SCHEDULED FOR ORAL ARGUMENT ON NOVEMBER 28, 2018

United States Court of Appeals for the District of Columbia Circuit

No. 18-7047

ANATOLIE STATI; GABRIEL STATI; ASCOM GROUP S.A., MOLDOVA; TERRA RAF TRANS TRAIDING LTD,

Petitioners-Appellees,

v.

REPUBLIC OF KAZAKHSTAN,

Respondent-Appellant.

On Appeal from the United States District Court for the District of Columbia in No. 1:14-cv-01638-ABJ, Amy Berman Jackson, U.S. District Judge

BRIEF FOR PETITIONERS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellees Anatolie Stati, Gabriel Stati, Ascom Group, S.A. ("Ascom") and Terra Raf Trans Traiding Ltd. ("Terra Raf") file this certificate regarding parties, rulings, and related cases.

A. PARTIES AND AMICI

The parties in this case are as follows:

Republic of Kazakhstan

Anatolie Stati

Gabriel Stati

Ascom Group, S.A.

Terra Raf Trans Traiding Ltd.

B. RULINGS UNDER REVIEW

The rulings under review are the Order and Memorandum Opinion [Joint Appendix ("JA") 753-784], issued on March 23, 2018 by the district court in *Anatolie Stati, et al. v. Republic of Kazakhstan*, 14-cv-1638-ABJ (D.D.C.), and all prior orders and decisions incorporated into that final order.

C. RELATED CASES

The following related case is currently proceeding in the United States District Court for the District of Columbia: *Republic of Kazakhstan v. Anatolie Stati, et al.*, No. 1:17-cv-02067-ABJ (Oct. 5, 2017).

F.R.A.P. AND L.R. RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellees Ascom Group, S.A. ("Ascom") and Terra Raf Trans Traiding Ltd. ("Terra Raf"), by and through their undersigned counsel, hereby state as follows:

Ascom is a closed joint stock company incorporated under the laws of Moldova. Ascom is 100%-owned by Anatolie Stati. No publicly-held corporation owns 10% or more of Ascom's stock.

Terra Raf is a limited liability company incorporated under the laws of Gibraltar. Terra Raf is 50%-owned by Anatolie Stati and 50%-owned by Gabriel Stati. No publicly-held corporation owns 10% or more of Terra Raf's stock.

Respectfully submitted,

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GLOSSARY OF ABBREVIATIONS

Ascom	Appellee Ascom Group, S.A.
August 2016 Order	District Court's Memorandum Opinion and Order dated August 5, 2016
Award	approximately US$ 500 million award dated December 19, 2013 against the ROK in favor of the Statis
ECT	Energy Charter Treaty
FAA	Federal Arbitration Act
First SCC Notification	SCC's letter to the ROK dated August 5, 2010
Opinion of March 2018	District Court's Memorandum Opinion dated March 23, 2018
KPM	Kazpolmunay LLP
LPG Plant	liquefied petroleum gas plant for which the Tribunal ordered the ROK to pay US$199 million to the Statis
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards	New York Convention
Opposition	ROK's Opposition to confirmation of the Award dated February 26, 2015
RFA	Request for Arbitration filed by the Statis on July 26, 2010
ROK	Appellant Republic of Kazakhstan

Second SCC Notification	SCC letter to the ROK dated August 26, 2010
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCC Rules	2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
Statis	collectively, the Appellees Anatolie Stati, Gabriel Stati, Ascom, and Terra Raf
Svea Court	Svea Court of Appeal in Sweden
Terra Raf	Appellee Terra Raf Trans Traiding Ltd.
TNG	Toklynneftagaz LLP
Tribunal	three-person arbitral panel appointed to arbitrate the Statis' dispute with the ROK
UK-Argentina BIT	Agreement for the Promotion and Protection of Investments Between the United Kingdom and Argentina dated December 11, 1990

INTRODUCTION

These proceedings arise from an arbitration between the Republic of Kazakhstan (the "ROK") and Anatolie Stati, Gabriel Stati, Ascom, and Terra Raf (collectively the "Statis") pursuant to the Energy Charter Treaty (the "ECT"). The Statis prevailed in that arbitration (the "Arbitration") and the Stockholm-based tribunal (the "Tribunal") issued an award on December 19, 2013 (the "Award") finding that the ROK breached the Statis' rights under the ECT and ordering the ROK to pay over US$500 million in damages.

Over five years after the issuance of the Award, the ROK has still not paid a single cent to the Statis, and instead has waged a global campaign to evade its obligations under, and defeat enforcement of, the Award. That campaign began in Sweden, the seat of the arbitration, and included repeated efforts by the ROK to annul the Award. The Swedish courts, the courts with primary jurisdiction over the Award, have rejected these arguments and confirmed the Award's validity under the laws that the Parties chose to govern it.

This Court should do the same. The ROK's appeal invites this Court to eschew its mandate under U.S. law by conducting a grains-of-sand level review of the Tribunal's conduct of the Arbitration, claiming in effect that a US$ 500 million award that has been left undisturbed by the Supreme Court of the country in which

it was rendered should be effectively nullified in the United States by virtue of claimed "defects" that the ROK either caused or acceded to through its conduct during the Arbitration.

But in enforcement proceedings such as these arising from the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1985), 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention"), courts do not enjoy wide latitude to search for reasons to refuse recognition of arbitral awards – indeed, the New York Convention favors their prompt enforcement. *See, e.g.*, *Comm'ns Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 330 (D.C. Cir. 2014).

The District Court conducted a proper and thorough review of the Award and reached the correct result. It found, consistently with the record, that the SCC appointed the ROK's arbitrator only after the ROK, plainly on notice of the need to do so, did not. It also found, consistently with the Supreme Court's decision in *BG Group, PLC v. Republic of Arg.*, 572 U.S. 25 (2014) that it was not empowered to second-guess the Tribunal's decision concerning the "cooling-off" period under the ECT, which afforded the Parties an equivalent opportunity to settle their dispute as they would have had if it had occurred prior to the filing of the Request for Arbitration, and further that that requirement was not "jurisdictional" within the meaning of the New York Convention.

The District Court also properly applied its discretion in refusing to allow the ROK to relitigate its fraud allegations in the United States. Understanding that the ROK's attempt to amend its defenses had no firm mooring in the Federal Rules, the District Court reasonably and properly applied the "interests of justice" standard, and was within its discretion in refusing to allow the ROK to completely change its theory of fraud in order to sidestep the District Court's initial decision.

The ROK's arguments against the District Court's decision confirming the Award have no merit. This Court should affirm the decisions on appeal in all respects.

STATEMENT OF THE ISSUES

1. Whether the District Court committed reversible error by confirming the Award after finding that the ROK was on notice of its obligation to appoint an arbitrator and that the SCC acted consistently with the parties' arbitration agreement, the SCC's arbitration rules, and due process in appointing an arbitrator on behalf of the ROK when the ROK failed to do so.

2. Whether the District Court committed reversible error by confirming the Award after finding that the cooling-off period set forth in the ECT was procedural, not jurisdictional, in nature and that the ROK's treaty-based agreement to arbitrate was not conditioned on that requirement.

3. Whether the District Court erred in denying the ROK's motion to argue a new theory of fraud in support of its opposition to confirmation of the Award.

4. Whether the District Court erred in denying the ROK's motion for reconsideration of the District Court's decision to deny the ROK's motion to argue a new theory of fraud in support of its opposition to confirmation of the Award.

STATEMENT OF THE CASE

In the Award, the Tribunal held that the ROK had expropriated the Statis' business in the ROK, and awarded the Statis damages in excess of US$500 million. Following the issuance of the Award, the ROK commenced a proceeding in the Svea Court of Appeal (the "Svea Court"), the Stockholm-based appellate court with primary jurisdiction over the Award, seeking to have it set-aside on a number of grounds. The Svea Court, following lengthy proceedings, rejected the ROK's claims in their entirety, refused to disturb the Award, and denied the ROK leave to appeal. The Award is thus final and immediately enforceable in Sweden, the seat of the arbitration, and cannot be annulled.

I. THE STATIS AND THEIR INVESTMENTS IN KAZAKHSTAN

Anatolie Stati is a natural citizen of Moldova and Romania, and resides at 20 Dragonmirna Street, Chisinau, Republic of Moldova. [JA 15], at ¶ 2.

Gabriel Stati is a natural citizen of Moldova and Romania, and is Anatolie Stati's son. He resides at 1A Ghioceilor Street, Chisinau, Republic of Moldova. *Id*. at ¶ 3.

