No. 18-7047

IN THE
United States Court of Appeals
for the District of Columbia Circuit

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

Petitioners-Appellees,

v.

Republic of Kazakhstan,

Respondent-Appellant.

Appeal from the United States District Court,
District of Columbia
Civil Action No. 1:14-cv-01638-ABJ
Judge Amy Berman Jackson, Presiding

PETITION FOR REHEARING OR REHEARING *EN BANC*

JONATHAN S. FRANKLIN
MATTHEW H. KIRTLAND
PETER B. SIEGAL
NORTON ROSE FULBRIGHT US LLP
799 9th Street NW, Suite 1000
Washington, DC 20001-4501
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

Counsel for Appellant

May 20, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTE AND RULE:

OTHER AUTHORITIES:

* Authorities on which we chiefly rely are marked with asterisks

GLOSSARY

KMG Bid	Indicative bid by KazMunaiGas for assets in underlying arbitration
LPG Plant	Liquefied Petroleum Gas Plant
SCC	Stockholm Chamber of Commerce

STATEMENT OF COUNSEL PURSUANT TO FED. R. APP. P. 35(b)

The panel decision conflicts with *Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria*, 844 F.3d 281, 287-89 (D.C. Cir. 2016). In that case, this Court held that "because public policy violations implicate the integrity of the enforcing court," parties "cannot waive" or forfeit a fraud-based public policy defense to confirmation of an international arbitral award. *Id.* at 288. Moreover, this Court further held, regardless of whether such a defense is even presented to the district court or raised for the first time on appeal, "the court itself was bound to raise it in the interest of the due administration of justice." *Id.*

Yet in this case, the panel affirmed the district court's refusal to permit a foreign sovereign—appellant Republic of Kazakhstan ("Kazakhstan")—to present a public policy defense to confirmation of an international arbitral award on the sole ground that the defense was untimely presented. *See* Judgment ("Panel Op.") at 3. Rehearing is therefore necessary to secure and maintain uniformity of this Court's decisions.

Further, the panel's unreasoned departure from *Enron Nigeria* presents an issue of exceptional importance. Because Kazakhstan is a foreign sovereign, the international arbitral award at issue can only be enforced in U.S. courts through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (the "New York Convention"). Yet, the panel and the

district court failed to accord due respect to Kazakhstan's sovereign interest in exercising its right to present all valid New York Convention defenses to confirmation of a nearly $500 million international arbitral award obtained against it through fraud. By contrast, courts in other countries that have considered enforcement of the same award have afforded Kazakhstan the opportunity to present the same fraud defense Kazakhstan sought leave to present here. And, of these, the only court to have comprehensively analyzed the merits of this fraud defense—the High Court of England—concluded that Kazakhstan demonstrated a *prima facie* case that the Award was obtained by fraud. The panel's decision therefore threatens the integrity and international reputation of the federal courts, which, as a result of the panel's decision, risk being made party to the fraud Kazakhstan alleged here and has been given the opportunity to prove in other jurisdictions. Rehearing is necessary for that reason as well.

STATEMENT OF THE CASE

A. District Court Proceedings.

1. The Petition To Confirm And Kazakhstan's Motion For Leave To Supplement Its Defenses.

In 2013, Petitioners-Appellees Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. (the "Stati Parties") obtained a nearly $500 million arbitral award against Kazakhstan in an international arbitration the Stati Parties initiated under the rules of the Stockholm Chamber of Commerce ("SCC").

Panel Op. 1-2. Underlying that award were claims that Kazakhstan had violated its obligations under the international Energy Charter Treaty by, *inter alia*, pressuring the Stati Parties to sell certain investments in Kazakh oil-and-gas interests. *Id.* A significant portion of the award—$199 million—was based on the arbitral tribunal's valuation of a liquefied petroleum gas plant (the "LPG Plant") that the Stati Parties had attempted to sell. *See* Kazakhstan Opening Br. ("Opening Br.") at 3-4 (filed Oct. 15, 2018). In awarding the Stati Parties compensation for the LPG Plant at that amount, the arbitral panel accepted the assertions of the Stati Parties and their experts, who had expressly urged that the minimum value of the plant was the $199 million indicative bid (the "KMG Bid") that the Stati Parties had obtained from the state-owned oil and gas company KazMunaiGas before commencing the arbitration. *See*, *e.g.*, JA388 n.16; JA81-82 ¶¶ 1746-48.

