INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

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

Claimants,

v.

UNITED STATES OF AMERICA,

Respondent.

ICSID CASE NO. ARB/21/11

CLAIMANTS' REJOINDER ON PRELIMINARY OBJECTIONS

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I. INTRODUCTION

1. Respondent's Reply barely confronts the substantial authority presented by Claimants in their Observations on Respondent's Preliminary Objections (the "Observations") opting instead to try and improperly amend its Preliminary Objections (or assert new ones) for the first time on Reply. Setting aside those procedural and substantive defects, however, the Reply nonetheless comes nowhere near meeting Respondent's burden of "clearly and obviously" showing that Claimants' claims "manifestly lack legal merit."[1]

2. Respondent's primary argument is that this arbitration must be dismissed because Claimants failed to wait 6-months from the date they *noticed* Respondent of the alleged breach before filing this arbitration; in essence, Respondent claims the cooling off period is jurisdictional ("Jurisdictional Objection 1"). This should be rejected. As addressed below, the language of the relevant treaty nowhere requires notice, the weight of authority holds that cooling off periods are not jurisdictional, the treaty's MFN clause reduced the waiting period to three months, and consultations would have been futile in any event. Indeed, Respondent's position in this arbitration shamelessly contradicts the positions it has taken (and prevailed on) over the last 20 years, urging three different tribunals across seven different instances to interpret the word "should" as hortatory, not mandatory – including for consultation provisions in NAFTA that are nearly identical to the ones in this treaty.

3. Respondent's next major argument is that additional review of the measures is required in Respondent's local courts *before* the Tribunal can determine whether there has been a treaty violation ("Merits Objection 1.1"). This argument must be rejected too because the Treaty clearly renders the status of judicial review irrelevant in disputes, such as this one, that allege

[1] Respondent's Rule 41(5) Preliminary Objections ("Preliminary Objections") ¶ 52.

arbitrary or discriminatory measures. Moreover, Respondent fails to refute Claimants' authorities that demonstrate no exhaustion of local remedies is required to challenge Respondent's executive branch or even the acts of Respondent's judiciary that violate the fair and equitable treatment standard or that amount to judicial expropriation. Respondent's only response to these arguments relies on a line of inapposite "effective means" cases premised solely on undue delay, as opposed to what's alleged to be going on here, *i.e.*, a lack of reasonably available local remedies to provide effective redress.

4. Next, Respondent proceeds to pivot from its original (three paragraph) argument that "the challenged non-final measures cannot constitute expropriation as a matter of law," ("Merits Objection 1.2"), to new arguments that ignore the Treaty's definitions and ignore that Respondent has taken total control of Claimants' investments (including intangible property rights) and publicly claimed those investments are the proceeds of crimes, all while fully intending to forfeit these investments forever. That is sufficient to make out an arguable (if not classic) case of expropriation at this stage. Perhaps sensing weakness in the argument that deprivation of property rights for a non-ephemeral period of time cannot constitute expropriation as a matter of law, Respondent pivots for the first time in Reply to new factual arguments, devoting several pages to them, which is both impermissible because the rules do not permit it at this late stage and because the standard does not allow Respondent to challenge Claimant's factual assertions unless they are essentially frivolous (which they are not).[2]

5. Finally, Respondent's Reply in support of its argument that jurisdiction to prescribe cannot form the predicate of an FET claim under the U.S.-Ukraine BIT, ("Merits Objection 2,") still "fails to cite any authority that supports its position that the limitations on a

[2] Reply ¶¶ 123-128.

State's jurisdiction to prescribe can never be relevant to the FET standard." As Claimants showed in the Observations, "[i]ntuitively, the Treaty's FET standard is at least arguably violated if investments suffer harm because of measures that unreasonably exceed the limits of Respondent's jurisdiction to prescribe." Respondent tries to avoid this conclusion by adding in an array of new arguments, (which is improper), none of which adequately dispatch with the merits of the proposition that measures that exceed the limits of prescriptive jurisdiction under customary international law are *per se* unreasonable and may fail to satisfy the requirement of fair and equitable treatment.

6. Indeed, as mentioned above, not infrequently the Reply impermissibly attempts to introduce new arguments for the first time. Rule 41(5) imposes both substantive and temporal requirements that prohibit this sort of gamesmanship. Specifically, it mandates that Respondents "specify as precisely as possible the basis for the objection" and that Respondents raise such objections "no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal."

7. Thus, substantively, Rule 41(5) preliminary objections must be as specific and precise as possible, so that the contours and scope of the preliminary objections are clearly defined and readily understood.[3] Notwithstanding this substantive requirement, the Reply attempts to expand, alter, or even assert new preliminary objections from those raised in its

[3] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under ICSID Arbitration Rule 41(5) of the ICSID Arbitration Rules (12 May 2008) ¶ 88 (CL-0003) ("The Tribunal considers that these legal materials confirm that the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high.").

original Preliminary Objections.[4] Respondent does not even try to explain why it was not "possible" to assert these new objections in its original Preliminary Objections, because it cannot.

8. And temporally, Rule 41(5) contains an express deadline: "a preliminary objection needs to be filed within thirty days from the constitution of the Tribunal and before the First Session of the Tribunal."[5] Notwithstanding this deadline, Respondent repeatedly asserts new objections for the first time in Reply, more than 115 days after the Tribunal's constitution. The Tribunal should not allow Respondent to avoid the clear dictates of Rule 41(5) by altering the nature of its Preliminary Objections for the first time in Reply.[6]

9. In sum, Claimants' claims are more than colorable and arguable. Respondent may feel strongly about its legal defenses, may wish to dispatch with the arbitral process summarily, and may not want to proceed in the arbitration at all, but Rule 41(5) only permits that extraordinary relief when the claims are so poor as to render them "manifestly without legal merit." The arbitral process need not be cut short merely because Respondent disagrees on the relative legal and factual merits. The investor-State dispute resolution system exists precisely to resolve contentious international investment disputes and to enforce the meaningful promises of legal protection made by host-States to investors such as Claimants. The Treaty offers meaningful

[4] For example, on Reply Respondent adds an entirely new objection, the so-called "Merits Objection 3," in which Respondent, for the first time, argues extensively that its conduct was consistent with municipal law and argues at length about the U.S. doctrines of prescriptive and adjudicatory comity.

[5] *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Decision on the Admissibility of Respondent's Preliminary Objection to the Jurisdiction of the Tribunal under Rule 41(5) of the Arbitration Rules, 17 March 2015, ¶ 29 (CL-0124) ("The Tribunal concludes that the disputed sentence in Rule 41(5) means that the two temporal conditions are cumulative; a preliminary objection needs to be filed within thirty days from the constitution of the Tribunal and before the First Session of the Tribunal. The Request met the second condition but not the first."

[6] *Id.* ¶ 34 (CL-0124) (declining to consider untimely objection given "[t]he circumstances in which the Objection has been filed and the procedural opportunities that exist for the Tribunal to consider Respondent's objections at a later stage of the proceeding.").

promises, and Claimants seek to avail themselves of the Treaty in the ordinary course – through full and fair dispute resolution.

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

A. Jurisdictional Objection 1: Claimants complied with the six-month waiting period, and in any event the waiting period is not a basis for dismissal

1. The Treaty does not contain a notice requirement

10. Respondent's Reply asserts Claimants are attempting to "circumvent[]" preconditions to arbitration and to "flout" the procedural rules.[7] But Respondent's argument is based entirely on the unsupported and plainly incorrect notion that a "dispute" does not arise unless and until the claimant provides respondent with "notice" of the dispute. Respondent seeks to insert this "notice" requirement as a condition precedent to a demand for arbitration even though the BIT does not even mention notice and contains no notice requirement.

11. Worse than the simple absence of a notice requirement in the Treaty, is the fact that numerous similar treaties contain *explicit* notice requirements, thus demonstrating contracting nations know exactly how to *require* "notice" when they want to.[8] Indeed, Respondent entered into just such a treaty on December 17, 1992 (the NAFTA treaty) just two years before it entered into the Treaty here on March 4, 1994.[9]

12. Respondent attempts to address this glaring drafting discrepancy by telling the Tribunal to ignore the contrast because other treaties "have no bearing" on the interpretation of the Treaty here.[10] But that runs in direct conflict to the requirement that the Treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in

[7] Reply ¶¶ 32-33.
[8] *See* Observation ¶ 93 at nn.110-12 (citing BITs which explicitly provide for a notice requirement).
[9] North American Free Trade Agreement, adopted on 17 December 1992, Article 1119: Notice of Intent to Submit a Claim to Arbitration (CL-0125).
[10] *See* Reply ¶ 47.

their context . . .”[11] There is no good faith basis (and Respondent provides none) for interpreting the ordinary meaning of a treaty which includes no notice requirement, as nonetheless having one, when other treaties, including many in existence at the time Respondent entered into this Treaty, simply say notice is required when they want to impose a notice requirement.[12]

13. Respondent’s cited authority does nothing to alter this simple proposition. The treaty in *Almasryia v. Kuwait*[13] *contained an express notice requirement* of exactly the type missing from the US-Ukraine Treaty. There, the treaty provided that a dispute may only be submitted to arbitration if it could not be resolved “within six months of *the date on which either of the two parties* to the dispute *requested an amicable settlement by notifying the other party in writing*.”[14] The *Almasryia* tribunal understandably found that “[t]he language of this provision plainly indicates that [] the written notification” requirement is not optional and must “be complied with before an arbitration may be initiated.”[15]

14. Moreover, Respondent’s contention that an investment dispute “can only arise when the allegation is made that a breach of the Treaty has occurred,”[16] misinterprets the Treaty. The Treaty provides that “an investment dispute is a dispute . . . arising out of or relating to . . . an

[11] *See* Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (RL-053).
[12] *See* L. Reed, J. Paulsson & N. Blackaby, GUIDE TO ICSID ARBITRATION 97 (2011) (CL-0020) (“Some BITs require investors to submit a written notification of dispute (e.g., the Model UK BIT, Annex 5). Others do not, (e.g., the U.S.-Argentina BIT, Annex 6)”). The U.S.-Argentina BIT’s dispute resolution clause is substantively identical to the dispute resolution clause at issue here. *See* Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, adopted on 14 November 1991, Art. VII (CL-0126).
[13] Reply ¶¶ 32-33.
[14] *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, ¶ 36 (Nov. 1, 2019) (RL-009).
[15] *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, ¶ 38 (Nov. 1, 2019) (RL-009).
[16] Reply ¶ 44.

alleged breach of any right conferred or created by this Treaty . . ."[17] The Treaty thus does not provide that an investment dispute arises out of the first "allegation" of a breach,[18] it simply provides that to qualify for the rights granted under the treaty, an investment dispute must arise out of or relate to[19] "an alleged breach" of the Treaty itself. The "alleged breach" here occurred upon Respondent's expropriation of Claimants' investments via commencement of the civil forfeiture actions.[20] The plain meaning of the Treaty is, therefore, that an investment dispute occurs when there is an "alleged breach" by the State; not when Claimant alleges to Respondent that they have breached the Treaty. This interpretation is consistent with scholarly articles and Respondent's own interpretation and use of the term "alleged breach" elsewhere.[21]

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[17] Treaty, Article VI(1).

[18] Respondent's reliance on *Murphy Exploration v. Ecuador*, *see* Reply ¶¶ 44, 49, is, as Claimants showed in their Observations, inapposite. *See* Observations ¶¶ 96-98, 121-23.

[19] Established case law, including at the highest levels of Respondent's court system, makes clear that the use of the phrase "arising out of or relating" is broad and includes virtually all disputes. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (CL-0127) (labelling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996) (CL-0128) ("Both the Supreme Court and this court have characterized similar formulations to be broad arbitration clauses capable of an expansive reach."); *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 637 (Fla. 1999) (CL-0129) ("On the other hand, the phrase 'arising out of or relating to' the contract has been interpreted broadly to encompass virtually all disputes between the contracting parties, including related tort claims.").

[20] Respondent's reliance on *Marshall Islands v. India*, *see* Reply ¶ 44, is misplaced. In that case, the ICJ addressed the meaning of "dispute" under the "established case law" of the ICJ, not under the clear and unambiguous language of the Treaty. *See Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment, 2016 I.C.J. 255, 271, ¶ 34 (Oct. 5, 2016) (RL-057).

[21] *See, e.g., Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Reply of the United States of America to the Counter-Memorial of the Loewen Group, Inc. on Matter of Jurisdiction and Competence, at 20-21 (Apr. 26, 2002) (CL-0130) (relying on distinction between "the time of the alleged breach of duty and [] the time when the claim is presented" and implicitly equating "the date of injury" with "the time of the alleged breach of duty"); *Loewen Group, Inc. & Raymond L. Loewen v. the United States of Am.*, ICSID Case No. ARB (AF)/98/3, Rejoinder of the United States of America, at 72 (Aug. 27, 2001) (CL-0131) (using the ordinary meaning of the term alleged to argue that the "claimants [must] prove, as necessary element of their claim, that their alleged damages were *proximately* caused by the alleged breach"); *ADF Grp., Inc v. United States of America*, ICSID Case No. ARB (AF)/00/1, Hearing, at 514-15 (Apr. 16, 2002) (CL-0132) (recognizing, albeit in context of NAFTA, that "a claim must be based on an alleged breach which occurred in the past. If you look at the underlined portion, we find that 6 months must pass from the events giving rise to a claim before that claim may even be submitted.").

15. Respondent's attempt to distinguish *Link Trading v. Moldova*,[22] fails, as Respondent does not address the tribunal's finding that the dispute at issue arose when the conduct that formed the basis of the claims (*i.e.*, the alleged breach) occurred, not when the respondent was formally apprised that a breach was being alleged.

16. Thus, in light of the plain text of the Treaty that contains no notice requirement, the Tribunal should reject Respondent's contention that the present dispute did not arise until notice was sent.

2. Claimant timely filed the Ohio Action

17. Respondent does not dispute that there is a "clear nexus" between the Texas and Ohio disputes and that, therefore, "the Tribunal should be able to exercise its jurisdiction over the Related Measures" without waiting for expiration of another waiting period.[23] It is also undisputed that Claimant filed the Ohio dispute with this Tribunal more than 6-months after Respondent filed the Texas forfeiture actions in its national courts.[24]

18. Respondent argues, however, that the Ohio Action is still untimely because it was commenced less than six months after Claimants provided formal notification of their intent to arbitrate the Texas dispute.[25]

19. As explained above, however, the time begins to run from when the alleged breach occurs, not from the date "notice" is provided. *Supra*, ¶¶ 10-16. As more than 6-months elapsed between Respondent's filing the Texas forfeiture actions and Claimants' filing of the related measure over the Ohio forfeiture cases, the Ohio demand was also timely filed.[26]

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[22] *See* Reply ¶ 48.
[23] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 329 (Sept. 9, 2021) (CL-0021); *see also* Observations ¶¶ 100-105.
[24] Reply ¶ 99, nn.169-170.
[25] Reply ¶ 42.
[26] *See* Observations ¶¶ 101-05.