Ascom is a joint stock company incorporated under the laws of Moldova, with headquarters in Moldova, and located at 75A, Mateevici Street, Chisinau, MD-2009, Republic of Moldova. *Id*. at ¶ 4. Anatolie Stati owns 100% of Ascom. *Id*.

Terra Raf is a limited liability company incorporated under the laws of Gibraltar, and is located at Don House, Suite 31, 30-38 Main Street, Gibraltar. [JA15-16], at ¶ 5. The Statis each own 50% of Terra Raf. *Id*.

Appellees began searching for investment opportunities in the ROK in 1999. [JA20], at ¶ 28. The ROK was then expected to be "among the top five oil producers [worldwide], holding 30 billion barrels of proven oil and 85 trillion cubic feet of gas reserves." [JA39], at ¶ 202. Shortly after beginning their search, the Statis purchased a 62% interest in Kazpolmunay LLP ("KPM"), a closed stock company which owned the subsoil use rights to the Borankol oil field, and a 75% interest in Toklynneftagaz LLP ("TNG"), a Kazakh company that owned the subsoil use rights to the Tolkyn field and the Tabyl exploration block. [JA20-21], at ¶¶ 29-30. The Statis, through a series of transactions, thereafter became the

operators for both the Borankol and Tolkyn fields, as well as the Tabyl block. [JA21], at ¶ 31.

From 2001, the Statis started making substantial investments through KPM and TNG to develop the Borankol and Tolkyn fields, as well as to explore the Tabyl Block. *Id*. at ¶ 32. Additionally, TNG began construction of a liquefied petroleum gas plant (the "LPG Plant"). *Id*. Altogether, the Statis invested more than US$1 billion developing the fields and exploring the Tabyl Block. *Id*.

Less than seven years after the Statis first invested in the ROK, and right when their investments began to yield significant returns, the ROK commenced a campaign of intimidation and harassment to push the Statis to sell their investments. [JA21-22], at ¶ 33. The ROK based its tactics on a "playbook" of harassment, which as explained by the Statis during the arbitration, "typically commences with an executive-mandated investigative onslaught and ends with a firesale of assets to the State or an outright seizure." [JA57], at ¶ 635. The ROK proceeded accordingly in October 2008, by: (1) publicly accusing the Statis of fraud and forgery, which impaired their credit rating and clouded their title to TNG; (2) levying more than US$70 million in baseless back taxes against KPM and TNG; (3) arresting and prosecuting KPM's general manager for alleged "illegal entrepreneurial activity," and sentencing him to a four-year prison and a

US$145 million fine; and (4) seizing KPM's and TNG's assets without adequate basis. [JA21-22], at ¶ 33.

II. THE SCC ARBITRATION

In light of the ROK's draconian actions *vis-à-vis* the Statis and their investments, the Statis filed a Request for Arbitration on July 26, 2010 (the "RFA") under the ECT. [JA32], at ¶ 6. Consistent with Article 2 of the Arbitration Rules (the "SCC Rules") of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC"), the RFA included the name, address, telephone number, facsimile number, and e-mail address of the arbitrator appointed by the Statis. [JA207], at Art. 2.

The SCC notified the ROK of the commencement of the arbitration by letter on August 5, 2010 (the "First SCC Notification"), and informed the ROK that in accordance with SCC Rule 5, it was expected to submit an Answer by August 26, 2010, "at the latest." [JA235]. The SCC attached the RFA to the First SCC Notification. *See* [JA236]. Of relevance to this appeal, SCC Rule 5(1)(v) required the ROK's Answer to include "if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Respondent." [JA208-209], at Art. 5.

The SCC sent the First SCC Notification by DHL, which arrived at the ROK's Ministry of Justice on August 9, 2010. [JA240].

By August 26, 2010, the ROK had not yet filed an Answer. Accordingly, the SCC sent a follow-up letter (the "Second SCC Notification") to the ROK's Ministry of Justice, reminding it to "submit an Answer *in accordance with Article 5 of the SCC Rules* . . . by 10 September 2010, at the latest." [JA242] (emphasis added). The SCC also reminded the ROK that "failure to submit an Answer does not prevent the arbitration from proceeding." *Id*. The ROK did not acknowledge receipt of the Second SCC Notification, nor did it submit an Answer or appoint an arbitrator by the extended deadline.

Thus, by letter to the SCC dated September 13, 2010, the Statis requested "that the Board of the Arbitration Institute of the SCC appoint an arbitrator on behalf of [the ROK] so that the arbitration may proceed." [JA244]. The SCC forwarded the Statis' letter to the ROK's Ministry of Justice, by priority airmail, on the same day. *See* [JA243-247]. The ROK did not respond to that letter.

On September 23, 2010, the SCC notified the Parties that the SCC Board had appointed Professor Sergei N. Lebedev on the ROK's behalf. [JA249].

Over two months after the appointment of Professor Lebedev, and three months after the filing of the RFA, the ROK objected to the appointment of Professor Lebedev by letter dated December 2, 2010, arguing that it was made "without [the ROK's] consent or prior consultation, and without having had an adequate opportunity to select its own arbitrator." [JA258]. The ROK asserted further that "[t]he necessities of governmental procedures require due consideration and militate against the setting of aggressive time limits," and therefore, that "a 21-day or even 35-day time limit to file an Answer and appoint an arbitrator is extremely short." *Id*. On that basis, the ROK also "[requested] that it be permitted to exercise its right to appoint its own arbitrator." *Id*.

The Statis responded by letter of December 7, 2013, noting that SCC Rule 15(1) sets forth the exclusive grounds upon which an arbitrator may be challenged. [JA260]. The Statis further averred that because the Parties had not previously agreed to any required qualifications, "the only possible basis for an arbitrator challenge . . . is 'justifiable' (or legitimate) doubts about an arbitrator's impartiality or independence." *Id*. Having considered the Parties' submissions, the SCC decided that "[n]o ground for disqualification of Professor [ ] Lebedev has been found" and promptly dismissed the ROK's challenge. [JA264]. The Arbitration proceeded.

The ROK's failed attempt to disqualify Professor Lebedev did not end its efforts to escape the Tribunal's jurisdiction. By letter of January 18, 2011, the ROK argued that under Article 26 of the ECT, "a dispute may not be submitted to international arbitration unless and until three months have elapsed from the date on which a party has requested amicable settlement of the dispute." [JA283-284]. The ROK warned that "[i]f this issue is not addressed promptly . . . the purpose of the ECT's mandate for amicable settlement discussions will be lost" and "propose[d] that the Tribunal order [the Statis] to engage in amicable settlement discussions as required in Article 26 of the ECT, and that the proceedings be suspended during the three-month period *in satisfaction of that jurisdictional requirement*." [JA284-285]. (emphasis added) With the Statis' agreement, the Tribunal granted the ROK's request for a three-month stay – during which the Parties failed to reach a settlement – and ultimately held that the stay satisfied the ECT, noting that "[i]n view of the clear intention of Art. 26(1) and (2) ECT . . . after the failed discussions during the granted three month period, there is no prejudice to either Party and there is no reason to deny jurisdiction." [JA62], at ¶ 830.

The Tribunal proceeded to assess the merits of the dispute. On liability, the Tribunal found, *inter alia*, that the ROK's actions "constituted a string of measures of coordinated harassment" that "must be considered as a breach of the obligation

to treat investors fairly and equitably, as required by Art. 10(1) ECT." [JA67], at ¶ 1095. The Tribunal awarded the Statis damages of US$497,685,101, plus interest, and US$8,975,496.40 in legal costs. [JA89], §N.

In calculating damages related to the LPG Plant, the Tribunal concluded that "the relatively best source for the valuation . . . are the contemporaneous bids that were made for the LPG Plant by third parties after Claimants' efforts to sell the LPG Plant." [JA81], at ¶ 1746. One such bid was made by state-owned KMG, which the Tribunal considered as the "relatively best source of information for the valuation of the LPG Plant among the various sources of information submitted by the Parties. . . ." [JA82], at ¶ 1747.

