IN THE ARBITRATION UNDER THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND UKRAINE CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT BETWEEN

OPTIMA VENTURES LLC, OPTIMA 7171 LLC AND OPTIMA 55 PUBLIC SQUARE LLC

Claimants

-and-

UNITED STATES OF AMERICA

Respondent

ICSID CASE NO. ARB/21/11

REPLY TO CLAIMANTS' OBSERVATIONS ON THE UNITED STATES OF AMERICA'S RULE 41(5) PRELIMINARY OBJECTIONS

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I. Introduction

1. The United States' Preliminary Objections established that Claimants' claims are manifestly without legal merit and this Tribunal should dismiss this case in its entirety.[1] In tacit recognition of the weaknesses of their case, Claimants shifted the focus of their claims in their Observations from the acts of the U.S. district court to the acts of the U.S. Department of Justice in filing the civil forfeiture cases and issuing press releases.[2] In the process, Claimants abandoned previous legal arguments, for example regarding Article VIII of the U.S.-Ukraine BIT,[3] and added a new claim with respect to the Treaty's effective means clause.

2. This recrafting does not remedy the central flaws in Claimants' case because, *inter alia*:

- This Tribunal still lacks jurisdiction due to Claimants' disregard for the Treaty's six-month cooling-off period, a required condition to the U.S. consent to arbitrate;
- The principles of adjudicatory and prescriptive comity, the linchpins of all of their claims under Articles II and III, are irrelevant to the case as Claimants have pled it;
- Claimants' failure to pursue available remedies in U.S. courts requires the dismissal of any claims based on the civil forfeiture cases because the allegedly offending measures are inchoate, the alleged deprivation is non-permanent, and Claimants have failed to establish that the decision to file the civil forfeiture cases was arbitrary; and

[1] *See* Preliminary Objections of the United States of America under ICSID Rule 41(5) (Feb. 14, 2023) ("U.S. Preliminary Objections").

[2] *See* Observations in Connection with Respondent's Rule 41(5) Preliminary Objections (Apr. 17, 2023) ("Claimants' Observations").

[3] Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment ("U.S.-Ukraine BIT," "BIT," or "Treaty") (CL-0069).

- Claimants still have not demonstrated how the Tribunal has jurisdiction to hear an alleged breach of principles of prescriptive jurisdiction, and in any event such principles (as asserted by Claimants) would not bar the actions of the United States here.

Thus, Claimants' claims remain manifestly without legal merit, and this case should be dismissed under ICSID Rule 41(5).

* * *

3. Consistent with U.S. anti-money laundering statutes, the U.S. Department of Justice filed civil forfeiture complaints against properties in the United States owned by U.S. companies Optima 7171 LLC and Optima 55 Public Square LLC. Those corporate entities are in turn owned by Optima Ventures LLC, a company registered in Delaware. Optima Ventures LLC is owned by two Americans, Mordechai Korf and Uriel Laber, as well as two Ukrainian oligarchs, Ihor Kolomoisky and Gannadiy Boholiubov.

4. In the civil forfeiture cases, the Department of Justice asserted that Kolomoisky and Boholiubov embezzled and fraudulently obtained money from PrivatBank, a Ukrainian bank they previously owned, and then used the laundered proceeds to purchase properties in the United States through Optima Ventures LLC and its subsidiaries. The U.S. court issued temporary restraining orders against those properties pending adjudication. Claimants and the Department of Justice then agreed to the sale of the properties to preserve their value (both properties were in severe financial distress before the filing of the forfeiture complaints). Proceeds of the sales were put into interest-bearing accounts pending the final outcome of the civil forfeiture cases.

5. U.S. law does not permit the courts to forfeit property to the U.S. government until the owner has had an opportunity to claim the property (or in this case, the proceeds of the sale), and those claims are adjudicated. In such proceedings, the United States bears the burden of proof to

establish the elements necessary to effectuate the forfeitures. Claimants may follow through on the available process to challenge the civil forfeiture and are doing so in at least one U.S. court case not related to this arbitration. Yet, with respect to the two properties located in Ohio and Texas, Claimants made initial claims on the proceeds of the sales but then sought a stay in both cases so they could prematurely initiate this arbitration under the Treaty.

6. The central thesis of Claimants' Treaty arguments, as redeveloped in their Observations, is that the Department of Justice was precluded from pursuing civil forfeiture because Ukrainian authorities had not criminally charged Kolomoisky and Boholiubov for the fraud and embezzlement they allegedly committed against PrivatBank. Claimants argue that the U.S. failure to wait for Ukraine to prosecute Kolomoisky and Boholiubov was inconsistent with U.S. law regarding prescriptive and adjudicative comity, as well as supposed international limits on the extraterritorial exercise of prescriptive jurisdiction. Claimants claim that these inconsistencies render the civil forfeiture cases related to the laundering of the stolen funds *in the United States* unreasonable, arbitrary, and expropriatory. In their Observations, Claimants have added a new claim that there were no effective means for contesting the civil forfeiture cases in U.S. courts, and have made new, unsupported factual assertions about the United States' actions being politically motivated.

7. Each of these arguments, including the new claim regarding effective means, should be dismissed at the outset as manifestly lacking in legal merit. While responding to Claimants' shifting arguments, the United States will address its four objections below in the same order as in its Preliminary Objections.

8. *First*, the U.S. Preliminary Objections established that Claimants failed to abide by the Treaty's mandatory six-month cooling-off period before commencing this arbitration. The six-month cooling-off period is a precondition to the United States' consent to arbitrate, and Claimants' omission deprives this Tribunal of jurisdiction. Claimants have not successfully rebutted this objection. Among other failures, Claimants have provided no factual basis for arguing that the United States waived the cooling-off period, and Claimants' attempt to import shorter waiting periods from other treaties through the BIT's most-favored-nation (MFN) clause is baseless because the language of the BIT does not permit such importation. This case should be dismissed in full on this jurisdictional basis alone.

9. *Second*, the United States objected that this Tribunal lacks jurisdiction over Claimants' claims regarding U.S. law on prescriptive and adjudicatory comity, which relied on Article VIII of the Treaty. The comity arguments are central to Claimants' theory of the case, and yet Article VIII, which places no obligation on either State, was the sole legal support for their comity claims in the Requests for Arbitration. Claimants now admit that Article VIII does not provide an independent basis for a claim against the United States but continue to assert that the U.S. actions were "inconsistent" with U.S. law on comity which, Claimants argue, may be taken into account when assessing their claims under Articles II and III. Unfortunately for Claimants, their comity claims fare no better under Articles II and III than they did under Article VIII because as a legal matter, nothing the United States did in the underlying cases could be described as inconsistent with principles of prescriptive or adjudicatory comity. Thus, Claimants' Article II and III claims, which rely on this alleged inconsistency, must be dismissed.

10. *Third*, the United States demonstrated in its Preliminary Objections that non-final judicial acts cannot form the predicate of a breach of Treaty Articles II(3)(a) or III(1) as a matter of law. It is well established that judicial finality is a key substantive element of any treaty claim related to judicial measures, and this element has not been met in this case. In response, Claimants appear to have abandoned their due process allegations regarding acts of the U.S. judiciary, and assert instead that their claims relate to the actions of the Department of Justice. But this reframing does not save those claims because:

- The Department of Justice cannot unilaterally restrain or forfeit Claimants' property; U.S. law requires a court order for such acts. Since there is no final order of a U.S. court ordering forfeiture, the restraints are temporary, and Claimants have not pursued any available recourse in the court proceedings, any measures involving the forfeiture proceedings are inchoate and cannot be asserted as a breach of Article II of the Treaty.
- Claimants' reliance on *ELSI* and *Lemire* is misplaced, as those cases involved executive action that was immediately effective, whereas in this case the restraint and forfeiture can only be accomplished through judicial order.
- Claimants' argument that the actions taken solely by the Department of Justice were "arbitrary" rely on Claimants' comity and prescriptive jurisdiction claims, which fail as a matter of law.
- Claimants' new arguments regarding effective means are equally meritless because it is well established in international law that one cannot assert a claim of "effective means" without at least attempting to utilize the means that are available.
- The temporary orders currently in place do not constitute a permanent deprivation, and therefore do not meet the requirements of an expropriation under Article III.

For all of these reasons, despite Claimants' attempt to shift focus to the acts of the Department of Justice, the lack of finality of the U.S. court proceedings remains fatal to Claimants' case.

11. *Fourth*, the United States objected that Article II(3)(a), which addresses only breaches of the minimum standard of treatment under customary international law, does not permit a claim for putative violations of "prescriptive jurisdiction" (which, Claimants assert, is an independent limitation on a State's authority to regulate outside its own territory). In their Observations, Claimants still have not demonstrated how prescriptive jurisdiction can give rise to a claim under the Treaty, either as part of fair and equitable treatment or otherwise. In any event, as presented by Claimants, their claims regarding prescriptive jurisdiction fail, because the United States is asserting jurisdiction over money laundering *in the United States*, involving the purchase of real property *in the United States*, through Optima Ventures LLC, a company incorporated *in the United States*, which was owned and managed by two U.S. citizens. The U.S. assertion of jurisdiction over acts of money laundering in its territory is entirely consistent with – and in fact, is required by – international law. Claimants' suggestion that principles of prescriptive jurisdiction limit the United States from pursuing these civil forfeitures is plainly and obviously wrong.

12. In short, Claimants' claims are manifestly lacking in legal merit, and must be dismissed under ICSID Rule 41(5).

II. The Parties Agree on the Standard for ICSID Arbitration Rule 41(5) Objections

13. The Parties agree that ICSID Arbitration Rule 41(5) requires the United States to establish that "a claim is manifestly without legal merit,"[4] such that the objections show that the claim is "clearly and obviously" without legal merit.[5]

III. Claimants' Factual Allegations Need Not Be Accepted at Face Value

14. For purposes of the United States' Preliminary Objections under Rule 41(5), the basic facts are not in dispute:

- In 2020, the Department of Justice filed complaints for civil forfeiture against U.S. real estate indirectly owned by Kolomoisky and Boholiubov, alleging that the properties were purchased with laundered money embezzled from PrivatBank. The legal bases for the cases are statutes enacted by the U.S. Congress to fight international money laundering conducted in or through the territory of the United States.
- The underlying alleged fraud on PrivatBank is the subject of court proceedings in jurisdictions inside and outside of the United States, including cases filed by PrivatBank, but has not yet resulted in any criminal proceedings against Kolomoisky and Boholiubov in Ukraine.
- In response to Department of Justice requests, the relevant court issued restraining orders to prevent the dissipation of the properties at issue.

[4] *See* U.S. Preliminary Objections ¶ 49 (quoting ICSID Arbitration Rule 41(5)); Claimants' Observations ¶ 2 (quoting ICSID Arbitration Rule 41(5)).

[5] U.S. Preliminary Objections ¶ 52 (quoting *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules ¶¶ 88, 92 (May 12, 2008) (RL-008)); Claimants' Observations ¶ 7.

- Claimants made claims on the restrained property, which started the process by which the Department of Justice would bear the burden of proving that civil forfeiture was appropriate.
- Shortly thereafter, the United States and Claimants stipulated that the properties should be sold in order to preserve their value. The proceeds from those sales were placed in interest-bearing escrow accounts pending the final resolution of the civil forfeiture cases.
- If Claimants succeed in their claims in U.S. court, the net proceeds of the sales with interest would be returned to Claimants, and Claimants would be entitled to reimbursement for their attorneys' fees. If the United States succeeds, the proceeds would be forfeited to the United States.
- However, instead of following through on their claims in U.S. court, the Claimants requested a stay in favor of the instant arbitration.

15. The Parties further agree that in the context of an objection under Rule 41(5), the Tribunal may generally presume the facts as alleged by Claimants to be true except where Claimants' alleged facts are "incredible, frivolous, vexatious or inaccurate or made in bad faith."[6] Here, the Tribunal need not accept many of the facts alleged by Claimants "at face value" because those facts are inaccurate, incredible, and "plainly without foundation."[7] In particular, while Claimants' allegations are now focused on acts of the Executive Branch of the U.S. government rather than

[6] U.S. Preliminary Objections ¶ 52 (quoting *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules ¶ 105 (May 12, 2008) (RL-008)); Claimants' Observations ¶ 7.

[7] U.S. Preliminary Objections ¶ 52 (quoting *Almasryia for Operating & Maintaining Touristic Construction Co., L.L.C. v. Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules ¶ 33 (Nov. 1, 2019) (RL-009)).

the judicial branch,[8] a review of Claimants' factual descriptions of the Executive Branch's actions and their ramifications shows that Claimants' factual assertions are baseless.

16. To establish the United States' alleged political motivation,[9] for example, Claimants assert that certain communications "internal to or including the U.S. State Department suggest that Respondent was involved in and may have pressured, and/or facilitated Ukraine to nationalize PrivatBank."[10] Claimants' representations as to the content of these exchanges, which have been publicly posted on the State Department's website since at least 2021, are inaccurate.[11] Claimants allege that the United States was "having internal discussions on November 4, 2019, about the need for Ukraine to expel Kolomoisky or face '*a Justice Department investigation of PrivatBank.*'"[12] But the document they cite is not an internal State Department document; rather, it is an unanswered email from a person outside the U.S. government to a State Department official, in turn quoting from a letter that the outside person had sent to a friend in Ukraine, which describes "one man's guess" as to political developments in Ukraine.[13]

17. Claimants also rely on documents purporting to show U.S. support for the nationalization of PrivatBank.[14] It was no secret that Ukraine's foreign allies, including the United States, along with international financial institutions, were supportive of Ukraine's financial sector reforms in

[8] Claimants' Observations ¶ 172 (asserting in particular that it is "the actions of [the U.S. Department of Justice] that are primarily at issue in this arbitration").

[9] *Id.* ¶ 169; *see also id.* ¶¶ 81-85.

[10] *Id.* ¶¶ 81-85.

[11] Each document Claimants cite (found in Exhibits C-0034 through C-0040) contains a date at the top of the page indicating the day it was released to the Freedom of Information Act ("FOIA") requester who sought it. Claimants did not themselves request the documents, which were uploaded to the Department of States' FOIA "Reading Room" shortly after they were released.

[12] Claimants' Observations ¶ 84 (citing October 2019 – State Department Email (C-0039); November 2019 – State Department Email (C-0040)).

[13] November 2019 – State Department Email (C-0040).

[14] Claimants' Observations ¶¶ 81-83.

general, and the decision to stabilize the country's financial system through the nationalization of PrivatBank, the country's largest private lender, in particular. This support appears to stem not from "political motivations," but from concern over Ukraine's financial stability.

18. In its Preliminary Objections the United States cited, for instance, Christine Lagarde, the Managing Director of the International Monetary Fund, and her call for nationalization of PrivatBank as an "important step in [Ukraine's] efforts to safeguard financial stability" and "to maintain public confidence in the banking system."[15] Similarly, the World Bank, noting "a significant capital shortfall in PrivatBank, the largest systemic bank in Ukraine," stated that the decision to "transfer[] full ownership to the State . . . is an important step to preserve Ukraine's financial stability, increase confidence in the banking system and provide equal treatment for all bank [sic] requiring capitalization."[16] The European Bank for Reconstruction and Development also endorsed the nationalization decision, with a representative stating that it was the "right way forward for Ukraine."[17] A joint statement of the G7 ambassadors added:

> The Government's decision to nationalize Privatbank . . . will help ensure that all banks in Ukraine are held to the same prudential regulatory standards. This will make the banking sector stronger and more resilient. This nationalization is also a means for the Government of Ukraine to safeguard deposits of household and legitimate businesses and to facilitate uninterrupted access to banking services for Privatbank's client base. Ukraine's banking sector clean-up is a vital component of its larger reform efforts. We look forward to continuing to support Ukraine and working together to promote macroeconomic and financial stability, improve the

[15] U.S. Preliminary Objections ¶ 30 (quoting *IMF Statement on the Stability of the Banking System in Ukraine*, INT'L MONETARY FUND (Dec. 19, 2016) (R-0038)).

[16] *World Bank Statement Regarding the Nationalization of PrivatBank*, WORLD BANK (Dec. 19, 2016) (R-0087).

[17] *EBRD Voices Backing for Nationalisation of Ukraine's PrivatBank*, EUR. BANK FOR RECONSTRUCTION & DEV. (Dec. 19, 2016) (R-0088).

> investment climate, and help the Ukrainian people continue on a path toward economic prosperity.[18]

19. If the United States supported Ukraine's nationalization of PrivatBank, it found itself in good company. There was nothing untoward or "political," let alone internationally wrongful, about this support. In short, Claimants have no actual evidence of the "political motivation" they allege.[19]

20. Claimants also quote at length from two Department of Justice press releases that accompanied the filing of the civil forfeiture cases, suggesting that the press releases themselves breached the Treaty and/or caused Claimants damage. The press releases detailed the allegations of fraud, embezzlement, and money laundering that are the basis of the civil forfeiture cases. Claimants complain, for example, that these press releases "claim[ed] 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,"[20] and that they "immediately rendered the Claimants' investments inalienable and destroyed their commercial value."[21]

[18] *Statement of the G7 Ambassadors on Nationalization of the Privat Bank*, U.S. EMBASSY IN UKRAINE (Dec. 19, 2016) (R-0089).

[19] *Cf.* Claimants' Observations ¶ 169; *id.* ¶¶ 81-84.

[20] *Id.* ¶ 26.

[21] *Id.* ¶ 172.

21. Claimants' assertion that the press releases, which are a standard issuance coincident with the initiation of civil forfeiture cases,[22] destroyed the value of their investments is unsupported and inaccurate. *First*, on the face of the press releases relied on by Claimants, the Department of Justice left no doubt as to the posture of its cases, referring carefully to "alleg[ations] in the complaint,"[23] and, importantly, included the following unambiguous disclaimer: "A complaint is merely an allegation and all defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law."[24]

22. *Second*, as detailed in the United States' Preliminary Objections,[25] PrivatBank's 2016 capital shortfall of over $5.5 billion, due to loans made to parties related to Kolomoisky and Boholiubov, was old news by the time the United States commenced the civil forfeiture cases in 2020. The bank had already been nationalized,[26] and a 2018 investigation conducted by Kroll Inc., retained by the National Bank of Ukraine, had found "a large scale and coordinated fraud over at

[22] *See, e.g.*, DEP'T JUST., OFF. PUB. AFFS., Press Release: U.S. Seeks to Recover More Than $300 Million in Additional Assets Traceable to Funds Allegedly Misappropriated from Malaysian Sovereign Wealth Fund (Sept. 16, 2020) (R-0090); DEP'T JUST., OFF. PUB. AFFS., Press Release: United States Files Complaint to Forfeit 280 Cryptocurrency Accounts Tied to Hacks of Two Exchanges by North Korean Actors (Aug. 27, 2020) (R-0091); DEP'T JUST., OFF. PUB. AFFS., Press Release: Department of Justice Seeks Recovery of Approximately $3.5 Million in Corruption Proceeds Linked to Ex-President of The Gambia (July 15, 2020) (R-0092).