3. The MFN provision trumps the six-month waiting provision

20. Respondent does not dispute that, if the most favored nation ("MFN") provision of the Treaty applies to the waiting period, then Claimants' claims were timely filed.[27] Respondent just argues the MFN clause does not apply. However, the plain text of the Treaty and reasoned authorities demonstrate the Treaty's MFN clause applies to arbitral waiting periods, particularly where, as here, the Treaty contains a list of permissible exceptions to MFN treatment[28] which does not include dispute resolution procedures.

21. Thus, even if Claimants are found to not have complied with the six-month waiting period, that provision is trumped by the Treaty's MFN clause which reduces the Treaty's waiting period to just three months to match the shorter waiting periods in other BITs Respondent entered into.

22. Respondent asserts that a treaty party "does not accord *treatment* to investments through the mere existence of provisions in its other international agreements such as cooling-off clauses or other dispute settlement provisions."[29] However, this tortures the meaning of the word "treatment." Under the plain, ordinary meaning that must be given to all treaty terms, dispute resolution procedures offered by BITs are "part of the protection offered" by such treaties, and those procedures are necessarily "part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause."[30] If Investor X is required to wait six months to file a claim against State Party A, while Investor Y is only required to wait three months to file

[27] Respondent concedes that Claimants "provided the United States with 'notice of their intention to arbitrate' alleged breaches of the U.S.-Ukraine BIT on October 5, 2020" and the "claim was submitted to ICSID on February 8, 2021 – . . . four months later." Preliminary Objections ¶ 57.
[28] *See* Treaty, Art. II(1), Annex.
[29] Reply ¶ 52.
[30] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 102 (Aug. 3, 2004) (CL-0040).

a similar claim against State Party A, under any reasonable interpretation Investor X is receiving less-favorable "treatment" from State Party A than Investor Y. Under Article 31 of the VCLT, there is no valid reason for this panel to conclude otherwise.

23. Respondent wrongly claims the "weight of authority" is that "investors cannot use an MFN clause to import dispute resolution clauses from other treaties."[31] But Respondent's argument is only supported by a single ILC report, which itself says nothing about the "weight of authority" but instead reviews the divergence of authority on the issue, concluding:

> The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT [Vienna Convention] . . . . The application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Nonetheless, the matter remains one of treaty interpretation . . . . Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.[32]

24. Indeed, and contrary to Respondent, the "weight of authority" is that an MFN clause applies to dispute resolution procedures, including waiting periods, as evidenced by Professor Dr. Schill's finding that "investment tribunals have uniformly accepted that MFN clauses allow circumventing access restrictions to investor-State arbitration, in particular less favorable waiting periods, if third-country BITs offer more favorable conditions," [33] a finding Respondent does not challenge.

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[31] Reply ¶ 53.

[32] *See* Final Report of the Study Group on the Most-Favoured Nation Clause, Yearbook of the International Law Commission, vol. II (Part Two) ¶¶ 213-216 (2015) (RL-060). Respondent cites ¶ 105 of the report, which states that, under the "view" of some tribunals, "an investor who has not met the requirements for commencing a claim against the respondent State cannot avoid those requirements by invoking the procedural provisions of another BIT." *Id.* ¶ 105. The authors go on to discuss contrary decisions, and neither is deemed a preferred or majority view. In any event, as will be shown in Section 4, *infra*, the clear "weight of authority" is that waiting periods are *not* jurisdictional.

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

25. This conclusion is further strengthened by the principle of *ejusdem generis*, because the exclusion of dispute resolution from the Treaty's list of permissible MFN exceptions shows the parties' intent to allow the MFN clause to override less favorable dispute resolution provisions. Respondent cites minority-view cases stating that an intent to allow an MFN clause to modify a dispute resolution clause requires "clear and unambiguous" language.[34] In fact, the law does not require "clear and unambiguous" language, but in any event the parties' failure to place dispute resolution on the exclusion list clearly and unambiguously demonstrates that the MFN clause fully applies to this case.

26. Respondent's attempt to downplay *Maffezini v. Spain* because the decision is " over two decades old," is not only irrelevant, it is inconsistent with Respondent's reliance on the 18-year old decision upon which it principally relies, *Plama v. Bulgaria*.[35] Respondent further ignores that *Maffezini* has repeatedly been followed and approvingly cited.[36] Moreover, Respondent ignores Professor Dr. Schill's article, which details the reasoning for applying MFN clauses in accordance with plain language.[37]

27. Additionally, there is nothing to Respondent's suggestion that the MFN clause at issue in *Maffezini* was "much broader" than the clause at issue here;[38] if anything, the U.S.-Ukraine Treaty is broader and clearer because, unlike the *Maffezini* treaty, it contains an explicit list of exceptions, which list does not include dispute resolution.[39]

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[34] Reply ¶ 54.
[35] Reply ¶ 54 n.87.
[36] *See* Observations ¶¶ 112-13 nn.143-49.
[37] *Id.* ¶ 114.
[38] Reply ¶ 56.
[39] *Compare* Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, art. IV(2), Oct. 3, 1991, 1699 U.N.T.S. 187 ("In all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country.") (RL-065); *with* Treaty Art. II ("Each Party shall permit and treat

28. In view of the foregoing, the panel should adhere to the Treaty's plain language, follow the *Maffezini* line of authorities, and hold that the MFN clause reduced the waiting period to three months.

4. The waiting period is not jurisdictional

29. As detailed in Claimant's Observations,[40] most tribunals find waiting periods to be procedural matters and non-jurisdictional, because any other result would be "inconsistent with the fundamental objectives and aspirations of the arbitral process [and] also inconsistent with the parties' desire, in virtually all cases, to ensure access to prompt, binding, and neutral means of resolving their disputes."[41]

30. Indeed, while Respondent asserts that "several" tribunals have deemed waiting periods to be jurisdictional,[42] its own cited authority recognizes that is not the majority position, and that only a "lesser number of decisions" have come out that way.[43] The fact is that the "voices expressing the view that the cooling-off provision is of jurisdictional nature remain isolated," and the "view that periods foreseen for negotiations are not of jurisdictional nature is preferable."[44]

investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.")

[40] *See* Observation ¶¶ 116-123.

[41] Born & Šćekić, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', 14 D. Caron et al. (eds.), Practising Virtue – Inside International Arbitration 227, 228 (2015) (CL-0050).

[42] Reply ¶ 37.

[43] *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, ¶ 57 (Mar. 5, 2013) (RL-050).

[44] Baltag, *Not Hot Enough: Cooling Off Periods and the Recent Developments Under the Energy Charter Treaty*, 6(1) Indian J. Arb. L. 190, 196 & n.34 (2017) (quoting R. Dolzer & C. Schreuer, Principles of International Investment Law 248-249 (2008)) (CL-0059).

31. In fact, even the two decisions Respondent relies on for its argument that waiting periods are jurisdictional are premised on unique facts not present here.[45] In *Burlington Resources v. Ecuador*, the claimant did not provide notice of its claim *at all*.[46] Similarly, in *Murphy Exploration v. Ecuador*, the claimant filed its notice of arbitration only one business day after notifying Ecuador of the existence of an investment dispute, leaving "no possibility that the Parties could have availed themselves of a time frame in which they could have tried to resolve their disputes amicably."[47] The claimants' blatant disregard for any effort to negotiate in *Burlington* and *Murphy* were likely a substantial factor in each panel's decision to characterize the waiting period as jurisdictional.

32. Here, of course, even Respondent concedes that Claimants provided at least four-months' notice of their claims. Moreover, after Claimants provided notice and filed this arbitration, Respondent kept quiet about any alleged failure to confer and waited over two *years* before raising this alleged issue, for the very first time, in its Preliminary Objections. That sort of gamesmanship should not be rewarded. Indeed, even Respondent must concede that nothing would stop Claimants from filing this exact claim now. Under these circumstances, there is no basis for treating the waiting period as jurisdictional and forcing Claimants to restart the entire arbitration process. "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which

[45] *Generation Ukraine Inc. v. Ukraine*, does not support Respondent's position. In that case, the panel noted it would be "hesitant" to deem a waiting period non-jurisdictional, but ultimately made no finding because the claimant waited a sufficient time before filing. *See Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, ¶ 14.4, (Sept. 16, 2003) (RL-032) ("The Tribunal need not rule upon the status of the requirement to consult and negotiation in this case because the Claimant has quite clearly discharged its obligation to do so").

[46] *See Burlington Resources Inc. v. Ecuador*, ICSID Case No ARB/08/5, Decision on Jurisdiction, ¶ 312 (June 2, 2010) (RL-049) ("Claimant has only informed Respondent of this dispute with the submission of the dispute to ICSID arbitration, thereby depriving Respondent of the opportunity, accorded by the Treaty, to redress the dispute before it is submitted to arbitration.").

[47] *See Murphy Exploration and Production Company International v. Ecuador (I)*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶ 109 (Dec. 15, 2010) (RL-017).

the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew."[48]

33. Respondent relies on one case, *Almasryia v. Kuwait*, where, in a split decision, the majority found the waiting period jurisdictional even though claimant had not blatantly disregarded the waiting period.

34. This Tribunal should not follow the *Almasryia* majority for four reasons, including because the language of the *Almasryia* treaty was materially different then the Treaty here.

35. *First*, the *Almasryia* majority's jurisdictional discussion was largely *dicta* because notwithstanding its jurisdictional decision, the majority proceeded to rule on the merits and found no expropriation had occurred.[49] *Second*, the majority's decision is contrary to the weight of authority from both arbitral panels and scholarly commentators. "Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."[50] *Third,* the dissenting arbitrator's reasoning is more persuasive than the majority's. In his dissent, Arbitrator Pascal Dévaud pointed out the waiting period could not "obviously" be jurisdictional, as required by

[48] *See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, 2008 I.C.J. 412, 441 ¶ 85 (Nov. 18, 2008) (CL-0133); *See also Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1984 I.C.J. 392, 428 ¶ 83 (Nov. 26 1984) ("It would make no sense to require Nicaragua now to institute fresh proceedings") (CL-0134).

[49] *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, ¶¶ 49-58 (Nov. 1, 2019) (RL-009).

[50] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶ 184 (Aug. 6, 2003) (CL-0048).

Rule 41, in light of contrary authority such as *Biwater Gauff v. Tanzania* and the existence of the futility exception to the waiting period.[51]

36. *Finally*, and most importantly, the treaty at issue in *Almasryia* contains fundamentally different language than the Treaty here. The *Almasryia* treaty stated that disputes "*shall* be settled, as far as is possible, by amicable means" and contained a detailed and explicit notice requirement.[52] The *Almasryia* majority deemed the term "shall" to be "mandatory language," creating a condition precedent that "allows the referral of the dispute for resolution 'if' the dispute is not solved within six-months starting from a specific action ('the request of an amicable settlement') through written notification."[53] Here, by contrast, the Treaty only states the parties "*should* initially seek a resolution through consultation and negotiation" and (as mentioned above) says nothing about notice. Thus, there is no similar mandatory language in the Treaty here, rendering the *Almasryia* opinion inapposite.

37. Inexplicably, while Respondent relies so heavily on the *Almasryia* award, it fails to tell the Tribunal that it has repeatedly and successfully argued, in this very context, that the word "should" is merely hortatory whereas "shall" is mandatory.[54] Indeed, Respondent has advocated for interpretations of dispute resolution provisions virtually identical to the one at issue here to mean that Claimants *may* "consider, *if they so choose*, amicable settlement or other

[51] *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Dissenting Opinion of Pascal Dévaud on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, ¶¶ 91-103 (Nov. 1, 2019) (CL-0135).
[52] *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, ¶ 36 (Nov. 1, 2019) (RL-009).
[53] *Id.* ¶ 38.
[54] *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Submission of the United States of America, (Feb. 28, 2018) ¶ 9 n.9 (RL-052).

courses of action prior to arbitration"[55] but that "[s]uch *consultations or negotiations are not required*."[56]

38. Specifically, NAFTA Article 1118[57] provides that, "The disputing parties *should* first attempt to settle a claim through consultation or negotiation." In nearly identical language, the Treaty here provides that "In the event of an investment dispute, the parties to the dispute *should* initially seek a resolution through consultation and negotiation."[58]

39. In Respondent's own words:

> "In this connection, while Article 1118 (Settlement of a Claim through Consultation and Negotiation) also refers to the 'disputing parties,' that Article does not require consultations or negotiations ('The disputing parties should first attempt to settle a claim through consultation or negotiation.') (emphasis added by Respondent) . . . Thus, while . . . Articles 1118 . . . are 'procedures' consent to arbitrate and consent to the submission of a claim to arbitration may still be in 'accordance' with those procedures even if the disputing parties do not engage in consultations or negotiations."[59]

40. This was by no means the only time Respondent has submitted interpretations to this effect. Indeed, Respondent has long advocated for this position across three separate cases over a period *of twenty-one years*:

41. *First,* in 2002, Respondent submitted a third-party argument in the *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India* matter, where Respondent explicitly stated that:

> The United States concurs with the EC's conclusion that Article 21.2 is not mandatory. We would emphasize that, as used in the covered agreements, "should" is a hortatory term, and not a mandatory term. Moreover, if the use of

[55] *Id.*
[56] *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Factum of the Intervener United States of America in the Ontario Superior Court of Justice, 5 n.14 (Jan. 10, 2020) (CL-0136).
[57] NAFTA, Art. 1118 (CL-0125).
[58] Treaty, Art. VI (2).
[59] *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Second Submission of the United States of America (Aug. 17, 2018), n.22 (CL-0137).