III. THE ENFORCEMENT PROCEEDINGS

A. Proceedings in Sweden and Before the District Court

Despite the clear language of the ECT and the SCC Rules requiring it to do so, the ROK did not honor the Award, and opted instead to commence set-aside proceedings. Shortly thereafter, the Statis commenced enforcement proceedings by filing a Petition to confirm the Award (the "Petition") before the District Court on September 30, 2014. *See* [JA14-25]. The ROK filed its opposition (the "Opposition") on February 26, 2015, arguing that the District Court should not confirm the Award on the basis that: (1) the Tribunal lacked jurisdiction because

the three month cooling-off requirement under Article 26 of the ECT was not satisfied; (2) the SCC did not give the ROK proper notice in respect of the appointment of its arbitrator and deprived it of its right to make that appointment and due process; and (3) the Tribunal committed various purported procedural errors.

On April 5, 2016, more than a year after the ROK filed its Opposition to the Petition, the ROK filed a motion for leave to file "additional grounds" in support of its Opposition. [JA332-339]. In that motion (the "Motion to Supplement"), the ROK alleged that it had "[come] into possession of new evidence that supports additional and independent grounds under the New York Convention." [JA337]. Specifically, the ROK alleged that "the [US]$199 million awarded to the Statis for the LPG Plant in the SCC Arbitration was a direct result of [a] fraud" perpetrated by the Statis, and that the purported fraud "renders the entire award unenforceable, at minimum, as contrary to public policy under Articles V(2)(b) of the New York Convention."[1] [JA337-338].

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[1] Notably, the ROK's allegations of fraud only pertain to damages (and only a single element of the Tribunal's damages calcuation), not whether the ROK was liable for its breaches under the ECT found by the Tribunal. *See* [JA68-84], ¶¶ 1693-1757. Even assuming *arguendo* that any purported fraud infected the Award, under the terms of the Award, the ROK would still owe

On May 11, 2016, the District Court denied the ROK's motion. [JA379]. It concluded that it was not "in the interest of justice to conduct a mini-trial on the issue of fraud here when the arbitrators themselves expressly disavowed any reliance on the allegedly fraudulent material" and noted that "the issue ha[d] already been presented to the Swedish authorities." [JA378-379].

The ROK then filed a motion for reconsideration (the "Motion for Reconsideration") on May 18, 2016. [JA380-393]. In that motion, the ROK elaborated on the facts underlying the Statis' alleged "fraud." The ROK's motion presented an entirely new theory of fraud not previously pled to the District Court.

During the pendency of the ROK's motion to submit new grounds in opposition to the Award in the District Court, the Swedish set-aside proceedings – in which the ROK had raised its fraud allegations – had progressed to an advanced stage. The District Court thus stayed the enforcement proceedings until the Svea Court could reach a decision on the ROK's set-aside petition. [JA476].

On December 9, 2016, the Svea Court rejected the ROK's petition to set aside the Award. *See* [JA477]. In its decision, the Svea Court rejected all the ROK's claims and objections regarding the Award – including its fraud-based

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the Statis, at a minimum, US$300 million. The ROK, however, has not expressed willingness to pay any part of its debt to the Statis.

claims – awarded the Statis legal costs, and denied the ROK leave to appeal. [JA477, 625].

On the ROK's fraud claim, the Svea Court held that "[s]ince the tribunal based its decision on the indicative bid, the evidence invoked by the Investors in the form of oral testimony, witness statements and expert reports regarding the amount of the investment [in the LPG Plant] – evidence which [the ROK] claimed was false – has not been of direct significance to the outcome." [JA600]. Accordingly, the Svea Court concluded that it "cannot constitute sufficient grounds . . . for considering the award invalid." *Id*. Separately, on whether the indicative bid itself amounted to false evidence, the Svea Court concluded that because the bid was made before the arbitration, "[t]he indicative offer per se is thus not to be regarded as false evidence even if potentially incorrect details of the amount invested in the LPG Plant . . . have been *among the factors* that KMG took into account when calculating the size of the bid." *Id*. (emphasis added)

Notwithstanding the Svea Court's denial of leave to appeal its decision, the ROK sought review before the Swedish Supreme Court anyway. This attempt was unsuccessful; on October 24, 2017, the Swedish Supreme Court rejected the ROK's motion for extraordinary review, thus extinguishing the last avenue available to the ROK at the seat of arbitration to challenge the Award. [JA746].

Thereafter, after almost four years of litigation, the District Court confirmed the Award, issued the Judgment, and denied the ROK's Motion for Reconsideration on March 23, 2018. [JA753-754].

B. The District Court's Orders on Appeal

1. The District Court's May 11, 2016 Order

On May 11, 2016, the District Court issued an order (the "May 2016 Order") denying the ROK's Motion to Supplement. [JA376]. In the Order, the District Court applied – at the Parties' suggestion, while noting the application of the rule did "not quite fit" – Fed. R. Civ. P. 15 to the motion, and found that that standard permitted relief where "justice so requires." [JA377-378]. After considering the ROK's arguments regarding the probative value of the "evidence" it sought to introduce, and its materiality to the matter before the District Court, the District Court concluded that "it would not be in the interest of justice to broaden the scope of this proceeding to consider whether petitioners did or did not mislead the foreign arbitration panel when it presented evidence related to the value of the plant in question." [JA378]. The District Court further clarified that it "ha[d] not come to any conclusions about the legitimacy of the evidence presented to the arbitrators on this issue," and noted that it had relied on the Tribunal's decision to disregard the "allegedly fraudulent" evidence in reaching its decision. Addressing

the ROK's contention that justice required that it be allowed to supplement the record with its new evidence of "fraud," the District Court concluded that "given the fact that the issue has already been presented to the Swedish authorities, it will not be in the interest of justice to conduct a mini-trial on the issue of fraud here when the arbitrators themselves expressly disavowed any reliance on the allegedly fraudulent material." [JA379].

2. The District Court's August 5, 2016 Order

On August 5, 2016, the District Court issued an order and opinion (the "August 2016 Order") finding that it had subject matter jurisdiction over the Parties' dispute under the Federal Arbitration Act (the "FAA"), and that the Parties' dispute falls within the implied waiver and arbitration exceptions to the Foreign Sovereign Immunities Act. *See* [JA460-471], §§ I & II.

Of particular importance to this appeal, in its August 2016 Order, the District Court dismissed the ROK's contention that it had not consented to arbitration, and its corollary theory that because the ROK did not consent to arbitration, no agreement to arbitrate existed under the FAA. The District Court's decision was based on its plain reading of the text of Article 26(3)(a) of the ECT – which specifies that "*[s]ubject only to subparagraphs (b) and (c) [of Article 26]*, each Contracting Party hereby gives its unconditional consent to the submission of

a dispute to international arbitration or conciliation in accordance with the provisions of this Article" (emphasis supplied) – which the District Court found provided only two exceptions to the "unconditional consent" provided therein, specifically those found in Articles 26(3)(b) and (c). [JA462]. The ROK did not allege that either of those exceptions applied in this case, but rather argued that the "cooling-off" requirement embodied in Articles 26(1)-(2) should be read as a mandatory prerequisite to the ROK's consent to arbitrate in Article 26(3). *Id*. The District Court disagreed, finding that "[a]lthough [the ROK] is correct that Article 26(3) requires arbitration to proceed in accordance with article 26's provisions . . . the international arbitration provision does not act as a condition precedent to a party's consent." *Id*. Indeed, as the District Court found, "[i]nterpreting the ECT to mean that the three-month settlement period is a prerequisite to consent . . . would be an obscure way to include a third major exception to otherwise unconditional consent." [JA463]. Accordingly, the District Court rejected the ROK's suggestion that the failure to meet the three month cooling-off period requirement—which the Parties did, in fact, satisfy—dispossessed it of subject matter jurisdiction.

Though the District Court found that it had jurisdiction over the Parties' dispute, it decided to stay confirmation proceedings until the conclusion of the

proceedings before the Svea Court. [JA475]. It did so given "the possibility that the pending set-aside proceeding could have a dramatic impact on the petition to confirm the arbitration award . . ." *Id*.

3. The District Court's March 23, 2018 Opinion and Order

On October 24, 2017, over a year after the District Court stayed the confirmation proceedings, the Swedish proceedings came to an end. *See* [JA746]. Five months later, on March 23, 2018, the District Court rendered its decision in an opinion (the "March 2018 Opinion"), whereby it confirmed the Award and denied the ROK's Motion for Reconsideration. The District Court made three critical holdings, all of which the ROK seeks to reverse through this appeal.