This proceeding began in late 2014, when the Stati Parties, relying on the New York Convention, as codified in the Federal Arbitration Act, filed a petition to confirm the arbitral award in the district court. JA14-25; *see* 9 U.S.C. §§ 201-08. In February 2015, Kazakhstan filed a response raising its then-known New York Convention defenses. *See generally* Opening Br. 12-13. Briefing on those defenses was completed in May 2015. *Id.*

After that initial briefing was completed, Kazakhstan began receiving through discovery in separate proceedings a series of documents showing that the

$199 million valuation the Stati Parties had urged for the LPG Plant was infected by fraud. The evidence demonstrated, *inter alia*, that the Stati Parties manipulated related-party transactions to falsely inflate the LPG Plant's construction costs by tens or hundreds of millions of dollars, and that they then used those falsified statements to court bidders, including KMG.[1] In turn, despite knowing that the KMG bid was tainted by their own fraud, the Stati Parties encouraged the arbitral panel to rely on that bid in valuing the LPG Plant for the purpose of assigning liability and damages. *See* JA388 n.16. Ultimately, as noted, the arbitral panel relied exclusively on the fraudulently obtained KMG Bid in awarding the Stati Parties $199 million in damages for the LPG Plant. JA81-82 ¶¶ 1746-48.

In light of that new evidence, Kazakhstan moved the district court in April 2016 for leave to add new defenses to the Stati Parties' petition, including that confirmation of a fraudulently obtained award would violate the public policy of the United States and, therefore, was prohibited by Article V(2)(b) of the New York Convention. JA332-39; *see* New York Convention, art. V(2)(b) ("Recognition and enforcement of an arbitral award may … be refused if the competent authority in the country where recognition and enforcement is sought finds that ... [t]he recognition or enforcement of the award would be contrary to the

---

[1] Details of the Stati Parties' fraud are set forth at pages 13-16 of Kazakhstan's opening brief on appeal.

public policy of that country."). Kazakhstan told the court that although it "ha[d] not completely unraveled the totality of Petitioners'" fraudulent scheme, it "presently underst[ood]" that the Stati Parties had "misrepresented the LPG Plant construction costs for which they claimed reimbursement in the SCC Arbitration." JA335-37. Kazakhstan further stated that "[t]he $199 million awarded to Petitioners for the LPG Plant in the SCC Arbitration was a ***direct result*** of the fraud," and explained that the "supplemental filing" it sought leave to submit would set forth "***[t]he full details***" of the Stati Parties' scheme and its effect on the award. JA337-38 (emphases added). This additional defense that Kazakhstan requested leave to present, if accepted as true, would render the award unenforceable under the Convention and applicable law. *See*, *e.g.*, *Enron Nigeria*, 844 F.3d at 170.

The Stati Parties opposed the motion, arguing (among other things) that Kazakhstan's proposed pleading would be "futile" because the KMG Bid—the only evidence on which the arbitral panel had relied—was a neutral and independent measure of the LPG Plant's value. JA358-63. But in reply, Kazakhstan repeated and emphasized that the Stati Parties' fraud went straight to the KMG Bid itself: "As will be shown in detail by Kazakhstan in its proposed supplemental filing, ***the Stati Parties' fraud infected the $199 million number relied upon by the Tribunal***." JA370 (emphasis added); *see also* JA370-71

("Kazakhstan's supplemental filing will show that the Stati Parties submitted false testimony and evidence to the SCC arbitration tribunal, that this fraud directly resulted in the $199 million award to the Stati Parties for the LPG Plant and that this $199 million is a material component of the SCC award.").

Nevertheless, six days after Kazakhstan filed its reply, the district court accepted as true the Stati Parties' futility argument, rather than Kazakhstan's allegations, and denied the motion for leave. JA376-79. Without even permitting Kazakhstan to present the "full details" of the alleged fraud it had sought leave to file, the court erroneously concluded that "it is clear that the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision." JA378.