> "should" were to create an obligation, it would have the same meaning as "shall". This would deprive all significance from the decision by the drafters of the covered agreements to use one term rather than the other, thus violating the principle that "words must not be read into the Agreement that are not there".[60]

42. Respondent was successful:

> Turning first to the text of Article 21.2, we find nothing in that provision which explicitly requires a Member to take any particular action in any case. Nor has India pointed to any contextual element which would suggest that the hortatory word "should" must nonetheless be understood, in Article 21.2 of the DSU, to have the mandatory meaning of "shall".[61]

43. *Second*, in the abovementioned *B-Mex and others v. Mexico* arbitration (where Respondent was represented by the very same counsel as here,[62]) Respondent took the position described above (that "should" attempt to settle does not require such attempts) *three times*: in the Submission of the United States of America in the *B-Mex and others v. Mexico* arbitration on February 28, 2018;[63] in the Second Submission of the United States in *B-Mex and others v. Mexico* arbitration on August 17, 2018;[64] and in the Factum of the United States submitted in the *B-Mex v. Mexico* litigation in Canada on January 10, 2020.[65]

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[60] *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141, Recourse to Article 21.5 of the DSU by India - Report of the Panel, 29 November 2002, Annex-B-2, Third Party Submission of the United States, ¶ 12 (CL-0138).

[61] *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141, Recourse to Article 21.5 of the DSU by India - Report of the Panel, 29 November 2002, para. 6.267 (CL-0139).

[62] The Submissions of the Respondent in the *B-Mex and others v. Mexico* arbitration were signed by Lisa J. Grosh, the same counsel for Respondent here.

[63] *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Submission of the United States of America (Feb. 28, 2018) (RL-0052).

[64] *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Second Submission of the United States of America (Aug. 17, 2018), n.22 (CL-0137).

[65] *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Factum of the Intervener United States of America in the Ontario Superior Court of Justice (Jan. 10, 2020), n.14 (CL-0136) (""NAFTA Article 1118 (Settlement of a Claim through Consultation and Negotiation) provides that the disputing parties '*should* first attempt to settle a claim through consultation or negotiation.' (emphasis added by Respondent.) Such consultations or negotiations are not required.")

44. Notably, Respondent's position prevailed in *B-Mex v. Mexico* where the tribunal ultimately agreed that: "It is common ground that a failure to pursue such settlement discussions however is no bar to Treaty arbitration."[66]

45. *Third*, Respondent submitted a brief in the United States Court of Appeals for the Second Circuit as *Amicus Curiae* in the case of *Georges v. United Nations*, and therein Respondent interpreted the statement by the United Nation's Executive Committee of the Preparatory Commission to the effect that, when the United Nations enters into contracts with private individuals or corporations, "it *should* include in the contract an undertaking to submit to arbitration disputes arising out of the contract, if it is not prepared to go before the Courts," as follows: "The use of the word 'should' is hortatory and undermines Appellants' position that the UN's immunity is conditioned upon providing a dispute resolution mechanism."[67]

46. Thus, Claimants' arguments here, that the Treaty's use of the word "should" is hortatory (not mandatory) is supported by Respondent's own prior international submissions, domestic submissions, and the consensus of scholarly writing.[68]

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[66] *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 113 (CL-0140).

[67] Brief for Amicus Curiae United States of America, *Georges v. United Nations*, No. 15–455–cv (2d Cir. Aug. 27, 2015), at 17 (CL-0141). Respondent has urged a similar interpretation in municipal court cases interpreting Section 1610(f)(2) of the Foreign Sovereign Immunities Act. *See Hegna v. Snow*, CIV.A. 03-01479HHK, (D.D.C. Sept. 5, 2003), Defendants' Motion to Dismiss with Memorandum of Points and Authorities in Support, at 17 (CL-0142) ("'Should' generally denotes a precatory instruction, not a mandatory directive.")

[68] Erik Franckx and Marco Benatar, 'The "Duty" to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas' (2013) 31 *Chinese (Taiwan) Yearbook of International Law and Affairs* 66, 73 (CL-0143) ("'Should' is one of the most commonly used forms of hortatory language and stands in stark contradistinction to 'shall.'"); Matthew Coghlan, *Prospects and Pitfalls of the Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 3 Melb. J. Int'l L. 165, 166-67 (2002) (CL-0144) ("Although prevented by the US from establishing substantive emissions reduction targets, the developed world adopted an unenforceable hortatory commitment (in the language of 'should' rather than 'shall') to reduce GHG emissions, while accepting voluntary undertakings to commit to future reductions from the developing world."); Charles B. Bourne, *The International Law Association's Contribution to International Water Resources Law*, 36 Nat. Resources J. 155, 194 (1996) (CL-0145) ("Being only guidelines, however, the Articles are couched only in precatory terms; the word 'should' rather than 'shall' is used."); David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 Ga. L. Rev. 599, 652 n.39 (1995) (CL-0146) (the "Stockholm Declaration [on the Human Environment]

47. Indeed, prior to the negotiation of NAFTA, which began in 1990, every single U.S. BIT, (aside from the U.S.-Turkey BIT and U.S.-Morocco BIT), used the word "shall" with respect to pre-arbitration consultation and negotiation.[69] Following NAFTA on January 1, 1994, not a single U.S.-BIT signed thereafter uses the word "shall" – which Respondent uniformly replaced with "should." Respondent's positions (taken when it was an uninterested third-party) are correct: "if the use of 'should' were to create an obligation, it would have the same meaning as 'shall.' This would deprive all significance from the decision by the drafters of the covered agreements to use one term rather than the other, thus violating the principle that 'words must not be read into the Agreement that are not there.'"[70]

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is a nonbinding instrument, its text alternates between hortatory language, as indicated by the word 'should,' and mandatory requirements, as indicated by 'shall' or 'must.'"); Katherine W. Meighan, *The Israel-Plo Declaration of Principles: Prelude to A Peace?*, 34 Va. J. Int'l L. 435, 453 (1994) (CL-0147) ("Joseph Gold contends that international norms are deemed soft for one of two reasons: either the obligations imposed are vague, or the operative language is too weak to bind the parties (e.g., precatory words such as 'may' and 'should' are used rather than words of obligation"); C. O'Neal Taylor, Fast Track, Trade Policy, and Free Trade Agreements: Why the Nafta Turned into A Battle, 28 Geo. Wash. J. Int'l L. & Econ. 1, 109 (1994) (CL-0148) ("Having appropriately recognized that lower compliance costs provide a lure to investors, the NAFTA stops short of prohibiting a party from taking such an action. Rather, Article 1114 merely states that a country 'should not' take such actions. This use of precatory, rather than mandatory, language in Article 1114 also renders a party's failure to satisfy Article 1114 immune to dispute settlement under the agreement.").

[69] *See* Treaty Between the United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment, adopted on 15 May 1990, Art. VI. 2 (CL-0149); Treaty between the United States of America and the Republic of Poland concerning Business and Economic Relations, adopted on 21 March 1990, Art. IX. 2 (CL-0150); Treaty Between the Government of the United States of America and the Government of the People's Republic of The Congo Concerning the Reciprocal Encouragement and Protection of Investment, adopted on 12 February 1990, Art. VI. 2 (CL-0151); Treaty between the United States of America and Grenada concerning the Reciprocal Encouragement and Protection of Investment, adopted on 2 May 1986, Art. VI. 2 (CL-0152); Treaty Between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment, adopted on 12 March 1986, Art. VII. 2. (CL-0153); Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments, adopted on 29 September 1982, Art. VII. 2 (CL-0154); Treaty Between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment, adopted on 26 February 1986, Art. VII. 2 (CL-0155); Treaty Between the United States of America and the Republic of Haiti Concerning the Reciprocal Encouragement and Protection of Investment, adopted on 13 December 1983, Art. VII 2 (CL-0156); Treaty Between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment, adopted on 6 December 1983, Art. VII (CL-0157); Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investments, adopted on 27 October 1982, Art. VII. 2 (CL-0158).

[70] *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141, Recourse to Article 21.5 of the DSU by India - Report of the Panel, 29 November 2002, Annex-B-2, Third Party Submission of the United States, ¶ 12 (CL-0138).

48. The use in the Treaty of the virtually identical language contained in NAFTA Article 1118 is no coincidence and Respondent fails to explain how it can maintain that consultation and negotiation is entirely discretionary when it comes to Article 1118 of NAFTA, but a jurisdictional requirement here.[71]

49. As recognized by the *Biwater v Tanzania* tribunal, "Treaties often contain hortatory language, and there is an obvious advantage in a provision that specifically encourages parties to attempt to settle their disputes. There is no reason, however, why such a direction need be a strict jurisdictional condition."[72]

50. At present, nearly three years have passed since the filing of the civil forfeiture actions, and "[c]learly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of" the Treaty.[73]

5. The futility exception applies

51. As cited in Claimant's Observations, a claimant need not wait to file an arbitration if the respondent nation "exhibit[s] no interest in negotiating."[74] Respondent's Reply confirms that the futility exception applies here and thus the Treaty's six-month cooling off period does not apply.

52. Specifically, Respondent's Reply does not assert it "exhibited an interest in negotiating" with Claimants. Indeed, Respondent does not contend there is (or was) *any* realistic chance that a settlement could have been reached as a result of such negotiations. Nor does

[71] Reply ¶¶ 32, 38.
[72] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 345 (CL-0055).
[73] *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 24 June 1998, ¶ 85 (CL-0159)
[74] *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Judgment of the Svea Court of Appeal ¶ 95 (Dec. 9, 2016) (CL-0061); *see* Observations ¶¶ 124-132.

Respondent suggest that any such negotiations would have provided any meaningful opportunity for Claimants to convince Respondent to change its position – a position Respondent continues to take by, among other things, filing their Rule 41(5) objections – that "none of the measures taken constitute violations of the U.S.-Ukraine Bilateral Investment Treaty."[75] Respondent's Reply thus demonstrates the futility of any hypothetical negotiations.

53. Instead, Respondent claims the six-month cooling off period serves "additional functions" beyond allowing for the parties' resolution of the dispute.[76] But Respondent cites no authority in support of this assertion, which is contradicted by, among other things, the very existence of the futility exception.[77]

54. Indeed, the Respondent has, over and over again, taken the position that none of the measures it has taken were violative of the Treaty.[78]

55. Respondent's inability to show that it had any interest in negotiation of a resolution to this dispute with Claimants, and its insistence from the outset through today that Claimants' claims are not valid and should be summarily dismissed, confirms that the futility

[75] C-0042
[76] *See* Reply ¶ 61.
[77] The authorities cited by Respondent, *see* Reply ¶ 67, are irrelevant. To the extent Respondent suggests the futility exception only applies where negotiations between the parties have dragged on for years, that is not the case. *See Ronald S. Lauder v. Czech Republic*, Award, ¶¶ 188 (Sept. 3, 2001) (CL-0056) ("[A]lthough there were **only 17 days** between CNTS's and CME's letter to the Media Committee of the Czech Parliament of 2 August 1999 and the filing of the Notice of Arbitration on 19 August 1999, there is no evidence that the Respondent would have accepted to enter into negotiation with Mr. Lauder or with any of the entities he controlled and which were involved in the dispute during the waiting period).
[78] That same position has been maintained by Respondent for the last 3 years where it has repeatedly maintained that "None of the measures referenced . . . constitute violations of the U.S.-Ukraine BIT," including on October 27, 2020, November 19, 2020, December 15, 2020, January 14, 2021, and February 5, 2021. *See* C-0013; C-0042; C-0044; C-0045; C-0046. Of course, Respondent never mentioned its position that arbitration was premature until the Preliminary Objections were filed. The intention is not to promote the purpose of consultation or negotiation but to frustrate it. Finally, to the extent Respondent's position is that Claimants should have consulted with the Department of State, that is belied by Respondent's representation that "[t]he responsibility for anti-money laundering enforcement efforts, including forfeiture cases, lies with the U.S. Department of Justice, and chiefly the Money Laundering and Asset Recovery Section (MLARS)." Preliminary Objections at ¶ 18.

exception applies and, even if, contrary to fact, Claimants had not waited an appropriate amount of time to commence these proceedings, Respondent's Rule 41(5) objections should be overruled.

B. Jurisdictional Objection 2: the addition of "Merits Objection 3" is procedurally improper and lacks legal merit

56. In the Preliminary Objections, Respondent asserted that to the extent Claimants' claims are based on a violation by Respondent of its obligations under Article VIII of the Treaty, this Tribunal lacks jurisdiction.

57. Claimants' Observations explained Respondent misunderstood the nature of Claimants' claims, none of which are based solely on Respondent's violation of Article VIII. Rather, Article VIII is relevant to Claimants' claims that Respondent breached its obligations under Article II and Article III of the Treaty, in that Respondent's derogation from its own "laws and regulations" and/or its "international legal obligations" may support Claimants' case that Respondent's conduct breached the standard of fair and equitable treatment and/or demonstrate that such conduct was "arbitrary and discriminatory."

58. Seemingly recognizing the futility of "Jurisdictional Objection 2," on Reply Respondent adds an entirely new objection, the so-called "Merits Objection 3," in which Respondent, for the first time, argues extensively that its conduct was consistent with municipal law. Respondent attempts to justify its procedurally improper inclusion of novel arguments for the first time on reply by wrongly asserting that Claimants "reframe[d] their arguments in the Preliminary Objections." However, as explained above, Claimants did not "reframe" any arguments in the Preliminary Objections, they simply corrected Respondent's misreading of the claims asserted and misunderstanding of the relevance of Article VIII to Claimants' claims. Respondent's failure to address in its Preliminary Objections the claims actually asserted by

Claimants does not justify the inappropriate inclusion of novel arguments on Reply, and the Tribunal should not consider "Merits Objection 3" because it was not properly raised.

59. Regardless, even if Respondent's "Merits Objection 3" was properly raised (it was not) and could be considered (it cannot), Respondent's newly-raised arguments do not in any way justify the dismissal of Claimants' claims under Rule 41(5).

60. Respondent argues at length that the U.S. doctrines of prescriptive and adjudicatory comity do not apply here. Without conceding that Respondent is correct, even if these municipal doctrines do not apply, that would not justify the summary dismissal of Claimants' claims at this stage of the proceeding because Claimants' claim the measures taken with respect to their investments violated the standard of fair and equitable treatment and were arbitrary and discriminatory in violation of the customary international law doctrine of prescriptive jurisdiction.[79] This issue is addressed more fully in Section D, *infra*.