First, the District Court reiterated its conclusion that the cooling-off requirement in the ECT was a procedural requirement, not a jurisdictional prerequisite to the ROK's consent to arbitrate under the ECT. [JA753, 460-463]. As such, the District Court applied a deferential standard of review in respect of the Tribunal's interpretation of the cooling-off requirement. As stated above, in its August 2016 Order, the District Court credited the Tribunal's determination that a three-month stay in the Arbitration satisfied the cooling-off requirement under the ECT. [JA468] (citing Award, ¶ 830) ("the arbitrators found the procedural hurdle to have been satisfied"). In the Judgment, the District Court concluded that the

Tribunal's decision "[wa]s worthy of deference given respondent's own actions during the arbitration." [JA774] (citing the ROK's January 18, 2011 letter proposing a stay in the proceedings "in satisfaction" of Article 26 of the ECT). Specifically, the District Court found that "[b]ecause [the ROK] proposed and obtained a means to cure the alleged procedural deficiency, its claim that the initial failure to wait still invalidates the arbitration is not persuasive." *Id*. at n.10.

Second, the District Court held that the SCC provided proper notice to the ROK in respect of the appointment of its arbitrator and of the SCC's appointment of Professor Lebedev. [JA776-783]. The District Court analyzed the record and determined that the SCC's communications to the ROK, especially the First and Second SCC Notifications, "'reasonably' informed [the ROK] of the proceedings and its obligation to appoint an arbitrator and g[ave] [it] an opportunity to be heard." [JA780] (citations omitted). The District Court thus concluded that the SCC did not violate its rules or due process in appointing Professor Lebedev. [JA781].

Finally, the District Court denied the ROK's Motion for Reconsideration that it be permitted to amend its Opposition to confirmation of the Award based on its theory that purported incidents of fraud infected the Award. [JA762-770]. The District Court concluded that the ROK had not pointed to any recent change in law

or newly-discovered evidence, but simply repeated old arguments and presented new theories not previously raised in its initial motion. [JA763].

STANDARD OF REVIEW

This Circuit has not expressly addressed the standard applicable in reviewing a district court's decision to confirm or vacate a foreign arbitral award. *See Getma Int'l v. Republic of Guinea*, 862 F.3d 45, 48 (D.C. Cir. 2017). However, it is well established that legal issues are ordinarily reviewed *de novo*, *U.S. v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001), and findings of fact are reviewed for clear error, *Awad v. Obama*, 608 F. 3d 1, 6-7 (D.C. Cir. 2010). *See also Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción*, 832 F.3d 92, 100 (2d Cir. 2016) ("In reviewing a district court's confirmation of an arbitral award, we ordinarily review legal issues de novo and findings of fact for clear error") (emphasis in original) (internal citations omitted). The latter standard "applies to the inferences drawn from findings of fact as well as to the findings themselves." *Awad*, 608 F.3d at 7.

Separately, Circuit law mandates that a district court's denial of a motion for leave to amend be reviewed "for abuse of discretion, 'requiring only that the court base its ruling on a valid ground.'" *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (internal citations and punctuation omitted). The same

standard applies to a district court's denial of a party's motion for reconsideration. *See Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008).

SUMMARY OF ARGUMENT

The District Court correctly found that the SCC appointed Professor Lebedev in accordance with the SCC Rules and the parties' arbitration agreement, and provided the ROK with notice, "reasonably calculated, under all circumstances," that the ROK was required to appoint an arbitrator by a deadline which the SCC extended, but the ROK still missed. The District Court also found correctly that the SCC afforded the ROK an opportunity to challenge the appointment of Professor Lebedev and appropriately considered the ROK's reasons for the challenge and its request that it be allowed to belatedly appoint its own arbitrator.

Second, the District Court was correct in holding that the cooling-off requirement in the ECT is a procedural step required prior to the commencement of arbitration under the ECT, not a precondition to the ECT's consent to arbitrate. The District Court's holding on this issue is on all fours with the Supreme Court's recent decision in *BG Group*.

Third, the District Court properly denied the ROK's Motion to Supplement, which sought to introduce an entirely new theory of fraud – one that was

considered and discredited at the seat of the arbitration – in support of its Opposition to confirmation of the Award filed almost a year earlier.

Fourth, the District Court properly denied the ROK's Motion for Reconsideration, which rested upon the same unsuccessful arguments made in its initial motion, as well as new arguments it chose not to raise in that motion. The District Court faithfully applied the "as justice requires" standard to the ROK's Motion for Reconsideration because there was neither a change in law nor any new discovered evidence that weighed in favor of reconsideration.

ARGUMENT

I. THE SCC'S APPOINTMENT OF PROFESSOR LEBEDEV DOES NOT SERVE AS A BASIS FOR REFUSING RECOGNITION OF THE AWARD.

A. The District Court Did Not Err in Refusing Non-Recognition of the Award Under Article V(1)(d)

1. The New York Convention Does Not Require Non-Recognition of an Arbitral Award

The ROK opens its argument section by claiming, erroneously, that non-recognition of an award is mandatory when an Article V defense has been established, stating that "[a] federal court *cannot enforce an award* if it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." ROK Brief, at 24 (emphasis added). The ROK further contends that the New York Convention "provides that a court

must refuse recognition and enforcement of an award if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." *Id*. (internal citations omitted). This is incorrect.

As this Court has recognized, the New York Convention *requires* recognition of arbitral awards, unless a ground for non-recognition is applicable, in which case, courts *may* (or may not) exercise their discretion to refuse to recognize the award on that ground. *See Chevron Corp. v. Ecuador*, 795 F.3d 200, 207 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2410 (2016); *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (under the New York Convention, courts must recognize arbitral awards, but may refuse recognition if one or more Article V grounds apply); *see also Belize Soc. Dev. Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 38 & n.17 (D.D.C. 2013) (noting that even if a ground for non-recognition under Article V applied, the court would not exercise its discretion to refuse recognition of the award, "consistent with our federal treaty obligations and policies favoring arbitral dispute resolution, deference to arbitrators, and comity with fellow treaty signatories") (brackets in original) (internal citations and punctuation omitted). As set forth in its plain text, the New York Convention mandates recognition of arbitral awards in accordance with its provisions. Specifically, Article III of the New York Convention provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in

accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." By contrast, Article V of the New York Convention provides that "recognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought" proof sufficient to satisfy one of the grounds listed in Article V. New York Convention, Art. V(1)(d) (emphasis added). This is echoed in the FAA, which instructs that a court "*shall* confirm the award" absent a ground under the New York Convention to deny recognition or enforcement. 9 U.S.C. § 207.

As set forth below, the ROK has not demonstrated that the District Court ran afoul of its mandate imposed by the New York Convention and FAA to confirm foreign arbitral awards, and therefore, its decision should stand.

2. The SCC Did Not Violate the Parties' Arbitration Agreement or Its Own Rules

Article V(1)(d) of the New York Convention allows a court to refuse recognition and enforcement of the award where "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." New York Convention, Art. V(1)(2). Given the strong public policy in favor of international arbitration, a party challenging an award under the New York

Convention bears a heavy burden. *See Encyclopaedia Universalis S.A. v. Encyclopedia Britannica, Inc*., 403 F.3d 85, 90 (2d Cir. 2005). The ROK failed to meet this heavy burden, as the District Court correctly found that the SCC did not violate its own rules, or the Parties' arbitration agreement, by appointing Professor Lebedev as an arbitrator after the ROK failed to do so. *See* [JA781] (citing Article V(1)(d), New York Convention).

Under the ECT, the Parties' arbitration agreement is composed of the Investor's election of arbitration (and its selection of arbitral rules to apply to the arbitration) and the State's unconditional consent to arbitrate once such an election is made. Article 26(4) of the ECT provides that an Investor may consent to arbitration and "choose[ ] to submit [a] dispute for resolution" through, *inter alia*, "an arbitral proceeding under the [SCC]." That Investor's consent and a State's unconditional consent to arbitrate under Article 26(3) together constitute the disputing parties' arbitration agreement, which, by extension, incorporates the underlying rules of the arbitral procedure selected by an Investor under Article 26(4). Here, upon the submission of the RFA to the SCC, the Statis consented to arbitration with the ROK, under the auspices of the SCC and pursuant to the SCC Rules.