[23] 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); 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).

[24] 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); 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). The complaints initiating the cases in the district court – the bases for the press releases – likewise entered the public domain and became accessible to the public through the court's filing system. In fact, links to PDF copies of the complaints were included at the bottom of the press releases. 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); 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).

[25] U.S. Preliminary Objections ¶¶ 30-36.

[26] Anton Troianovski, *A Ukrainian Billionaire Fought Russia. Now He's Ready to Embrace It.*, N.Y. TIMES (Nov. 13, 2019) (R-0037).

least a ten year period, which resulted in the Bank suffering a loss of at least USD 5.5 billion."[27] Moreover, PrivatBank, under new leadership, had obtained in an English court a well-publicized worldwide freezing order in 2017, issued *ex parte*, for up to $2.6 billion.[28] Optima Ventures LLC, the Delaware parent company that owned both the Texas and Ohio properties, was later designated as subject to the worldwide freezing order.[29] In the United States in 2019, PrivatBank had likewise sued Kolomoisky, Boholiubov, and their "Optima" entities in Delaware state court, asserting claims of unjust enrichment, fraud, racketeering, and civil conspiracy with respect to "hundreds of millions of dollars' worth of United States assets,"[30] including the assets that were to become the subjects of the Department of Justice's forfeiture cases.[31] The same year, news broke that the Federal Bureau of Investigation was investigating Kolomoisky and Boholiubov.[32] In 2020, it was

[27] NAT'L BANK OF UKRAINE, *Fraud Identified in PJSC CB "PRIVATBANK" for the Period Before Nationalisation*, at 2 (Jan. 16, 2018) (R-0040) (emphasis omitted).

[28] *JSC Commercial Bank PrivatBank v. Kolomoisky* [2019] EWCA (Civ) 1708 [11] (Eng.) (R-0033).

[29] By its terms, the worldwide freezing order, as amended, prohibited Kolomoisky and Boholiubov from "in any way dispos[ing] of, deal[ing] with or [diminish[ing] the value of [their] assets" within or "outside of England and Wales." *PJSC Commercial Bank Privatbank v. Kolomoisky*, Claim No. 2017-000665, Freezing Order ¶ 4 (Jan. 15, 2018) (Eng.) (R-0093). Similarly, the order prohibited any "bodies corporate which are directly or indirectly owned and/or controlled" from "procur[ing] or permit[ting] those bodies corporate to dispose of, deal with or diminish the value of any of their respective assets whether inside or outside of England and Wales." *Id*. In attempting to satisfy the order, Kolomoisky designated Optima Ventures LLC, the corporate parent of the Texas and Ohio properties' entities, as among his assets subject to the order outside of the United Kingdom. *See JSC Commercial Bank v. Kolomoisky* [2021] EWHC 403 [79] (Eng.) (R-0094).

[30] *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, 2021 WL 3722095 at *1 (Del. Ch. Aug. 23, 2021) (R-0034).

[31] *See, e.g.*, *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Defendants Optima 777, LLC and Optima 55 Public Square, LLC's Motion to Approve Sale of Distressed Properties at 1 (Dec. 24, 2020) (R-0095) (seeking a court order approving of the sale of the Ohio property in the Delaware case); *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Stipulation and [Proposed] Order Regarding Sale of 7171 Forest Lane Property at 3 (Oct. 5, 2021) (R-0096) ("The parties [in the Delaware case] acknowledge that the former CompuCom Headquarters, located at 7171 Forest Lane, Dallas, Texas, and owned by Defendant Optima 7171, LLC, is subject to the Status Quo Order, as well as those orders entered by the U.S. District Court for the Southern District of Florida in conjunction with civil forfeiture proceedings in the [Southern District of Florida] Proceedings.").

[32] Betsy Swan, *Billionaire Ukrainian Oligarch Ihor Kolomoisky Under Investigation by FBI*, DAILY BEAST (Apr. 8, 2019) (R-0044).

reported that a grand jury had been empaneled in Cleveland.[33] Against this public backdrop, the Department of Justice's filing of the civil forfeiture cases and the attendant press releases cannot be regarded as having damaged the value of Claimants' properties.

23. Indeed, as to the Ohio property, Claimants urged the Delaware state court overseeing the case brought by PrivatBank to authorize the sale, arguing:

> Potential lenders and buyers are not interested in getting involved with properties that have any litigation risks and that they will not consider refinancing or buying these valuable properties . . . . Without the ability to sell or refinance these loans, [the relevant asset is] now in foreclosure and will soon be sold at auction.[34]

24. Critically, Claimants made these representations *before* the Department of Justice filed for civil forfeiture against or issued press releases regarding the Ohio property.

25. In fact, the record suggests that the civil forfeiture cases and attendant press releases did not impact the value of the properties *at all*. The Ohio property was already for sale and under contract for $17 million before the civil forfeiture case was filed and the press release posted. The gross sale price after the initiation of the forfeiture case – $17 million – was precisely the same as the sale price agreed before the forfeiture case was filed.[35]

26. Finally, Claimants allege in their Observations that the Ohio and Texas properties were, in effect, subjected to a forced sale orchestrated by the Department of Justice against Claimants' will. As to both properties, they complain that they "had no alternative" or "no choice" "but to

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[33] Michael Sallah, *This Billionaire Oligarch Is Being Investigated by a US Federal Grand Jury for Alleged Money Laundering*, BUZZFEED NEWS (May 19, 2020) (R-0046).

[34] *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Defendants Optima 777, LLC and Optima 55 Public Square, LLC's Motion to Approve Sale of Distressed Properties at 1-2 (Dec. 24, 2020) (R-0095).

[35] Noting on December 24, 2020, *i.e.*, six days before the Ohio civil forfeiture case was filed, that "Optima 55 received an offer to purchase 55 Public Square for $17 million." *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Defendants Optima 777, LLC and Optima 55 Public Square, LLC's Motion to Approve Sale of Distressed Properties ¶ 12 (Dec. 24, 2020) (R-0095).

acquiesce."[36] This narrative is not serious. Rather, the Claimants freely agreed to the sale of the properties and represented to the U.S. court that the sale was in the Claimants' own best interests.[37]

27. As to the Ohio property, which the Claimants admit was in "dire" financial condition[38] and was already under contract to be sold when the forfeiture case was commenced,[39] the record reflects that Claimants represented to the U.S. court that they "agreed to the terms of the sale and agree that it is in the best interest of all parties to sell at this time."[40] Similarly, as to the Texas property, which the Claimants likewise admit was in a "dire" financial state[41] and was vacant at

[36] Claimants' Observations ¶¶ 41, 48.

[37] This is not unusual in civil forfeiture cases: "Frequently, a party to a civil forfeiture case suggests that to avoid waste or diminution in value of the defendant property, it would be in everyone's interest if the property were sold as quickly as possible, with the sale proceeds substituted as the defendant *res*. . . . Among other things, a court may order an interlocutory sale if the property is perishable or at risk of depreciation, . . . or if the property is subject to a mortgage or to taxes on which the owner is in default." STEFAN D. CASSELLA, ASSET FORFEITURE IN THE UNITED STATES 427 (3d ed. 2022) (R-0003) (internal quotation marks and citations omitted).

[38] Claimants' Observations ¶ 41. The property at 55 Public Square was already in distress at the time the forfeiture case was filed. *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Agreed Mot. Authorize Interlocutory Sale and Inc. Mem. Law at 3-4 (S.D. Fla. Feb. 9, 2021) (R-0068). Accrued property taxes and associated late penalties owed on the property exceeded $1.2 million. *Id.*

[39] Email Chain, Jan. 8, 2021 at 4 (C-0010) (where counsel for claimants relayed to the Department of Justice that "[t]oday [December 22, 2020], Optima 55 Public Square LLC executed an agreement of purchase and sale for the 55 Public Square building in Cleveland, Ohio").

[40] *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Agreed Mot. Authorize Interlocutory Sale and Inc. Mem. Law at 1-2 (S.D. Fla. Feb. 9, 2021) (R-0068) (noting that "[t]he parties have agreed to the terms of the sale and agree that it is in the best interest of all parties to sell at this time," and adding that "[t]he parties agree that the sale of the Property at this time will maximize and preserve the value of the Property by avoiding fees and costs related to an outstanding mortgage, property taxes, maintenance costs, and other expenses that would accrue if the Property were not sold"); *see also United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Order Granting Unopposed Mot. Interlocutory Sale ¶ 3 (S.D. Fla. Feb. 11, 2021) (R-0073) (confirming that the claimants consented to an interlocutory sale).

[41] Claimants' Observations ¶ 48; *see also 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 at 2, 5 (S.D. Fla. Sept. 20, 2021) (R-0082) ("Optima has failed to pay property taxes for the 2020 tax year and other expenses due associated with maintaining the Property. As of September 16, 2021, the outstanding property taxes and associated late penalties totaled more than $300,000. Expenses related to the Property taxes continue to accrue and remain unpaid. Moreover, Optima has not paid association fees required by the Lake Forest Community Association. As of September 16, 2021, there is more than $125,000 outstanding.") (internal record citations omitted).

the time the forfeiture case was commenced,[42] the record reflects that "both the Government and the current owner of the Property, Optima 7171 LLC . . . believe selling the Property is in the best interest of all parties."[43] Consequently, the district court approved the sale of both properties in order to preserve value, and ordered that the net proceeds of the sales were to be deposited in an interest-bearing escrow account.[44]

28. The sales proceeds now sit in an interest-bearing account, for which Claimants have made a claim but requested a stay. If Claimants were to proceed in U.S. courts, the Department of Justice would be required to prove its case by a preponderance of the evidence to succeed in having the proceeds forfeited to the U.S. government.[45] If the Department fails to carry that burden, Claimants would be entitled to the return of the substitute *res*, with interest for these funds held in escrow, as well as reimbursement by the government of legal fees incurred in the forfeiture litigation.[46] This approach to conservatory measures aimed at preventing dissipation of assets pending the outcome of the civil forfeiture proceedings related to money laundering is in line not

[42] *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 at 9-10 (S.D. Fla. Oct. 26, 2020) (C-0007) (where the Department of Justice explained that "[t]he Government has not taken any role in management [of the CompuCom Campus]. The CompuCom Campus, which is vacant, has experienced no change, other than notice of forfeiture being posted on the locked doors.").

[43] *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 at 2 (S.D. Fla. Sept. 20, 2021) (R-0082). Claimants, without citing any record or other proof, also assert that "[i]n 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." Claimants' Observations ¶ 30.

[44] *See* U.S. Preliminary Objections ¶¶ 37-47. To be sure, the "interlocutory sale of property is not mandatory. To the contrary, the district court has wide discretion to decide if a motion under Rule G(7) should be granted." CASSELLA, ASSET FORFEITURE IN THE UNITED STATES 429 (R-0003) (internal citation omitted).

[45] 18 U.S.C. § 983(c)(1) (2016) (R-0018).

[46] U.S. Preliminary Objections ¶ 22.

only with the U.S. statutory framework but with international best practices.[47] Claimants' choice to stay that process and prematurely pursue this arbitration underlies both the flaws in Claimants' case and the U.S. Preliminary Objections thereto, including, as discussed below, the U.S. objection regarding the six-month cooling-off period, and its objections regarding finality, which undermine Claimants' Article II and Article III claims.

IV. Claimants' Claims Are Manifestly Without Legal Merit and Should Be Rejected

A. **Jurisdictional Objection 1:** Claimants Failed to Satisfy the BIT's Preconditions to Arbitrate, Which Are Not Mere "Niceties" But Rather Form the Basis of the United States' Consent to Arbitrate

29. A State's consent to arbitration is paramount for the jurisdiction of an arbitral tribunal hearing a dispute against that State.[48] As explained in the Preliminary Objections,[49] consent is the "cornerstone" of jurisdiction in investor-State arbitration,[50] and it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.[51]

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[47] *Id.* ¶¶ 20, 26 (noting that the Financial Action Task Force recommends that countries adopt mechanisms for "provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of" property allegedly involved in money laundering).

[48] *See Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, ¶ 88 (Feb. 3) (RL-013) (any conditions to consent expressed "in a compromissory clause in an international agreement . . . must be regarded as constituting the limits thereon"); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (1st ed. 2009) (RL-012) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself.").

[49] *See* U.S. Preliminary Objections ¶¶ 54-62.

[50] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965) (RL-011) ("[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre"); *see also Waste Management, Inc. v. Mexico [I]*, ICSID Case No. ARB(AF)/98/2, Award ¶ 16 (June 2, 2000) (RL-043) ("[I]t is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends"); *William Ralph Clayton et al. v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 229 (Mar. 17, 2015) (RL-044) ("General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors . . . must be interpreted and applied in a manner that respects the limits that the [] Parties put in place as integral aspects of their consent, . . . to an overall enhancement of their exposure to remedial actions by investors.").

[51] *The Renco Group Inc. v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) (RL-045) ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration

30. Here, the United States' consent to arbitrate under Article VI(4) of the U.S.-Ukraine BIT is limited to requests for arbitration pursuant to Article VI(3). This provision establishes as a mandatory prerequisite to the submission of a claim to arbitration that "six months have elapsed from the date on which the dispute arose." A claim submitted before the expiration of the mandatory six-month period is not in compliance with Article VI(3) and does not engage U.S. consent under Article VI(4).

31. Claimants failed to meet this jurisdictional requirement. With respect to the Texas case, Claimants, as they admit in paragraph 31 and again in paragraph 126 of their Observations, "first raised the obligations of the Treaty with Respondent on October 5, 2020,"[52] reserving their rights in a domestic court pleading. Four months later, on February 8, 2021, they filed their claim with ICSID. With respect to the Ohio case, which the Department of Justice commenced on December 30, 2020, Claimants signaled a potential dispute under the Treaty on January 19, 2021 – again through a reservation of rights in a domestic filing.[53] They filed their Request for Arbitration for this claim on February 24, 2021, just 36 days later.

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agreement between Renco and Peru."). *See also ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction ¶ 336 (July 18, 2013) (RL-015) ("In order for a claimant to benefit from the jurisdictional protection granted by an arbitration mechanism, there is a condition *ratione voluntatis:* the State must have given its consent to such procedure, which allows a foreign investor to sue the State directly at the international level. This consent is expressed broadly or restrictively, with or without conditions of exhaustion of local remedies or waiting periods, as allowing all claims or only certain claims. In other words, the State's consent is given under certain conditions. Just as, for example, the conditions of nationality must be fulfilled before an investor can have access to rights under a BIT, the conditions subject to which the State gives its consent must be fulfilled before a right to arbitration can arise. Such conditions are an inherent part of the State's given consent. In other words, if these conditions are not fulfilled, there is indeed no consent."); Christoph Schreuer, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski et al., eds., 2008) (RL-046) (explaining that "[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE ARBITRATION 219 (2008) (RL-047) (explaining also that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

[52] Claimants' Observations ¶ 126 (emphasis added); *see also id.* ¶ 31.

[53] U.S. Preliminary Objections ¶¶ 57-59; Claimants' Observations ¶¶ 88, 97, 100.

32. Claimants' circumvention of the preconditions to arbitrate may not be excused. The procedural requirements set out in this BIT, and other investment agreements to which the United States is party, are not merely technical "niceties" but rather explicit treaty requirements that serve important functions.[54] Although the provision has several benefits,[55] the primary purpose of the six-month waiting period is, of course, to allow the Parties to attempt to reach a solution before resorting to arbitration.[56] In *Almasryia v. Kuwait*, where the respondent brought a similar jurisdictional objection under ICSID Rule 41(5), the tribunal concurred with prior tribunals that found that notice and waiting period requirements "seek[] to prevent a dispute by giving advance notice to a State so that, if possible, a positive solution to the dispute may be achieved. This requirement is an integral part of the State's consent rather that [sic] a negligible formality."[57] The *Almasryia* tribunal ultimately found that the claimant did not fulfill its preconditions to arbitrate and there was thus a manifest "legal impediment which goes to the jurisdiction of the Tribunal."[58]

[54] *See Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/01, Decision on a Motion to Add a New Party ¶ 29 (Jan. 31, 2008) (RL-048) (in the context of a NAFTA dispute, the tribunal rejected a belated attempt to add a claimant, noting that the procedures in the Treaty "cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim").

[55] *See infra* ¶ 61.

[56] *See* U.S.-Ukraine BIT (1994) art. VI(2) (CL-0069) ("In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation.").

[57] *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. Kuwait*, ICSID Case No. ARB/18/2 (Egypt-Kuwait BIT), Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules ¶ 39 (Nov. 1, 2019) (RL-009); *see also Burlington Resources Inc. v. Ecuador*, ICSID Case No ARB/08/5, Decision on Jurisdiction ¶¶ 312-15 (June 2, 2010) (RL-049) (finding that the six-month waiting period is "designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration"); *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue ¶¶ 71-72 (Mar. 5, 2013) (RL-050) ("The explicit requirements that the parties must seek to engage in consultations and negotiations . . . and that there be a . . . waiting period . . . are accepted by the Tribunal as pre-conditions to submitting the dispute to arbitration. . . . [C]ompliance is an essential element of Turkey's prospective consent to qualify its sovereignty to permit unknown future investors of the other contracting State to claim relief under the terms of the BIT against it in an international forum.").

[58] *Almasryia*, Award ¶ 48 (RL-009).