2. Kazakhstan's Motion For Reconsideration.

Kazakhstan moved for reconsideration one week later. JA380-93. With its motion, Kazakhstan submitted nearly 200 pages of documents that detailed the reason why the court's ruling was based on a fundamental misunderstanding of fact, *i.e.*, that the $199 million awarded to the Stati Parties for the LPG Plant was the "direct result of the fraud" because the Stati Parties had urged the arbitral panel to rely on the fraudulently obtained KMG Bid. *See, e.g.*, JA388 n.16. Having thus demonstrated that the court erred in concluding the fraud defense would have been futile, Kazakhstan again requested that the district court permit it to present the full merits of that defense. JA380-93.

More than two months later, without having ruled on the fully briefed motion to reconsider, the district court *sua sponte* stayed the case pending resolution of related proceedings in Sweden. JA455-76. The stay lasted more than a year, until November 2017. Then, another four months after ending the stay, in March 2018, the district court finally resolved Kazakhstan's motion for reconsideration. JA752-84. The court acknowledged that both in its initial motion and on reconsideration, Kazakhstan had asserted that the Stati Parties "fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed reimbursement." JA764-65. Nevertheless, the court declined to consider the fraud defense on the merits, instead erroneously concluding that Kazakhstan's reconsideration motion relied on an "entirely separate theory of fraud that [Kazakhstan] did not seek leave to introduce" in its original filing. JA765.[2]

That supposed change formed the basis of the court's refusal to address the fraud defense's merits. It held that merits consideration was improper for "the simple reason that [Kazakhstan] did not [initially] present the facts it now seeks to

---

[2] In concluding Kazakhstan's theory had changed, the district court did not consider the unlikelihood that Kazakhstan could have developed a new theory (and compiled nearly 200 pages of documentary evidence supporting it) in the one week between the district court's denial of Kazakhstan's motion and the filing of Kazakhstan's reconsideration request. In fact, the documents presented in the reconsideration motion were just some of the "full details" of the fraud Kazakhstan had promised to provide the Court but was denied leave to present.

introduce." JA764. "[B]ecause [Kazakhstan] d[id] not claim that these facts were not available to it at the time it filed its initial motion to include additional defenses," the district court went on, "they are improperly raised now." JA764. The district court reiterated that point throughout its order denying reconsideration, offering no findings as to the merits of the fraud and no other grounds on which reconsideration could alternatively have been denied. *See* JA764-766. In the same order—which came twenty-two months after Kazakhstan had first sought to present its fraud defense—the court proceeded to confirm the award, thereby transforming it into a final, enforceable judgment of a U.S. court. *See* JA783-84.

By contrast, courts in five other countries have afforded Kazakhstan the opportunity to present the same fraud defense under the New York Convention that Kazakhstan sought leave to present to the district court. As the district court was aware when it made its decision, the only court to have comprehensively analyzed the merits of this fraud defense—the High Court of England—concluded that Kazakhstan had demonstrated a *prima facie* case that the Award was obtained by fraud because when the Stati Parties "ask[ed] the [Swedish] Tribunal to rely on the KMG Indicative Bid," they committed "a fraud on the [arbitral Panel]." JA735 ¶ 48. The English High Court therefore concluded that to protect "the integrity of arbitration" and "its supervision by the Courts," the "interests of justice require" that the fraud allegations be "examined at a trial and decided on their merits"

before a decision on confirmation could be made. JA744 ¶ 92-93. In response, the Stati Parties abandoned their confirmation proceedings in England on sanction that they never again attempt to enforce the arbitral award in England and pay all of Kazakhstan's associated legal fees and expenses. *See* Opening Br. 16-18; Kazakhstan Reply Br. ("Reply Br.") at 22 n.8 (filed Oct. 15, 2018); *see also Stati & Ors v. The Republic of Kazakhstan*, [2018] EWCA Civ 1896, 2018 WL 03777710 (Eng.).[3]

B. The Panel Decision.

Kazakhstan appealed to this Court. In addition to vigorously contesting that it had changed theories, Kazakhstan also argued that even if it had done so, the district court was still required to consider its fraud defense on the merits. *See* Opening Br. 54-55 (regardless of timeliness, confirmation of award tainted by fraud would work manifest injustice); *see also* Reply Br. 23-24 (same). As