[79] Respondent inaccurately claims that "[t]he principles of adjudicatory and prescriptive comity [are] the linchpins of all of their claims under Articles II and III." Reply ¶ 2. That characterization is not accurate. The Notices of Arbitration repeatedly reference the customary international law doctrine of prescriptive jurisdiction, including in the opening paragraphs of the Notices of Arbitration and all throughout. *See Optima Ventures LLC and Optima 7171 LLC v. United States of America*, Request for Arbitration, ¶ 83 (Feb. 8, 2021) ¶¶ 21-44 (Art 2. FET claim referencing prescriptive jurisdiction), ¶¶ 67-73 (Art. 3 expropriation claim referencing prescriptive jurisdiction); *Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America*, Request for Arbitration, at p. 8 (Feb. 24, 2021) (concluding paragraph of "Introduction and Factual Background" section stating that "The United States is improperly attempting to deprive Ukrainian investors of their investments in the United States, and has encumbered and seized those assets, based on the United States' unilateral interpretation of Ukrainian criminal law, as applied to conduct occurring in the territory of Ukraine. In doing so, the United States has exceeded the reasonable limits of prescriptive jurisdiction, violated the requirement of fair and equitable treatment, and unlawfully expropriated Ukrainian investments."); *see also id.* at ¶¶ 27-50 (Art 2. FET claim referencing prescriptive jurisdiction), ¶¶ 68, 72-75 (Art. 3 Expropriation Claim referencing prescriptive jurisdiction).

C. Merits Objection 1: Respondent's first merits objection lacks legal merit because the claims are authorized by the Treaty and the challenged measures plainly amount to expropriation

1. The claims are authorized by the Treaty

61. In both its initial Rule 41(5) motion and Reply, Respondent has sought to myopically confine Claimants' claims to exclusively judicial action. Now, in furtherance of this effort, Respondent devotes particular attention in its Reply to the *ex parte* restraining order in the Texas Action. Respondent's attempt to limit this arbitration to questions regarding the propriety of discrete restraining order(s) focuses too narrowly on judicial conduct. Yet in focusing solely on judicial conduct, Respondent attempts to distract this Tribunal from the relevant procedural and legal background. Respondent asserts that Claimants are "argu[ing] that the temporary restraining orders in both the Ohio and Texas cases unlawfully expropriated their assets in violation of Article III" – but in the Ohio Action *there is no restraining order*.[80] Claimants have obviously never challenged a non-existent restraining order.

62. Instead, in the actual notice of arbitration filed in the 55 Public Square action, the challenged measures are, *inter alia*, that Respondent was "improperly attempting to deprive Ukrainian investors of their investments in the United States, and . . . encumber[ing] and seiz[ing] those assets, based on the United States' unilateral interpretation of Ukrainian criminal law, as applied to conduct occurring in the territory of Ukraine."[81] Claimants argue that, "[i]n doing so, the United States has exceeded the reasonable limits of prescriptive jurisdiction, violated the requirement of fair and equitable treatment, and unlawfully expropriated Ukrainian

[80] *See* Reply ¶ 81. Contrary to Respondent's suggestions, there is no such restraining order in the Ohio Action, and accordingly Claimants (obviously) have never argued anything about this non-existent restraining order.
[81] *Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America*, Request for Arbitration, at 8 (Feb. 24, 2021).

investments."[82] Claimants further asserted that measures such as the "conditioning of a sale on the transfer of the proceeds to the custody of the United States Marshals Service" and the "utilization of the United States judicial system by the United States executive branch (the Department of Justice) to encumber and transfer Ukrainian investments to the United States government, based upon alleged criminal conduct and losses within the territory of Ukraine, constitute unlawful expropriation."[83] These measures did not require (or reference) any court order because the DOJ did not need judicial approval to file a forfeiture complaint, DOJ was expressly requiring that any sale be conditional on deposit of the proceeds with Respondent, and any unapproved sale might risk the threat of criminal charges – the DOJ insinuates as much in the forfeiture complaint.[84] As Claimants showed in the Observations, "[p]rospective buyers invariably require authorization from DOJ prior to any purchase offer" and "[i]nvestments could not be sold because any buyer performing due diligence would invariably be frightened off by the prospect of association with an investment alleged by DOJ to be inextricably intertwined with and tainted by criminal 'money laundering' – even if those aspersions lack basis in law or fact."[85] As set forth in paragraph 64, *infra*, the tribunal in *Valeri Belokon v. Kyrgyz Republic* recognized as much: "[a] particular enjoyment of property is the right to be associated with that investment," and "[w]here that association is improperly characterized as criminal, the impairment is evident."[86] The use of a restraining order in the Texas action, and the lack thereof in the Ohio action, evinces the broad discretion given to Respondent's executive to select the way in which it will proceed with a forfeiture in any given case (e.g., to file a forfeiture lawsuit, to file a *lis*

[82] *Id.*
[83] *Id.* ¶¶ 71-72.
[84] *United States v. Real Property Located at 55 Public Square, Cleveland*, Ohio, Case No. 1:20-cv-25313, Verified Complaint for Forfeiture in Rem (Dec. 30, 2020) ("Ohio Compl."), ¶ 127 (C-0011).
[85] Observations at ¶¶ 172, 174.
[86] *Id.*

pendens on the property register, and/or to communicate with buyers and sellers and issue unilateral demands regarding the terms of sale – none of which requires judicial approval). This executive discretion also highlights the merely ancillary role of Respondent's judiciary, as a court order was only deemed necessary in the Texas action (but not the Ohio action).

63. Respondent did not need a restraining order in the Ohio Action because its chief prosecutors in charge of international money laundering filed a public forfeiture lawsuit, which claimed that the 55 Public Square property in Cleveland, Ohio was traceable to and tainted by a multi-billion-dollar criminal scheme. In addition to this public lawsuit, Respondent published a press release expressly accusing Claimants of investing in 55 Public Square with "funds misappropriated from PrivatBank in Ukraine as part of a multi-billion-dollar loan scheme."[87] By filing the forfeiture lawsuit and officially declaring an association between the investment and a "multi-billion-dollar loan scheme," the threat of criminal taint (and potential claw back) became omnipresent for potential buyers and anyone else (including Claimants) seeking to profit from the investment. Claimants had no choice but to preserve the value of their investment by complying with Respondent's clear demand and non-negotiable "require[ment] that all net proceeds from the sale be deposited with the U.S. Marshals Service."[88] The Ohio Action (which had no restraining order) only proves that judicial conduct (such as the entry of a restraining order in the Texas Action) is merely ancillary to otherwise squarely executive action.

64. Claimants wholly deny any insinuation that their open, transparent, and publicly disclosed U.S. investments amount to a so-called "multi-billion-dollar loan scheme." As in the case of *Valeri Belokon v. Kyrgyz Republic*, Respondent's official publication of these false

[87] DEPT'T JUST., OFF. PUB. AFFS., Press Release: Justice Department Seeks Forfeiture of Third Commercial Property Purchased with Funds Misappropriated from PrivatBank in Ukraine (Dec. 30, 2020) (C-0012).
[88] Observations ¶ 41.

allegations of criminal conduct, whether in a civil forfeiture lawsuit or an official prosecutorial press release, clearly "infringe[s] on [Claimants'] rights to enjoy the benefits of [their] investment."[89] The tribunal in that case recognized that "[a] particular enjoyment of property is the right to be associated with that investment," and consequently determined "[w]here that association is improperly characterized as criminal, the impairment is evident."[90] If the threat of "prosecution is used meretriciously to impose a sequestration administration and prohibit the management of property then the protections of the BIT must come to the fore."[91] Proceedings initiated by Respondent's highest-level prosecutors alleging criminal conduct have the "consequence[] of depriving the investor of the management, use, and enjoyment of property, th[us] the BIT requires that the underlying charges not be 'unreasonable, discriminatory or arbitrary.'"[92] Respondent's conduct, primarily at the hands of its executive, effectively rendered the investments "arbitrarily destroyed," and "compensation is accordingly due."[93]

65. These measures by Respondent's chief international prosecutors, taken without valid basis, are challenged in both the Ohio request for arbitration and the Texas request for arbitration.[94] Respondent actually concedes that the challenged measures and the arbitral claims in both are the same in its agreement to consolidate the two arbitrations: Respondent expressly recognized that the two requests for arbitration share a "*substantive identity of the claims*" and a "*substantive similarity of the alleged facts*."[95] Yet there was no restraining order in Ohio, so the

[89] *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, ¶ 270 (Oct. 24, 2014) (CL-0007)
[90] *Id.*
[91] *Id.* ¶ 271.
[92] *Id.* ¶ 272.
[93] *Id.*
[94] *Compare Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America*, Request for Arbitration, ¶¶ 49-50, 71-72 (Feb. 24, 2021) *with Optima Ventures LLC and Optima 7171 LLC v. United States of America*, Request for Arbitration, ¶¶ 42-44, 70-71 (Feb. 8, 2021).
[95] U.S. Response to Optima Claimants' Proposals, 15 April 2021 (C-0041) (emphasis added).

identical claims and facts must pertain to something more than an *ex parte* restraining order. As set forth in paragraphs 61–63, *supra*, judicial conduct is not the singularly challenged measure.[96]

66. Because the measures initiated by the DOJ arbitrarily destroyed the investments, and the clear language of Article II(3)(b) of the Treaty provides that "[f]or purposes of dispute resolution . . . a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party,"[97] the status of judicial review is irrelevant. As recognized by the Tribunal in *Lemire v. Ukraine*, "[t]he literal meaning of this phrase could not be clearer: even if a party has had (and has not exercised), or has exercised (with whichever outcome) the right to judicial review, such action or omission is irrelevant in an investment arbitration deciding whether the measure is arbitrary or discriminatory."[98] The Treaty goes beyond merely waiving a procedural requirement to exhaust local remedies; it modifies the definition of arbitrary or discriminatory measures and renders the status of judicial review substantively irrelevant in any dispute claiming that a specific measure is arbitrary or discriminatory. Thus, a duly constituted and impartial international arbitration panel is vested with the power to determine whether a state act is arbitrary or discriminatory entirely irrespective of the status of review of that act in the local courts of the state.

67. Instead of meaningfully addressing this Treaty-specific protection against arbitrary or discriminatory measures, Respondent, in its attempt to downplay the gravity of the

[96] Respondent goes on to claim that Claimants discarded and "abandoned" their "due process" arguments (Reply ¶ 82) – not so. That case is still maintained. *See* Observations ¶¶ 200-205. Claimants further discuss this argument in paragraphs 74-81, *infra*. The so-called "due process" argument was hardly "abandoned," and remains very much alive.
[97] Treaty, Article II(3)(b).
[98] *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 277 (Jan. 14, 2010) (CL-0072).

actions taken against Claimants' investments, recasts the DOJ's Chief of the International Unit for Money Laundering and Asset Recovery as a "low level" official,[99] less than "an inferior official in the Kyiv City State Administration" responsible for a "lease agreement and construction permit"[100] or an administrative body that regulates the radio "broadcasting industry."[101] Respondent also attempts to rewrite Article II(3)(b) based on a misguided interpretation of prior international decisions, as opposed to what the Treaty actually says.

68. Again, it is the text of the Treaty and its express offer of protection to the investor that matters. Pursuant to Article 31(1) of the VCLT, the Treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,"[102] and Article II(3)(b) of the Treaty could not be clearer – "even if a party has had (and has not exercised), or has exercised (with whichever outcome) the right to judicial review, such action or omission is irrelevant in an investment arbitration deciding whether the measure is arbitrary or discriminatory."[103] Respondent may not substitute its own desired requirement for exhaustion of judicial remedies in place of the Treaty's literal language.

69. Respondent does not dispute that Article II(3)(b) was first inserted in the 1991 U.S. Model BIT "in reaction to the decision of the International Court of Justice in the [*ELSI*] case,"[104] nor does it dispute that "[t]he United States was concerned that, as a result of this decision, an arbitral panel formed pursuant to the investor-to-State or State-to-State dispute

[99] Respondent also characterizes a U.S. federal district court judge, appointed by Respondent's President and confirmed by the U.S. Senate to life tenure, as a "low level" or "inferior" court. *See* Reply ¶ 88 & n.153.
[100] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, ¶ 52 (June 14, 2010) (CL-0110).
[101] *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 278 (CL-0072).
[102] *See* Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (RL-053).
[103] *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability ¶ 277 (Jan. 14, 2010) (CL-0072).
[104] *See* Observations ¶ 163.

procedures of the BIT might conclude that the act of a host State which impaired investment was not an arbitrary and discriminatory act in violation of the BIT, because the act was subject to review or appeal under local law."[105] Clearly, Respondent impaired the investments at issue here by tainting them with criminal allegations, mandating that the investments be transferred to Respondent's treasury, refusing to allow Claimants to access, avail themselves of, or manage their investments at all, and by intending for their permanent forfeiture. The point of the Treaty's modified definition of arbitrary or discriminatory measures is to render it wholly irrelevant that specific measures (which have already caused improper impairment to investments in violation of the Treaty), might – someday – be subject to further review or appeal domestically.[106]

70. Under the Treaty, if measures arbitrarily impair investments, Claimants then have the opportunity to receive the protections of the Treaty without justice being further delayed. That is what Article II(3)(b)'s literal language allows. Respondent's defense regarding the prospect of judicial review – at some point in the indefinite future – is exactly why Article II(3)(b) exists. It allows Claimants to immediately challenge the measures that have arbitrarily impaired their

[105] *Id.* ¶ 167.

[106] Respondent seeks to distinguish *ELSI* on its facts because the Mayor of Palermo's decision to requisition Raytheon's property was "final" and "crystallized" – even though, like here, it was also separately reviewable through administrative appeals and in local courts. *See* Reply ¶ 91. What the Mayor of Palermo did was sequester the investment, and that is what Respondent has also done here for the purpose of permanent forfeiture. Respondent points out that technically the Mayor of Palermo did not file a court case at the outset, while nevertheless noting that the Mayor of Palermo's action was immediately subject to administrative appeal and review, and therefore quasi-judicial. But, regardless, it is not the specific fact pattern of the *ELSI* case that controls the protection of the investments in this case – the language of Article II(3)(b) and the specific protections created by the Treaty following the *ELSI* case are what governs. *ELSI* is only relevant insofar as it is in the background of Article II(3)(b)'s genesis and confirms that the purpose of Article II(3)(b) is to ensure that, if a measure is arbitrary or discriminatory, it can be challenged through dispute resolution regardless of the prospect of local judicial review. That is what Article II(3)(b) says and that is the protection it provides. The whole point of adding Article II(3)(b) to the Treaty is to do away with the speculative defense that, perhaps at some point in the future, due to the possibility of judicial review, Respondent may ultimately return investments that have already been taken in their entirety and which Respondent intends to forfeit forever.

investments before an impartial international arbitration panel, so that justice is not delayed or denied.