33. Claimants cannot flout these procedural rules, operating on their own timeline without regard for the conditions that the United States placed on its consent to arbitrate claims in accordance with Article VI. Nor may this Tribunal overlook Claimants' decision not to comply.[59] As in *Almasryia*, this Tribunal should find that Claimants' failure to abide by the mandatory cooling-off period of the BIT warrants dismissal under ICSID Rule 41(5).

34. The remainder of this section will address each of Claimants' arguments and excuses outlined in their Observations. *First*, contrary to Claimants' argument, the preconditions to arbitration detailed in the Treaty are not merely "procedural" but are in fact conditions to the U.S. consent to arbitrate and required for each dispute. *Second*, notice of an alleged Treaty breach is required to commence the six-month cooling-off period; otherwise, no "investment dispute" has arisen. *Third*, Claimants cannot use the MFN clause in the Treaty to import shorter cooling-off periods from other treaties. *Fourth* and finally, the United States in no way waived the cooling-off period in this case.

1. The Preconditions to Arbitrate Are Not Merely "Procedural"

35. In their Observations, Claimants attempt to argue that the six-month waiting period is "directory and procedural rather than . . . mandatory and jurisdictional in nature."[60] This is not the appropriate conclusion here, for several reasons.

36. *First*, the United States has long taken the position in its non-disputing party submissions that the preconditions to arbitrate in its investment treaties are jurisdictional and failure to comply

[59] *See, e.g.*, *Louis Dreyfus Armateurs SAS v. India*, PCA Case No. 2014-26, Decision on Jurisdiction ¶ 94 (Dec. 22, 2015) (RL-014) ("States are free to condition their consent to arbitration in any way they wish, and when they unmistakably have done so, it is not for tribunals to deem such requirements merely precatory, or to permit them to be sidestepped on policy grounds that essentially substitute the tribunal's judgment for that of the Contracting Parties.").

[60] Claimants' Observations ¶ 117 (citing *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction ¶ 184 (Aug. 6, 2003) (CL-0048)).

with these procedures precludes a tribunal's jurisdiction to hear a case. For example, in a non-disputing Party submission to the tribunal in *Pope & Talbot v. Canada*, the United States noted, in the context of NAFTA, "[c]ompliance with each of the [treaty's] procedural requirements for submitting a claim to arbitration is necessary for a Chapter 11 tribunal to have jurisdiction over the claim."[61] While there are textual differences between the NAFTA and the Treaty at issue here, there is no textual reason why this Tribunal should decide that the Parties here viewed the preconditions to arbitrate as anything other than a jurisdictional requirement.[62]

37. *Second*, several arbitral tribunals examining this issue have likewise found that preconditions to arbitrate are jurisdictional requirements. For example, in *Burlington Resources v. Ecuador*, in which the tribunal was interpreting the U.S.-Ecuador BIT, the tribunal stated:

> [B]y imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. *That suffices to defeat jurisdiction.*[63]

[61] *Pope & Talbot v. Canada*, UNCITRAL, Third Submission of the United States of America ¶ 2 (July 24, 2000) (RL-051); *see also B-Mex LLC and others v. Mexico*, ICSID Case No. ARB(AF)/16/3, Submission of the United States ¶ 5 (Feb. 28, 2018) (RL-052) (noting that "by conditioning their consent in Article 1122(1) upon the satisfaction of the 'procedures set out in this Agreement', the NAFTA Parties explicitly made the satisfaction of these procedures jurisdictional (not admissibility) requirements") (emphasis in original).

[62] This position is concordant with Ukraine's apparent position that Article VI of the BIT is jurisdictional. *See Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award ¶¶ 7.1, 14.1-14.3 (Sept. 16, 2003) (RL-032). While Ukraine's pleadings in that case are not publicly available, the award suggests that Ukraine's position is that Article VI is jurisdictional in nature. The tribunal noted that Ukraine argued that the claimant in that case had not "complied with the requirement in Article VI(2) of the BIT to seek a resolution of the investment dispute through consultation and negotiation." *Id.* ¶ 14.1. The subsequent practice by both States in arguing that Article VI is jurisdictional "shall be taken into account" in interpreting the Treaty. Vienna Convention on the Law of Treaties art. 31(3)(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (RL-053).

[63] *Burlington*, Decision on Jurisdiction ¶ 315 (RL-049) (emphasis added).

38. In another case interpreting the same BIT at issue in this case, a tribunal found itself "hesitant" to "consider the requirement to consult and negotiate before proceeding to arbitration as 'procedural' rather than a condition precedent for the vesting of jurisdiction . . . so as to render it superfluous, as would be the case if a 'procedural' characterisation of the requirement effectively empowered the investor to ignore it at its discretion."[64]

39. The main case cited by Claimants, *Western NIS Enterprise Fund v. Ukraine*, illustrates precisely why this Tribunal should decline jurisdiction. While the tribunal in that case did not find the claimant's defect *in itself* to be jurisdictional in nature, it nevertheless suspended the proceedings so that the claimant could show that it had given proper notice to the respondent. The proceedings were never resumed because the parties *settled* – demonstrating how the adherence to the preconditions to arbitrate can allow for a more efficient and amicable resolution of a dispute.[65]

40. The other cases cited by Claimants are inapplicable or unpersuasive. For example, in *Lauder v. Czech Republic*, the tribunal concluded that the six-month waiting period was a procedural, rather than jurisdictional, rule.[66] However, the tribunal did not determine what would happen if a claimant did not comply with such a procedural obligation. As the tribunal in *Murphy Exploration v. Ecuador* stated in refuting the *Lauder* decision, "[i]t is contrary to the fundamental

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[64] *Generation Ukraine*, Award ¶ 14.3 (RL-032); *Almasryia*, Award ¶ 40 (RL-009) (noting that the six-month waiting period constitutes a "*fundamental requirement* . . . not an *inconsequential procedural* requirement but rather a *key component of the legal framework* established in the BIT and in many other similar treaties") (emphases in original) (quoting *Murphy Exploration and Production Company International v. Ecuador (I)*, ICSID Case No. ARB/08/4, Award on Jurisdiction ¶¶ 149, 151, 154 (Dec. 15, 2010) (RL-017)); *see also Methanex Corp. v. United States*, UNCITRAL, First Partial Award ¶ 121 (Aug. 7, 2002) (RL-054) ("[I]n order to establish its jurisdiction, a tribunal must be satisfied that Chapter 11 does indeed apply and that a claim has been brought within its procedural provisions."). *Cf. Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. El Salvador*, ICSID Case No. ARB/09/17, Award ¶¶ 79-80, 115 (Mar. 14, 2011) (RL-055). The *Commerce Group* tribunal was discussing the "waiver" requirement in Article 10.18.2 of the Dominican Republic-Central America-United States Free Trade Agreement. Both the "waiver" and "consent" requirements are found in the same articles, and there is no textual basis for treating them differently. *See also Waste Management*, Award ¶ 31.2 (RL-043).

[65] *See Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order ¶¶ 7-10 (Mar. 16, 2006) (CL-0051).

[66] *Ronald S. Lauder v. Czech Republic*, Award ¶ 187 (Sept. 3, 2001) (CL-0056).

rules of interpretation to state that while it constitutes a 'procedural rule that must be satisfied by the claimant', noncompliance does not have any consequence whatsoever."[67]

41. *Third*, a pre-arbitral consultation and negotiation period is what the Treaty Parties intended and enforcing such periods furthers the goal of amicable dispute settlement.[68] Claimants are incorrect that dismissing the claims would do nothing to further the purpose of pre-arbitration waiting periods. Requiring Claimants to follow the required procedures to bring an arbitration in the current case would have provided an opportunity for pre-arbitral consultation and negotiation, of which Claimants failed to take advantage.

42. The jurisdictional preconditions to arbitrate are also required for each dispute in this case. Claimants argue that they should not be required to adhere to the "pre-arbitration formalities" for subsequent disputes where the initial dispute and any subsequent disputes "relate to the same dispute having the same subject-matter."[69] They argue that such a requirement would be "inefficient."[70] Of course, "inefficiency" is not a basis for circumventing the conditions that the contracting parties placed on their consent to arbitration. But this argument is unavailing in any

[67] *Murphy* Exploration, Award on Jurisdiction ¶ 147 (RL-017); *see also id.* ¶ 148 (disagreeing with the *SGS v. Pakistan* tribunal, noting that "even though there is an explicit treaty requirement, the investor may decide whether or not to comply with it as it deems fit"). None of the other cases cited by Claimants involve either the Treaty or the Parties to the Treaty at issue here, and therefore are of limited import for this Tribunal in determining whether the Parties intended such preconditions to arbitrate to be jurisdictional or merely procedural. For example, in *Casinos Austria International v. Argentina*, unlike in this case, the waiting period was not formulated as a condition precedent for the Parties' consent, which the tribunal recognized was a distinguishing feature. *See Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/14/32, Decision on Jurisdiction ¶ 280 (June 29, 2018) (CL-0052).

[68] *See* JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES 534 (3d ed. 2021) (RL-056) ("While the specific language of the treaty in question will influence this issue, from a policy perspective it would seem that the better view is that periods of consultation and negotiation are jurisdictional in nature and a condition precedent to arbitration. All treaties evince a preference by the contracting parties to settle investor-state disputes through negotiations and other amicable means rather than by arbitration and litigation. The stipulated consultation period is one means of achieving this desirable public policy goal. Arbitral tribunals should not diminish the condition's importance by asserting jurisdiction before it is fulfilled.").

[69] Claimants' Observations ¶ 101 (citations omitted).

[70] *Id.* (citations omitted).

case, because even accepting Claimants' arguments that there was a "clear nexus" between the Texas and Ohio cases, Claimants have not met the six-month cooling-off period for either claim. In particular, the filing of the Request for Arbitration for the second claim came less than five months after the initial notification of an intent to arbitrate provided for the first claim.

2. There Can Be No Dispute Without Notice of an Alleged Treaty Breach

43. Claimants argue that the "dispute" referenced in Article VI(3)(a) and Article VI(1) of the Treaty "arises between parties at the moment an alleged breach of the Treaty occurs."[71] According to Claimants, this alleged breach took place on August 6, 2020, when the Department of Justice filed its civil forfeiture complaint against the Texas property.

44. Claimants' assertion that the six-month cooling-off period begins when the alleged breach occurs is incorrect. Their reading of the Treaty conflates the "alleged breach" with the "dispute." An investment dispute can only arise when the allegation is made that a breach of the Treaty has occurred, invoking international responsibility.[72] Thus, the United States has not "improperly attempt[ed] to insert into the Treaty a notice requirement;"[73] notice, in the form of an allegation, is already baked into the reference to an "investment dispute" in Article VI. As the Tribunal in *Murphy Exploration v. Ecuador* stated, "without the prior allegation of a Treaty breach, it is not possible for a dispute to arise which could then be submitted to arbitration under . . . the BIT."[74]

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[71] *Id.* ¶ 89.

[72] *See Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment, 2016 I.C.J. 255, 271, ¶ 38 (Oct. 5) (RL-057) ("[A] dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant . . . ."). *Cf.* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 43, U.N. Doc. A/56/49 (Vol. I) (2001) (RL-058) (requiring an injured State to give notice of its claim to another State against which it wishes to invoke responsibility).

[73] Claimants' Observations ¶ 90.

[74] *Murphy Exploration*, Award on Jurisdiction ¶ 104 (RL-017).

45. This makes good sense. Without alleging or providing notice of a dispute, the primary purpose of the provision – to allow for amicable dispute resolution of the Treaty breach through negotiation and consultation – would be undermined. The respondent State may be fully aware of the underlying events, but would have no idea that the claimants believe that a Treaty breach occurred until so notified by the claimant. That is certainly the case here, where, as discussed below, the civil forfeiture cases were entirely consistent with U.S. and international law.[75]

46. Arbitral tribunals interpreting substantially similar or identical language in treaties to which the United States is a party confirm the understanding that notice is required before a dispute can arise under an international investment treaty, even where there is no formal requirement in the treaty. In fact, in *Western NIS*, cited by Claimants and discussed above, the Tribunal highlighted the importance of notice in the U.S.-Ukraine BIT, explaining that "[p]roper notice is an important element of the State's consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations."[76]

47. Claimants attempt to argue that the lack of a specific Treaty requirement for formal notice means that the Treaty lacks any notice requirement whatsoever. To do this, they cite several treaties pre-dating the U.S.-Ukraine BIT, none of which involves either of the two Treaty Parties here, which had specific notice requirements. The existence of these treaties, and the way they have formulated their preconditions to arbitrate, have no bearing on the obligation that a party seeking to invoke violations of the U.S.-Ukraine BIT provide notice of such allegations.

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[75] *See infra* Sections IV.B & IV.D.

[76] *Western NIS Enterprise Fund*, Order ¶ 5 (CL-0051); *see also Burlington*, Decision on Jurisdiction ¶¶ 335-36 (RL-049) (in interpreting the U.S.-Ecuador BIT, the tribunal noted: "as long as no allegation of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI. This requirement makes sense as it gives the state an opportunity to remedy a possible Treaty breach and thereby avoid arbitration proceedings under the BIT, which would not be possible without knowledge of an allegation of Treaty breach. . . . Because a dispute under Article VI(3)(a) only arises once an allegation of Treaty breach is made, the six-month waiting period only begins to run at that point in time.").

48. The sole case that Claimants cite to support their position, *Link-Trading v. Moldova*, is also unavailing.[77] In *Link-Trading*, the respondent enacted a trade measure impacting the claimant in August 1998, fifteen months before the claimant submitted its formal complaint and ultimately served its notice of arbitration on November 25, 1999. In the intervening months, the respondent "brought pressures to bear upon Claimant . . . to comply with the changed customs rules."[78] The tribunal was satisfied that the length of time between the alleged breach and the complaint, the failure to negotiate, and the documented communications between the parties during that period sufficed to provide the respondent actual notice of an investment dispute, such that an amicable settlement might be reached.[79]

49. Here, the United States filed a civil forfeiture case, which is merely an allegation that properties are subject to forfeiture, consistent with the statutory approach to the enforcement of federal laws against money laundering. As in *Murphy*, Claimants have offered no evidence to show that the United States was aware of the existence of a dispute under the U.S.-Ukraine BIT with respect to any action prior to October 5, 2020.[80] It would be illogical for this Tribunal to

[77] Claimants also cite "practitioners' guides to international arbitration." *See* Claimants' Observations ¶ 95 n.117. But this, too, is unavailing. The guide simply points out that the cooling-off period is typically three or six months "from the date the dispute arises" or is "notified by the investor to the host State." LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 97 (2d ed. 2011) (CL-0020). As noted above, a dispute cannot arise unilaterally, and therefore there must be either knowledge of the dispute among the parties or one party notifies the other(s) of the dispute. Similarly, whether *written* notification is required or not does not impact whether notice of an allegation is required for a dispute to arise. *See id.*

[78] *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, Award on Jurisdiction at 6 (Feb. 16, 2001) (CL-0019).

[79] *Id.*

[80] *Cf. Murphy Exploration*, Award on Jurisdiction ¶ 105 (RL-017). Claimants attempt to distinguish *Murphy Exploration* by arguing that only three days elapsed between notification of the dispute and bringing the arbitration. While the tribunal in that case noted that time frame to conclude that the parties could not have attempted to amicably resolve the dispute, the controlling factor for the tribunal in its decision was that "it is necessary for the Respondent to have been aware of the alleged Treaty breaches in order to resort to arbitration under Article VI of the BIT." *Id.*

conclude that the United States had notice that the mere filing of a civil forfeiture complaint would give rise to a dispute under the U.S.-Ukraine BIT.

3. Claimants Cannot Import Dispute Resolution Clauses from Other Treaties

50. Claimants argue that they were not required to comply with the six-month cooling-off period because "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."[81] Claimants point to other U.S. treaties as examples of dispute resolution clauses that contain three-month, rather than six-month, waiting periods.[82] This attempt to avoid the Treaty's preconditions to arbitrate is misguided as a matter of law.

51. Article II(1) of the Treaty provides:

> 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. . . .
>
> (Emphases added)

52. As a threshold matter, to establish a breach of the obligation to provide MFN treatment under Article II(1), a claimant has the burden of proving that its investments: (1) were accorded "treatment"; (2) were "in like situations" with identified "nationals or companies of any third country"; and (3) received treatment "less favorable" than that accorded to those of identified

[81] Claimants' Observations ¶ 106.

[82] *Id.* ¶ 108 (citing BITs between the United States and Albania (1995), Azerbaijan (1997), Bahrain (1999), Bolivia (1998), Croatia (1996), Georgia (1994), Honduras (1995), and Mozambique (1998)).

nationals or companies. A Party does not accord *treatment* to investments through the mere existence of provisions in its other international agreements such as cooling-off clauses or other dispute settlement provisions. Claimants have not identified any investment that was accorded actual treatment by the United States, never mind one that was in a like situation or treated more favorably, and therefore no violation of Article II(1) can be established.[83]

53. The cases that Claimants cite do not compel a different outcome. The weight of authority addressing this question establishes that, as a matter of law, investors cannot use an MFN clause to import dispute resolution clauses from other treaties.[84] Notably, a claimant must meet the requirements *ratione materiae*, *ratione personae*, and *ratione temporis*, as detailed in a specific treaty, for the exercise of jurisdiction by a dispute settlement tribunal under that treaty. In this regard, "[a]n investor who has not met the requirements for commencing a claim against the respondent State cannot avoid those requirements by invoking the procedural provisions of another BIT."[85]

54. Put differently, the importation of a dispute resolution clause from another treaty implicates, and potentially undermines, the States' consent to arbitration as negotiated in a specific treaty. Thus, it cannot be assumed that an MFN clause can be used to import such conditions from other treaties. Rather, "[t]here has to be evidence that the MFN provision was designed to apply to change the jurisdictional limitations on the tribunal because the host State's consent was

[83] *See* UN Conference on Trade & Dev. [UNCTAD], UNCTAD Series on Issues in International Investment Agreements II, *Most-Favoured-Nation Treatment* 23-24 (2010) (RL-059) (noting that a comparison between two foreign investors in like circumstances is required to assess an alleged breach of an MFN treatment clause).

[84] *See, e.g.*, Final Report of the Study Group on the Most-Favoured Nation Clause, Yearbook of the International Law Commission, vol. II (Part Two) ¶ 105 (2015) (RL-060) (noting the prevailing view among tribunals that MFN provisions cannot apply to change jurisdictional limitations).