[3] The Stati Parties have initiated legal proceedings to attempt to enforce the arbitral award under the New York Convention in five other countries: England, the Netherlands, Belgium, Luxembourg and Italy. In each of these countries, the courts have permitted Kazakhstan to fully present its New York Convention defense that the award was obtained by fraud and therefore is unenforceable under the particular public policy of that country. *See, e.g.*, Kazakhstan Rule 28(j) Letter (filed Nov. 15, 2018) (advising of status of Netherlands proceedings). Because the public policy defense under the New York Convention is a matter of national law particular to each country in which enforcement is attempted, different courts may reach different answers on the question of whether the fraud violates that country's particular public policy. However, no country other than the United States has prevented Kazakhstan from even presenting its fraud defense.

Kazakhstan explained, the district court had erred by converting the arbitral ruling into "a judgment of a United States court against a sovereign nation … without even considering whether doing so would further advance the Stati Parties' fraud…." Opening Br. 55. It further noted the "substantial injustice of confirming as a U.S. judgment a half-billion [dollar] award procured against a foreign sovereign by fraud," *id*. at 55-56, and argued that it had an absolute right to present its fraud defense. *See* Reply Br. 26-27.

At oral argument, Kazakhstan emphasized those contentions, specifically citing and relying on *Enron Nigeria* for the proposition that, like subject-matter jurisdiction, the public policy defense Kazakhstan sought to advance cannot be waived or forfeited:

> And I would add … that the district court … cited this court's decision in *Enron Nigeria* …. One thing that that case holds, Your Honor, is that ***a defense under Article V of the New York Convention, a public policy defense, … cannot be waived and cannot be forfeited***, and that the court must always consider it, even for the first time on appeal. The reason, the court held, is because ***the court is otherwise becoming*** [***a***] ***tool of the fraud***.

Oral Arg. at 9:58-10:34 (emphasis added).

The panel nevertheless affirmed. In an unpublished order devoting only a single sentence to the motion for reconsideration and the facts it raised, the panel held that "[w]e further agree with the District Court that Kazakhstan improperly presented new facts in its motion for reconsideration that it had not introduced in

its original motion to supplement." Panel Op. 3. The panel did not mention, address, or attempt to distinguish *Enron Nigeria*'s conclusion that, even where present, such untimeliness is irrelevant to a party's right to present, and the court's independent duty to examine, a public policy defense to confirmation.

ARGUMENT

THE PANEL DECISION CONFLICTS WITH *ENRON NIGERIA'S* HOLDING THAT PUBLIC POLICY DEFENSES CANNOT BE WAIVED OR FORFEITED.

In *Enron Nigeria*, after thoroughly considering the issue, this Court squarely held that that fraud-based public policy defenses to confirmation of an arbitral award cannot be waived or forfeited. 844 F.3d at 283-89. There, Nigeria invoked—arguably for the first time on appeal—Article V(2)(b) of the New York Convention to argue against confirmation of an award on the ground that it would "violate[] the public policy of the United States," which prohibits "reward[ing] a party for fraudulent and criminal conduct." *Id.* at 283. Nigeria made that argument despite having waived its right to challenge the arbitral award in the underlying arbitration agreement and also having failed to raise any public policy defense in the district court. *Id.* at 283-89.

In response, the party seeking enforcement ("Enron") argued that fraud could not constitute a public policy defense and that, in any event, Nigeria had waived and forfeited any such defense. 844 F.3d at 287-88. But this Court

disagreed on all counts. As to whether fraud constitutes a public policy defense, the Court was clear: It is a "fundamental equitable principle" that courts may not "be[] made parties to fraud or other criminal acts." *Id.* at 287. Further, the Court held, the public policy exception in Article V(2)(b) of the New York Convention, as codified in the Federal Arbitration Act, enshrines that principle as an available defense to confirmation of an arbitral award. *Id.*