The ROK does not argue that the SCC Rules did not apply to the Arbitration, or that it was unaware of their application when it received the notices from the

SCC. Rather, the ROK argues that the District Court "misread[]" the SCC Rules in reaching its conclusion that the SCC did not violate those rules. ROK Brief, at 27. Notably, the ROK does not appear to contest that the District Court was required to apply a deferential standard when a "party's challenge involves an application of the arbitral institution's own rules…" [JA781-782] (citing *Belize Bank Ltd. v. Government of Belize*, 191 F. Supp. 3d 26, 37 (D.D.C. 2016), *aff'd*, 852 F.3d 1107 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 448, 199 L. Ed. 2d 329 (2017)). The District Court correctly applied that standard in finding, based on the record before it, that the SCC appointed Professor Lebedev in accordance with the SCC Rules and that the ROK was afforded proper notice of its right to appoint an arbitrator. [JA778, 781-782].

Specifically, the District Court properly found that the SCC "plainly informed [the ROK] of the date by which it was to name an arbitrator" because (1) the First SCC Notification provided a date by which an Answer should be submitted,[2] and (2) SCC Rule 5(1)(v) provides that an Answer "*shall include*" the name and contract information of the arbitrator appointed by the respondent.

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[2] The ROK is incorrect that "no… deadline [to appoint an arbitrator] was ever set or disclosed to Kazakhstan." ROK Brief, at 29. The First Notification clearly notified the ROK that its Answer (which should include an appointment of an arbitrator) should be submitted to the SCC "by 26 August 2010 at the latest." [JA235].

[JA779]. Further, the District Court noted, based on the record before it, that, at the time of the First SCC Notification (which attached a copy of both the RFA and the SCC Rules), it was clear that the only outstanding issue was the ROK's nomination of an arbitrator and the selection of a Chairman, given that: (1) the Statis (in their RFA, which was attached to the First SCC Notification) had elected that the Tribunal be composed of three members; (2) the Statis had already designated their own party-appointed arbitrator in the RFA; and (3) the default rule under SCC Rule 12 is that a tribunal shall be composed of three arbitrators, unless the parties agree to a sole arbitrator, or – in the absence of the parties' agreement – the SCC determines that a sole arbitrator is more appropriate under the circumstances. [JA779-780]. When the ROK failed to respond to the First SCC Notification, the SCC sent the Second SCC Notification, which – like the First SCC Notification – requested the ROK's submission of an Answer "in accordance with Article 5 of the SCC Rules" and extended the ROK's deadline for doing so to September 10, 2010. [JA241].

It is undisputed that the ROK failed to submit an Answer or appoint an arbitrator by the first deadline of August 26, 2010, or even the extended deadline of September 10, 2010. Accordingly, the District Court appropriately found that, under the circumstances, the SCC's notifications to the ROK, read in conjunction with the SCC Rules, provided reasonable notice to the ROK of its right to appoint

an arbitrator and the deadlines for doing so, and – when the ROK failed to exercise that right within the specified time to do so – the "SCC Board reasonably went ahead and appointed an arbitrator on [the ROK's] behalf as it is permitted to do under [Rule 13(3) of] the SCC [Rules]." [JA776-778, 780].

Finally, the District Court found that the ROK was provided ample notice of the potential consequences of its failure to submit an Answer and appoint its arbitrator within the deadlines provided by the SCC, as both the First and Second SCC Notifications, as well as Article 5(3) of the SCC Rules, warned that "failure to submit an Answer does not prevent the arbitration from proceeding." [JA779-780].

The ROK contends that none of SCC Rules 5, 12 or 13 applied in these circumstances, and proffers an unduly narrow interpretations of those rules, which, if credited, would permit one party to unilaterally stop an arbitration in its tracks by simply refusing to cooperate with the other party in reaching an agreement on the procedural conduct of the arbitration. The District Court – applying a thorough and logical reading of the SCC Rules, and the deference properly owed to the SCC's interpretation of its own arbitration rules – properly rejected the ROK's narrow interpretation of those rules. [JA781]. Its conclusion that the SCC exercised its authority in accordance with the SCC Rules (and, by extension, in conformity with the Parties' arbitration agreement providing for the application of

those rules at the investor's election) is entirely without error and should be affirmed.

3. The District Court Did Not Err in Refusing Non-Recognition of the Award Under Article V(1)(b)

Article V(1)(b) of the New York Convention authorizes a court to refuse recognition and enforcement of an award if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator, or of the arbitration proceeding or was otherwise unable to present his case." New York Convention, Art. V(1)(b). The Convention "essentially sanctions the application of the forum state's standards of due process" in determining whether an award should be denied recognition under Article V(1)(b). *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (Rakta)*, 508 F.2d 969, 975 (2d Cir. 1974). As this Court has held, "[d]ue process requires 'notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Crooks v. Mabus*, 845 F.3d 412, 423 (D.C. Cir. 2016) (emphasis supplied), quoting *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599 (D.C. Cir. 1993) (internal quotation marks omitted). Moreover, the constitutional requirement of due process must have "due regard for the

practicalities and peculiarities of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

The ROK argues that the SCC's alleged "strip[ping]" of its right to appoint an arbitrator also constituted a failure of due process, and that the District Court erred in rejecting the ROK's claim that the SCC deprived it of its right to appoint an arbitrator "without providing any notice" to the ROK in violation of the SCC Rules.[3] ROK Brief, at 33. As explained above, the District Court properly found, based on the record before it, that the SCC provided multiple notifications to the ROK placing it on notice that it needed to submit an Answer (which the SCC Rules provide should include the nomination of an arbitrator), and that its failure to do so would not prevent the arbitration from proceeding without its input. [JA778-781]. The District Court also determined that the SCC acted in accordance with SCC Rules 5, 12 and 13 in appointing an arbitrator on the ROK's behalf when the ROK apparently ignored those notifications and the SCC Rules, and failed to appoint an arbitrator within the deadlines set out by the SCC. *Id*. As noted in the previous

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[3] The ROK also claims that the SCC's appointment of an arbitrator in this Arbitration conflicted with an alleged "prior representation" made by the SCC in connection with another SCC arbitration to which the ROK was a party. ROK Brief, at 32-33. The identified representation does not conflict with the actions taken by the SCC in the subject Arbitration, where – as the District Court correctly found – the ROK did "explicitly fail[] to make an appointment."

section, the District Court properly concluded based on the record before it that the ROK was not denied the ability to appoint an arbitrator. The ROK simply ignored the SCC's Rules and multiple notifications from the SCC requesting that the ROK exercise its right to do so.

On appeal, the ROK repeats its arguments made to the District Court that none of those notifications or rules could have put the ROK on notice of its right to appoint an arbitrator, or the consequences or failing to exercise that right within the time provided to do so, by attempting to analyze each notification and rule individually, in a vacuum, and without regard for the circumstances of the case. ROK Brief, at 26-27. This Circuit has rejected such a narrow and isolated analysis, and instead requires an analysis of "all the circumstances" in determining whether a litigant was afforded due process. *See Crooks*, 845 F.3d at 423 ("Due process requires 'notice reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"). The District Court correctly applied that standard by analyzing the context within which those notifications were issued, and finding, under the circumstances, that the SCC appointed Professor Lebedev in accordance with the SCC Rules and that the ROK was afforded proper notice of its right to appoint an arbitrator, as well as the consequences of failing to do so. [JA778, 781-782].

The ROK's due process argument also fails because it ignores that a party seeking to establish a due process violation must also show that it suffered prejudice as a result of the due process shortfall, something that is glaringly absent in this case This Court and several others have held that there can be no procedural due process violation absent a showing of prejudice. *Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009) ("In the absence of any suggestion of prejudice, we cannot conclude that [Appellant] was deprived . . . of procedural due process"); *Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010) ("a party who claims to be aggrieved by a violation of procedural due process must show prejudice"); *Rapp v. U.S. Dept. of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995) ("In order to establish a due process violation, petitioners must demonstrate that they have sustained prejudice as a result of the allegedly insufficient notice"). Likewise, courts have held in enforcement proceedings pursuant to the New York Convention that "a more appropriate standard of review would be to set aside an award based on a procedural violation *only if* such violation worked substantial prejudice to the complaining party." *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, No. 90-0169 (JGP), 1992 WL 122712, *5 (D.D.C. May 29, 1992) (emphasis added).

The record before the District Court evidences that the ROK was in fact given an opportunity by the SCC to challenge the appointment of Professor

Lebedev by demonstrating one or more grounds for disqualification under the SCC Rules, including a lack of impartiality, independence or qualifications. [JA777-778] (citing [JA256]). However, the ROK's objection did not identify any such grounds for disqualification, and the SCC accordingly dismissed the ROK's challenge. [JA262]. The ROK similarly did not even attempt to demonstrate to the District Court that the SCC's appointment of Professor Lebedev impacted the fairness of the arbitral proceeding, or that Professor Lebedev was biased or otherwise unable to fairly decide the dispute.[4]

Accordingly, the District Court did not err in finding that the ROK was not deprived of due process by the SCC's appointment of Professor Lebedev after the ROK's repeated failures to appoint its own arbitrator, and that there was no basis for refusing to recognize the Award under Article V(1)(b) of the New York Convention.