[85] *Id.*

predicated on compliance with those limitations."[86] The effect of an MFN provision thus turns on an interpretation of the specific MFN clause at issue and its context.[87] Any reference to the treaty parties' intention to import a dispute settlement provision from another agreement must be "clear[] and unambiguous[]."[88] Without such a clear and unambiguous agreement, many tribunals have rejected using an MFN clause in a way that would expand the scope of consent to dispute settlement beyond that provided in the original treaty.[89]

55. The U.S.-Ukraine BIT does not clearly or unambiguously reference an intention to extend MFN treatment to matters of jurisdiction or procedure. Indeed, Article II does not reference other treaties' provisions – including their dispute resolution provisions – at all. Thus, on its face, the U.S.-Ukraine BIT does not permit the use of its MFN clause to import dispute resolution provisions from other treaties.

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[86] *Id.* ¶ 114.

[87] *See, e.g.*, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction ¶ 223 (Feb. 8, 2005) (RL-061) ("[A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."); *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award ¶ 289 (July 2, 2018) (RL-030) (noting that "[i]t is preferable to look at the precise MFN clause in order to determine its effect than to rely on general concepts of what the invocation of such clauses may achieve or may not achieve").

[88] *Plama*, Decision on Jurisdiction ¶ 200 (RL-061) (rejecting the possibility of importing another treaty's dispute resolution provision and explaining that "a reference may in and of itself not be sufficient; the reference is required to be such as to make the arbitration clause part of the contract"). Claimants assert that "[t]here is nothing in the Treaty that excludes dispute resolution provisions from MFN treatment." Claimants' Observations ¶ 110. This is irrelevant. The question, rather, is whether the Treaty clearly and unambiguously *permits* the importation of an arbitration provision from another treaty.

[89] *See, e.g.*, *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award ¶ 210 (Feb. 16, 2023) (RL-062) (cautioning that "the scope of consent to arbitration . . . could be expanded massively and also be interpreted differently for each contracting State, depending on the scope of consent included in other treaties concluded by that State"); *Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Venezuela*, ICSID Case No. ARB(AF)/18/3, Award ¶ 167 (Nov. 5, 2021) (RL-063) ("[A] tribunal has no power to incorporate into the treaty more favorable dispute resolution terms so as to create or expand the Contracting States' consent to arbitrate."); *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award ¶¶ 277-78 (Aug. 22, 2012) (RL-064) (noting the absence of textual support in the underlying BIT for claimant's argument that other treaties' dispute resolution clauses should be imported through the underlying BIT's MFN provision, and that international law "does [not] require states to run around disavowing the jurisdiction of international tribunals in order to avoid being ensnared by unanticipated jurisdictional tentacles every time a claimant invents a clever new argument").

56. Claimants' reliance on *Maffezini v. Spain*, a decision over two decades old, is misplaced.[90] In *Maffezini*, the tribunal found that "the most favored nation clause included in the Argentine-Spain BIT embrace[d] the dispute settlement provisions of th[e] treaty" and thus claimant could rely on the provisions contained in the Chile-Spain BIT concerning pre-arbitration requirements.[91] The *Maffezini* tribunal based its conclusion, in part, on the plain language of the MFN provision in the Argentina-Spain BIT, which according to the tribunal "embrace[d]" the dispute resolution provision of the treaty. Specifically, the Argentina-Spain BIT's extension of MFN treatment to "all matters governed by this Agreement,"[92] which arguably included the treaty's dispute resolution clause, is a much broader formulation than that found in the U.S.-Ukraine BIT.[93] Similarly, all of the post-*Maffezini* cases that Claimants cite in support of importation in this case are inapposite because they involve treaties containing MFN provisions that have a broader scope than Article II(1) of the U.S.-Ukraine BIT.[94]

57. Several more recent tribunals have rejected importation of dispute resolution clauses from other treaties through an MFN clause. These tribunals conducted the treaty analysis outlined above and concluded that the MFN clauses at issue – like Article II(1) of the U.S.-Ukraine BIT – were

[90] *See* Claimants' Observations ¶ 111 and accompanying footnotes.

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

[92] Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, art. IV(2), Oct. 3, 1991, 1699 U.N.T.S. 187 (RL-065).

[93] *Maffezini*, Decision of the Tribunal on Objections to Jurisdiction ¶ 60 (CL-0039) (noting that Argentina's other treaties "omit this reference and merely provide that 'this treatment' shall be subject to the clause, which is of course a narrower formulation").

[94] *See, e.g.*, *Vivendi v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction ¶ 59 (Aug. 3, 2006) (CL-0042) (relying on the broader formulation of the Spain-Argentina BIT); *Suez et al. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction ¶ 55 (May 16, 2006) (CL-0043) (same); *Krederi*, Award ¶ 341 (RL-030) (relying on the broader formulation of the U.K.-Ukraine BIT); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction ¶¶ 128, 132-33 (Oct. 5, 2007) (CL-0045) (clarifying that "for the purposes of this Award, it does not have to answer [whether the term 'treatment' includes the protection by an arbitration clause], but only regarding the sub-question whether it includes an arbitration clause covering expropriation").

drafted narrowly and that their reach did not extend to jurisdictional or procedural matters. For example:

- The tribunal in *Plama v. Bulgaria* explained that "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."[95]
- The Tribunal in *H&H v. Egypt* held that "the MFN clause contained in the US-Egypt BIT cannot be used to avoid the application of the fork-in-the-road clause contained therein. The Tribunal shares in this respect the view of the tribunal in *Plama v. Bulgaria*, which noted that dispute resolution provisions are separable from the remainder of the treaty and constitute an agreement on their own."[96] The MFN clause in the U.S.-Egypt BIT is substantially similar in scope to Article II(1) of the U.S.-Ukraine BIT.[97]
- The tribunal in *Salini v. Jordan* held that the applicable MFN clause in the Jordan-Italy BIT was not broad enough to provide jurisdiction over contractual disputes, as provided for in other BITs of the host State. The tribunal stressed that the applicable MFN clause neither directly referred to dispute settlement nor broadly covered "all matters" of the basic BIT as in *Maffezini v. Spain*, and that it could not

[95] *Plama*, Decision on Jurisdiction ¶ 223 (RL-061).

[96] *H&H Enterprises Investments, Inc. v. Egypt*, ICSID Case No. ARB/09/15, Award ¶ 358 (May 6, 2014) (RL-066).

[97] Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, art. II(2), U.S.-Egypt, Sept. 29, 1982, T.I.A.S. No. 92-627 (RL-067) ("Each Party shall accord investments in its territory, and associated activities related to these investments, of nationals or companies of the other Party treatment no less favorable than that which it accords in like situations to investments and associated activities of its own nationals or companies, or nationals or companies of any third country, whichever is most favorable.").

identify any intention of the treaty parties to have dispute settlement included in the reach of MFN treatment.[98]

58. Notably, other tribunals have altogether rejected using MFN clauses to import provisions from other treaties, including for substantive provisions of another treaty.[99] Experts have also called into question, based on a textual and historical review of MFN clauses in numerous treaties, whether MFN clauses in investment treaties were designed to import standards of treatment at all.[100]

59. In summary, Claimants' attempt to import a more favorable waiting period from other treaties fails because the Claimants have not identified an investment in like circumstances that received more favorable treatment, and because the MFN provision in Article II(1) of the Treaty has a limited scope and does not import procedural protections.

[98] *Salini Costruttori S.p.A and Italstrade S.p.A v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction ¶¶ 115-119 (Nov. 29, 2004) (RL-068).

[99] *See İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award ¶¶ 326-32 (Mar. 8, 2016) (RL-069) (refusing to import any substantive standard of treatment via an MFN clause); *Vladimir Berschader and Moïse Berschader v. Russia*, SCC Case No. 080/2004, Award ¶ 194 (Apr. 21, 2006) (RL-070) (finding that the expression "'all matters covered by the present Treaty' [which is the language considered in *Maffezini*] does not really mean that the MFN provision extends to all matters covered by the Treaty" and thus rejected the idea "that the parties intended the MFN provision to extend to the dispute resolution clause").

[100] *See, e.g.*, Simon Batifort and J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873, 874 (2018) (RL-071) ("A careful analysis of the text of specific clauses leads to a much more nuanced picture and calls into question the prevailing view that all MFN clauses in investment treaties were designed to import standards of treatment."); Christopher Greenwood, *Reflections on 'Most Favoured Nation' Clauses in Bilateral Investment Treaties*, *in* PRACTISING VIRTUE 556, 559-61 (David D. Caron, Stephan W. Schill, *et al.*, eds., 2015) (RL-072) (emphasizing that, as a matter of law, third-party treaty provisions are neither "writ[ten] into" nor "incorporate[ed]" into the basic treaty via an MFN clause).

4. The United States Did Not Waive Its Right to a Six-Month Waiting Period

60. Claimants further argue that the United States waived the six-month cooling-off period in the Treaty. Claimants point to no express waiver, of course, but assert that there was an implied waiver because the United States "expressed no willingness" to seek an amicable resolution of the dispute and that, in such a situation, adhering to a jurisdictional waiting period would be "futile."[101]

61. As an initial matter, the six-month cooling-off period is not *solely* for the purpose of allowing the parties to come to an amicable resolution of the dispute, although (as discussed above) this is a primary one.[102] Additional functions include allowing a Treaty Party time to identify and assess the potential dispute(s), coordinate among relevant national and subnational bodies, and to consider other courses of action prior to arbitration, such as preservation of evidence or preparation of a defense. The Claimants' failure to adhere to the six-month waiting period denied the United States the opportunity to undertake these activities.

62. Focusing just on amicable resolution, Claimants have cherry-picked facts following the October 5, 2020 invocation of the Treaty in a way that mischaracterizes the United States' actions and intent. Claimants cite a series of emails sent to the Department of Justice in October 2020 in both their Requests for Arbitration and Observations.[103] Even though they rely upon these exchanges to support their futility claims, they declined to put the correspondence cited extensively in their Requests for Arbitration in the record. In their Observations, they only include one later exchange on the topic.[104] The full email chains, which the United States supplies with this filing,

[101] Claimants' Observations ¶¶ 124-25.

[102] *See supra* ¶ 32.

[103] Claimants' Observations ¶¶ 29-37, 126-32; *Optima Ventures LLC and Optima 7171 LLC v. United States of America*, Request for Arbitration ¶¶ 98-99 (Feb. 8, 2021); *Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America*, Request for Arbitration ¶ 88 (Feb. 24, 2021).

[104] *See* November 19, 2020 E-mail Chain (C-0042).

and the subsequent developments between the United States and Claimants demonstrate that the United States was open to discuss the applicability of the Treaty, as requested, and to consult with Claimants.

63. Claimants emailed the Department of Justice on October 6, 2020, requesting its advice on the applicability of the Treaty in the underlying cases, and offering to consult. An attorney from the Department of Justice responded the same day, stating that the attorney would "want to take some time to think about these issues to make that discussion productive."[105]

64. Claimants sent follow-up emails regarding its Treaty query on October 21 and 22. The Department of Justice responded on October 27, advising the Claimants that Article VI(2) of the BIT was the proper article under which they could request consultations with the United States government, rather than the one referenced by Claimants, Article V (which governs consultations between the Treaty Parties). In this same correspondence, the Department of Justice notified Claimants that the office that handles disputes arising under the Treaty is the Office of the Legal Adviser in the U.S. Department of State. The Department of Justice provided the contact information for that office.[106] Claimants never followed up with the Department of State, and instead brought this arbitration without any further consultation.

65. Claimants only put one email chain in the record related to this issue, the content of which simply notes that the United States has not consented to the arbitration (for one, because the preconditions to arbitrate had not been satisfied) and that the United States did not agree that the

[105] Email Exchange, S. Bronstein and R. Dunlap (Oct. 5-6, 2020) (R-0097). This email exchange further demonstrates that the United States was unaware of any potential investment dispute prior to October 6, 2020. *See infra* Section IV.2.

[106] Email from S. Bronstein to H. Srebnick (Oct. 27, 2020) (R-0098).

Treaty applied to the cases at issue.[107] The email said nothing of the United States' availability or unavailability to consult, or an unwillingness to negotiate.

66. The United States' established practice when provided notice of investment disputes is to consult with the party or parties seeking to bring a claim. Claimants themselves confusingly state that the United States "exhibited no interest in negotiating from the outset of this dispute"[108] but then note that Claimants have "repeatedly consulted with Respondent, including with Respondent's representatives remotely and also in person in 2021, 2022, and 2023."[109] That the Parties have been "unable to reach a resolution"[110] does not excuse Claimants' failure or suggest that pre-arbitration consultations would necessarily have been futile.[111]

67. In cases where tribunals have held that waiting periods could be waived because negotiations would be futile, the facts underlying the tribunals' decisions were distinct. For example, in *Teinver v. Argentina*, the parties had been negotiating for eight years to settle the dispute at issue, to no avail.[112] In *Zaza Okuashvili v. Georgia*, the alleged breach took place 14 years before the notice of intent, and the tribunal found that the respondent had "every intention of firmly contesting each aspect of the Claimant's claims, starting with jurisdiction."[113] Here, in contrast, just weeks after being notified of the potential Treaty claim, the Department of Justice

[107] November 19, 2020 E-mail Chain (C-0042).

[108] Claimants' Observations ¶ 125 (internal quotations omitted).

[109] *Id.* ¶ 131.

[110] *Id.*

[111] *Murphy Exploration*, Award on Jurisdiction ¶ 135 (RL-017) (noting that "the obligation to negotiate is an obligation of means, not of results").

[112] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction ¶¶ 126-29 (Dec. 12, 2012) (CL-0025).

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

directed Claimants to the relevant team at the Department of State to conduct consultations.[114] As it was Claimants, and not Respondent, who chose not to follow through with such consultations, their futility argument must fail.

68. In conclusion, this Tribunal manifestly lacks jurisdiction to hear this dispute *in toto* due to Claimants' failure to abide by the six-month cooling-off period. The case should be dismissed.

B. **Jurisdictional Objection 2/Merits Objection 3:**[115] Claimants Do Not Dispute That Article VIII Does Not Provide an Independent Basis for a Claim; Claimants' Attempts to Reframe Their Comity Arguments Fare No Better

69. Claimants' claims lean heavily on the argument that the United States should have refrained from proceeding against the underlying properties because Ukrainian authorities have not instituted criminal proceedings regarding the fraud perpetrated against PrivatBank. In so arguing, Claimants rely on two forms of comity recognized by U.S. law: prescriptive comity and adjudicatory comity.

70. In their Requests for Arbitration, Claimants cited only to Article VIII to support their claim that the United States violated their "entitlement" to have the case dismissed on the basis of comity.[116] The United States, in its Preliminary Objections, demonstrated that Article VIII does not create or confer any obligation on the host State, and therefore does not support a Treaty claim

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[114] *See also S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Kazakhstan (I)*, SCC Case No. 116/2010, Judgment of the Svea Court of Appeal p. 30 (Dec. 9, 2016) (RL-073) (respondent "failed to respond to most of the Investors' requests and exhibited no interest in negotiating," distinguishing this case from the situation here); *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award ¶ 347 (July 24, 2008) (CL-0055) ("By the time the Request for Arbitration was filed, a long process of negotiation and renegotiation had already failed, and the Republic's position was entrenched."); *Lauder*, Award ¶¶ 188-90 (CL-0056) (finding that "there is no evidence that the Respondent would have accepted to enter into negotiation with Mr. Lauder or with any of the entities he controlled and which were involved in the dispute during the waiting period"); *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Jurisdiction (Sept. 9, 2008) ¶ 19 (RL-074) (noting that for a period of "18 months or so," the claimant made "a number of submissions seeking to rebut the allegations made").

[115] Although this objection was originally asserted as the United States' second jurisdictional objection, Claimants' concession regarding Article VIII and its reframing of the issue as arising under Articles II and III turns this into a merits issue. The comity issue has therefore been recharacterized as "Merits Objection 3."

[116] *See Optima 7171 LLC*, Req. Arb. ¶¶ 45-63; *Optima 55 Public Square LLC*, Req. Arb. ¶¶ 51-64.

by an investor.[117] Claimants have expressly conceded this point, agreeing that Article VIII does not create any rights or obligations that could be used as a basis of claim in an investor-State dispute.[118] The Tribunal can therefore summarily dismiss any claims that arise under Article VIII, including with respect to comity.

71. In their Observations, Claimants reframe their Article VIII arguments as relating to Articles II and III of the Treaty, suggesting that U.S. measures were "inconsistent" with U.S. law, were "unlawful," or "willfully disregarded the fundamental principles of the [domestic] regulatory framework in force at the time."[119] Without conceding whether these standards in fact apply to a claim under either Article II or Article III of this Treaty, it is plain that these newly-asserted arguments, like the Article VIII claim, are manifestly without merit and should be dismissed. Nothing about the U.S. conduct, as pled by Claimants, could be characterized as "unlawful," or otherwise "inconsistent with" or "willfully disregarding" U.S. law. Specifically, the United States acted consistently with both prescriptive comity and adjudicatory comity principles in the underlying cases. The Tribunal's determination in this regard can be undertaken as a matter of law based on agreed and undisputable facts.

1. Prescriptive Comity Does Not Apply to This Case, Because the Statutes Are Clear as to Their Extraterritorial Scope

72. Prescriptive comity, or the presumption against extraterritoriality, is a rule of statutory interpretation drawing on the principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United

[117] U.S. Preliminary Objections ¶¶ 63-65.

[118] Claimants' Observations ¶ 141.

[119] *Id.* ¶¶ 136-39 (internal quotations and citations omitted).