The Court next rejected Enron's assertion of waiver. In the underlying arbitration agreement, Nigeria had agreed to a provision that "expressly waive[d], to the fullest extent permitted by applicable law, any right to challenge an award by the arbitrators anywhere outside the place of arbitration." 844 F.3d at 287 (quoting arbitration agreement). But the Court concluded this was irrelevant. No matter how unambiguously Nigeria had manifested its intentions, it "***could not waive*** an Article V(2)(b) public policy defense to enforcement of [an] Award," because that defense is designed to protect ***the court's*** own "integrity." *Id.* at 288 (emphasis added)*; see also id.* ("[P]arties cannot waive their rights under Article V(2)(b) because public policy violations implicate the integrity of the enforcing court."). Rejecting any rule "elevating the parties' contractual choices above the fundamental need of the federal courts to protect their own integrity," the Court held that public policy defenses under the Convention are inherently non-waivable. *Id.* (citing *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948); Restatement (Third) of the

U.S. Law of Int'l Commercial Arbitration § 2-16(b) (Am. Law. Inst., Tentative Draft No. 4, 2015)).

The Court then concluded that the same principles apply to assertions of forfeiture. It held that "[e]ven if Nigeria did not adequately raise [its public policy defense] in the district court, … ***forfeiture cannot divest the court of its duty to resolve the public policy question any more than waiver can***." 844 F.3d at 288 (emphasis added). That is because a public policy objection "may not be waived by any system of pleading," and regardless of whether or when such a defense is presented "the court itself was bound to raise [it] in the interest of the due administration of justice." *Id.* at 289 (quoting *Noonan v. Gilbert*, 68 F.2d 775, 776 (D.C. Cir. 1934)). Even if a party fails to recognize a public policy defense until appeal, "the court ***must*** nevertheless decide the issue." *Id.* (emphasis added).[4]

The panel's decision in this case cannot be reconciled with *Enron Nigeria*. As noted above, the district court's sole rationale for refusing to consider the

---

[4] As Kazakhstan noted at oral argument, *Enron Nigeria* is thus controlling support for the contention, made in its briefs, that the district court was obligated under the New York Convention to forgive a procedural default even if one existed. *See* Opening Br. 54-55; Reply Br. 26-27. *Enron Nigeria* also makes clear that, as with subject matter jurisdiction, this Court has an independent obligation to ensure that public policy defenses under the Convention—particularly those based on fraud—are adjudicated on the merits even where (unlike here) the defenses or the reasons for their consideration are expressly waived.

Article V(2)(b) defense that was presented and substantiated in Kazakhstan's motion for reconsideration was its conclusion that it was untimely, even though the evidence was presented twenty-two months before the district court ruled on the confirmation petition. *See* JA764.[5] That finding then formed the sole basis for the panel's cursory affirmance. *See* Panel Op. 3 ("We further agree with the District Court that Kazakhstan improperly presented new facts in its motion for reconsideration that it had not introduced in its original motion to supplement.").

But the district court's waiver/forfeiture finding should properly have been deemed irrelevant, because both the district court and this Court are obligated to examine the fraud allegations ***no matter when*** they were presented. *Enron Nigeria*, 844 F.3d at 288-89. Indeed, the *Enron Nigeria* rule applies *a fortiori* here: Unlike Nigeria, which did not present its defense until appeal, Kazakhstan expressly requested leave to present its defense nearly two years ***before*** the district court confirmed the award. At worst, Kazakhstan simply declined, in accordance with the standard procedure for seeking to amend pleadings, to inundate the court with its substantive proof in its motion for leave. Even assuming *arguendo* that Kazakhstan committed procedural error—indeed, even assuming it changed its

---

[5] The district court was aware of *Enron Nigeria* when it made that determination, having cited the case for the proposition that enforcing an arbitral award obtained through fraud would violate U.S. public policy. JA767.

theory—*Enron Nigeria* holds that a fraud-based public policy objection "may not be waived by any system of pleading." *Id.* at 289 (citation omitted). Thus, any short delay by Kazakhstan in presenting substantive evidence—which in any event did not prejudice the district court's ruling on the issue nearly two years later—could not justify the district court's (and the panel's) refusal to permit Kazakhstan to fully present its public policy defense or consider the merits of that defense. By so refusing, the panel's decision risks undermining the integrity of the courts themselves. *See id.* at 287. Rehearing should be granted for that reason alone.