71. Even if, for sake of argument, Claimants' countenance Respondent's myopic focus on judicial action, Respondent entirely fails to grapple with the substantial authority cited in the Observations demonstrating that acts of the judiciary which violate the fair and equitable treatment standard ("FET") or amount to judicial expropriation, may be challenged pursuant to the Treaty. Respondent does not engage at all with the reasoning of substantial authority, including *Infinito Gold*,[107] *Vivendi*,[108] *Charles Arif*,[109] *Saipem*,[110] *Sistem*,[111] and *Standard Chartered*,[112] as well as the reasoned discussion by Gharavi[113] and others of this issue.

[107] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award ¶ 359 (June 3, 2021) (CL-0076) ("court decisions may deprive investors of their property rights 'just as surely as if the State had expropriated [them] by decree" and, "[i]n the same vein, judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice.").

[108] *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award II, ¶ 7.4.10 (Aug. 20, 2007) (CL-0094) ("To the extent that Respondent contends that the fair and equitable treatment obligation constrains government conduct only if and when the state's courts cannot deliver justice, this appears to conflate the legal concepts of fair and equitable treatment on the one hand with the denial of justice on the other.").

[109] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, ¶ 347 (Apr. 8, 2013) (CL-0095) ("[A]s a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made). Respondent's argument that there can be no international wrongful act or Treaty dispute arising from a court decision until the entire justice system has heard the case is therefore rejected.").

[110] *Saipem S.p.A v. The People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07, ¶ 151 (Mar. 21, 2007) (CL-0096) ("As a matter of principle, exhaustion of local remedies does not apply in expropriation law.").

[111] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, ¶ 118 (Sept. 9, 2009) (CL-0098). ("It is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an expropriation of property by that State. The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree. If the Claimant has been deprived of its property rights by an act of the State, it is irrelevant whether the State itself took possession of those rights or otherwise benefited from the taking.").

[112] *Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, ¶ 279 (Oct. 11, 2019) (CL-0093) ("[J]udicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its[] property or property rights[] can . . . amount to expropriation. While denial of justice could in some case result in expropriation, it does not follow that judicial expropriation could only occur if there is denial of justice").

[113] H. Gharavi, *Discord Over Judicial Expropriation*, ICSID REVIEW, Vol. 33, No. 2 (2018) (CL-0073).

72. The point made by Gharavi is particularly acute here: if "the State . . . could [] organize [a] taking via the judiciary," Respondent could then "inflict on the investor an obligation to exhaust local remedies, save for a narrow futility exception, and a higher threshold for liability in relation to the merits of the decision or the amount of compensation."[114] Claimants' interpretation of Professor Greenwood's writing, which Respondent substantially relied on in its Preliminary Objections but now entirely ignores in its Reply, supports this conclusion as well. That is because Professor Greenwood recognized that the "waiver of the local remedies rule," which is always waived by default in ICSID arbitration, "will affect" a case in which the challenged measures are initiated by a non-judicial government branch, such as the DOJ.[115] That is the interpretation of Mourre,[116] a leading international arbitrator and former President of the ICC International Court of Arbitration, and it prevents against "absurd results."[117] As Claimants showed in their Observations, if it were otherwise, "States could engage in the most egregious expropriation and unfair and inequitable treatment of foreign investments, so long as the offending branches of government simultaneously seek judicial imprimatur for their international delicts."[118]

73. Instead of grappling with these extensive arguments,[119] Respondent largely ignores them and instead attempts to pigeonhole Claimants' Observations on an "effective means"[120] claim. In the Claimants' Observations, the phrase "Effective Means" appears six (6)

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[114] *Id.* at 354.
[115] Christopher Greenwood, *State Responsibility for the Decisions of National Courts*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 56, 64 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) (RL-026).
[116] Alexis Mourre, *Expropriation by Courts: Is It Expropriation or Denial of Justice?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011 60, ¶¶ 20-21 (Arthur W. Rovine, eds., 2012) (CL-0091).
[117] *See* Gharavi, *Discord Over Judicial Expropriation*, at 354 (CL-0073).
[118] *See* Observations ¶ 181.
[119] *See id.* at ¶¶ 152-199.
[120] *Id.* ¶¶ 200-205.

times – *in only three paragraphs* (first appearing in paragraph 150), whereas in Respondent's Reply it appears twenty times, including in the very first paragraph.[121] The "effective means" argument is one of five arguments in opposition to Merits Objection 1(1).[122] Claimants submitted that: (1) customary international law's minimum standard of treatment is the floor, not the ceiling; (2) disputes based on arbitrary or discriminatory measures are not burdened by a requirement to exhaust judicial review; (3) the measures were initiated by the U.S. Department of Justice, a non-judicial branch of Respondent; (4) the Treaty's *lex specialis* authorizes the investment dispute; and (5) the Treaty requires effective means of enforcing rights and the Claimants need not exhaust local remedies because such exhaustion would be ineffective. Claimants' arguments do not rise or fall on an "effective means" claim, but even if they did, Respondent's Reply again misses the mark.

74. Respondent's Reply to the "effective means" argument implores Claimants to continue litigating in its domestic courts, while simultaneously arguing that Claimants cannot meaningfully challenge the application of domestic legislation in excess of the limits of prescriptive jurisdiction under customary international law. In Respondent's words, "[b]ecause the principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction, *it has no application where Congress has indicated otherwise*" and, in addition, "[a] case in which the United States is the plaintiff would seem a particularly unsuitable candidate for abstention on international comity grounds. Where, as here, the executive branch has decided that a forfeiture action is in the interests of the United States, declining jurisdiction out of deference to the interests of a foreign nation would be inappropriate."[123]

[121] *Compare* Observations at ¶¶ 150, 200-201 *with* Reply at ¶¶ 1, 6-7, 10, 82-83, 97-98, 102.
[122] *Compare id.* ¶¶ 152-199 (first four arguments in opposition to Merits Objection 1(1) *with id.* ¶¶ 200-204 (fifth and final "effective means" argument).
[123] Reply ¶¶ 72, 78, n.130.

75. Contrary to Respondent's insinuation that Claimants' "effective means" claim is predicated on "undue delay," which first requires substantial effort in the domestic courts in order to accrue, an "effective means" claim may also be based on grounds other than undue delay: a finding of denial of justice (or lack of effective means) does not require exhaustion of remedies if the means offered do not hold out the prospect of a "reasonable possibility of an effective remedy."[124]

76. Respondent's citation to the *Chevron v. Ecuador* case is misguided because that case expressly recognizes this point pertinently as follows: "A respondent State must prove that remedies exist before a claimant will be required to prove their ineffectiveness or futility or that resort to them has been unsuccessful."[125] In Denial of Justice in International Law, it is stated that: "The victim of a denial of justice is not required to pursue improbable remedies."[126] The proper test is not one of "obvious futility", but rather what Judge Lauterpacht articulated in the *Norwegian Loans* case (1957) thus: "reasonable possibility of an effective remedy." As in the case of *LMC v. Mexico*, Respondent's "position is excessively restrictive. It implies that an investor is obliged to pursue all available remedies, even if there is no reasonable prospect that the request or appeal will effectively undo the *international* wrong."[127]

77. The *LMC v. Mexico* tribunal noted that the exception to the exhaustion of local remedies rule in circumstances where there is no "reasonable possibility of an effective remedy" has been "recorded" by the International Law Commission in Article 15(a) of "its Draft Articles

[124] Observations ¶ 201 (quoting Paulsson, *Denial of Justice in International Law* at 118 (CL-0075) (citing *Certain Norwegian Loans* [1957] ICJ Reports 9, dated July 6, 1957, p. 39) (CL-0080))
[125] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 329 (RL-080).
[126] Paulsson, *Denial of Justice in International Law* at 112-19 (CL-0075).
[127] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, ¶ 558 (CL-0160).

on Diplomatic Protection."[128] The distinction between an "effective means" claim predicated on undue delay as opposed to a claim predicated on the lack of a reasonable possibility of an effective remedy is also reflected in Article 15 of the ILC Draft Articles on Diplomatic Protection,[129] which distinguishes between: claims based on "undue delay in the remedial process which is attributable to the State alleged to be responsible,"[130] on the one hand; as opposed to a claim that "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress," on the other hand.[131] The latter claim does not require recourse to litigation in the relevant court system, because the claim itself is that there are "no reasonably available local remedies to provide effective redress." This form of claim includes circumstances in which:

> *the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be reviewed by local courts*; the local courts are notoriously lacking in independence; *there is a consistent and well-established line of precedents adverse to the alien*; *the local courts do not have the competence to grant an appropriate and adequate remedy to the alien*; *or the respondent State does not have an adequate system of judicial protection.*[132]

78. Claimants have shown that several of those exceptions colorably apply. *First*, Claimants have shown that challenges to Respondent's expansive, arbitrary, and unreasonable interpretation and application of its money laundering legislation in derogation of customary international law "will not be reviewed by local courts." As set forth in paragraphs 72-74 and 78

[128] *Id.* ¶ 561. This proposition is also in accord with Dugard, J., Third Report on Diplomatic Protection, 7 March 2002, A/CN.4/523, at ¶¶ 38-44 (CL-0099) and Paulsson, *Denial of Justice in International Law* at 118-19 (CL-0075).
[129] ILC (International Law Commission) Draft articles on Diplomatic Protection with Commentaries, adopted on 9 August 2006
[130] *Id.* at Art. 15(b).
[131] *Id.* at Art. 15(a).
[132] ILC (International Law Commission) Draft articles on Diplomatic Protection with Commentaries, adopted on 9 August 2006 at ¶ 23 (CL-0161).

of Respondent's Reply, it appears that Respondent agrees that there is no way to challenge the purportedly expansive scope of the legislation at issue for unfairly or inequitably exceeding the limits of Respondent's jurisdiction to prescribe under customary international law. Respondent's own cited authority makes this point: "If a statute makes plain Congress's intent . . . then Article III courts, which can overrule Congressional enactments only when such enactments conflict with the Constitution, must enforce the intent of Congress irrespective of whether the statute conforms to customary international law."[133] Only this duly constituted and impartial international arbitration panel is vested with that power.

79. *Second,* Claimants have shown that Respondent's judiciary cannot "second-guess the '[E]xecutive [B]ranch's judgment as to the proper role of comity concerns,' because the Executive Branch 'has already done the balancing in deciding to bring the case in the first place'" and, according to the U.S. Court, under U.S. law if "the executive branch has decided that a forfeiture action is in the interests of the United States, declining jurisdiction out of deference to the interests of a foreign nation would be inappropriate."[134] Accordingly, "there is a consistent and well-established line of precedent adverse to the [Claimants]," "[t]he courts of the respondent State do not have the competence to grant an appropriate and adequate remedy to the [Claimants]," and/or "the local courts have no jurisdiction over the dispute" regarding the limits on Respondent's jurisdiction imposed by international law, and this is a classic category of a case in which local remedies are ineffective

80. *Third,* Claimants have shown that the DOJ can indefinitely avoid a trial by seeking a stay based on an "ongoing" related criminal investigation and the U.S. courts do "not have

[133] *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1288 (D. Utah 2007) (R-0101).
[134] Observations at ¶ 203.

discretion to deny the requested stay because the statute mandates that a stay be entered in a civil forfeiture proceeding if the Government's related criminal investigation would be adversely affected" – the U.S. courts are "statutorily compelled to grant the stay."[135] There is therefore "a consistent and well-established line of precedents adverse to the" Claimants, "the local courts do not have the competence to grant an appropriate and adequate remedy," and "the respondent State does not have an adequate system of judicial protection."

81. At bottom, Respondent's attacks on the "effective means" claims are misguided because they fail to distinguish between a case based solely on undue delay, as opposed to a case based on lack of reasonably available local remedies to provide effective redress, or that local remedies provide no reasonable possibility of such redress. The "effective means" claims are legally cognizable and Respondent fails to meet its burden under Rule 41(5) of proving that they "manifestly" lack legal merit.

82. Perhaps realizing that the measures at issue may be properly challenged under the Treaty for the many reasons submitted in the Observations,[136] Respondent pivots away from its original argument that the challenged measures are purely "judicial" and "non-final" and therefore cannot "as a legal matter give rise to a claim of expropriation." [137] Instead, Respondent devotes much of its Reply argument to what Claimants did *after* they initiated arbitration. But – *before* Claimants initiated arbitration – Claimants filed a "time-sensitive" motion to vacate the *ex parte* restraining order in the Texas Action and requested "a prompt, adversarial evidentiary hearing with respect to the basis for the restraining order."[138] On February 8, 2021 and February

[135] Observations ¶ 201.
[136] Observations ¶¶ 144-205.
[137] Preliminary Objections ¶ 66.
[138] *See* Observations ¶ 20 & n.31.

24, 2021, six months after Respondent initiated the forfeiture action,[139] and four months after the "time-sensitive" motion to vacate was lodged (with no judicial action taken), Claimants initiated arbitration and availed themselves of the Treaty's protections.

83. Having initiated international arbitration pursuant to Article 26 of the ICSID Convention, "the right [was then] guaranteed . . . to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative."[140] Claimants "would violate [] Article [26] if [they] were, in the domestic courts of [the United States], to advance the arguments which [they will rely on in th[e] arbitration[.]"[141] Arbitration under the Convention, once elected, was to the exclusion of any other remedy.

84. Additionally, although Respondent now argues that Claimants did not do enough in court, Respondent neglects to appreciate the Treaty's fork-in-the-road provision set forth in Article VI(3). The fork-in-the-road provision here clearly provides that where the parties have "not submitted the dispute for resolution under paragraph 2 (a) or (b)" (to either the courts of the state party to the dispute or to a previously agreed dispute-settlement procedure), then "the national or company concerned may choose to consent . . . to the submission of the dispute for settlement by binding arbitration: (i) to the International Centre for the Settlement of Investment Disputes…"[142] Such a provision provides investors with alternative paths to resolve investment

[139] *See* Observations ¶¶ 27-28.
[140] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, ¶ 7 (Jan. 18, 2005) (CL-0162).
[141] *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, ¶ 61 (May 8, 2009) (CL-0163).
[142] Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment ("US-Ukraine BIT," "BIT," or "Treaty") (CL-0069); *see Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility ¶¶ 1.10, 4.72 (Feb. 27, 2012) (CL-0164) (interpreting substantively identical provision to constitute a "fork-in-the-road" provision); *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, Partial Award on Jurisdiction ¶ 159, 161 (Nov. 13, 2013) (CL-0165) (same).

disputes by offering the choice of litigation in "three alternative[]" and "mutually exclusive" forums.[143] "[T]he essence of a 'fork-in-the-road'" provision is "[t]he right to choose once," and "[o]nce the choice has been made there is no possibility of resorting to any other option."[144] In other words, once a party makes a decision to litigate in one of the listed forums (for example, the courts of the Host State), that choice is irrevocable, and the party cannot then pursue its litigation in a different forum (for example, international arbitration).[145] Claimants' challenges to Respondent's actions in excess of the limits imposed by customary international law, including its jurisdiction to prescribe, are the quintessential kinds of legal challenges that are suitable for a forum other than the Respondent's judicial system, such as an impartial international arbitration tribunal. Claimants accordingly exercised their right to initiate arbitration in exactly such a forum.