States.[120] The presumption against extraterritoriality is, however, exactly that: a presumption. The presumption is inapplicable where Congress has specified in the text of a statute that it relates to extraterritorial activity. As one U.S. court explained, "[b]ecause the principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction, *it has no application where Congress has indicated otherwise*."[121]

73. Here, Congress has specified quite clearly in the relevant statutes that they apply to money laundering activities in the United States (for example, the purchase of property in the United States) to money laundering activities outside the United States with a U.S. nexus (for example, when the money laundering was committed by U.S. citizens and U.S. corporate entities). One of the federal statutes on which the United States relied here, 18 U.S.C. § 1956, specifically prohibits money laundering "from a place in the United States to or through a place outside the United States *or to a place in the United States from or through a place outside the United States*."[122] A second applicable statute, 18 U.S.C. § 1957, likewise refers to money laundering that "*takes place outside the United States* . . . but the defendant is a United States person," as was the case with respect to the U.S. Optima entities.[123] A third applicable federal statute, 18 U.S.C. § 2314, criminally prohibits the transportation, transmission, or transfer "in interstate or foreign commerce [of] any goods, wares, merchandise, securities or money, of the

[120] *In re Picard*, 917 F.3d 85, 100-103 (2d Cir. 2019) (R-0099) ("[P]rescriptive comity . . . asks a question of statutory interpretation: should a court presume that Congress, out of respect for foreign sovereigns, limited the application of domestic law on a given set of facts?") (internal quotation marks and citation omitted).

[121] *In re Maxwell Communication*, 93 F.3d 1036, 1047 (2d Cir. 1996) (R-0100) (emphasis added) (citation omitted); *see also United States v. Lombardo*, 639 F. Supp. 2d 1271, 1289-90 (D. Utah 2007) (R-0101) (finding that the "plain language" of the relevant statute applied extraterritorially and therefore that prescriptive comity was "preclude[d]"). Thus, the Supreme Court's holding in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, on which the Claimants rely extensively in their Requests for Arbitration, is plainly inapplicable. In that case, the Court plainly limited its holding to "ambiguous statutes." 542 U.S. 155, 164 (2004) (R-0102).

[122] 18 U.S.C. § 1956(a)(2) (R-0007).

[123] 18 U.S.C. § 1957(d)(2) (R-0007).

value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud."[124] Finally, 18 U.S.C. § 2315 prohibits the receipt, possession, concealment, storage, bartering, selling, or disposing of "any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledg[ing] or accept[ing] as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, *which have crossed a State or United States boundary* after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken."[125]

74. In short, because Congress has clearly specified that federal money laundering laws apply to money laundering that originates outside U.S. territory, the presumption against extraterritoriality is inapplicable.[126]

2. Adjudicatory Comity Does Not Apply as a Matter of Law to the Facts of This Case as Alleged by Claimants

75. Claimants' reliance on adjudicatory comity is likewise meritless. Adjudicatory comity refers to a court's discretion to dismiss a case in favor of a parallel, identical case in a foreign court. Claimants' claims regarding adjudicatory comity fail for four reasons.

76. *First*, adjudicatory comity is an affirmative defense for which, if raised, the Claimants would have the burden of proof.[127] It was incumbent upon the Claimants to raise and pursue comity before the U.S. court; the court had no obligation to apply adjudicatory comity *sua sponte*.

[124] 18 U.S.C. § 2314 (2013) (R-0103).

[125] 18 U.S.C. § 2315 (2013) (R-0104). Further, recognizing the damage caused by foreign criminal proceeds being introduced into the United States' financial system, Congress explicitly criminalized the transfer of funds into the United States that constitute proceeds of certain crimes committed abroad. 18 U.S.C. §1956(c)(7) catalogues specific offenses that, even if occurring abroad, constitute a basis for forfeiting proceeds laundered into the United States.

[126] Even if the statutes were ambiguous regarding extraterritoriality, prescriptive comity only applies when there is a "true conflict" between the extraterritorial application of the U.S. statute and another state's laws or regulations. *Hartford Fire Ins. Co. v. Merrett Underwriting Agency Management Ltd.*, 509 U.S. 764, 798 (1993) (R-0105) (internal quotation marks and citations omitted). Here, there can be no serious contention that the U.S. laws on money laundering and civil forfeiture conflict with Ukrainian laws.

[127] *See, e.g., United States v. Sum of $70,990,605*, 4 F. Supp. 3d 189, 204 (D.D.C. 2014) (R-0106).

With respect to the Texas and Ohio cases, while Claimants initially filed motions raising comity concerns, the Claimants stayed the cases before the court could rule on the motions. Once again, Claimants' rush to arbitration dooms their claims.

77. *Second*, adjudicatory comity is a discretionary doctrine.[128] A court's exercise of discretion not to dismiss a case based on principles of comity cannot be described as an "unlawful" act sufficient to support a claim under Claimants' interpretation of Article II or III.

78. *Third*, it is well established that while a court may dismiss a case on the basis of comity in private disputes, it will not exercise such discretion where the United States is the plaintiff in the case, as the Executive Branch has already made a determination to proceed with the case despite any alleged foreign policy implications.[129] This rule has been applied in several civil forfeiture cases involving money laundering in particular, to deny motions to dismiss on the basis of adjudicatory comity.[130] In fact, in the Kentucky case that is not before this Tribunal, Claimants'

[128] *Cooper v. Tokyo Electric Power Company, Inc.*, 860 F.3d 1193, 1205 (9th Cir. 2017) (R-0107) (describing adjudicatory comity as a "discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state").

[129] *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 6 (D.D.C. 1990) (R-0108) ("It is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances."), *aff'd* 908 F.2d 981 (D.C. Cir. 1990).

[130] *See, e.g., United States v. All Assets Held in Account Number XXXXXXXX*, 83 F. Supp. 3d 360, 371-72 (D.D.C. 2020) (R-0109) ("Here, the Executive Branch, through the Department of Justice, has brought this forfeiture action against defendant properties involved in alleged violations of United States criminal laws. . . . Because the Executive has already done the balancing in deciding to bring the case in the first place, the doctrine of international comity does not bar this lawsuit.") (citation omitted); *see also United States v. All Assets Held at Bank Julius Baer & Co.*, 772 F. Supp. 2d 205, 210 n.3 (D.D.C. 2011) (R-0110) ("[A] case in which the United States is the plaintiff would seem a particularly unsuitable candidate for abstention on international comity grounds. Where, as here, 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.").

comity argument was definitively rejected on this very basis, [131] a fact Claimants acknowledge in their Observations.[132]

79. *Fourth*, a court may choose to exercise its adjudicatory comity discretion if "that case is pending in a foreign court with proper jurisdiction."[133] Here, while Claimants refer to a series of cases in Ukraine, Claimants have expressly asserted that there is no law enforcement case pending in Ukrainian courts against any relevant party, including with respect to the money laundering asserted by the United States.[134] Moreover, in the related Kentucky case, which Claimants refer to as "instructive" and "substantively identical" to the Texas and Ohio cases,[135] the court ruled *against* the Claimants on this point, finding that the issues presented in the Ukrainian cases were not the same as the issues presented to the U.S. court in the civil forfeiture case:

> [T]he Ukrainian decisions do not reach decisions about whether the loan proceeds were ultimately used to purchase PNC Plaza [the property at issue in the Kentucky case]. Similarly, they do not reach any conclusions about whether the money used to pay back the loan ultimately came from other loans issued by PrivatBank. And the decisions do not indicate if the transactions were part of a larger scheme to misappropriate funds from PrivatBank or if the

[131] *See United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain from) Government's Verified Civil Forfeiture Complaint (S.D. Florida Sept. 28, 2022) (C-0009). This was not the sole reason Claimants' motion to dismiss on the basis of comity was denied; according to the magistrate judge, there were "myriad grounds" to reject the motion. *Id.* at 32.

[132] Claimants' Observations ¶ 79.

[133] *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005) (R-0111) ("International comity, as it relates to this case, involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction."); *see also Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014) (R-0112).

[134] Claimants' Observations ¶ 76.

[135] *Id.* ¶ 78. In its written submissions in the Kentucky case, the Claimants argued, unsuccessfully, that the cases in Ukraine "have definitely addressed . . . [and] rejected wholesale the United States' foundational allegations that the . . . [loans at issue] violated Ukrainian law." *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23278, Claimants' Objections to Magistrate Judge Goodman's Report and Recommendations Regarding Motion to Dismiss in Case No. 20-cv-23279 at 8 (S.D. Fla. Oct. 26, 2022) (R-0113). This, according to Claimants, should have led to "devastating consequences" for the Kentucky case. *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23278, Claimants' Reponses to United States' Objections to Report and Recommendations at 19 (S.D. Fla. Nov. 21, 2022) (R-0114).

documentation used to demonstrate financial propriety was false or fraudulent.

Thus, as flagged by the United States, "[i]t is unsurprising that sophisticated money launderers would obtain and present pieces of paper that suggest that a legitimate transaction occurred; that is a predictable feature of such a criminal scheme."

The United States also argues (convincingly, in my view) that the instant civil forfeiture action involves factual issues not resolved by the Ukrainian courts: "(1) whether the loans were part of a fraudulent scheme to misappropriate money from PrivatBank; (2) whether the misappropriated funds were laundered into the United States; (3) whether they were used to acquire PNC Plaza; and (4) whether the Defendant Asset is subject to forfeiture. And, because the allegation is that both loans were part of a broader scheme, this Court will have to address not just whether the loans at issue were repaid on paper, but whether the funds for that repayment came from other loans issued by PrivatBank. . . . Furthermore, this Court will also need to consider (unlike the Ukrainian court) the critical issue of what happened to the loan funds *after* they were issued.[136]

[136] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint at 33-34 (S.D. Fla. Sept. 28, 2022) (C-0009) (footnotes and internal citations omitted). As Claimants state, the court's preliminary findings were subsequently adopted in their entirety by the court, which referred to the "well-reasoned analysis and conclusions" in those preliminary findings. Claimants' Observations ¶ 80 (citing *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23278, Order at 2 (S.D. Fla. Dec. 30, 2022) (R-0084)).

The same reasoning would apply equally to the Texas and Ohio civil forfeiture cases.[137] In their Observations, Claimants ignore the above analysis, instead quoting without context a footnote to the court's discussion.[138]

80. Therefore, as with prescriptive comity, Claimants' allegations as pled cannot support their claim that U.S. measures were "unlawful," or were "inconsistent with" or "willfully disregarded" U.S. law with respect to adjudicatory comity. To the contrary, U.S. judicial actions were entirely consistent with U.S. law on both forms of comity. Thus, Claimants' Article II and III claims, which rely on their arguments regarding prescriptive and adjudicatory comity, are manifestly without merit and must be dismissed.

C. **Merits Objection 1:** Claimants' Claims Lack the Requisite Finality to Form the Basis of a Legally Viable Claim, Notwithstanding Their Attempts to Refashion Them as Based on Executive Conduct

81. In their Requests for Arbitration, Claimants articulated two claims under Articles II and III of the Treaty based on court measures in the U.S. civil forfeiture cases. *First*, Claimants alleged that the *ex parte* temporary restraining order issued in the Texas case violated due process and therefore the "fair and equitable treatment" provision of Article II(3)(a). *Second*, Claimants argued

[137] Claimants, by way of "example," point to Ukrainian court judgments from courts of first instance concerning only some of the loans so far identified by the Department of Justice as being traceable to the purchase of the Texas property. *See* Claimants' Observations ¶¶ 64-72 (discussing purported cases with respect to loan numbers 4O10091D, 4Z10339D, and 4Z10340D, but not CY001K/2). Claimants fail to point to a single Ukrainian court judgment concerning PrivatBank loans identified in the Department of Justice's complaint as traceable to the purchase of the Ohio property. *Cf. United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Complaint for Forfeiture in Rem at 24-28 (Dec. 30, 2020) (C-0011). In addition, Claimants rely on a Ukrainian Supreme Court decision concerning a single PrivatBank loan. *See* Claimants' Observations ¶¶ 73-74 (loan number 4N09129D). That loan was listed in the Department of Justice's complaints as among the many loans used to fund the Optima scheme. *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Complaint for Forfeiture in Rem at 11, 14 (Dec. 30, 2020) (C-0011). But the decision, for all the reasons noted by the district court in the Kentucky case, concerned a different, narrower set of factual and legal questions than those at stake in the civil forfeiture cases.

[138] *See* Claimants' Observations ¶ 78 (quoting *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint at 34 n.12 (S.D. Fla. Sept. 28, 2022) (C-0009)). Claimants, while omitting the court's analysis as to the Ukrainian cases, misleadingly quote a footnote discussing the Department of Justice's ultimate burdens in the Kentucky civil forfeiture case. *Cf. id.*

that the temporary restraining orders in both the Ohio and Texas cases unlawfully expropriated their assets in violation of Article III.[139] The United States demonstrated in its Preliminary Objections that these claims are manifestly without legal merit because the judicial measures are non-final.[140] In particular, the United States argued that the lack of finality of the underlying U.S. court orders rendered Claimants' claims manifestly without legal merit even assuming *arguendo* that judicial measures can be challenged outside the confines of denial of justice.[141]

82. Claimants responded in their Observations by recasting their claims, now alleging that "the actions of the U.S. Department of Justice – not the U.S. judiciary – . . . are primarily at issue in this arbitration" in an attempt to avoid the obvious finality problems with their original claims.[142] Claimants appear to have entirely abandoned their due process claim under Article II and instead argue that the main focus of their Article II(3) claim is the Department of Justice's allegedly "arbitrary" decision to initiate civil forfeiture proceedings. Claimants further argue (1) that the supposed *lex specialis* of the Treaty permits immediate review of that decision,[143] and, (2) despite failing to pursue the available avenues in the underlying U.S. civil forfeiture cases and instead advocating for a stay in those proceedings to pursue this very arbitration, they somehow lack

[139] *See, e.g.*, *Optima 7171 LLC*, Req. Arb. 4, ¶ 70 (alleging that the court order to "compel the transfer of the proceeds of the CompuCom Campus sale to the custody of the United States Marshals Service" constitutes an expropriation of their investment); *see also Optima 55 Public Square LLC*, Req. Arb. 4, ¶ 71 (alleging that conditioning the sale of 55 Public Square "on the transfer of the proceeds to the custody of the United States Marshals Service" constitute an expropriation of their investment).

[140] U.S. Preliminary Objections, Section IV.C.

[141] *Id.* Section IV.C.2 and ¶ 75 & n.149 ("'Due process' claims, assuming *arguendo* that such claims with respect to judicial measures are cognizable outside a denial of justice, presuppose that at least some 'process' has been tried and found wanting. Where, as here, *no* process has been tried to remedy alleged procedural issues, the alleged breach simply remains inchoate and incomplete."); *id.* Section IV.C.2 (explaining that, even assuming judicial expropriation claims can be brought, Claimants' claims are manifestly without legal merit because any deprivation of their investments is temporary and reversible).

[142] Claimants' Observations ¶ 148.

[143] *Id.* Sections III.C.i.2, III.C.i.4.

effective means in U.S. courts to contest the civil forfeiture cases in violation of Article II(7).[144] Under Article III, Claimants have claimed at various points that they were the target of a creeping expropriation comprised of executive action (the Department of Justice's filing of the civil forfeiture complaints) and judicial action (the temporary restraining orders).[145] At other points Claimants have pivoted to alleging an indirect expropriation claim based solely on the Department's filing and routine publication of the civil forfeiture complaints, which Claimants assert diminished the value of their properties[146] – an assertion that, as discussed above, is demonstrably false.[147]

83. Despite Claimants' attempt to reconfigure their case, their Article II and III claims remain manifestly without legal merit. *First*, with respect to Article II(3), the Department of Justice did not undertake any action unilaterally that impacted Claimants' investment; rather, the temporary restraints and the potential civil forfeiture had to be obtained – and accordingly were sought – through the court. As Claimants did not use the available recourse in those pending, barely begun proceedings but instead prematurely pursued this arbitration, the U.S. measures with respect to Claimants' properties are inchoate. Claimants' attempt to assert that U.S. actions are otherwise "arbitrary" due to comity and prescriptive jurisdiction concerns fall flat. *Second*, with respect to Article II(7), Claimants' failure to use the "means" available to them in the civil forfeiture cases also renders their effective means claim meritless. Finally, with respect to Article III, Claimants have not established the permanent deprivation of property required to establish an expropriation or that the mere act of filing the civil forfeiture cases substantially destroyed the value of their

[144] *Id.* Section III.C.i.5.

[145] *Id.* ¶¶ 176, 196-97, 207-08.

[146] *Id.* ¶¶ 144, 196, 208-09, 212, 217.

[147] *See supra* Section III.

investments. Thus, Claimant's allegations do not rise to the level of expropriation as clearly defined under the Treaty and international law.

1. Claimants' Article II(3) Claim Based on Alleged Arbitrary Measures Is Manifestly Without Legal Merit Because Preliminary, Non-Final, and Unchallenged Acts Do Not Rise to the Level of a Treaty Breach, and Claimants Have Not Shown that the Decision to Initiate Such Proceedings Was Arbitrary

84. In their Observations, Claimants focus primarily on two acts of the Department of Justice in an attempt to allege a breach of Article II(3) of the Treaty: the Department's filing of the civil forfeiture cases, and its publication of press releases coincident with the filing. Claimants allege that these actions were politically motivated and inconsistent with principles of comity and prescriptive jurisdiction, which they argue render the actions "arbitrary" and contrary to the Treaty. These revised claims are manifestly without legal merit and should be dismissed, because (1) Claimants' failure to use the recourse available to them in the civil forfeiture cases renders any claim based on those proceedings inchoate; (2) the *lex specialis* of Article II(3)(b) does not transform what are otherwise manifestly inchoate and premature claims into Treaty breaches; and (3) Claimants have not made out a colorable claim that any actions taken by the Department of Justice alone were "arbitrary."