Rehearing is further warranted because this case epitomizes the considerations that the Court identified in *Enron Nigeria*. Protecting their own integrity, courts in other countries continue to permit examination into the very same fraud that is the subject of Kazakhstan's defense. For example, as noted, the English High Court permitted Kazakhstan to present its preliminary evidence of the alleged fraud and concluded this demonstrated a "prima facie case" that the arbitral award was obtained by fraud, and set the matter for a full trial. *See supra* at 8-9 & n.3. In the face of this ruling, permitting the district court's judgment to stand without even permitting Kazakhstan to present its full case, much less making a determination on the merits of the fraud, threatens to undermine this Court's integrity with no corresponding benefit. *See Enron Nigeria*, 844 F.3d at 287-89.

Kazakhstan does not now seek a decision from this Court adjudicating its fraud defense; it only seeks to exercise its right to present the full details of the alleged fraud, and to have the district court evaluate the merits of this evidence, which the court erroneously refused to even consider on the ground that it was allegedly presented too late. The panel's cursory decision approving that determination further threatens the international standing of the federal courts by failing to afford due respect to the interest of Kazakhstan, a coequal sovereign, in availing itself of all the treaty rights and defenses to which it is entitled under the New York Convention. *Cf., e.g., Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 91 (2d Cir. 2005) (policy favoring arbitration does not warrant disregarding what "the New York Convention requires"). Rehearing is warranted for those reasons as well.

CONCLUSION

The Court should grant rehearing and reverse the judgment.

Respectfully submitted,

/s/ Jonathan S. Franklin

Jonathan S. Franklin
Matthew H. Kirtland
Peter B. Siegal
NORTON ROSE FULBRIGHT US LLP
799 9th Street NW, Suite 1000
Washington, DC 20001-4501
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

May 20, 2019

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(a) because this petition contains 3,861 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

/s/ Jonathan S. Franklin
Jonathan S. Franklin

May 20, 2019

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing petition with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on May 20, 2019. Service upon participants in the case who are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

/s/ Jonathan S. Franklin
Jonathan S. Franklin

May 20, 2019

Counsel for Appellant

ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7047 **September Term, 2018**

FILED ON: APRIL 19, 2019

ANATOLIE STATI, ET AL.,
APPELLEES

v.

REPUBLIC OF KAZAKHSTAN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01638)

Before: WILKINS and KATSAS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. After full review of the case, the Court is satisfied that appropriate disposition of the appeal does not warrant an opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED and **ADJUDGED** that the decisions of the United States District Court for the District of Columbia be **AFFIRMED**.

From 1999 to 2000, Petitioners-Appellees Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. ("the Statis") acquired controlling shares in two Kazakh oil companies: Ascom purchased a 62 percent interest in Kazpolmunay LLP ("KPM"), and the Statis purchased 75 percent interest in Toklynneftagaz LLP ("TNG"). These companies owned subsoil use rights to the Borankol oil and Tolkyn gas fields and the Tabyl exploration block in Kazakhstan. By 2001, the Statis invested an estimated one billion US dollars exploring and developing these projects.

These developments stalled in 2008 when the President of Kazakhstan received a letter from the President of Moldova, the Statis' home country. The letter stated that Anatolie Stati invested in UN-sanctioned areas using proceeds from Kazakhstan's mineral resources and that he

was concealing profits in offshore accounts. As a result, the Kazakh government began investigating Anatolie Stati and his companies.

For several reasons, Petitioners characterize this investigation as a "campaign of intimidation and harassment" to pressure the Statis to sell their investments to Kazakhstan's state-owned oil company at a substantially depreciated price. JA 21-22. They allege that Respondent-Appellant Kazakhstan publicly accused the Statis of fraud and forgery, which clouded their title to TNG. Moreover, according to the Statis, Kazakhstan levied more than $70 million in back taxes against KPM and TNG, and it arrested and prosecuted KPM's general manager for "illegal entrepreneurial activity." JA 21-22. Kazakhstan defends the validity of its investigation and claims that the back taxes were properly assessed and KPM's general manager was justly prosecuted pursuant to a legitimate criminal investigation. On July 21, 2010, Kazakhstan terminated KPM and TNG's subsoil use contracts.

On July 26, 2010, the Statis filed a Request for Arbitration ("Request") with the Stockholm Chamber of Commerce ("SCC") in Sweden. The Request claims that Kazakhstan's actions violated its obligations as a signatory to the Energy Charter Treaty ("ECT"). The ECT is an international agreement that permits signatories to arbitrate disputes in foreign tribunals, such as the SCC. Under the ECT, the SCC rules governed the arbitral proceedings.