85. The problem with Respondent's argument that the decision in *Generation Ukraine* required additional action in the Respondent's domestic judicial system is that this would effectively allow a non-judicial branch of Respondent (such as the DOJ) to seize investments and destroy value, while concomitantly pushing forward as a plaintiff in a lawsuit to validate its internationally wrongful actions. In such a circumstance, the investor seeking to arbitrate the investment dispute is placed into a debacle: the investor evidently has a duty under *Generation Ukraine* to do something; but the investor also has a duty under the fork-in-the-road clause not

[143] *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, Partial Award on Jurisdiction ¶ 159, 161 (Nov. 13, 2013) (CL-0165); *See also* Dolzer R. & Schreuer, C., *Principles of International Investment Law*, Oxford University Press, 2d ed., 2012, p. 267 (CL-0166).
[144] *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, ¶ 181 (July 31, 2007) (CL-0167).
[145] *See* Jacomijn J. Van Haersolte-van Hof & Anne K Hoffman, *The Relationship Between International Tribunals and Domestic Courts*, The Oxford Handbook of International Investment Law 962, 998 (2008) (CL-0168) ("'Fork-in-the-road' provisions in investment treaties are clauses stipulating that the investor has to make a choice between the different procedural forums offered to him under the treaty, for example local courts, previously agreed dispute settlement mechanisms, or international arbitration proceedings, in order to have his claims heard. As soon as he, for example, selects the local courts of the host state and has initiated proceedings accordingly, he will not be able to submit the same claim to one of the other forums provided for in the treaty, including international arbitration.").

to submit the dispute to the courts of the Respondent, as well as a duty to honor exclusive arbitral jurisdiction once invoked.

86. Under the circumstances, Claimants did what was required of them. *Before* arbitration, Claimants endeavored to resolve the matter with the highest levels of the DOJ and to preserve the status quo *via* a motion to vacate. Then, at a hearing held 60 days *after* arbitration was initiated, Claimants sought to stay the forfeiture proceedings because the arbitral process is "to the exclusion of any other remedy" and, if Claimants had done any more, no doubt Respondent would not be arguing that Claimants did too little (as it now argues), but would instead argue that Claimants did too much and waived arbitration forever under the fork-in-the-road clause.[146]

87. Fundamentally, as the *Helnan* Committee correctly recognized, "the consequences" of the interpretation that Respondent advances here (requiring further recourse to its local courts) would "be serious" and "inject an unacceptable level of uncertainty into the way in which an investor ought to proceed when faced with a decision on behalf of the Executive of the State, replacing the clear rule of the Convention which permits resort to arbitration."[147] Claimants did what was required both *before* arbitration and *after* arbitration, and Respondent's

[146] Respondent's own cited authority demonstrates that the submission of claims to the domestic courts of Respondent, which relate at all to the subject matter of a subsequent arbitration, risks waiver under the fork-in-the-road clause – even if such claims are based on entirely different causes of action. In *H&H v. Egypt*, the tribunal concluded (with respect to an identical fork-in-the-road provision in a U.S. BIT) that "investment arbitration proceedings and local court proceedings are often not only based on different causes of action but also involve different parties . . . . [still] the dispute at hand [must] not be submitted to other dispute resolution procedures; what matters therefore is the subject matter of the dispute rather than whether the parties are exactly the same . . . one must assess whether the claims share the same fundamental basis." *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, ¶¶ 367-368 (RL-066). The tribunal in *H&H v. Egypt* concluded that the mere submission of counterclaims in domestic courts (even for breach of contract, as opposed to violations of international law or international treaty obligations) waived the right to arbitrate because the counterclaims arose out of the same subject matter. *Id.* at ¶ 379.

[147] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, ¶ 52 (June 14, 2010) (CL-0110).

insinuation to the contrary is misguided and does not account for the distinction between pre-arbitration and post-arbitration conduct.

88. As a final effort to argue around the measures that have been properly challenged by Claimants in this international arbitration, Respondent asserts that Claimants "have not established 'arbitrariness'" and "have provided no actual evidence of political motivation."[148] At the outset, Claimants note that, in the context of Rule 41(5), it is not their burden to prove arbitrariness. On the contrary, "[t]he factual premise has to be taken as alleged by the Claimant."[149] And it is actually Respondent's burden to prove that the case is manifestly without legal merit. "Only if on the best approach for the Claimant, its case is manifestly without legal merit, it should be summarily dismissed."[150]

89. Notwithstanding this burden of proof placed upon Respondent, which does not require that Claimants prove the case at the very start of the arbitration, Claimants can already put forward evidence of "political motivation."

90. For example, on November 16, 2016, approximately one month prior to the nationalization of PrivatBank, then Vice-President Joe Biden placed a phone call to then President of Ukraine Petro Poroshenko. The audio of the phone call was later released by a Ukrainian Member of Parliament.[151]

91. The exchange shows that Respondent viewed Mr. Kolomoisky (one of Claimants' chief principals and owners) as "a pain in the ass and a problem for everybody," Respondent was pressuring the President of Ukraine to "push the PrivatBank to closure so that the IMF loan comes

[148] *See* Reply ¶¶ 51-52.
[149] *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, ¶ 61 (Feb. 2, 2009) (CL-0006).
[150] *Id.*
[151] Telephone Call Between Vice-President Biden and President Poroshenko (Nov. 16, 2016) (C-0047).

forward," and Respondent was warning the President of Ukraine that heeding Respondent's demands was "critically important to your economic as well as physical security."[152] The exchange also demonstrates that the President of Ukraine was issuing public statements about PrivatBank at the behest of Respondent, and evidently the nationalization of PrivatBank needed to be carried out on an expedited basis, even before the results of an audit had come in.[153] Nationalization needed to be handled quickly, due to concern that the then-incoming President Trump would not agree with Respondent's assessment of the need for nationalization.[154]

92. Furthermore, Claimants have shown that, "[i]n every case, the Ukrainian courts have found that the loans at issue – in many cases the very same loans Respondent alleges were fraudulent in the civil forfeiture actions – were not fraudulent, and in fact were lawfully issued and properly performed."[155] "These judgments have been issued or upheld by nine Ukrainian trial-level judges and 41 Ukrainian appellate-level judges, including at the country's highest court, the Grand Chamber."[156] Moreover, "neither Ukrainian authorities nor any other law enforcement authorities in the world have charged any individual or entity with any crime in relation to the alleged fraudulent loan scheme underlying Respondent's civil forfeiture actions."[157]

93. The evidence adduced, even at this early Rule 41(5) stage, is at least plausibly suggestive of political motivation. Ultimately, the burden at the Rule 41(5) stage is on

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[152] *Id.*
[153] *Id.*
[154] *Id.* Approximately five months before this call, on June 3, 2016, President Poroshenko publicly stated that there was "No Threat to PrivatBank" because there was sufficient liquidity. Jun. 2016 - State Department Email (C-0035). Approximately four months prior to this call, on July 26, 2016, an attorney reached out to the State Department to discuss PrivatBank's financial health and liquidity. The lawyer was dismissed internally as a "Kolomoisky lobbyist." Jul. 26, 2016 – State Department Email (C-0048).
[155] *See* Observations ¶ 75.
[156] *Id.*
[157] *Id.* ¶ 76.

Respondent to entirely *disprove* any possibility of *legal* merit. Respondent has not done so and cannot do so.

2. Respondent's conduct was manifestly expropriatory

94. After devoting just three paragraphs to the argument that "non-final measures cannot constitute expropriation as a matter of law" based on a purported lack of "permanent deprivation," Respondent's Reply devotes twelve pages to this claim.[158] Yet, this position is not supported by the plain language of the Treaty, including its definition of "Investment" and "Expropriation" which Respondent inexplicably does not cite to or reference.

95. Article III provides that "[i]nvestments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation')[.]" The Letter of Submittal further clarifies that expropriation includes "direct or indirect state measures 'tantamount to expropriation or nationalization,' and thus appl[ies] to 'creeping expropriations' that result in a substantial deprivation of the benefit of an investment without taking of the title to the investment."[159]

96. The definition of investment is equally broad. Under Article I of the Treaty, an "Investment" consists of:

> "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party . . . and includes: (i) *tangible and intangible property*, including rights, such as mortgages, liens and pledges (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; . . . [and] (v) *any right conferred by law or contract*, and any licenses and permits pursuant to law[.]"

[158] Preliminary Objections, ¶¶ 76-78.
[159] U.S. - Ukraine BIT, S. Treaty Doc. No. 103-37, Letter of Submittal, comments to Article III (Expropriation) (Sept. 7, 1994) (CL-0069).

97. The Letter of Submittal states that "[t]he Treaty's definition of investment is broad, recognizing that investment can take a wide variety of forms" and "include[s] both tangible and intangible property, interests in a company or its assets, 'a claim to money or performance having economic value, and associated with an investment,' intellectual property rights, and any rights conferred by law or contract[.]'"[160] Plainly, under the Treaty, an "Investment" includes intangible property rights, including the intangible right to "a claim to money or a claim to performance having an economic value" and any other "right conferred by law[.]"

98. In this case, Respondent has both destroyed the value of the Investments and denied Claimants intangible rights they are entitled to under the law. What Claimants had prior to the challenged measures was ownership and control of their investments with a combined value in excess of $23.8 million dollars. What Claimants have after the challenged measures is the right to litigate against the Respondent for the return of their investments, which indisputably have already been entirely transferred to Respondent *in toto* and which Respondent intends to permanently forfeit. The value of the former circumstance is substantially destroyed when converted to the subsequent circumstance: investments worth in excess of $23.8 million are worth significantly more than the right to litigate against Respondent for the investments' return. Aside from the impairment of the investments' value, not even Respondent disputes that the right to control, manage, and profit from the investments was taken from Claimants, and those intangible

[160] *Id.*, comments to Article I (Definitions).

rights each qualify as an "Investment" and their taking is sufficient to constitute an expropriation[161] – whether characterized as direct or indirect.[162]

99. Even assuming – purely *arguendo* – that the investments' value is not impaired, that would not be dispositive because "an expropriation claim may be accepted not because of a decrease in value of investment, but because of a loss of control, which prevents the investor from using or disposing of its investment."[163] "An investor may lose control of the investment by losing rights of ownership or management, even if the legal title is not affected."[164] Indeed, "[l]oss of control is thus a factor that is alternative to destruction of value."[165] It has been held that "[a] finding of indirect expropriation would require . . . that the investor no longer be in control of its business operation, *or* that the value of the business have been virtually annihilated."[166] There is no dispute that Claimants were divested of all control over their investments, and that alone is sufficient.[167]

100. A classical definition of expropriation in the *Starrett Housing* case reflects this well-established principle:

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[161] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 98 (Dec 8, 2000 ("An expropriation is not limited to tangible property rights.") (CL-0104); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, ¶ 164 (May 20, 1992) (CL-0169) ("[T]he taking of contractual rights involves an obligation to pay compensation therefore."); *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 255 (Nov. 14, 2005) (CL-0058) ("[E]xpropriation is not limited to *in rem* rights and may extend to contractual rights"); *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, ¶ 17 (Aug. 3, 2005) (CL-0170) ("[T]he restrictive notion of property as a material 'thing' is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing").

[162] The distinction between direct or indirect expropriation is largely a distinction without a difference in this case because "an indirect expropriation occurs if the state deliberately deprives the investor of the ability to use its investment in any meaningful way and a direct expropriation occurs if the state deliberately takes that investment away from the investor" – here both happened. *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, ¶ 8.23 (June 16, 2010) (CL-0171).

[163] UNCTAD, EXPROPRIATION, UNCTAD Series on Issues in International Agreements II, at 67 (2012) (CL-0172).

[164] *Id.*

[165] *Id.*

[166] *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, ¶ 285 (Sept. 28, 2007) (CL-0173) (emphasis added).

[167] Further, as stated in paragraph 98, *supra*, the investments' value has been virtually annihilated.

> "…it is recognized under international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner."[168]

101. Respondent criticizes Claimants' "reliance on awards issued by the Iran-United States Claims Tribunal (IUSCT)" because such awards (according to Respondent) "do not imply a lower bar for creeping expropriations."[169] Yet *Starrett Housing* involved a similar decree as in the Texas Action, insofar as Iran immediately assumed for itself the right to manage the investment and therefore expropriated the investment, even if theoretically the taking of the intangible rights could potentially have been temporary. Contrary to Respondent's aspersions, "the Iran-United States Claims Tribunal [has] found an expropriation in a number of cases that involved the appointment by the Iranian Government of temporary managers in the subsidiaries of United States companies or the acts of such appointees."[170]

102. Respondent's defense that any deprivation is temporary as Claimants will have the opportunity to litigate forfeiture claims against Respondent for the return of their investments is itself an implicit acknowledgment that Respondent has no intention of conducting

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[168] *Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, IUSCT Case No. 24, Interlocutory Award (Award No. ITL 32-24-1), ¶¶ 66-67 (Dec. 19, 1983) (CL-0174) ("the succinct language of [the decree] makes it clear that the appointment of Mr. Erfan as a temporary manager in accordance with its provisions deprived the shareholders of their right to manage Shah Goli. As a result of these measures the Claimants could no longer exercise their rights to manage Shah Goli and were deprived of their possibilities of effective use and control of it.").

[169] Reply ¶ 109.

[170] UNCTAD, EXPROPRIATION, UNCTAD Series on Issues in International Agreements II, at 15 (2012) (CL-0172) (citing *Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, IUSCT Case No. 24, Interlocutory Award (Award No. ITL 32-24-1), (Dec. 19, 1983) (CL-0174); *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award (Award No. 141-7-2), 29 June 1984 (CL-0175) ("[T]he Plan and Budget Organization of the Government of Iran on 24 July 1979 appointed a temporary manager for AFFA" – and this required "under international law and general principles of law [the] compensation for the full value of the property of which it was deprived.).

consultations or restoring Claimants' investments and, thus, proves the non-ephemeral nature of the State's unlawful conduct.[171]

103. By way of example, the tribunals in *Belokon v. Krygyz Republic*, *Tza Yap Shum v. Peru*, and *Wena Hotels v. Egypt* all decided that subsequent compensation or even return of an investment does not necessarily take away the non-ephemeral nature of an indirect expropriation.