85. To be clear, the United States maintains that Article II(3) sets forth the minimum standard of treatment for aliens under customary international law.[148] The text of Article II(3) only requires that the States Parties provide treatment that is at least as protective as the minimum standard of treatment under customary international law: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and *shall in no case be accorded*

[148] As for the proposition that judicial action properly is only challengeable through denial of justice claims, *see* U.S. Preliminary Objections ¶ 68 n.131, ¶ 75 n.148.

treatment less than that required by international law." (Emphasis added). By its plain terms, it does not require that States Parties provide treatment *greater than* the minimum standard of treatment. A State Party can of course choose to do so, but Article II(3) does not mandate this. That Article II(3) is intended to obligate the States Parties to provide *only* the minimum standard of treatment under customary international law is further reinforced in the letter transmitting the Treaty to the U.S. Senate:

> Paragraph 3 guarantees that investment shall be granted "fair and equitable" treatment. It also prohibits Parties from impairing through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. *This paragraph sets out a minimum standard of treatment based on customary international law*.[149]

86. Even assuming that Article II(3) does not reflect the customary international law minimum standard of treatment or that judicial actions can be challenged outside a denial of justice, Claimants' arguments still fail on their own terms.

a. Any Measures Related to the Civil Forfeiture Cases Are Inchoate

87. To the extent Claimants continue to assert any claims under Article II(3) with respect to the civil forfeiture cases, Claimants' claims fail because of the non-final, preliminary nature of those proceedings. The Department of Justice could not (and did not) take any measures against Claimants' property on its own. Only the U.S. court could (and did) order temporary restraints on Claimants' property. Only the court can ultimately determine whether the property should be

[149] U.S.-Ukraine BIT, S. TREATY DOC. NO. 103-37, Letter of Submittal, comments to Article II (Treatment) (Sept. 7, 1994) (CL-069) (emphasis added); s*ee also ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award ¶ 195 (Jan. 9, 2003) (RL-018) (observing with respect to State Department transmittal letters addressing the FET provisions of the U.S.-Albania and U.S.-Estonia BITs (which are substantively identical to the U.S.-Ukraine BIT) that "[t]he intent of one of the two State Parties to the two treaties is clearly relevant").

forfeited to the U.S. government or returned to Claimants. Because the case is stayed, the court has not yet made that determination.

88. Even assuming that judicial conduct can violate the Treaty where there is no denial of justice, Claimants' failure to make any reasonable efforts to use the process available to them to contest the civil forfeiture cases in the U.S. district court means that *any alleged Treaty breach remains inchoate*. Where low-level, isolated acts are at issue – particularly involving lower courts – failure to use available remedies may prevent the crystallization of a treaty breach. Paulsson, for example, notes that "[t]he failure to pursue local remedies may be given weight in assessing the substantive justification for claims other than denial of justice."[150] The arbitral tribunal in *Generation Ukraine v. Ukraine* also endorsed this principle.[151] While Claimants point to the *ad hoc* committee's criticism of *Generation Ukraine* in *Helnan v. Egypt*, that case involved a final, effective ministerial decision that was separately reviewable in the local administrative courts.[152] And with regard to the decisions of lower courts in particular, the *ad hoc* committee in *Helnan* was careful to qualify that: "a claimant's prospects of success in pursuing a treaty claim *based on the decision of an inferior official or court*, which had not been challenged through an available appeal

[150] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 109 n.28 (2005) (RL-075).

[151] *Generation Ukraine*, Award ¶ 20.30 (RL-032) ("[I]t is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to [a treaty breach] is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction.") (emphasis in original); *cf. Frontier Petroleum Services Ltd. v. Czech Republic*, PCA Case No. 2008-09, Final Award ¶ 410 (Nov. 12, 2010) (RL-076) (dismissing a due process claim based on flaws in bankruptcy courts in part because "[e]ven if there was any procedural unfairness in the decision-making of the bankruptcy courts the Tribunal considers that availability of full rights of appeal has satisfactorily eliminated any procedural imperfections in the process which occurred in the lower courts").

[152] *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee ¶¶ 50-51 (June 14, 2010) (CL-0110) (emphasis added).

process, should be lower, since the tribunal must in any event be satisfied that the failure is one which displays insufficiency in the system, justifying international intervention."[153]

89. Again, the U.S. civil forfeiture cases had barely begun when Claimants requested to stay them to pursue this arbitration, and the only court-ordered measures issued thus far are preliminary, isolated decisions of the court of first instance. The temporary restraining orders also do nothing more than preserve the status quo pending the U.S. civil forfeiture cases, which the Department of Justice commenced with the filing of its complaint but which Claimants have chosen to stay. To be clear, the U.S. district court has not found that the Department of Justice has established that Claimants' property is subject to civil forfeiture. Thus, this is not merely a case where there is no final decision of the State's highest courts, or even the State's intermediate appellate courts. There is no final decision of *even the lowest courts*. And as discussed in Section IV.C.2 below, Claimants have made no efforts, let alone reasonable efforts, to use the recourse available to them in the U.S. civil forfeiture cases. With respect to the restraint and potential forfeiture of their properties, Claimants' have not suffered sufficiently final "treatment," arbitrary or otherwise, capable of constituting a breach of Article II(3).

b. Claimants' Reliance on Lex Specialis Is Misplaced

90. Claimants are also wrong that the *lex specialis* of Article II(3)(b) renders "the status of judicial or appellate review irrelevant in a dispute challenging arbitrary measures."[154] With respect to any claim that encompasses the prematurely stalled U.S. civil forfeiture cases, Article II(3)(b)

[153] *Id.* ¶ 48; *see also id.* ¶ 50 ("To be sure, the Treaty standard of fair and equitable treatment is concerned with consideration of the overall process of the State's decisionmaking. A single aberrant decision of a low-level official is unlikely to breach the standard unless the investor can demonstrate that it was part of a pattern of state conduct applicable to the case or that the investor took steps within the administration to achieve redress and was rebuffed in a way which compounded, rather than cured, the unfair treatment.").

[154] Claimants' Observations ¶ 170.

cannot transform what are otherwise manifestly inchoate and premature claims into treaty breaches.

91. Even assuming that Claimants are correct that the United States added this clause to its 1991 Model BIT in reaction to the International Court of Justice's decision in *ELSI*,[155] that case involved a final measure issued unilaterally by an Italian mayor that was separately reviewable through administrative appeals and in local courts.[156] Claimants' other authority, *Lemire v. Ukraine*, also involved enforceable measures issued unilaterally by an independent regulatory body that could be separately reviewed in local courts.[157] Under Claimants' theory, the changes made to the U.S. Model BIT following *ELSI* were meant to ensure that a crystallized treaty breach by an executive authority could be pursued in investor-State arbitration despite available domestic administrative and judicial remedies with respect to that breach.

92. But here, in order to take any enforceable measures against Claimants' property, the Department of Justice had to proceed (and did proceed) through the U.S. district court, and, as outlined in the U.S. Preliminary Objections,[158] the U.S. court process available to any claimant in a civil forfeiture case involves multiple steps before any measure could be regarded as final. In

[155] *Id.* ¶ 163.

[156] *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, 1989 I.C.J. 15 ¶¶ 30-31, 41-42 (July 20) (CL-0085).

[157] In *Lemire*, the investor challenged as arbitrary the Ukrainian National Council for TV and Radio Broadcasting's repeated denials of their applications for frequencies. *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability ¶ 213 (Jan. 14, 2010) (RL-077). The National Council "is a regulatory body established directly by law, independent of the Government and reporting to both the President and the Parliament of Ukraine" and "the highest regulatory organ for the broadcasting industry." *Id.* ¶¶ 143, 278. As in *ELSI*, these executive decisions were taken without any need to initiate court proceedings and had immediate, enforceable effect. *Id.* ¶ 296. Ukraine argued that the arbitrary claim should be dismissed because the claimant "never challenged any of the decisions before the Ukrainian Courts" and "should have taken advantage of the available local remedies that would have been capable of correcting the alleged administrative wrong." *Id.* ¶ 274. It was in reaction to this argument that the *Lemire* tribunal held that whether an investor resorted to or had the opportunity to resort to local measures was "irrelevant" to whether a measure is arbitrary or discriminatory. *Id.* ¶ 277.

[158] U.S. Preliminary Objection ¶¶ 19-22.

the absence of any effort by Claimants to pursue those steps, there is simply no final measure capable of rising to the level of Treaty breach. Indeed, Claimants omit that the *Lemire* tribunal expressly cautioned that:

> *This does not mean that an investor can come before an ICSID tribunal with any complaint, no matter how trivial, about any decision, no matter how routine, taken by any civil servant, no matter how modest his hierarchical place.* In this case, however, the claim is raised against the conduct of the National Council, that is to say the highest regulatory organ for the broadcasting industry. On this basis, the Tribunal considers that there should be no impediment to Claimant seeking to hold Ukraine accountable for an alleged breach of the BIT.[159]

93. In other words, the *Lemire* tribunal recognized that, notwithstanding the second sentence of Article II(3)(b), the failure of an investor to pursue review of preliminary actions may defeat their Treaty claim because such efforts are necessary to substantiate a treaty breach.

c. Claimants Have Not Established a Claim of "Arbitrariness"

94. In recasting its claims, Claimants assert that the Department of Justice's initiation of the civil forfeiture cases, and the attendant press releases, were "arbitrary" because (1) Ukrainian authorities have not criminally charged Claimants for the underlying fraud and embezzlement, and/or (2) the decision to file the civil forfeiture claims and issue the press releases was politically motivated.[160] Unfortunately for Claimants, neither claim holds water.

95. On the first point, Claimants' theory relies on their arguments that initiating the civil forfeiture cases in these circumstances was inconsistent with principles of prescriptive and adjudicatory comity, as well as prescriptive jurisdiction. As discussed above in Section IV.B (with respect to comity) and below in Section IV.D (with respect to prescriptive jurisdiction), neither

[159] *Lemire*, Decision on Jurisdiction and Liability ¶ 278 (RL-077) (emphasis added).

[160] Claimants' Observations ¶ 169.

argument has any merit. Principles of comity simply do not apply in this case, and it cannot be seriously argued that the United States' prescriptive jurisdiction does not extend to money laundering activities conducted in its territory, particularly as the U.S. money laundering law is fully consistent with recommendations of the Financial Action Task Force (FATF) and other international standards.[161] The Tribunal can rule on both of these issues as matters of law. The "arbitrariness" claim relying on such arguments can be easily dismissed.

96. As for the second point, Claimants insinuate that, for political reasons, the United States encouraged Ukrainian authorities to nationalize PrivatBank and then sullied the reputations of Kolomoisky and Boholiubov and devalued the properties at issue through the issuance of press releases coincident with the civil forfeiture motions.[162] As discussed in Section III above, the allegations of fraud and embezzlement conducted by Kolomoisky and Boholiubov on PrivatBank, the resulting liquidity crisis at PrivatBank, and the necessity of nationalizing PrivatBank to protect account holders were all publicly acknowledged by Ukrainian authorities, their independent auditors, the International Monetary Fund, the World Bank, the G7 ambassadors, the European Bank for Reconstruction and Development, and PrivatBank itself, all long before the United States pursued the underlying civil forfeiture cases. Claimants have provided no actual evidence of political motivation.[163] Against this backdrop, Claimants manifestly have not made out a claim that the Department of Justice's decision to file civil forfeiture complaints and make public those cases was politically motivated.

[161] *See infra* ¶ 133.

[162] Claimants' Observations, Section II.E.

[163] *See supra* Section III.

2. Claimants Cannot Establish an Effective Means Claim Under Article II(7) Because They Have Not Tried Any Available Means in the U.S. Civil Forfeiture Cases

97. Claimants' newly articulated effective means claim under Article II(7) also is manifestly without legal merit because Claimants have not even attempted any of the available means of recourse available as part of the U.S. civil forfeiture cases.

98. The United States maintains that an effective means claim is subsumed within the denial of justice obligation.[164] But even assuming *arguendo* that an effective means claim can be brought independent of a denial of justice claim, a prerequisite of an effective means claim is that an investor actually tried the means available to them. Both cases cited by Claimants make this point. In *Chevron v. Ecuador (I)*, the tribunal stated that "[t]he Claimants must . . . have adequately utilized the means made available to them to assert claims and enforce rights in Ecuador in order to prove a breach of" effective means.[165] Further, "[a] high likelihood of success of these remedies is not required in order to expect a claimant to attempt them."[166] And – critically for this case – "the Tribunal must consider whether a given claimant has done its part by properly using the means placed at its disposal. A failure to use these means may preclude recovery if it prevents a proper

[164] The obligation to provide "effective means" for enforcement of rights historically has been considered a component of the customary international law protection against denial of justice. *See, e.g.*, ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 135 (Kraus Reprint Co. 1970) (1938) (RL-078) (writing that "every State is duly bound to possess a judicial organization guaranteeing that lawsuits will be impartially and competently adjudicated," and in particular, that "[t]he procedural apparatus which is set up must. . . provide the alien . . . with *effective means* for the pursuit of his rights"). Arbitral tribunals also have held that the obligation to provide "effective means" forms part of the obligation not to deny justice. *See, e.g.*, *Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador*, ICSID Case No. ARB/04/19, Award ¶ 391 (Aug. 18, 2008) (RL-079) (the effective means provision in the U.S.-Ecuador BIT "guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments. As such, it seeks to implement and form part of the more general guarantee against denial of justice").

[165] *Chevron Corp. and Texaco Petroleum Co. v. Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits ¶ 268 (Mar. 30, 2010) (RL-080).

[166] *Id.* ¶ 326.

assessment of the 'effectiveness' of the system for asserting claims and enforcing rights."[167] The *White Industries v. India* tribunal endorsed the *Chevron* tribunal's approach.[168]

99. Claimants' failure to make use of the remedies available to them in the underlying U.S. civil forfeiture cases "preclude[s] recovery" as it undeniably "prevents a proper assessment of the 'effectiveness'" of those court proceedings. Claimants agreed to and indeed sought their own stay of the civil forfeiture cases in the U.S. district court in order to pursue their claims under the U.S.-Ukraine BIT. Claimants sought these stays less than two months after the Department of Justice filed the civil forfeiture complaint initiating proceedings with respect to the Ohio property[169] and a mere six months after filing the Texas case.[170]

100. Even assuming that Claimants need not pursue any means where there is no "reasonable possibility of an effective remedy,"[171] Claimants manifestly fail to meet this standard. Claimants assert both that the U.S. courts automatically grant any stay request made by the Department of Justice, and that the duration of the pending Kentucky case (not before this Tribunal) somehow

[167] *Id.* ¶ 324.

[168] *See White Industries Australia Limited v. India*, Final Award ¶ 11.3.2-3 (Nov. 30, 2011) (RL-081) (adopting the *Chevron* tribunal's "comprehensive analysis."); *see also id.* ¶ 11.3.2 ("A claimant must, however, adequately utilise the means available to it to assert claims and enforce rights. It will be up to the host State to prove that local remedies are available and the claimant to show that those remedies were ineffective or futile").

[169] The complaint in the Ohio case was filed on December 30, 2020. *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Compl. Forfeiture In Rem (S.D. Fla. Dec. 30, 2020) (C-0011). The claimants moved the district court to stay the case pending arbitration on February 19, 2021. *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Claimants Optima Ventures LLC and Optima 55 Public Square, LLC's Mot. Compel Arb. at 21 (S.D. Fla. Feb. 19, 2021) (R-0077).

[170] The complaint in the Texas case was filed on August 6, 2020. *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) (C-0001). The claimants moved the district court to stay the case pending arbitration on February 5, 2021. *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants Mordechai Korf and Uriel Laber's Mot. Compel Arb. at 6 (S.D. Fla. Feb. 5, 2021) (R-0075).

[171] Claimants' Observations ¶ 201.

demonstrates that Claimants had no available remedy.[172] These assertions are plainly without foundation.

101. Both Claimants and the Department of Justice had the right to request a stay of a civil forfeiture case pending a criminal investigation or case.[173] But such stays are not automatic. In fact, the district court in the Kentucky case denied the Department of Justice's request for a stay pending the criminal investigation,[174] and Claimants themselves asserted that a stay pending a criminal investigation was far from automatic:

> If "the Government's arguments do nothing more than speculate about how civil discovery will adversely affect its criminal investigation," a stay is improper. *United States v. All Funds ($357,311.68) Contained in N. Trust Bank of Fla. Account No. 7240001868*, No. Civ. A. 3:04–1476, 2004 WL 1834589, at *2 (N.D. Tex. Aug. 10, 2004). "Importantly, the government's burden is not simply to show that civil discovery could adversely affect the criminal case, but to prove that civil discovery will adversely affect the criminal case." *United States v. $3,592.00 United States*

[172] *Id.* ¶¶ 52-57, 202.

[173] *Compare* 18 U.S.C. § 981(g)(2) (C-0019) (requiring a "related" criminal investigation or case in conjunction with a judicial determination that "continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case"), *with* 18 U.S.C. § 981(g)(1) (C-0019) (requiring a "related" criminal investigation or case in conjunction with a judicial determination that "civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case"). As detailed in the United States' Preliminary Objections, all parties to the Texas and Ohio cases sought a voluntary stay. U.S. Preliminary Objections ¶ 44. Claimants sought their stay expressly in order to pursue the present arbitration. *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants Optima Ventures LLC and Optima 7171, LLC's Mot. Compel Arb. at 21 (S.D. Fla. Feb. 5, 2021) (R-0074); *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Claimants Optima Ventures LLC and Optima 55 Public Square, LLC's Mot. Compel Arb. at 21 (S.D. Fla. Feb. 19, 2021) (R-0077). These requests for stay were granted. *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Omnibus Order ¶ 1 (S.D. Fla. May 13, 2021) (R-0080).

[174] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Omnibus Order at 2 (S.D. Fla. May 13, 2021) (R-0080). During the hearing leading up to the order, the judge had reasoned that based on Claimants' representations that "there is no civil discovery afoot in [the Kentucky case], and all that they are anticipating at the present time is answering the special interrogatories and a hearing on them, on the motion to dismiss." *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Mot. Hr'g Tr. at 25 (S.D. Fla. May 10, 2021) (R-0079).

> *Currency*, 2016 WL 5402703, at *1 (W.D.N.Y. Sept. 28, 2016) (emphasis in original).[175]

The Department of Justice's detailed advocacy for a stay of all three forfeiture cases leaves no doubt that it was aware of its burden to convince the court of the need for a stay.[176]

102. Claimants also point out that the Kentucky proceedings have been pending for two years and nine months but have yet to go to trial.[177] Part of that period is attributable to Claimants' successful efforts to have the case dismissed on a technicality, with leave to refile, thus again demonstrating the effectiveness of the U.S. court proceedings and the U.S. courts' careful consideration of Claimants' arguments. However, even where briefing in the court proceeding in *White Industries* took three and a half years before a stay was issued, the tribunal held that "it cannot be said that [the host State] failed to provide [the claimant] with effective means to enforce its rights simply because it took this long to get to this point."[178] Claimants' own actions, moreover – repeated requests for extensions on submissions – account for approximately six months of any

[175] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Claimants Optima Ventures, LLC, Optima 7171, LLC, Optima 55 Public Square LLC, Mordechai Korf and Uriel Laber's Response in Opposition to United States' Motion for Stay at 4 (S.D. Fla. Mar. 2, 2021) (R-0115). While the statute instructs that the court "shall" stay the civil forfeiture proceeding, 18 U.S.C. § 981(g)(1)-(2) (C-0019), "the stay of a civil forfeiture case is mandatory" if, *and only if*, "the Government shows that proceeding with the civil case would adversely affect a criminal investigation or trial." CASSELLA, ASSET FORFEITURE IN THE UNITED STATES 434 (R-0003) (citing 18 U.S.C. § 981(g)(1)). While courts differ "on the degree of specificity required for the Government to show that the civil forfeiture case will have an adverse effect on the related criminal case. . . . Whatever the degree of specificity required, the courts agree . . . . that granting a stay in accordance with the statute does not violate the claimant's right to due process, and that the prejudice to the claimant by the stay is not a reason to deny it, but the court may nevertheless limit the length of the stay and force the Government to return to court to justify its extension." *Id*. at 436-37.

