Customary International Law are *Per Se* Unreasonable and Fail To Satisfy the Requirement of Fair and Equitable Treatment

218. Respondent argues that "Claimants' Allegations Concerning Prescriptive Jurisdiction Cannot Form the Predicate of a 'Fair and Equitable Treatment' Claim Under the U.S.-Ukraine BIT."[307] Respondent again bases this argument on its proposition that Article II(3)(a) is limited "to the customary international law minimum standard of treatment of aliens and [therefore] does not incorporate unrelated supposed customary international law concerning 'prescriptive jurisdiction.'"[308]

219. But, as set forth in the case of *Lemire v. Ukraine*, "[w]hat the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor."[309] "In view of the drafting of Article II.3 of the BIT . . . the actions or omissions of the [Respondent] may qualify as unfair and inequitable,

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or to refrain from a certain course of action is equally binding and gives rise to the effect of res judicata." Christoph Schreuer, Non-Pecuniary Remedies in ICSID Arbitration, 20 Arb. Int'l 325, 325 (2004) (CL-0117); *see also Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Jan. 14, 2004, Decision on Jurisdiction, ¶¶ 79-81 (collecting cases) (CL-0118) ("An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these [non-pecuniary] powers are indeed available . . . . [I]n addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts. Jurisdiction is therefore also affirmed on this ground."). A declaration that the measures taken are in violation of Respondent's international legal obligations will not be of mere advisory value: it will ensure that the activity does not reoccur and afford the Claimants legal certainty. *See* 22 U.S.C. § 1650a ("An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States.") (C-0043).

[306] *Dominion Minerals*, Decision of the Ad hoc Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5), ¶ 152 (CL-0009).

[307] Rsp's PO at 42.

[308] Rsp.'s PO ¶ 80.

[309] *Joseph Charles Lemire*, Decision on Jurisdiction and Liability at ¶ 253 (CL-0072).

even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith."[310]

220. Likewise, in the case of *Azurix v Argentina*, brought under the U.S.-Argentina BIT, the Tribunal interpreted the same language and reached the same conclusion: "the treatment accorded to investment will be no less than required by international law." [311] "The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law." [312]

221. The United Nations Conference on Trade and Development ("UNCTAD") study on "Fair and Equitable Treatment," after reviewing the evidence in some detail, also concludes: "The[] considerations point ultimately towards fair and equitable treatment not being synonymous with the international minimum standard . . . Where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable."[313] The UNCTAD study reached that conclusion for similar reasons as the *Lemire* and *Azurix* tribunals:

> In a number of BITs involving the United States, and in its model BIT, the fair and equitable standard is combined with full protection and security, and this combined standard is reinforced by the rule that each party to the agreement "shall in no case accord treatment less favorable than that required by international law" (Article II(3)(a)). At the same time, however, the United States has consistently maintained that customary international law assures the international minimum standard for all foreign investments; it is therefore fair to assume that the reference to international law in Article II(3)(a) is an assurance that the international minimum standard shall form a safety net for all investments. This approach -- fair and equitable treatment with full protection and security on the one hand, and treatment no less favourable than that required by international law on the other -- suggests that the two sets of standards are not necessarily the same. To be sure, the reference to treatment no less than that required by international law could possibly be made *ex abundante*

[310] *Id.* at ¶ 254.
[311] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award ¶ 361 (July 14, 2006) (CL-0119).
[312] *Id*.
[313] UNCTAD, Fair and Equitable Treatment (UNCTAD Series on Issues in International Investment Agreements, 1999) (CL-0120), at p. 40.

> *cautela*, but its presence in most bilateral treaties involving the United States suggests that it is not perceived as verbiage.[314]

222. Fundamentally, "in assessing whether the standard has been transgressed, a tribunal must determine whether, in all of the circumstances of the particular case, the conduct properly attributable to the state has been fair and equitable, or unfair and inequitable."[315] This "is an objective standard" which is fact specific and must be assessed on a case by case basis.[316]

223. Although there are a number of "specific bases of jurisdiction," the bases for prescriptive jurisdiction "reflect a broader principle requiring a genuine or sufficiently close connection to justify or make reasonable the exercise of prescriptive jurisdiction."[317] "[I]nterfere[nce] with a foreign nation's ability to regulate its own commercial affairs" is only reasonable to "redress domestic . . . injury caused by foreign . . . conduct."[318] "[I]t is not reasonable to apply American laws to foreign conduct insofar as that conduct causes independent foreign harm that alone gives rise to a plaintiff's claim."[319]

224. Whether Respondent's treatment of Claimants' investments exceeds the limits of the jurisdiction to prescribe under customary international law hinges in large part on determinations of reasonableness. The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" claims.[320]

225. In *Saluka v. Czech Republic*, the tribunal held with respect to the FET requirement that:

> A foreign investor whose interests are protected under the Treaty is entitled to expect that the [host State] will not act in a way that is manifestly inconsistent, non-

[314] *Id.* at p. 39.
[315] *Compañía de Aguas* at ¶ 7.4.12. (CL-0094)
[316] *Id.*
[317] 7171 Notice of Arbitration ¶ 23 (Restatement (Fourth) of Foreign Relations Law § 407 (2018) (CL-121).
[318] 7171 Notice of Arbitration ¶ 43.
[319] 7171 Notice of Arbitration ¶ 43.
[320] *See, e.g., National Grid PLC v. The Argentine Republic*, Award, 3 November 2008, ¶ 168 (CL-0122) ("the term 'fair' means . . . 'reasonable'").

> transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).[321]

226. In this case, the "Ukrainian law enforcement authorities have not brought any charges concerning the loans at issue, no Ukrainian criminal court has determined any wrongdoing occurred, and Ukrainian courts have . . . validated the loans at issue as legitimate and not fraudulent,"[322] yet Respondent nevertheless still seeks to forfeit all of Claimants' investments based on claims that loans held to be lawful in Ukraine's courts are unlawful under Ukrainian law. Respondent is engaging in a quintessential overreach in derogation of the limitations placed on Respondent's jurisdiction to prescribe under customary international law. The Treaty's FET standard and prohibition on expropriation is at least arguably violated if investments suffer harm due to governmental measures that unreasonably exceed the limits of Respondent's jurisdiction to prescribe. Respondent cites no precedent to support its proposition that there can be no overlap between the limits of prescriptive jurisdiction and the FET standard.

227. The *Certain Iranian Assets* case relied upon by Respondent is entirely inapposite.[323] By way of background, in 1996, the United States amended its law so as to remove the immunity from suit before its courts of States designated as "State sponsors of terrorism" in certain cases involving allegations of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such acts; it also provided exceptions to immunity from execution applicable in such cases. Plaintiffs then began to bring actions against Iran before United States courts for damages arising from deaths and injuries caused by acts allegedly

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[321] *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 309 (CL-0123).

[322] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint, at 19 (S.D. Fla. Sept. 28, 2022) at 19 (C-0009).

[323] Rsp's PO ¶ 84 (quoting *Certain Iranian Assets (Iran v. United States)*, Preliminary Objections, Judgment, 2019 I.C.J. 7, ¶¶ 57-58 (Feb. 13) (RL-041)).

supported, including financially, by Iran. In 2002, 2008, and 2012, the United States adopted further measures to facilitate the execution of judgments against the assets of Iran or its State entities. Following the measures taken by the United States, many default judgments and substantial damages awards have been entered by United States courts against the State of Iran and, in some cases, against Iranian State-owned entities.

228. Following the United States' withdrawal of Iran's sovereign immunity, Iran invoked Article IV(2) of the Treaty of Amity between the United States of America and Iran, which required the United States to provide Iranian "nationals and companies . . . including interests in property . . . most constant protection and security . . . in no case less than that required by international law."[324] Iran argued that the United States' withdrawal of Iran's sovereign immunity for certain Iranian State-owned assets constituted a breach of this provision, because it failed to offer the Iranian State-owned assets "most constant protection and security[.]"[325] The ICJ quickly dispatched of this argument because Article IV of the Treaty of Amity was supposed to protect nationals and companies – not sovereign governments or sovereign assets.[326] The Treaty of Amity's "provisions clearly indicate that the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature."[327] "It cannot therefore be interpreted as incorporating, by reference, the customary rules on sovereign immunities" because the purpose of the Treaty of Amity is not to protect sovereigns, it is to protect "persons and legal entities engaged in activities of a commercial nature," i.e., investors such as those at issue in this arbitration. [328]

[324] *Certain Iranian Assets*, Judgment, 2019 I.C.J. 7, ¶ 53.
[325] *Id.* at ¶ 54.
[326] *Id.* at ¶¶ 54-58.
[327] *Id.* at ¶ 58.
[328] *Id.*

229. Critically, Respondent does not cite to *any* authority that says that the limitations placed on a State's jurisdiction to prescribe under customary international law can never be relevant to the FET standard. In fact, none of Respondent's cited authority even so much as *discusses* the interplay between customary international law's limits on jurisdiction to prescribe and the FET standard.

230. Contrary to Respondent's strict construal of Article II(3) of the Treaty, Article II(3)'s "reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard."[329] When "interpret[ing] the 'fair and equitable' treatment standard," the Tribunal may "look[] also at general principles and public international law in a non-BIT context."[330] The Tribunal may therefore consider whether the treatment of Claimants' investments exceeds customary international law's "limitations on a nation's exercise of its jurisdiction to prescribe" and whether any such jurisdictional overreach is unfair or inequitable.[331]

231. Respondent fails to cite any authority that supports its position that the limitations on a State's jurisdiction to prescribe can never be relevant to the FET standard. Intuitively, the Treaty's FET standard is at least arguably violated if investments suffer harm because of measures that unreasonably exceed the limits of Respondent's jurisdiction to prescribe.

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[329] *Compañía de Aguas* at ¶ 7.4.6-7 (CL-0094). Respondent seemingly concedes the relevance of a wider range of international law principles in the Letter of Transmittal accompanying the Treaty Between the Government of the United States of America and the Government of the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment, adopted on 7 March 1994 (CL-0032). The Letter of Transmittal interprets an FET standard that is substantively identical to the FET standard in the U.S.-Ukraine BIT and concedes that "[t]he general reference to international law also implicitly incorporates other fundamental rules of international law[.]" This seemingly admits that "other fundamental rules of international law" may be consulted when evaluating the requirements of the FET standard.

[330] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶ 127. (CL-0066).

[331] 7171 Notice of Arbitration ¶ 22 .

232. Ultimately, because "Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues" such as questions regarding the interplay between the applicable FET standard and the limits of Respondent's jurisdiction to prescribe under customary international law, Respondent's second merits objection itself lacks merit and should be denied, especially given the lack of any precedent to support Respondent's argument.[332]

IV. CONCLUSION

233. Respondent's Preliminary Objections pursuant to Rule 41(5) lack merit and should be denied.

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Respectfully Submitted,

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[332] *PNG Sustainable Development*, Decision on the Respondent's Objections under Rule 41(5) at ¶ 89 (CL-0001).