104. In *Belokon v. Krygyz Republic*, the tribunal found that the imposition of an administration and sequestration regime on Manas Bank (the claimant's investment), based on unsubstantiated allegations of money laundering and public allusions to an "ongoing investigation," amounted to an expropriation because there were "no assurances by the Respondent that this temporary administration w[ould] soon be at an end" and there was "no reason to expect that the sequestration administration . . . [would] terminate in a foreseeable future."[172] That is the exact circumstance here: Respondent has asserted total control over the investments without an indication of when this control will end. As in *Belokon*, the deprivation of the investments for an indefinite period of time constitutes expropriation – even if return of the investments is theoretically possible at some point in the future.[173]

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[171] Reply ¶ 115

[172] *See Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, ¶¶ 207-208 (Oct. 24, 2014) (CL-0007) ("The Tribunal has been provided no assurances by the Respondent that this temporary administration will soon be at an end. To the contrary, the Tribunal understands that the temporary administration must be imposed while there is an ongoing investigation against the Claimant and the personnel of Manas bank . . ..the Respondent has been unable to explain the legal basis for the continuing application of the sequestration regime to Manas Bank. In effect, there is no reason to expect that the sequestration administration of Manas Bank will terminate in a foreseeable future.").

[173] *See id. See also Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Award, ¶ 300 (Mar. 1, 2012) (CL-0176) ("As described above, the Tribunal finds that the telegram instructing [X] not to let the ship leave the territorial waters of Ukraine, and the continuation of the travel ban for the ensuing year, was a sovereign act taken by Respondent. That act deprived Claimants of access to and control over the essential asset for its investment, i.e., the ship, and thus of Claimants' contractual rights to use that asset. While Respondent asserts that any deprivation was merely temporary because the travel ban was lifted after one year, the damage to the investment had by that time been done. An entire sailing season was cancelled, and Claimants' business suffered substantial harm such that they could not reasonably have been expected to resume operations as if nothing had happened. Indeed, at that stage, two of the Claimants were in insolvency proceedings,

105. In *Tza Yap Shum v. Peru*, the tribunal held that measures including back taxes and fines, and certain interim measures, constituted an expropriation. Although the claimant successfully challenged certain of the taxes and fines, it was denied access to the host-State's banking system, which so severely decreased claimant's ability to transact business and generate sales that it ultimately required a debt restructuring. The tribunal held that the duration of the harm imposed by the measures on the investment was only one discrete factor to consider, and that the severity of the effect also had to be considered. In light of this, the tribunal found that while the measures lasted for approximately one year, they nonetheless constituted expropriation because they substantially impaired claimant's operational ability. Significantly, the tribunal's decision was made despite the fact that the company at issue eventually availed itself of bankruptcy proceedings, which allowed the company to restructure its finances, return to the banking system, and begin operations afresh. The tribunal decided that these subsequent reversals of fortune and removal of adverse effects, did not impact the decision regarding expropriation because the company had commenced proceedings to recover what it had lost as a result of the host-State's actions and it would "thus be illogical to allow [the State] to benefit from these efforts of the [investor], in order to justify or minimize the impact of its own conduct."[174] The tribunal's reasoning holds true here: it would be illogical to permit Respondent to benefit from measures that are oppressive and expropriatory merely because subsequent efforts by Claimants might (speculatively) allow for the return of certain investments at some unknown point in the future.

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and, even if those entities had remained solvent, it is not reasonable to assume that customers would be willing to work with them in light of these events."). In *Inmaris v Ukraine*, the measures "destroyed the value of Claimants' contractual rights," which could not be given back, and also the "diminution in value (due to the lasting damage to Claimants' business) was, for all intents and purposes, permanent," and that was sufficient. *Id.* ¶ 301 (CL-0176).

[174] *See Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, ¶¶ 221-22 (July 7, 2011) (CL-0177).

106. *Wena Hotels v. Egypt* further demonstrates that even a temporary measure may have an expropriatory effect.[175] There, the State seized claimant's hotels for a year, then eventually returned them, albeit "stripped of much of their furniture and fixtures."[176] Egypt was nevertheless found liable for expropriation, because "to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference 'in the use of that property or with the enjoyment of its benefits.'"[177] Respondent attempts to distinguish *Wena Hotels v. Egypt* by claiming that the tribunal's decision was conditional upon ancillary facts: the State indicated that the seizure would be permanent, "neither hotel was returned to Wena in the same operating condition that it had been in before the seizures," and when returned "neither hotel had a permanent operating license," and eventually Wena was evicted.[178] In sum, Respondent attempts to distinguish *Wena Hotels v. Egypt* by arguing that: (1) the deprivation was "intended to be permanent"; and (2) resulted in a permanent deprivation.

107. But Respondent's position is clearly belied by the undisputed facts of this case and the clear language of the *Wena Hotels* award. In this case, as in *Wena Hotels*, Respondent's stated intention is, indisputably, to seize the investments permanently. Moreover, the *Wena Hotels* tribunal held that "allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference 'in the use of that property or with the enjoyment of its benefits.'"[179] It was the seizure and illegal possession of the property rights for a substantial period of time – (not damage to furniture, etc.) – that caused the tribunal to find that there had been an expropriation. And that conclusion was

[175] Somewhat incidentally, the President of the *Wena Hotels v. Egypt* Tribunal was Monroe Leigh, a legal adviser for the United States Defense Department, later appointed to serve as Legal Adviser of the Department of State.
[176] *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award ¶ 99 (Dec. 8, 2000) (CL-0104).
[177] *Id.*
[178] Reply ¶ 113.
[179] *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 99 (Dec. 8, 2000) (CL-0104).

reached because (as the Treaty here also recognizes) expropriation can occur even if only intangible property rights are taken: it is "well established that an expropriation is not limited to tangible property rights" and "the taking of such rights involves an obligation to make compensation therefore."[180] Contrary to Respondent's revisionary reading, the tribunal found that the taking of the intangible property rights for a non-ephemeral period was expropriation.

108. Respondent's effort to distinguish the decisions in *Middle East Cement v. Egypt* and *Olin Holdings Ltd. v. Libya* is equally unavailing and borders on an effort to rewrite those decisions wholesale. Respondent's basis for discounting *Middle East Cement v. Egypt* is "that there was 'no dispute between the Parties that, in principle, a taking did take place'" and, according to Respondent, the discussion of expropriation was therefore "dicta."[181] Of course, here, Respondent compelled a transfer to Respondent's treasury of all of Claimants' investments, and seized control of all managerial rights to the investments, with the express intention of forfeiting them forever; Respondent cannot seriously maintain that no "taking" took place. Respondent goes on to contend that the Claimants are "simply wrong" that the tribunal found a four-month taking adequate to implicate the international responsibility of Egypt for expropriation.[182] The simplest way to dispatch with this convoluted re-interpretation is to reproduce the literal language:

> As also Respondent concedes that, at least for a period of 4 months, Claimant was deprived, by the Decree, of rights it had been granted under the License, there is no dispute between the Parties that, in principle, a taking did take place. When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation or, as in the BIT, as measures "the effect of which is tantamount to expropriation." As a matter of fact, the investor is

[180] *Id.* ¶ 98.
[181] Reply ¶ 113.
[182] Reply ¶ 112.

> deprived by such measures of parts of the value of his investment. This is the case here, and, therefore, it is the Tribunal's view that such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefor. In order to determine the amount of such compensation, the Tribunal has to determine the "market value" of the investment affected.[183]

109. As the actual language above shows, the taking of the rights under the license for four months "amounted to an expropriation."[184] The paragraphs Respondent alludes to in its Reply relate to quantification of damages and/or otherwise do nothing to dispel with the obvious meaning of the aforementioned paragraph. To the extent that Respondent intends to continue to argue that the above paragraph does not mean what it says, Respondent engages in self-evident casuistry.

110. Similar to its effort with respect to the *Middle East Cement v. Egypt* decision, Respondent fails to meaningfully discount the decision of the tribunal in *Olin Holdings Ltd. v. Libya*, which determined that, "State measures, even if temporary, can have an effect equivalent to expropriation if their length and impact on the investment are sufficiently important."[185] Again, Respondent tries to avoid the clear import of that literal language by noting that the measure of damages in that case was based on the fact that the temporary taking caused a nascent company to lose first mover advantage and be "overtaken by competitors," but here Respondent can hardly contend that Claimants' investments and ability to compete in the market have not been harmed

[183] *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107 (CL-0108).
[184] *Id.*
[185] *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, ¶ 165 (CL-0107).

by prosecutorial allegations of inextricable association with multi-billion-dollar criminal fraud.[186] As Claimants showed in the Observations:

> Respondent has taken Claimant's real property and has, in effect, permanently deprived Claimants of the full economic rights and value of the investment, without compensation. Respondent has also harmed Claimants' U.S. businesses more broadly, because the taking of the assets has frustrated opportunities and the measures taken have gravely harmed the Claimants' ability to continue operating businesses. The extent of the damage caused by this indirect expropriation is a question of fact that is wholly inappropriate for resolution at the Rule 41(5) stage.[187]

111. The decision in *Olin Holdings Ltd. v. Libya* clearly supports such a theory of liability and Respondent's effort to recast the clear language of that decision to support its claim that legal merit is "manifestly" lacking borders on incomprehensible and is ultimately ineffectual.

112. Lastly, Respondent claims that "Claimants' primary source on creeping expropriation [is] the award in *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (*'Tecmed')*."[188] Claimants note the Observations span 233 paragraphs and *Tecmed* is cited in but one sentence of one paragraph.[189] *Tecmed* stands for the proposition that, "[u]nder international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary."[190] Here, there can be no genuine dispute that "the effects" of the measures taken by Respondent's highest-level international prosecutors, including allegations of billion-dollar fraud and total seizure and taking

[186] Quite obviously, such accusations and actions taken by some of the highest-level federal prosecutors in the United States of America have "permanent and profound effects on the investments at issue, even [if] they [ar]e ultimately revoked." Reply at n.210.
[187] Reply ¶ 114.
[188] Reply ¶ 107 (citing *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award May 29, 2003) (emphasis added) (RL-082)).
[189] Observations ¶ 207.
[190] *Tecmed*, ¶ 116.

of management rights and investments themselves, will have an effect "on the owner of the assets or on the benefits arising from such assets affected by the measures" that will be permanent.[191] "[B]eyond mere appearances . . . the real situation" is that unfounded allegations of criminal taint, coupled with indefinite taking of rights to management, not to mention the indefinite taking of the investments themselves, intending for permanent forfeiture, has a more than "temporary" effect on the investments.[192]

113. Perhaps sensing weakness in the argument that the deprivation of intangible property rights for a non-ephemeral period of time cannot constitute expropriation, Respondent pivots for the first time in Reply to new factual arguments, devoting several pages to them.[193] Specifically, Respondent alleges that: (1) the investments were already subject to a worldwide freezing order issued by the High Court of Justice in London in December 2017; (2) the value of the 55 Public Square property was already impaired by litigation risks, even before the DOJ filed the lawsuit directed to 55 Public Square; and (3) the investments were sold after the DOJ's allegedly wrongful conduct.

114. At the outset, Claimants note that all three objections, which are factual in nature, were never raised at all in the initial Preliminary Objections. Respondent's "Merits Objection 1.2" consisted of a sum total of three paragraph (¶¶ 76-78) and argued – essentially as a matter of law – that the taking of investments with the prospect of return at some point in the future cannot constitute expropriation. Respondent's argument in Merits Objection 1.2 was summarized in the Preliminary Objections as follows:

> In sum, Claimants' claims manifestly lack legal merit because they are based on temporary, reversible, pre-trial orders enacted by the

[191] *Id.*
[192] *Id.*
[193] Reply ¶¶ 123-128.

> lowest-level federal court, which they could have (and initially did) challenge. As such, the temporary restraining orders that form the basis of Claimants' expropriation claim are manifestly premature, and cannot engage the United States' international responsibility, as a matter of law.[194]

115. Perhaps sensing trouble with this Preliminary Objection's discrete legal argument, Respondent now creates three brand new factual arguments, all of which essentially argue for the first time that *even if* Respondent's measures could be capable of being expropriatory, other causal factors would have also impaired the investments or, alternatively, the value of the investments was unaffected by Respondent's conduct.[195]

116. These additional arguments lack merit and would have been inappropriate at the Rule 41(5) stage, even if timely raised, because they are disputed factual (not legal) arguments. But these additional factual arguments are particularly inappropriate now, more than 115 days after the constitution of the Tribunal on January 24, 2023, far exceeding Rule 41(5)'s 30-day time limit. Because Respondent purports to expand and create new Preliminary Objections, long after Rule 41(5)'s 30-day time-limit, these arguments ought to be summarily denied, as set forth in paragraphs 6-8, *supra*, even if they did not lack substantive merit, which they do.

117. *First*, Respondent alleges that the assets were "already subject to a worldwide freezing order issued by the High Court of Justice in London in December 2017,"[196] but that allegation is demonstrably incomplete, and evinces Respondent's lack of familiarity with the relevant factual and legal background. The decision of the Delaware Chancery Court that Respondent originally attached to its Preliminary Objections clearly explains as much: "the London Litigation is irrelevant . . . as it concerns a separate endpoint for separate

[194] Preliminary Objections ¶ 78.
[195] Note that Respondent took the investments intending to forever keep them.
[196] Reply ¶ 126

loans – wrongdoing distinct from the Optima Scheme at issue here" and "the loans" at issue here "differ from those in the London Litigation."[197] The loans and transactions at issue in the London litigation have nothing to do with any of the U.S. investments, because the U.S. investments at issue were made *after* the time period that is at issue in the London litigation. PrivatBank admitted as much in the Delaware Chancery Court through the declaration of Oleh Beketov:

> *[T]he London Litigation does not involve the Delaware Operative Facts and Issues, nor does it involve conduct directed at the United States.* To the extent there are similar causes of action—e.g., unjust enrichment claims in the London Litigation—such claims remain separate and distinct from the claims in PrivatBank's SAC because they do not involve the same parties, they do not involve the same harm, *they do not concern assets in the United States*, and thus they do not share a common set of operative facts that give rise to underlying causes of action PrivatBank has brought against Defendants. *The London Litigation and PrivatBank's Claims are separate and distinct cases.*[198]

118. Further, Respondent does not disclose that, with respect to the so-called freezing order, Mr. Kolomoisky disclosed his interest in Optima Ventures as an interest in a "trading company" as defined by the freezing order, and therefore "the freezing order as varied d[oes] not prohibit dealings or disposals in the ordinary and proper course of business[.]"[199] That is a far cry from ceding all managerial control to Respondent and then transferring the investments to Respondent for the purpose of their permanent forfeiture.[200]

119. <u>*Second*</u>, Respondent argues that "litigation risks" already threatened the property located at 55 Public Square in Cleveland, Ohio, before the DOJ's initiation of the forfeiture

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[197] *See Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, at 21 & n.87 (Del. Ch. Aug. 23, 2021) (R-0034),

[198] *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Beketov Declaration, ¶¶ 30-32 (D.E. 179-2) (Dec. 16, 2020) (C-0049) (emphasis added).