[176] *See United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, United States' Motion to Stay Civil Forfeiture Actions Pending Resolution of Related Criminal Action at 4, 8-9 (S.D. Fla. Feb. 19, 2021) (R-0045) (explaining, *e.g.*, that "the filing of special interrogatories, substantive filings, and civil discovery, would have an adverse effect on the United States' ability to conduct its related criminal investigation"); CASSELLA, ASSET FORFEITURE IN THE UNITED STATES 437-38 (R-0003) (citations omitted).

[177] Claimants' Observations ¶¶ 56, 202.

[178] *White Industries Australia Limited*, Final Award ¶ 11.4.7 (RL-081).

alleged delay in the Kentucky case to date.[179] The *Chevron* tribunal's caution applies equally here: "[s]hould the Claimants be found not to have exhausted available local remedies for delay, their action may be taken as a contributing cause of delay" and an effective means claim for undue delay should be rejected on that basis.[180]

103. Claimants' second argument that U.S. courts' deference towards the Executive Branch's assessments of comity creates a "classic category of case in which local remedies are ineffective" is similarly baseless.[181] The unavailability of one particular line of argument does not mean that Claimants lacked an effective remedy.[182] The U.S. civil forfeiture cases give Claimants ample

[179] *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Claimants' Unopposed Revised Motion for Extension of Time to File Responsive Motions at 2 (S.D. Fla. Oct. 26, 2020) (R-0116) (requesting a 25-day extension from November 16 to 20, 2020); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Claimants' Unopposed Motion for Extension of Time to File Responsive Motions or Answers at 2 (S.D. Fla. Nov. 19, 2020) (R-0117) (requesting a 28-day extension from November 20 to December 18, 2020); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Claimants' Unopposed Motion for Extension of Time to File Responsive Motions at 2 (S.D. Fla. Dec. 15, 2020) (R-0118) (requesting a 28-day extension from December 18, 2020 to January 15, 2021); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Claimants' Unopposed Motion for Extension of Time to File Responsive Motions at 2 (S.D. Fla. Jan. 14, 2021) (R-0119) (requesting a 21-day extension from January 15 to February 5, 2021); *United States v. All Right to and Interest in PNC Corporate Plaza Holdings LLC*, Case No. 1:20-cv-23279, Claimants' Motion for Extension of Time to File Responsive Motions at 2 (S.D. Fla. Feb. 5, 2021) (R-0120) (requesting a 14-day extension from February 5 to 19, 2021); *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 Time to File Objections and Responses to Report and Recommendations at 2 (S.D. Fla. Oct. 7, 2022) (R-0121) (requesting a 35-day extension from October 12 to November 16, 2022); *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 Time to File a Response to Plaintiff's Motion for Leave to Amend Verified Complaint at 2 (S.D. Fla. Nov. 3, 2022) (R-0122) (requesting a 14-day extension from November 9 to 23, 2022); *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 Time to File Responses to Objections to Report and Recommendations at 1-2 (S.D. Fla. Nov. 14, 2022) (R-0123) (requesting a 5-day extension from November 16 to 21, 2022); *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 Time to Respond to First Amended Complaint at 2 (S.D. Fla. Feb. 2, 2023) (R-0124) (requesting a 7-day extension from February 3 to 10, 2023).

[180] *Chevron Corp.*, Partial Award on the Merits ¶ 327 (RL-080); *see also id.* ("[T]he litigants' behavior in domestic courts remains part of the circumstances that the Tribunal must consider in determining if the delays experienced are undue.").

[181] Claimants' Observations ¶ 203 (quoting Dugard, J., Third Report on Diplomatic Protection, 7 March 2002, A/CN.4/523, at ¶¶ 38, 42-43 (CL- 0099)).

[182] *See* Claimants' Observations ¶ 203; *see also Chevron Corp.*, Partial Award on the Merits ¶ 326 (RL-080) (although the "strict exhaustion of local remedies is not necessary, … a claimant is required to make use of all

process to argue what could grant them full relief – that the Department of Justice has not proved that their property was purchased with proceeds of crime. But they have chosen not to make that argument and have instead come to this Tribunal as a parallel court of first instance. That was Claimants' choice, and one that does not indicate the absence of an effective remedy.

3. The Challenged Non-Final Measures Cannot Constitute an Expropriation as a Matter of Law

104. Turning to Article III, the United States explained in its Preliminary Objections that, even assuming judicial measures could be challenged outside a denial of justice, Claimants' expropriation claim would still fail as a matter of law because the challenged acts have not resulted in a permanent deprivation of Claimants' investments.[183] This is the threshold that Claimants must meet,[184] and they cannot do so. To the extent Claimants' expropriation claim focuses on the Department of Justice's decision to initiate and publicize civil forfeiture proceedings, moreover, that indirect expropriation claim fails for the additional reason that those acts by themselves did not substantially deprive Claimants of the value of their investment.

a. The Challenged Non-Final Measures Cannot Constitute an Expropriation as a Matter of Law Because They Have Not Resulted in a Permanent Deprivation of Claimants' Investments

105. None of the potential measures at issue are permanent or irreversible. The pre-trial court orders are inherently temporary, intended to preserve the value of the properties at issue while the U.S. court proceedings are pending. If Claimants prevail before the U.S. courts, the funds will be returned to them with interest, plus attorney fees and litigation costs. These types of measures are,

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remedies that are available and might have rectified the wrong complained of. Moreover, a high likelihood of success of these remedies is not required in order to expect a claimant to attempt them.").

[183] U.S. Preliminary Objections ¶ 76.

[184] *Id.* ¶ 76 & n.151 (citing cases finding that expropriation requires a permanent deprivation of the relevant investment).

as a matter of law, non-expropriatory because they are not permanent or irreversible, and Claimants' claims with respect to these measures must therefore fail.

106. In an effort to evade the dismissal of their claims, Claimants make four wholly unpersuasive arguments. Claimants' first argument is that creeping expropriations are subject to a lower threshold of permanence than direct expropriations.[185] Claimants provide no support for this assertion, which is based on a fundamental misapprehension of this type of expropriation (indeed, it is unclear whether the facts as alleged by Claimants could be characterized as a "creeping expropriation" in any event). While a creeping expropriation involves acts that may not be deemed expropriatory standing alone, these acts must together result in a permanent deprivation in order to constitute a creeping expropriation, as the arbitral decisions cited by Claimants underscore. The standard that applies is no different than in the case of a direct expropriation or a non-creeping indirect expropriation – it is simply met through a series of acts rather than a single act.

107. This is clear from Claimants' primary source on creeping expropriation, the award in *Técnicas Medioambientales Tecmed, S.A. v. Mexico* ("*Tecmed*"). There, the tribunal explained:

> [I]t is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are *irreversible and permanent* and if the assets or rights subject to such measure have been affected in such a way that "…any form of exploitation thereof…" has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal

[185] Claimants' Observations ¶¶ 207-208.

> ownership over the assets in question is not affected, and *so long as the deprivation is not temporary*.[186]

108. The *Tecmed* tribunal likewise emphasized the permanence of the deprivation resulting from Mexico's actions in its application of the law to the facts of the case:

> The Resolution meets the characteristics mentioned above: undoubtedly it has provided for the non-renewal of the Permit and the closing of the Landfill *permanently and irrevocably*, not only due to the imperative, affirmative and *irrevocable* terms under which the INE's decision included in the Resolution is formulated, . . . but also because after the non-renewal of the Permit, the Mexican regulations issued by INE become fully applicable. . . . Since it has been proved in this case that one of the essential causes for which the renewal of the Permit was denied was its proximity and the community pressure related thereto, there is no doubt that in the future the Landfill may not be used for the activity for which it has been used in the past and that Cytrar's economic and commercial operations in the Landfill after such denial have been *fully and irrevocably* destroyed, just as the benefits and profits expected or projected by the Claimant as a result of the operation of the Landfill.[187]

109. Claimants also attempt to rely on awards issued by the Iran-United States Claims Tribunal (IUSCT), but these awards do not imply a lower bar for creeping expropriations. Again, Claimants' own sources are against them. For example, Claimants cite an article by Sebastian Lopez Escarcena, but his characterization of the IUSCT's expropriation case law undermines Claimants' position:

> Most of the cases brought before the Iran-U.S. CT involved claims of creeping or constructive expropriations. This situation made the determination of the date of the taking difficult. The tribunal's solution consisted of establishing, on a case-by-case basis, the

[186] *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award ¶ 116 (May 29, 2003) (emphasis added) (RL-082).

[187] *Id.* ¶ 117.

> moment at which the interference had ripened into *a more or less irreversible deprivation of property*.[188]

110. Claimants are therefore wrong that a creeping expropriation, if that is indeed what they are alleging, need not be permanent.

111. Claimants' second argument is based on a few arbitral awards that have found expropriations based on acts that have eventually been undone. According to Claimants, these awards imply that a deprivation need not be permanent to be expropriatory. Claimants err, however, in focusing on whether the measure itself was permanent, whereas the proper focus must be on whether the deprivation caused by the measure was permanent.

112. Beginning with *Middle East Cement v. Egypt*, it is important to note at the outset that there was "no dispute between the Parties that, in principle, a taking did take place."[189] The tribunal's analysis of whether an expropriation had occurred was, accordingly, dicta (the focus of the tribunal's analysis was instead on the amount of compensation due to the claimant).[190] In any event, Claimants are simply wrong that the import ban at issue resulted in a deprivation lasting only four months.[191] The four-month period that Claimants reference was the amount of time that, according to Egypt, Middle East Cement's importation license had left to run when the ban came into effect in May 1989.[192] However, (1) the tribunal rejected Egypt's interpretation of the license, concluding that the license had closer to four *years* of validity remaining;[193] and (2) the tribunal

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[188] 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, 206 (2013) (emphasis added) (CL-0105).

[189] *Middle East Cement Shipping and Handling Co. v. Egypt*, ICSID Case No. ARB/99/6, Award ¶ 107 (Apr. 12, 2002) (RL-083).

[190] *See, e.g., id.* ¶¶ 107-29.

[191] Claimants' Observations ¶ 209.

[192] *Middle East Cement,* Award ¶ 110 (RL-083).

[193] *Id.* ¶¶ 111, 121.

determined that the import ban, no matter how long it lasted and whatever amount of time remained on the claimant's license, prevented the claimant from making any further use of the license – it was, in other words, a permanent deprivation of the claimant's rights under the license.[194]

113. *Wena Hotels v. Egypt* is similarly inapposite. In that case, the Egyptian Hotels Company (EHC) – an entity under the control of the Egyptian government – terminated the claimant's leases with respect to two hotels and then forcibly seized them.[195] While the claimant was able to regain control of the hotels after "approximately a year,"[196] the deprivation purported to be permanent at the outset (again, EHC terminated the claimant's leases and indicated that it would manage the hotels itself).[197] Moreover, "neither hotel was returned to Wena in the same operating condition that it had been in before the seizures."[198] Rather, "both hotels had been vandalized" and "stripped of much of their furniture and fixtures."[199] In addition, "neither hotel had a permanent operating license"[200] when it was returned and, in any event, Wena was ultimately evicted from both hotels.[201] The seizure of the claimants' property in *Wena Hotels* – which was intended to be permanent and in fact resulted in the claimant being permanently deprived of two hotels in

[194] *Id.* ¶ 108 ("[T]he License granted Claimant the right to import cement and the Decree No. 195 prohibits such import for Grey Portland Cement."); *see also id.* ¶¶ 168-69 (concluding that the claimant could not have used its import license for types of cement not banned by Egypt and that it was reasonable for the claimant not to resume its activities during the short period between the lifting of the import ban in 1992 and the expiration of the claimant's license in January 1993).

[195] *Wena Hotels Ltd v. Egypt*, ICSID Case No. ARB/98/4, Award ¶¶ 28-30, 33-50 (Dec. 8, 2000) (RL-084).

[196] *Id.* ¶ 94; *see also id.* ¶ 53 (the Nile Hotel remained in EHC's control for nearly 11 months and the Luxor Hotel remained in EHC's control for nearly 13 months).

[197] *Id.* ¶¶ 28, 30.

[198] *Id.* ¶ 92.

[199] *Id.* ¶¶ 92, 99.

[200] *Id.* ¶ 92.

[201] *Id.* ¶¶ 61-62 (in 1995 for the Nile Hotel and in 1997 for the Luxor Hotel).

operating condition – is thus far removed from the temporary restraint of Claimants' property at issue here, which consist of funds in an interest-bearing account.

114. Finally, in *Olin Holdings Ltd. v. Libya*, Libya directly expropriated property on which the claimant had constructed a factory via two expropriation orders issued in late 2006. The orders, which also applied to substantial property in the surrounding area, indicated that Libya had taken the property "for the public interest" and "for the execution of the urban development in the area located to the west and east of the airport road in Tripoli."[202] Although the expropriation orders were eventually cancelled by the Libyan courts and Libya ceased its efforts to evict the claimant in June 2011, the tribunal concluded that the effect on the claimant's investment was permanent because (1) Libya issued the orders when the claimant's business "had just started its operations" and (2) the orders deprived the claimant of its first-mover advantage and allowed it to be "overtaken by its competitors on the Libyan market."[203]

115. None of these three awards therefore undercuts the principle that an expropriation must result in a permanent deprivation of property. More fundamentally, none of these awards involved either the mere announcement of actions that the respondent State intended to pursue in its domestic courts or the inherently temporary restraint of property while judicial proceedings were pending. The fact that the awards found expropriations in wholly different circumstances has little relevance to this case.

116. Claimants' third argument is that the arbitral awards that the United States put forward in its Preliminary Objections to establish that Claimants must show a permanent deprivation do not, in fact, support this standard. Claimants contend that the discussion of the permanence threshold

[202] *Olin Holdings Ltd. v. Libya*, ICC Case No. 20355/MCP, Final Award ¶¶ 93-95 (May 25, 2018) (RL-085).

[203] *Id.* ¶¶ 165-66.

in *Burlington Resources, Inc. v. Ecuador* is dicta because "there was no issue on this point, and the deprivation at issue (the cancellation of contracts on two hydrocarbon drilling blocks) was undisputedly permanent."[204] Claimants are wrong. The *Burlington Resources* award in fact contains a detailed discussion of when the deprivation caused by Ecuador's conduct became permanent:

> It is nevertheless true that *Ecuador's occupation of the Blocks was not a permanent measure from the outset*. Indeed, in the weeks following the occupation of the Blocks, Ecuador continued to communicate with the Consortium with a view to handing back possession of the Blocks on condition that the Consortium were to resume operations. At that time, there still appeared to be – in the words of the tribunal in *Sedco v. Iran* – a "reasonable prospect" that the investor could "return [to] control" its investment. *As long as there was such prospect, Ecuador's occupation could not be deemed to be a permanent measure.*
>
> . . .
>
> [T]he Tribunal deems that, by the end of the 10-day period mentioned in Minister Pinto's letter of 19 August 2009, the possibility that the Consortium could resume operations, and hence that Burlington could regain control of the Blocks, had vanished altogether. Accordingly, the Tribunal considers that *Ecuador's takeover of the Blocks became a permanent measure on 30 August 2009*. As of this date, Ecuador deprived Burlington of the effective use and control of Blocks 7 and 21 on a *permanent basis, and thus expropriated its investment*.[205]

117. As this discussion shows, the *Burlington Resources* tribunal carefully considered the nature of Ecuador's actions and concluded that an expropriation had occurred only when the deprivation became permanent. Similarly, the tribunal in *I.P. Busta & J.P. Busta v. Czech Republic* stated:

> The Tribunal further notes that, for an expropriation to occur, in the form of direct or creeping expropriation, there must be *a permanent*

[204] Claimants' Observations ¶ 214.

[205] *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability ¶¶ 532, 535 (Dec. 14, 2012) (RL-033) (emphases added).

> *and irreversible deprivation*. The Tribunal refers in this respect to consistent arbitral case law which establishes that an expropriation takes place where an investor has been *permanently deprived* of the value of its investment in whole or in significant part.[206]

118. Claimants' fourth argument is that a temporary deprivation may still be expropriatory if it has "permanent effects."[207] This is a distinction without a difference. Claimants provide a single example of an award addressing this scenario, *Bahgat v. Egypt*, which involved measures that made it impossible for the claimant's companies to continue functioning.[208] Although the measures were eventually revoked, the damage to the claimant's investment was irreversible: "the Tribunal holds that the measures taken by Respondent against Claimant and his investment as outlined above very significantly and *irreversibly* devalued his investment."[209] In other words, the measures resulted in a permanent deprivation. And this is, indeed, the standard that the *Bahgat* tribunal stated that it would apply, explaining at the outset of its analysis that an expropriation requires a measure that "deprives the investor of its investment, the *deprivation is permanent*, and the deprivation finds no justification under the police powers doctrine."[210]

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[206] *I.P. Busta & J.P. Busta v. Czech Republic*, SCC Arbitration Case V 2015/014, Final Award ¶ 389 (Mar. 10, 2017) (RL-036).

[207] Claimants' Observations ¶ 215.