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[4] Any such showing would admittedly have been difficult to make, given that, Professor Lebedev issued a dissenting opinion to the Award in favor of the ROK. *See* [JA89].

II. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE ECT'S COOLING-OFF REQUIREMENT DID NOT AFFECT THE TRIBUNAL'S JURISDICTION

A. The "Cooling-Off" Provision in the ECT is Procedural in Nature and Does Not Negate the ROK's Unconditional Consent to Arbitrate

The District Court properly held in both its August 2016 Order and its March 2018 Opinion that the cooling-off provision in the ECT is procedural in nature rather than a condition precedent to the ROK's unconditional consent to arbitrate, and as such, arbitrators, not courts bear the responsibility for applying and interpreting the cooling-off requirement. [JA462-463, 772-774].

The ROK contends that the District Court erred by refusing to conduct a *de novo* review of the Tribunal's interpretation of the cooling-off period, claiming that the District Court merely "rubber stamped" the Tribunal's interpretation. ROK Brief, at 36. That is incorrect. The District Court conducted a thorough and independent analysis of Article 26's arbitration provision, and correctly found, consistent with *BG Group*, that the cooling-off period was not a condition precedent to the ROK's consent to arbitration. Applying the deferential standard of review mandated by the Supreme Court's decision in *BG Group*, the District Court also correctly found that the Tribunal properly applied the cooling-off

requirement because the ROK "proposed and obtained a means to cure the alleged procedural deficiency." [JA774], at n.10.

1. The Tribunal's Analysis of the Cooling-Off Requirement was Subject to Deferential Review Under *BG Group*

In *BG Group*, the Supreme Court upheld the presumption that "parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." 572 U.S. at 34 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002) ("courts assume parties 'normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters'"). In *BG Group*, the Supreme Court held that a requirement in the Agreement for the Promotion and Protection of Investments Between the United Kingdom and Argentina (the "UK-Argentina BIT") that the parties litigate a dispute in domestic courts prior to arbitration "operate[d] as a procedural condition precedent to arbitration" because it "determine[d] *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all." *Id*. (emphasis in original)

These key holdings control here and were properly applied by the District Court. The cooling-off requirement in Article 26(1) and (2) of the ECT is a procedural step prior to arbitration that dictates when the Statis may commence arbitration, not whether the ROK consented to arbitration at all.

The ROK attempts to distinguish *BG Group* by claiming that, unlike the UK-Argentina BIT, (1) the ECT "expressly states that the [cooling-off] requirement is a condition to [the ROK's] consent to arbitrate;" and (2) Article 26(2) of the ECT "employ[s] the archetypal example of conditionality: a simple, "if-then" statement that makes [the ROK's] consent [to arbitration] applicable *only* '[i]f [a] dispute[ ] can not be settled' within three months after amicable resolution of that dispute was requested." ROK Brief, at 39. These attempts to distinguish *BG Group* are unpersuasive.

First, as the District Court correctly noted, nowhere in the ECT does it "expressly state" that the cooling-off requirement in Article 26(1) and (2) is a condition to the ROK's consent to arbitrate. Article 26(1) and (2) do not refer to consent at all. Article 26(3) – through which the ROK granted its "unconditional consent" to arbitration – is *only* subject to two conditions, none of which pertain to the cooling-off requirement. In this regard, the ECT is quite like the UK-Argentina BIT, which "[did] *not* state that the local litigation requirement is a 'condition of consent' to arbitration." *BG Group*, 572 U.S. at 45 (emphasis in original). The District Court properly reached this conclusion in both its August 2016 Order and March 2018 Opinion. [JA462, 467-468, 772-774].

Second, the "if-then" statement in Article 26(2) of the ECT does not trigger the ROK's consent. Its express terms state that *if* the cooling-off period

requirement is satisfied, *then* "the Investor party to the dispute *may choose* to submit it for resolution[, including arbitration]." ECT, Art. 26(2) (emphasis supplied). The "if-then" statement in Article 26(2) thus gives rise to – not the ROK's consent to arbitrate – but the option of the Investor to commence arbitration. It dictates *when* an aggrieved Investor may exercise that option, not *whether* the ROK has consented to it. The District Court properly reached this conclusion in its August 2016 Order based on a plain text reading of Article 26(2) and 26(3). [JA462-463] (finding that Article 26(3) on its face only provides two exceptions to the "unconditional consent" provided therein, and that "[i]nterpreting the ECT to mean that the three-month settlement period is a prerequisite to consent … would be an obscure way to include a third major exception to otherwise unconditional consent.").

Third, while the local litigation requirement in the UK-Argentina BIT did not employ this "archetypal" if-then statement, that litigation requirement – like the cooling-off requirement in the ECT – had nothing to do with the state's consent to arbitration. The UK-Argentina BIT in *BG Group* provided that "a dispute 'shall be submitted to international arbitration' if 'one of the Parties so requests' [after] eighteen months has elapsed from the commencement of local court proceedings. *BG Group*, 572 U.S. at 35. Thus, in *BG Group*, the satisfaction of the local litigation requirement gave rise to the *option* by a party to request for binding

arbitration. That is also the case here, where under Article 26(2) of the ECT, an "Investor party *may* choose to submit [a dispute] for [arbitration]" upon the satisfaction of the cooling-off requirement.

Therefore, contrary to the ROK's claims, the cooling-off requirement in the ECT is similar to the local litigation requirement in *BG Group*. They are both procedural provisions that the District Court correctly found in both its August 2016 Order and the Judgment, are "for arbitrators, not courts, primarily to interpret and to apply." *BG Group*, 572 U.S. at 36 (citations omitted). [JA773-774, 467-468] (citations omitted).

Therefore, the District Court was correct in holding that the cooling-off requirement was a procedural requirement to arbitration and, as such, its application by the Tribunal merited a deferential standard of review.

2. The District Court Conducted an Independent Analysis of Article 26 in Determining that it had Subject Matter Jurisdiction

The ROK accuses the District Court of failing to "even review the [Tribunal's] decision" and instead "rubber-stamping" the Tribunal's conclusion that the cooling-off period had been satisfied. ROK Brief, at 43. This is not reflected in the District Court's decisions, which demonstrate that, notwithstanding the fact that the Tribunal's determinations on the cooling-off requirement were entitled to substantial deference, the District Court nonetheless independently

analyzed the text and structure of Article 26 in its August 2016 Order (in which the District Court found that it had subject matter jurisdiction over the Petition), and found that the plain text of that provision also supported the Tribunal's ruling that the cooling-off requirement was not a condition precedent to the ROK's consent to arbitrate.

When interpreting a treaty, courts are "guided by principles similar to those governing statutory interpretation." *Ice. Co. Ltd.-Eimskip v. U.S. Dept. of Army*, 201 F.3d 451, 458 (D.C. Cir. 2000). "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Sluss v. U.S.*, 98 F.3d 1242, *18 (D.C. Cir. 2018) (citing *Medellin v. Texas*, 552 U.S. 491, 506 (2008)); *see also U.S. v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013) ("Basic principles of treaty interpretation—both domestic and international—direct courts to construe treaties based on their text before resorting to extraneous materials."). Further, a court "must give effect, if possible, to every clause and word of a statute." *Owens v. Republic of Sudan*, 864 F.3d 751, 773 (D.C. Cir. 2017) (citing *Williams v. Tyler*, 529 U.S. 362, 404 (2000)). The District Court properly applied these principles in analyzing the plain text of Article 26(3)(a) of the ECT, which states in full:

> Subject *only* to subparagraphs (b) and (c), [the ROK] hereby gives its *unconditional consent* to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. (ECT, Art. 26(3)(a)) (emphasis added)

By that textual analysis, the District Court correctly concluded that the exceptions provided in Articles 26(3)(b) and (c) were "the only exceptions to [the ROK's unconditional consent]." [JA463]. The District Court's focus on Article 26(3) as the bedrock of consent in the ECT is also supported by Article 26(5)(a), which states:

> *The consent given [by a Contracting Party] in [Article 26(3)(a)]* together with the written consent of the Investor given pursuant to [Article 26(4) shall be considered to satisfy [the requirement for written consent or agreement in writing].