[199] R-0093, ¶¶ 10, 79.

[200] Indeed, Justice Trower did not countenance PrivatBank's contention that the sale of 55 Public Square without his approval was improper or otherwise violative of the freezing order and rebuffed PrivatBank's spurious claims: "the relief sought by the Bank is refused." R-0093, ¶ 109.

lawsuit. Specifically, Respondent references a motion filed in the Delaware lawsuit initiated by PrivatBank in Delaware state court, which sought authorization for the sale of 55 Public Square.[201] That motion is dated December 24, 2020, nearly five months after Respondent initiated the Texas Action on August 6, 2020.[202] The Texas Action's forfeiture complaint specifically identified 55 Public Square and claimed that it was "acquired . . . using funds misappropriated from PrivatBank[.]"[203] PrivatBank immediately capitalized on Respondent's accusations and repeatedly referenced Respondent's forfeiture lawsuit to add credibility to its own lawsuit in Delaware. In fact, on December 16, 2020, PrivatBank provided the Delaware court with a copy of Respondent's forfeiture complaint and referenced Respondent's allegations to bolster its own lawsuit: PrivatBank claimed its allegations were "so compelling that the United States Department of Justice has commenced two civil forfeiture proceedings against assets owned by Defendants Kolomoisky, Bogolyubov, Korf, Laber, and various Delaware Defendants[.]"[204] The allegations of Respondent's chief international money laundering prosecutors added weight and gravitas to otherwise private civil litigations and compounded the harm. Given Respondent's official charges against 55 Public Square (which PrivatBank then used to bolster its private lawsuit's credibility) and given that Respondent itself was directing the control of the investments, the possibility of selling 55 Public Square free and clear was impossible. Indeed, Respondent filed the lawsuit for the forfeiture of 55 Public Square on December 30, 2020,[205] less than a week after the referenced Delaware filing.

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[201] Reply ¶ 23.
[202] *Id.* ¶ 23 n. 34.
[203] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Compl. Forfeiture In Rem, ¶ 86(c)(i) (S.D. Fla. Aug. 6, 2020) (C-0001).
[204] *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, No. CV 2019-0377-JRS, Plaintiff's Answering Brief in Opposition to Defendants' Motions to Dismiss for *Forum Non Conveniens* (Dec. 16, 2020) C-0050).
[205] *See United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Complaint for Forfeiture in Rem (Dec. 30, 2020) (C-0011).

120. *Third*, Respondent argues that the mere fact that investments were able to be sold (conditional upon deposit of the sale proceeds with Respondent) refutes alleged expropriation.[206] This argument stretches credulity: of course, buyers will be available if Respondent expressly approves of a sale and offers assurances; but Respondent will only ever approve of such a sale if the proceeds are deposited with Respondent for the purpose of permanent forfeiture. Any buyer entering into such a complex transaction, with surrounding allegations of multi-billion-dollar fraud, will want to make absolutely certain that the price they are paying is well worth the time, trouble, and risk. They will know competition is limited. Those buyers will require a lower sale price than in an ordinary transaction that does not involve official allegations of multi-billion-dollar financial fraud and liaison with federal prosecutors.

121. Respondent then goes on to claim that Claimants are *only* seeking the actual sale price as their measure of damages, so the sale price must have been fair.[207] But the notices of arbitration clearly say that "Claimants currently estimate direct damages to be in *excess* of [the sale prices], which amount *includes* the net proceeds of the sale" and "Claimants reserve[] their right to quantify and modify their claims at an appropriate stage of these proceedings."[208] In any event, regardless of whether the Respondent-controlled sale resulted in a lower sale price, it matters not because Respondent has since taken total control of Claimants' investments (including intangible property rights), all the while fully intending to forfeit them forever – and that is sufficient to make out an arguable (if not classic) case of expropriation.

122. Measures that may potentially impact upon an investor's right to its investment and constitute expropriation are too diverse to fit into a neat formula:

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[206] Reply ¶¶ 127-128.
[207] Reply ¶ 127
[208] *See, e.g.*, *Optima Ventures LLC and Optima 55 Public Square LLC v. United States of America*, Request for Arbitration, ¶¶ 81-82 (Feb. 24, 2021).

> It is evident that the question of what kind of interference short of outright expropriation constitutes a taking under international law presents a situation where the common law method of case by case development is pre-eminently the best method, in fact probably the only method, of legal development.[209]

123. Respondent's countless arguments regarding the expropriatory effect of the measures taken, such as, *inter alia*, the prospect of the investments' return, whether the investments would have been lost or impaired anyway through other causes, whether the sale price was affected, etc., are improperly raised at this stage. As Claimants showed in their Observations, at this Rule 41(5) procedural posture, the measure of damage caused by the wrongful taking of their property rights is a question of fact that is wholly inappropriate for summary resolution.[210] Because these objections were not raised at all until Reply, they should be summarily denied.

124. Even countenancing, *arguendo*, Respondent's newly raised arguments that the expropriated investments are solely intangible property rights for which restitution is limited, adequate remedies may nevertheless be fashioned. "A wrongful expropriation can be nullified, but that does not mean that the objective of expropriation is frustrated; the process can be recommenced to achieve its public policy objectives."[211] If the sole available remedy is restitution, "[w]ill the remedy not end up being symbolic, if the value of the affected rights is depressed by the prospect that they will once again be substantially impaired, if not destroyed?"[212] If restitution would insufficiently hold Respondent responsible for the internationally wrongful expropriation, compensation in addition to restitution may be provided,

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[209] Christie G.C., "What Constitutes a Taking of Property under International Law," BRITISH Y.B. INT'L L. 307, 338 (1962) (CL-0178).
[210] Observations ¶ 217, n.305.
[211] *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Opinion of Jan Paulsson, ¶ 46 (Feb. 27, 2014) (CL-0179).
[212] *Id.*

"insofar as such damage is not made good by restitution."[213] If the measures taken are expropriatory as defined by the Treaty, then remedies will operate to honor the meaningful promises made by Respondent and will afford Claimants legal certainty and ensure that the prohibited activity does not reoccur.[214]

125. At bottom, Respondent took total control of Claimants' investments and all rights attendant thereto for the purpose of permanent forfeiture and that plausibly suggests expropriation.

D. Merits Objection 2: Measures that exceed the limits of prescriptive jurisdiction under customary international law may violative the FET standard

126. Respondent argued in its Preliminary Objections that the Treaty's FET standard is limited to the customary international law minimum standard of treatment of aliens, and thus whether treatment of investments exceeds the limits of Respondent's jurisdiction to prescribe is irrelevant to an FET claim.[215]

127. In their Observations, Claimants showed that the FET standard in the Treaty is not limited to the customary international law minimum standard of treatment, and that, in any event, measures that exceed the limits of prescriptive jurisdiction may also breach the FET standard.[216]

128. Respondent's Preliminary Objections largely relied on the decision of the ICJ in the *Certain Iranian Assets (Iran v. United States)* case to argue that the limits of Respondent's prescriptive jurisdiction under customary international law could not be considered in the FET

[213] *Id.* ¶¶ 46-47 (quoting ILC (International Law Commission) Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on 9 June 2001, Arts. 35, 36(1)); *see* ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, adopted on 9 June 2001, Arts. 35, 36(1) (CL-0064).
[214] *See* Observations ¶ 217, n.305.
[215] Preliminary Objection ¶¶ 79-83.
[216] Observations ¶¶ 218-233.

context. In their Observations, Claimants demonstrated that this decision is inapposite, and the Reply does not even attempt to respond.

129. On Reply, Respondent once again moves the goalposts and introduces new arguments to "Merits Objection 2" that were not raised in the Preliminary Objections, including: (1) prescriptive jurisdiction "*typically* involves legislative measures" and "is not at issue in this case as Claimants have presented it"; (2) the significance of measures taken in excess of the jurisdiction to prescribe is largely a matter of first impression in the context of an FET claim; (3) "prescriptive comity" case law is not relevant to "prescriptive jurisdiction"; and (4) if Claimants are correct, Respondent's ability to effectuate civil forfeitures based on unalleged and disproven crimes under the laws of another state may be impaired. None of these arguments were seriously raised in "Merits Objection 2," and these new objections are procedurally improper as set forth in paragraphs 6-8, *supra*. Moreover, in addition to their procedural impropriety, the arguments are misguided and without merit.

130. *First*, under international law, a state is subject to limitations on its "jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, *by executive act* or order, by administrative rule or regulation, or by determination of a court[.]"[217] A U.S. statute may remain valid even if its construction "within the limits of international law is not fairly possible . . . *but its application* may give rise to international responsibility for the United States."[218]

131. Here, of course the statutes relied upon by Respondent provide that fraud on a foreign bank is a valid predicate act for Respondent's regulation of money laundering that may

[217] Restatement (Third) of Foreign Relations Law § 401 (1987) (Categories of Jurisdiction) (emphasis added) (CL-0180).
[218] Restatement (Third) of Foreign Relations Law § 403 (1987) (Limitations on Jurisdiction to Prescribe) (emphasis added) (CL-0181).

take place in part outside of Respondent's territory, but those statutes, and Respondent's civil forfeiture claims, presuppose that the allegedly laundered funds arise from purported criminal conduct that takes place outside of the U.S., here, in Ukraine, and violates Ukrainian domestic law. However, as Claimants have shown, in this case "Ukrainian law enforcement authorities have not brought any charges concerning the loans at issue, no Ukrainian criminal court has determined any wrongdoing occurred, and Ukrainian courts have . . . validated the loans at issue as legitimate and not fraudulent."[219]

132. Notwithstanding the lack of even any criminal allegation (let alone prosecution or conviction) in Ukraine, by Ukrainian authorities, that the Ukrainian loans that form the basis of Respondent's claims in the civil forfeiture action were illegal under Ukrainian law, Respondent alleges as much in the civil forfeiture actions.[220] In addition, in arguing that the expropriation of Claimants' properties is consistent with limitations on Respondent's prescriptive jurisdiction, Respondent simply assumes that the funds used to purchase those properties were obtained illegally.[221] However, Respondent has no right to enforce its anti-money laundering laws by alleging and proving, as it must to succeed in the civil forfeiture actions,[222] that Ukrainian law was violated by Ukrainian companies when they took out loans from a Ukrainian bank, where "Ukrainian law enforcement authorities have not brought any charges concerning the loans at

[219] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint, at 19 (S.D. Fla. Sept. 28, 2022) at 19 (C-0009).
[220] *See United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv- 23278, Verified Compl. Forfeiture In Rem (S.D. Fla. Aug. 6, 2020) (the "Texas Compl.") ¶¶ 64-73. (C-0001).
[221] *See, e.g.*, Reply ¶ 132 ("The embezzled money used to purchase [Claimants'] properties was brought under U.S. jurisdiction.")
[222] *See United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint, (S.D. Fla. Sept. 28, 2022) at 34 n.12 (C-0009) (finding that in order to prevail in Kentucky Action, Respondent *must* "establish that Ukrainian companies violated Ukrainian law when they obtained loans from a Ukrainian bank.")

issue, no Ukrainian criminal court has determined any wrongdoing occurred, and Ukrainian courts have . . . validated the loans at issue as legitimate and not fraudulent,"[223] especially because "it is not reasonable to apply American laws to foreign conduct insofar as that conduct causes independent foreign harm that alone gives rise to a plaintiff's claim."[224]

133. *Second*, Respondent insinuates that prescriptive jurisdiction is irrelevant because its consideration in the FET context is novel. But Respondent has it backwards in this procedural context: "Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts."[225]

134. *Third*, Respondent argues that the U.S. municipal doctrine of prescriptive comity is irrelevant and inapplicable here. Not so. Under U.S. law, the doctrine of prescriptive comity – a doctrine of statutory interpretation requiring courts to interpret the law in a manner that does not exceed prescriptive jurisdiction – is only relevant if a particular law may exceed the limits of prescriptive jurisdiction under customary international law. Thus, the cases applying prescriptive comity necessarily reflect an evaluation of the limits placed on Respondent's jurisdiction to prescribe.[226]

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[223] *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Report and Recommendations on Claimants' Motion to Dismiss (or Abstain From) Government's Verified Civil Forfeiture Complaint, at 19 (S.D. Fla. Sept. 28, 2022) at 19 (C-0009). Respondent's insinuation that the Ukrainian courts have not rendered such rulings (Reply ¶ 79) is belied by the actual language of the Ukrainian decisions regarding loans at issue in this arbitration. *See* Observations ¶¶ 63-74; C-0028; C-0029; C-0030.

[224] There is no question that Respondent has jurisdiction to enforce its own laws (jurisdiction to enforce), nor is there any real question that Respondent has jurisdiction to adjudicate the conduct of companies operating within its territory (jurisdiction to adjudicate), however, "[u]nder international law, a state may not exercise authority to enforce law that it has no jurisdiction to prescribe. Such assertion of jurisdiction, whether carried out through the courts or by nonjudicial means, may be objected to both by the affected person directly and by the other state concerned." Restatement (Third) of Foreign Relations Law § 431 (1987) (CL-0182).

[225] *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent's Objections under Rule 41(5), ¶ 89 (CL-0001)

[226] *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (CL-0183) (prescriptive comity "rule of construction reflects principles of customary international law," namely the "exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State").

135. *Finally*, Respondent's purported concern about the impact on its ability to regulate international money laundering is a *non sequitur*. Claimants' position will only impact Respondent's ability to enforce its anti-money laundering laws, international or otherwise, to the extent Respondent's enforcement efforts are inconsistent with the limitations on Respondent's prescriptive jurisdiction imposed by customary international law and Respondent's obligations, under the Treaty or otherwise.

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Respectfully submitted,

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