[208] *Bahgat v. Egypt*, PCA Case No. 2012-07, Final Award ¶ 227 (Dec. 23, 2019) (CL-0115) ("[T]he arrest of Claimant on 5 February 2000 deprived ADEMCO and AISCO of their chief executive officer. The removal of Claimant's and the Companies' documents from the offices in February 2000 deprived the Companies of their ability to manage their business. The Freezing Order and its confirmation resulted in the discontinuation of the paying of salaries to the employees. On the same days followed the closure of the offices of ADEMCO and AISCO and the removal of the officers from the Project site. All these measures *de facto* brought an end to all commercial activities of ADEMCO and AISCO.").

[209] *Id.* ¶ 229 (emphasis added).

[210] *Id.* ¶ 221 (emphasis added); *see also id.* ¶ 225 ("In addition as noted in *Burlington*, the deprivation must be permanent and must not be justified by the police powers doctrine.") (quoting *Quiborax SA Non Metallic Minerals SA and Allan Fosk Kaplún v. Bolivia*, ICSID Case No. ARB/06/2, Award ¶ 238 (Sep. 16, 2015)). *Middle East Cement*, *Wena*, and *Olin* can be seen through a similar lens as *Bahgat*, in that the challenged measures in these cases had permanent and profound effects on the investments at issue, even though they were ultimately revoked. *See supra* ¶¶ 112-14.

119. The one academic article that Claimants reference on this point is in accord, although that is not obvious from Claimants' Observations, where Claimants provide a misleadingly truncated quote from the article, omitting key text. Whereas Claimants rely on the article for the proposition that "it is not a matter of how long the measure itself lasts but of how long the adverse effects endure on the investment,"[211] they have excised – without an ellipsis or any other indication of an editorial change – the following final phrase: "in other words, their irreversible nature."[212] As the omitted text demonstrates, a deprivation that is reversible or otherwise impermanent is not expropriatory, consistent with the U.S. position.

120. Claimants' arguments are therefore unavailing. Claimants must adequately allege that they have been permanently deprived of their property. They have not done so. The measures that the United States has taken are intended to preserve the status quo while proceedings are pending. They are temporary by nature and, accordingly, not expropriatory. Claimants' expropriation claims manifestly lack legal merit and must therefore be rejected.

b. The Department of Justice's Actions Did Not Substantially Deprive Claimants of the Economic Value of Their Properties

121. To the extent Claimants have advanced an indirect expropriation claim based solely on the Department of Justice's actions, that claim must fail for the additional reason that Claimants have not plausibly alleged that these actions deprived them of all or nearly all of the value of their alleged investments, nor could they.

[211] Claimants' Observations ¶ 216.

[212] Suzy H. Nikièma, *Best Practices: Indirect Expropriation*, IISD Best Practices Series at 14 (Mar. 2012) (emphasis added) (CL-0116).

122. For an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[213] Authorities referenced by both parties confirm this high threshold. For example, the *Busta* tribunal explained that expropriation requires "substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (i.e., approaching total impairment)."[214] Claimants' own sources are in accord. Among others, the *Tecmed* award states that "it must be first determined if the Claimant . . . was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist."[215]

123. Claimants cannot establish that the Department of Justice's mere filing and publication of the civil forfeiture complaints deprived them of all or nearly all of the value of their alleged investments for three reasons.

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[213] *Glamis Gold Ltd. v. United States*, UNCITRAL, Award ¶ 357 (June 8, 2009) (RL-039) (internal quotation marks and citation omitted). *See also Grand River Enterprises Six Nations, Ltd., et al. v. United States*, UNCITRAL, Award ¶ 147 (Jan. 12, 2011) (RL-086) (noting "the conception of expropriation applied in numerous cases – that expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests").

[214] *I.P. Busta & J.P. Busta*, Final Award ¶ 389 (RL-036) (internal quotation marks and citation omitted). *See also Anglia Auto Accessories Limited v. Czech Republic*, SCC Arbitration Case No. 2014/181, Final Award ¶ 292 (Mar. 10, 2017) (RL-035) (same); *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability ¶ 191 (Oct. 3, 2006) (RL-034) ("In many arbitral decisions, the compensation has been denied when [the challenged measure] has not affected all or almost all the investment's economic value.").

[215] *Tecmed*, Award ¶ 115 (RL-082). *See also* 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."); *Bahgat*, Final Award ¶ 221 (CL-0115) ("For an indirect expropriation to exist, it is generally accepted that the act or acts of the public authority concerned must have the effect of substantially depriving the investor of the economic value of its investment.").

124. *First*, allegations and lawsuits regarding the fraud that Kolomoisky and Boholiubov orchestrated at PrivatBank and their scheme to launder the proceeds of that fraud through an international network of corporate entities had for years been in the public domain and broadly publicized in the media when the Department of Justice initiated the civil forfeiture cases.[216] There had also been reporting on a pending FBI criminal investigation into Kolomoisky, Boholiubov, and their associates.[217] As noted above, in urging the Delaware court to authorize the sale of the Ohio property, Claimants had explained *before* the Department of Justice filed that civil forfeiture case:

> Potential lenders and buyers are not interested in getting involved with properties that have any litigation risks and that they will not consider refinancing or buying these valuable properties . . . . Without the ability to sell or refinance these loans, [the relevant asset is] now in foreclosure and will soon be sold at auction.[218]

125. Accordingly, any impact of the allegations against Claimants – and the facts demonstrate there was none – would have materialized *prior to* the Department of Justice's actions, when the allegations were initially made by third parties.

126. *Second*, by the time the Department of Justice initiated its cases against the Texas and Ohio properties, those claimed investments were already subject to a worldwide freezing order issued by the High Court of Justice in London in December 2017.[219] Again, at a minimum, this means that any loss in value attributable to Claimants' inability to sell the properties without court approval would have been incurred prior to the steps taken by the Department.

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[216] *See supra* Section III.

[217] *Id.*

[218] *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Defendants Optima 777, LLC and Optima 55 Public Square, LLC's Motion to Approve Sale of Distressed Properties ¶ 1 (Dec. 24, 2020) (R-0095).

[219] *See supra* Section III.

127. *Third*, Claimants' alleged investments were, in fact, sold for substantial sums *after* the Department of Justice's allegedly wrongful conduct – sums that equal those claimed by Claimants in this arbitration. The Ohio property, as explained above,[220] was already under contract to be sold by time the forfeiture case was commenced.[221] The gross sale price of $17 million achieved after the initiation of the Ohio case equaled the amount in the contract entered into prior to the commencement of that case.[222] Further, the net proceeds deposited into escrow of $587,365[223] equal (down to the dollar) the only specified amount of "direct damages" claimed by Claimants in their Request for Arbitration with respect to the Ohio property.[224] Similarly, the Texas property, which was vacant at the time the forfeiture case was commenced, sold, at Claimants' urging, in what Claimants described as "the proposed sale . . . to a third party, unaffiliated with any Defendant [in the Delaware case], and . . . negotiated at arms-length."[225] The sale price of $23.25 million,[226] Claimants insisted, "represent[ed] the fair market value of the property."[227] The only specified amount of "direct damages" that Claimants claim in this arbitration according to their Request for Arbitration, incidentally, amount to $23.25 million.[228] This fatally undercuts the suggestion that

[220] *Id.*

[221] Email Chain, Jan. 8, 2021 at 4 (C-0010) (where counsel for Claimants relayed to the Department of Justice that "[t]oday [December 22, 2020], Optima 55 Public Square LLC executed an agreement of purchase and sale for the 55 Public Square building in Cleveland, Ohio").

[222] Noting in a December 24, 2020 filing, *i.e.*, six days before the Ohio civil forfeiture case was filed, that "Optima 55 received an offer to purchase 55 Public Square for $17 million." *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Defendants Optima 777, LLC and Optima 55 Public Square, LLC's Motion to Approve Sale of Distressed Properties ¶ 12 (Dec. 24, 2020) (R-0095).

[223] Claimants' Observations ¶ 42.

[224] *Optima 55 Public Square LLC*, Req. Arb. ¶ 81.

[225] *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Stipulation and [Proposed] Order Regarding Sale of 7171 Forest Lane Property at 2-3 (Oct. 5, 2021) (R-0096).

[226] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Order Granting Unopposed Mot. for Interlocutory Sale at 2 (S.D. Fla. Sept. 22, 2021) (R-0083).

[227] *Id.* at 3.

[228] *Optima 7171 LLC*, Req. Arb. ¶ 91.

the Texas and Ohio properties had little or no value as a result of the Department of Justice's conduct.

128. For all these reasons, the Department of Justice's actions did not, and could not have, destroyed all or nearly all the value of Claimants' alleged investments. Claimants' expropriation claim based on these actions manifestly lacks legal merit and must therefore be dismissed.

D. **Merits Objection 2:** Claimants Identify No Grounds for a Claim Based on the United States' Purported Overreach of Its Prescriptive Jurisdiction

129. Claimants' Observations shed no further light on how the United States' purportedly "unreasonable" "overreach" of the limits on its prescriptive jurisdiction violates the Treaty.[229] As a preliminary matter, Claimants continue to confuse the concept of a State's jurisdiction to prescribe, which concerns its authority to regulate and typically involves legislative measures,[230] with its jurisdiction to adjudicate and its jurisdiction to enforce.[231] Indeed, Claimants "reiterate that it is the actions of [the Department of Justice] that are primarily at issue in this arbitration,"[232] but those actions only relate to the jurisdiction to enforce. Claimants likewise focus on purportedly Executive Branch measures that "seek[] to forfeit all of Claimants' investments based on claims that loans held to be lawful in Ukraine's courts are unlawful under Ukrainian law."[233] Rather than challenging U.S. legislative action, Claimants emphasize that "[t]he United States' exercise of

[229] Claimants' Observations ¶¶ 218-232.

[230] Although other branches of government may also exercise prescriptive jurisdiction, Claimants do not allege conduct implicating judicial or Executive Branch assertions of such jurisdiction. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, § 401(c) (2018) (RL-087) ("Legislative bodies exercise prescriptive jurisdiction when they enact statutes, but the executive branch also exercises prescriptive jurisdiction when it adopts generally applicable orders or regulations, as do courts when they make generally applicable common law.") Here, Claimants do not assert that the cases brought against them in U.S. district court have generated new common law or that the Executive Branch has promulgated orders that exceed the limits of the United States' jurisdiction to prescribe. As such, Claimants have put only matters arising from the United States' jurisdiction to adjudicate and enforce at issue in this arbitration.

[231] *See, e.g., id.* § 407(a).

[232] Claimants' Observations ¶ 172.

[233] *Id.* ¶ 226.

prescriptive jurisdiction *in this circumstance* is . . . contrary to the competing rights of Ukraine."[234] Put simply, prescriptive jurisdiction, a concept that applies to legislative action, is not at issue in this case as Claimants have presented it. All claims under Article II related to prescriptive jurisdiction can be summarily dismissed on that basis.

130. Claimants also fail to show how a purportedly excessive exercise of prescriptive jurisdiction itself would give rise to liability under the Treaty. Claimants suggest that a State's exercise of its prescriptive jurisdiction must be "reasonable" under the Treaty's fair and equitable treatment standard but point to no language in the Treaty in support of this theory.[235] Despite arguing that the United States "is engaging in a quintessential overreach in derogation of the limitations placed on [its] jurisdiction to prescribe under customary international law,"[236] Claimants identify no State practice or *opinio juris* supporting such customary international law limitations, or in support of the idea that an "overreach" of those unspecified limitations violates the specific terms of the Treaty (and to no investor-State arbitral decisions addressing this issue at all).[237] Thus, the United States' preliminary objection regarding prescriptive jurisdiction stands.

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[234] *Optima 7171 LLC*, Req. Arb. ¶ 27 (emphasis added); *Optima 55 Public Square LLC*, Req. Arb. ¶ 33 (same).

[235] Claimant's Observations ¶ 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.").

[236] *Id.* ¶ 226.

[237] Even if the Treaty's fair and equitable treatment standard were independent of the customary international law minimum standard of treatment, *qua non*, Claimants have not explained why the provision would include a "reasonableness" limitation on a state's exercise of its prescriptive jurisdiction. The Treaty itself contains no requirement of "reasonable" conduct. And the two cases Claimants cite in support of a "reasonableness" requirement inherent in the fair and equitable treatment clause, *Saluka v. Czech Republic* and *National Grid PLC v. Argentina*, have no bearing on this case. Both cases arose under non-U.S. treaties (the Czech Republic-Netherlands BIT and the United Kingdom-Argentina BIT, respectively) and involved both an autonomous fair and equitable treatment clause and a non-impairment clause expressly prohibiting the use of "unreasonable and discriminatory measures," which does not exist in the U.S.-Ukraine BIT. *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award (Mar. 17, 2006) ¶¶ 280, 309 (RL-088); *National Grid PLC v. Argentina*, Award ¶¶ 169-170 (Nov. 3, 2008) (CL-0122).

131. As noted above, the United States maintains that Article II(3)(a) refers to the minimum standard of treatment under customary international law,[238] and the minimum standard of treatment does not include a requirement of "reasonableness." But even accepting Claimants' arguments regarding "reasonableness," Claimants have not shown how the Department of Justice's enforcement of U.S. laws on international money laundering was an unreasonable exercise of prescriptive jurisdiction. Drawing on U.S. domestic law precedent, Claimants argue that it 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."[239] Yet the U.S. (not international) case they cite for this point addresses a different concept: prescriptive *comity*, which is addressed above.[240] Claimants do not explain how a principle that U.S. courts use to assess whether an ambiguous U.S. law may be applied to foreign conduct is in any way an *international law* limitation on a State's ability to address international money laundering.

132. In any event, Claimants have not explained how the United States' efforts to combat money laundering at issue in this arbitration are "unreasonable." Claimants assert that it was not "reasonable to apply American laws to foreign conduct," but here the United States has done nothing of the sort. While the money laundering scheme originated outside the United States, Claimants' properties purchased with the laundered money, and therefore subject to U.S. civil forfeiture laws, were located in the United States. The embezzled money used to purchase these properties was brought under U.S. jurisdiction. Two of the four individuals involved in the purchase of the properties, Korf and Laber, were U.S. nationals, and Optima Ventures LLC, owned

[238] *See supra* Section IV.C.1.

[239] Claimants' Observations ¶ 223 (internal quotation marks and citation omitted); *Optima 7171 LLC*, Req. Arb. ¶ 43 (citing *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 156 (2004)); *Optima 55 Public Square LLC*, Req. Arb. ¶ 49 (same).

[240] *See supra* Section IV.B.1.

in part and managed by Korf and Laber, was registered in the United States. Claimants have put forth no theory of international law that limits the United States' authority to regulate these entities and their money laundering activities in the United States.

133. It is worth recognizing, as a final point, the serious ramifications of Claimants' argument here. As the United States noted in its Preliminary Objections, civil forfeiture is a crucial tool in combatting money laundering, thereby depriving individuals engaged in criminal activity of the proceeds and benefits of their crimes.[241] Money laundering poses a threat to financial sectors, and can have serious, real-life adverse impacts on law and order, the environment, and human health and safety.[242] Efforts to counter international money laundering initiatives are not only encouraged but *required* under the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[243] the UN Convention against Transnational Crime,[244] and the UN Convention Against Corruption.[245] There are numerous international efforts to combat international money laundering, including those led by the United Nations' Office on Drugs and

[241] U.S. Preliminary Objections ¶¶ 2, 5, 23-27; *Tax Abuse, Money Laundering and Corruption Plague Global Finance,* UNITED NATIONS, DEP'T ECO. & SOC. AFFAIRS (Sept. 24, 2020) (R-0026) (citing United Nations High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda, *FACTI Panel Interim Report* (Sept. 2020)).

[242] U.S. Preliminary Objections ¶ 5; *The IMF and the Fight Against Money Laundering and the Financing of Terrorism,* INT'L MONETARY FUND (July 14, 2021) (R-0027).

[243] U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 3(1)(b)(i), *opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 95 (entered into force Nov. 11, 1990) (RL-001) (requiring States to adopt measures to criminalize "[t]he conversion or transfer of property, knowing such property is derived from any offense" specified in Article 3(1)(a)); *id.* art. 5(1) (requiring parties to adopt measures enabling the confiscation of proceeds "derived from offences" in Article 3(1), or "property the value of which corresponds to that of such proceeds").

[244] U.N. Convention Against Transnational Organized Crime, art. 6(1), *opened for signature* Dec. 12, 2000, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003) ("Palermo Convention") (RL-002) (requiring States to adopt measures to criminalize various forms of money laundering); *id.* art. 12(1) (requiring States to adopt measures necessary to enable the confiscation of proceeds of crime derived from offenses covered by the Convention or property equivalent in value, and "[p]roperty, equipment or other instrumentalities used in or destined for use in offences covered by this Convention").

[245] U.N. Convention Against Corruption, art. 23(1), *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) (RL-003) (mirroring art. 6(1) of the Palermo Convention); *id.* art. 31(1) (mirroring art. 12(1) of the Palermo Convention).

Crime's Global Programme Against Money Laundering.[246] These programs endorse the sorts of efforts undertaken by the United States in this case, including the temporary restraint of property alleged to have been the proceeds of crime. The FATF, of which the United States is a member, expressly urges parties to "enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of *bona fide* third parties: . . . (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences."[247] The FATF recommends in particular:

> Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.[248]

134. FATF's recommendation is well grounded. International efforts regarding money laundering focus not only on the considerable crimes alleged to have been committed by Kolomoisky and Boholiubov, but also on international terrorism, drug smuggling, and other crimes whose detrimental impacts cross borders. If Claimants are correct that a State cannot disrupt money laundering associated with criminal activities until the underlying crimes are charged or tried, international efforts to combat international money laundering, including the financing of terrorism, would be irreparably disrupted. Such a paradigm would benefit only those who seek to commit crimes and launder the proceeds through complex international transactions.

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[246] *See, e.g.*, U.N. OFF. DRUGS & CRIME, *Global Programme Against Money Laundering* (R-0125).

[247] FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS at 12 (2012, updated Oct. 2021) (R-0028).

[248] *Id.*

135. Because Claimants have not alleged facts indicating that the United States has exceeded the limits of its jurisdiction to prescribe, regardless of whether such a claim could be supported under the Treaty, the Tribunal should dismiss Claimants' claims regarding prescriptive jurisdiction as manifestly without legal merit.

V. Conclusion

136. For the reasons discussed above, the Claimants' claims must be dismissed in their entirety as manifestly lacking legal merit.

Respectfully submitted,

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