Despite the clear text of Article 26(3)(a), the ROK nonetheless continues to insist that its unconditional consent depends on the satisfaction of the "cooling-off period" in Article 26(1) and (2), which required that disputes "if possible, be settled amicably" and "[i]f such disputes can not be settled [amicably] . . . within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it [to arbitration, among other options]." ROK Brief, at 35-40.

According to the ROK, its consent depends on the satisfaction of the cooling-off period because Article 26(3) contains the phrase "in accordance with the provisions of [Article 26]." ROK Brief, at 39. But that phrase does not transform the cooling-off requirement in Articles 26(1) and (2) into conditions precedent to the ROK's unconditional consent. As the District Court properly held,

while the ROK may be correct that Article 26(3) requires arbitration to accord with the provisions of Article 26, the ROK's consent is still "subject *only* to [Article 26(3)] (b) and (c)." [JA462] (emphasis by the District Court).

The District Court was correct in rejecting the ROK's interpretation of these critical provisions of the ECT, which defies well-established rules of contract interpretation. The ROK's approach ignores the term "unconditional" and "only" from the face of Article 26(3)(a) and would render them mere nullities in contravention of well-established rules of interpretation. *Owens,* 864 F.3d at 773.

Thus, the District Court's decisions make clear that it did not simply "rubber-stamp" the Tribunal's conclusions with respect to the cooling-off requirement, but instead independently analyzed the text of Article 26 and found – like the Tribunal – that the cooling-off period was not a precondition to the ROK's consent to arbitration, and that the ROK had agreed to arbitrate with the Statis. [JA460-463, 773].

B. The Cooling-Off Provision in the ECT was Satisfied

The District Court also properly upheld the Tribunal's determination that the cooling-off requirement was satisfied as a result of the three-month stay of the arbitral proceedings requested by the ROK and granted by the Tribunal. Again, the District Court did not simply rubber-stamp this finding, but indeed considered the ROK's "own actions during the arbitration proceedings." [JA774], at n.10. The

District Court quoted directly from the ROK's January 18, 2011 letter to the SCC, in which the ROK proposed that:

> [T]he Tribunal order Claimants to engage in amicable settlement discussions as required by Article 26 of the ECT, and that the proceedings be suspended during the three-month period *in satisfaction of that jurisdictional requirement* . . . notwithstanding the fact that this jurisdictional defect could result in dismissal after full briefing and hearing on the merits.

[JA774], n.10 (quoting [JA280]). Based on the record before it, the District Court concluded that "[b]ecause [the ROK] proposed and obtained a means to cure the alleged procedural deficiency, its claim that the initial failure to wait still invalidates the arbitration is not persuasive." [JA774], at n.10.

The ROK argues that, even under a deferential standard of review, the District Court is in error because the Tribunal's "conclusion does not even draw its essence from the parties' alleged agreement" and that the Tribunal's "harmless-error determination" violated the rules of arbitration agreed by the parties. ROK Brief, at 44. This argument ignores the record, which supported the District Court's finding that the stay in the arbitration for purposes of achieving a settlement *emanated precisely from an agreement between the parties*. *See* [JA781] ("As to the cooling-off period, the Court defers to the tribunal's conclusion that this procedural requirement was satisfied when the tribunal imposed a three-month stay at respondent's request.") (emphasis added).

The District Court's determination that the Tribunal's rulings on the cooling-off requirement were worthy of deference was indeed well-supported by the rules that the parties agreed would govern their arbitration. The parties empowered the Tribunal to conduct the Arbitration in accordance with SCC Rule 19(1), which states that "[s]ubject to the [SCC] Rules *and any agreement between the parties*, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate." The Tribunal conducted the arbitration in a manner it deemed appropriate and stayed the proceedings, with the Parties' consent. More importantly, the Parties' settlement discussions during the stay – even if unsuccessful – cured any procedural deficiencies, as the ROK itself conceded in its letter to the Tribunal dated January 18, 2011. [JA278].

The District Court thus properly upheld the Tribunal's ruling that any initial failure to satisfy the cooling-off requirement did not invalidate the arbitration, and this Court should affirm the District Court's ruling.

III. THE DISTRICT COURT DID NOT ERR IN DENYING THE ROK'S MOTION TO SUPPLEMENT

The ROK's Motion to Supplement (filed nearly a year after the Petition had been fully briefed) was based on evidence that the ROK claimed "prove[d]" that the Award was "fraudulent." The District Court denied this motion on grounds that (1) the ROK had not demonstrated how the evidence it sought to introduce

into these summary proceedings would prove fraud that affected the outcome of the Arbitration; and (2) the Swedish courts were considering the ROK's fraud claims and evidence, and that it would not be in the interest of justice to conduct a parallel "mini-trial" on the same issue. [JA757]. In the interim, the Svea Court – the only court with plenary, primary jurisdiction over the Award – heard the case that the ROK sought to present before the District Court, and thoroughly rejected it based largely on the same logic of the District Court – *i.e.* that the ROK had not shown that the alleged fraud – even if true – worked a fraud on the Tribunal. [JA674], at 5.3.1. The ROK now seeks a third bite at the apple by asking this Court to reject the sound conclusions of both the District Court, and by extension, the Svea Court. For the following reasons, this Court should leave the District Court's decision undisturbed.

A. The District Court Properly Exercised its Discretion to Deny the Motion to Amend

The District Court's ruling is reviewable for abuse of discretion. It is well-settled that a district court's denial of a motion for leave to amend is reviewed for abuse of discretion, "requiring only that the court base its ruling on a valid ground." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (internal citations omitted); *see also In re InterBank Funding Corp. Sec. Litig*, 629 F.3d 213, 218 (D.C. Cir. 2010) (noting in the context of Rule 15(a)(2) that when

the district court denies a motion for leave to amend, a court must review such decision for abuse of discretion); *Xia v. Tillerson*, 865 F.3d 643, 649 (D.C. Cir. 2017) (same).

The District Court properly denied the ROK's Motion to Supplement after considering the entirety of the ROK's allegations presented in that motion. Specifically, the ROK's motion alleged that the new evidence it sought to introduce "revealed that Petitioners submitted false testimony and evidence with respect to "the LPG Plant construction costs for which they claimed reimbursement in the SCC Arbitration," and thus "obtained the SCC Award through fraud." [JA335]. Further, the ROK claimed that the new evidence would show inconsistencies in the Statis' testimony provided in the underlying arbitration. *Id*. In other words, the ROK's motion sought to introduce evidence that the Statis "g[ave] … false testimony" in the arbitration and therefore directly defrauded the Tribunal. [JA336].

Ultimately, the District Court held that even if the evidence the ROK sought to introduce established that evidence and testimony given by the Statis in the Arbitration with regard to the value of the LPG Plant were false (which was a question it did not reach), that evidence "would not be germane to the petition to confirm the award" because "it is clear that the arbitrators did not rely upon the

allegedly fraudulent evidence in reaching their decision," as the Tribunal chose instead to rely upon a contemporaneous indicative bid for the LPG Plant given by a third-party potential buyer, KMG. [JA378]. Specifically, the District Court held that because the Award reflected that the Tribunal did not rely upon evidence or testimony submitted by either the ROK or the Statis in reaching its determination of the value of the LPG Plant, any opposition to the Petition on grounds that the Statis submitted false evidence of the value of the LPG Plant to the Tribunal would be futile. [JA378-379]. Moreover, the District Court noted that the fraud theory that the ROK sought to advance by supplementing its Opposition to the Petition was already being presented to the Swedish courts, and that it would "not be in the interest of justice" to broaden the scope of the summary proceedings before it, or "to conduct a mini-trial on the issue of fraud here," particularly "when the arbitrators themselves expressly disavowed any reliance on the allegedly fraudulent material." *Id*.