On December 19, 2013, the tribunal issued an award in favor of the Statis. The tribunal found that Kazakhstan's actions "constituted a string of measures of coordinated harassment," which constituted "a breach of [its] obligation to treat investors fairly and equitably, as required by Art. 10(1) ECT." JA 67. The tribunal awarded the Statis $497,685,101 for damages, and Kazakhstan was also required to pay the Statis $8,975,496.40 in legal costs.

On September 30, 2014, the Statis filed a Petition to Confirm Arbitral Award in the District Court under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which has been incorporated into the Federal Arbitration Act. *See* 9 U.S.C. §§ 201-208. On April 5, 2016, after the parties had completed their merits briefings in this case, Kazakhstan filed a motion for leave to file "additional grounds" in support of its opposition to the petition to confirm the arbitral award. The District Court denied Kazakhstan's motion after considering whether justice required permitting it to add new grounds to its opposition to the petition to confirm the award. Kazakhstan then filed a motion for reconsideration of the District Court's denial of its motion to supplement. On March 23, 2018, the District Court issued a memorandum opinion denying the motion for reconsideration and confirming the arbitration award.

We affirm the District Court's grant of the Statis' petition to confirm the arbitral award. There is an "emphatic federal policy in favor of arbitral dispute resolution," thus district courts have "little discretion in refusing or deferring enforcement of foreign arbitral awards: the [New York] Convention is 'clear' that a court 'may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.'" *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,

473 U.S. 614, 631 (1985), and *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007)). Kazakhstan has failed to show that any exceptions to enforceability under the New York Convention are appropriate here.

In its primary argument on appeal, Kazakhstan contends that the arbitral award is not enforceable under the New York Convention because the SCC appointed Kazakhstan's arbitrator on its behalf and without notice, in violation of the governing arbitration rules. We defer to the SCC's interpretation of its own rules and hold that the SCC Board's appointment of the arbitrator was proper because Kazakhstan had notice and the opportunity to name an arbitrator but failed to do so.

Kazakhstan also claims that the District Court should have refused to enforce the arbitral award because the Statis failed to comply with the "cooling-off" provision that was an express condition of Kazakhstan's agreement to arbitrate. But their argument elides the fact that Kazakhstan received a stay – the precise remedy they sought. In January 2011, Kazakhstan sent a letter to the SCC objecting to the Statis' failure to comply with the cooling-off provision before commencing arbitration, and it proposed a stay of arbitration to cure the defect. Kazakhstan does not contest that, in response, the tribunal granted a three-month stay of the arbitral proceedings.

Kazakhstan's final argument is that the District Court erred by denying both its motion for leave to submit additional grounds in support of its opposition to the petition and its motion for reconsideration of that denial, because it had a right to present proof that the award was procured by fraud. We review the District Court's denial of Kazakhstan's motion for leave to submit additional grounds for defense for abuse of discretion, "requiring only that the court base its ruling on a valid ground." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996). We find that it was not an abuse of discretion for the District Court to deny Kazakhstan's motion because the District Court based its ruling on multiple valid grounds. We further agree with the District Court that Kazakhstan improperly presented new facts in its motion for reconsideration that it had not introduced in its original motion to supplement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rules 28(a)(1) and 35(c), Appellant the Republic of Kazakhstan files this certificate regarding parties and amici curiae. The parties in this case are as follows:

Republic of Kazakhstan

Anatolie Stati

Gabriel Stati

Ascom Group, S.A.

Terra Raf Trans Traiding Ltd.

These parties participated in the district court and in this appeal.

No amici have participated in this case.

/s/ Jonathan S. Franklin
Jonathan S. Franklin

May 20, 2019

Counsel for Appellant

CORPORATE DISCLOSURE STATEMENT

Appellant the Republic of Kazakhstan is a sovereign nation. Fed. R. App. P. 26.1(a) and Local Rule 26.1 therefore do not apply to it.

/s/ Jonathan S. Franklin
Jonathan S. Franklin

May 20, 2019

Counsel for Appellant