The District Court's analysis was amply supported by case law construing the public policy exception to recognition under the New York Convention narrowly, and requiring a party seeking to avoid recognition of an award on grounds of fraud to "demonstrate a causal connection between its opponent's conduct and the outcome of the arbitration." *ARMA, S.R.O. v. BAE Sys. Overseas*, 961 F. Supp. 2d 245, 254-55 (D.D.C. 2013); *see also Forsythe Int'l, S.A. v. Gibbs*

Oil Co. of Texas, 915 F.2d 1017, 1022 (5th Cir. 1990) (noting that the phrase "procured by fraud" should be read as "requiring a nexus between the alleged fraud and the basis for the panel's decision"). The District Court's analysis reflects this recognition, as it determined that there must be a causal nexus (and therefore a basis to deny confirmation of the Award) with the fraud alleged. The District Court did not abuse its discretion in determining that the allegations as pleaded by the ROK in its motion did not so demonstrate, and its conclusion in this regard should be left alone.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING KAZAKHSTAN'S MOTION FOR RECONSIDERATION

A district court's denial of a party's motion for reconsideration is reviewed for abuse of discretion. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008). Displeased by the District Court's (correct) decision, the ROK filed the Motion for Reconsideration. [JA380]. In that motion, the ROK argued that the District Court's decision had been based on a "fundamental misunderstanding of fact and an error of law." *Id*. However, the ROK attempted to justify why the District Court's conclusion was wrong by relying on details and averments of fact that had never been presented to the District Court before. In other words, the ROK sought to discredit the District Court's decision for its

"fundamental misunderstanding" of "facts" that were not before it at the time it made its initial decision.

For instance, the ROK argued that the District Court's finding that the alleged fraud "would not be germane to the petition to confirm" because "the arbitrators did not rely upon the fraud" was "factually incorrect." [JA380]. The Motion for Reconsideration then alleged that "[t]he $199 million valuation relied upon by the Tribunal to award damages … was equally the product of the fraud perpetrated by the Stati Parties," but conceded in a footnote that "Kazakhstan's prior papers did not provide the details set out herein regarding its fraud allegations because such details go directly to the merits and therefore were to be addressed in Kazahstan's supplemental filing." [JA380], n.3. Notably, in contrast to the ROK's Motion to Supplement – which focused on proving that the Award was procured by fraud because the Statis submitted false testimony during the Arbitration – the theory of fraud put forth in the ROK's Motion for Reconsideration focused instead on proving that KMG's third-party indicative offer was infected by fraud.

Under Fed. R. Civ. P. 54(b), "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and

all the parties' rights and liabilities." This relief may be granted "as justice requires." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011) (internal citations omitted). Courts in this Circuit have held that the "as justice requires" standard allows courts to grant a motion for reconsideration "only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of *new evidence not previously available*; or (3) a clear error in the first order." *Stewart v. Panetta*, 826 F. Supp. 2d 176, 177 (D.D.C. 2011) (emphasis added) (internal citations omitted). The District Court applied this standard faithfully, noting that the ROK "does not point to a change in the law . . . [n]or does it argue that it discovered new evidence after it had already filed its motion. It simply repeats arguments made unsuccessfully before and couples them with arguments it chose not to raise at that time, and it suggests that the Court's ruling was erroneous." [JA763]. In denying the ROK's motion to supplement, the District Court relied directly on the allegations and arguments presented to it in that motion. Indeed, on the record as presented, the District Court's decision was soundly reasoned and fair, and therefore should be left untouched.

The ROK claims that "[e]ven if the district court initially failed to comprehend that the contemporaneous bids relied on by the Panel were the exact evidence [the ROK] would show were poisoned by the Stati Parties' fraud, it

abused its discretion by failing to grant reconsideration when informed of its misunderstanding shortly thereafter." ROK Brief, at 51 (internal citations and punctuation omitted).

The record in this proceeding is clear, and it shows that the District Court fairly assessed and weighed the entirety of the Parties' submissions in denying the ROK leave to supplement its Opposition to the Petition. As explained by the District Court in its Judgment – and as conceded by the ROK in its Motion for Reconsideration – the ROK "did not present the facts it now seeks to introduce in its motion for reconsideration. And because [the ROK] does not claim that these facts were not available to it at the time it filed its initial motion to include additional defenses, they are improperly raised now." [JA764]. This conclusion comports with the law applied to motions for reconsideration in the courts of this Circuit. *Davis v. Joseph J. Magnolia, Inc.*, 893 F. Supp. 2d 165, 169 (D.D.C. 2012) ("While it is certainly true that newly-discovered evidence may be considered on a motion for reconsideration, a party may not rely on facts that could have been alleged in the underlying motion but were not.").

Moreover, the ROK did not even present the same theory of fraud in its Motion for Reconsideration as it did in its Motion to Supplement. *See S.E.C. v. Bilzerian*, 729 F. Supp. 2d 9, 14 (D.D.C. 2010) (motions for reconsideration cannot

be used as an opportunity to present legal or factual theories that could have been advanced earlier). The difference between the two theories is not one of mere "details," as the ROK argued before the District Court. [JA380], at n.3. It is one thing to allege that the Award was procured by fraud because the Statis submitted false testimony during the Arbitration and directly misled the Tribunal. It is an entirely different thing to allege that: (1) prior to the arbitration, the Statis engaged in certain conduct that yielded incorrect information that was (2) allegedly relied upon by a bank in drafting an Information Memorandum, which was then (3) at least partially relied upon (along with other publicly available information) by KMG in making a bid, which in turn was (4) invoked as evidence of the Statis' investments by the Statis' experts in their submissions to the Tribunal – which submissions were in the end expressly disavowed by the Tribunal – and considered in conjunction with substantial amounts of other testimony and documentary evidence weighed by the Tribunal, resulting in (5) an Award procured by fraud. The former theory alleges a direct fraud on the Tribunal, whereas the latter alleged fraud is causally removed from the Award several times over.

Despite the ROK's contention in its Motion for Reconsideration that a "mini-trial" would not be required to prove its alleged fraud, that is precisely what would have been required, as, even if the evidence the ROK sought to introduce were included in the record, an additional factual record would still have to be

developed to demonstrate causality; for example, to determine, *inter alia*: the degree to which the allegedly inaccurate information was relied upon and incorporated into the Information Memorandum; the degree to which KMG relied upon the Information Memorandum in offering US$199 million for the LPG Plant (in comparison and contrast to other reasons KMG might have had to submit a bid in that amount to acquire the LPG Plant); and whether the US$199 million valuation could have also been justified through the Tribunal's consideration of other available evidence not alleged to have been tainted by fraud. As the District Court properly recognized, a summary confirmation proceeding under the New York Convention would not generally provide an appropriate vehicle for such a trial, particularly where the same allegations and theories of fraud are being heard and determined by the courts of primary jurisdiction. *See* [JA770-771] (citing *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011)); *see also Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Pan., S. A.*, 312 F.2d 299, 301 (2d Cir. 1963) (holding that court's powers in a confirmation action "are narrowly circumscribed and best exercised with expedition" and courts should be wary not to "unduly complicate and protract the proceeding … with a potentially voluminous record" dealing with issues not germane to proceeding); *Arbitration between Exceed Int'l Ltd. v. DSL Corp.*, No. CIV.A. H-13-2572, 2014 WL 1761264, at *9 (S.D. Tex. Apr. 30, 2014) (refusing

to permit counterclaims in proceeding to confirm arbitral award under New York Convention, since "[t]he Convention allows for a summary disposition of the issues," and a "summary proceeding of limited scope serves 'the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expansive litigation.'").

As further argument, the ROK contends, based upon case law that does not bind this Court, that "an order denying reconsideration of an interlocutory order will be reversed when the district court fails to consider the record as it exists at the time of the Motion for Reconsideration, and not just as it existed at the time of the initial ruling." ROK Brief, at 51. First, the ROK provides no basis for its assumption that the District Court failed to consider the evidence placed into the record for the first time with the ROK's Motion for Reconsideration. Indeed, the District Court's decision reflects that – even accepting into that evidence into the record – reconsideration of its order denying the ROK's motion to supplement still would not be "required by justice" because the ROK's fraud claims had already been heard and rejected by the Svea Court, whose decision was then upheld by the Swedish Supreme Court. The District Court's decision did not "work a manifestly unjust result," as the ROK argues (ROK Brief, at 54), because the ROK had already had its day in court with respect to its so-called "evidence of fraud" and it

would not serve justice to provide the ROK with a second bite at the apple by broadening the scope of a summary confirmation proceeding.

Accordingly, the District Court did not abuse its discretion in denying the ROK's Motion for Reconsideration, and its decision in that regard should be affirmed.

CONCLUSION

For all the foregoing reasons, the Statis respectfully ask this Court to dismiss this appeal.

Dated: October 15, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of D.C. Cir. R. 32(e)(2)(B)(1) because it contains 12,355 words, not counting the items excluded by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: October 15, 2018

/s/ James E. Berger
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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2018, I electronically filed the foregoing brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. All interested parties are registered CM/ECF users.

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