19-3159(L)

19-3361(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ESSO EXPLORATION AND PRODUCTION NIGERIA LIMITED,
SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED,

Petitioners-Appellants-Cross-Appellees,

—against—

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Respondent-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONERS-APPELLANTS-CROSS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and to enable the Judges of this Court to evaluate possible grounds for disqualification or recusal, Petitioner-Appellant-Cross-Appellee Esso Exploration and Production Nigeria Limited, a private non-governmental party, by and through its undersigned counsel, hereby certifies that it is a wholly owned indirect subsidiary of Exxon Mobil Corporation, a publicly held corporation. No individual or entity owns 10% or more of the stock of Exxon Mobil Corporation.

Petitioner-Appellant-Cross-Appellee Shell Nigeria Exploration and Production Company Limited, a private non-governmental party, by and through its undersigned counsel, hereby certifies that it is a wholly owned indirect subsidiary of Royal Dutch Shell plc, a publicly held corporation. No individual or entity owns 10% or more of the stock of Royal Dutch Shell plc.

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JURISDICTIONAL STATEMENT

Petitioners-Appellants-Cross-Appellees Esso Exploration and Production Nigeria Limited ("EEPNL") and Shell Nigeria Exploration and Production Company Limited ("SNEPCO" and, together with EEPNL, "Petitioners") brought the underlying action pursuant to the Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, as codified by the Federal Arbitration Act, 9 U.S.C. §§ 201, 202, and 207 (the "FAA"). The District Court had subject matter jurisdiction under 9 U.S.C. § 203 and 28 U.S.C. § 1330(a).

The District Court entered its final Opinion & Order ("Opinion") granting Respondent-Appellee-Cross-Appellant Nigerian National Petroleum Corporation's ("NNPC") dismissal motion on September 4, 2019, and the Clerk of the Court entered the final Judgment closing the case on September 6, 2019. Opinion, SPA-1-50; Judgment, SPA-51. Petitioners timely appealed on October 2, 2019. Notice of Appeal, A-2650-51. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. In deciding NNPC's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), did the District Court err by failing to accept Petitioners' allegations on the merits as true?

Yes.

2. In determining whether a decision of the Nigerian Court of Appeal setting aside an arbitral award was repugnant to fundamental notions of what is decent and just in the United States, did the District Court err in limiting its analysis to the four specific factors this Court considered in Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92 (2d Cir. 2016), rather than assessing on the totality of the circumstances whether the Nigerian decision setting aside the arbitral award was repugnant to fundamental notions of what is decent and just in the United States?

Yes.

3. Did the District Court err by misapplying the four specific factors present in Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92 (2d Cir. 2016), when it found that (i) Petitioners' contractual rights would not be destroyed by the enforcement of the Nigerian decision, (ii) Petitioners had not been subject to the

retroactive application of law, and (iii) Petitioners had a forum in Nigeria in which to prosecute their claims?

Yes.

4. Did the District Court err in failing to enforce the portion of the arbitral award reinstated by the Nigerian Court of Appeal, and refusing to exercise its inherent authority to award uncontested damages?

Yes.

STATEMENT OF THE CASE

Two irreconcilable legal instruments were presented to the District Court (Pauley, J.) for recognition: (i) an arbitral award that granted Petitioners contractual damages of roughly $2 billion, which was rendered by an independent, expert tribunal that was the parties' agreed-upon decision maker; and (ii) a decision of Nigeria's Court of Appeal that denied Petitioners due process and freed NNPC, Nigeria's most powerful State-owned entity, from having to satisfy that multi-billion-dollar arbitral award. In setting aside the arbitral award, the Nigerian court held that while the arbitral tribunal had jurisdiction to adjudicate Petitioners' contractual claims and had validly ruled that Petitioners' rights had been breached, the tribunal could not award damages to compensate Petitioners for the harm they suffered. That decision left Petitioners with judicially-affirmed harm of billions of dollars, but no forum in Nigeria in which to seek compensation for that harm.

Petitioners turned to the courts of the United States for justice, and petitioned the Southern District of New York for confirmation of their arbitral award. After nearly two years of discovery on jurisdictional issues, NNPC moved pursuant to Federal Rule of Civil Procedure 12(b) to dismiss Petitioners' Third Amended Petition ("Petition" or "TAP") both for lack of personal jurisdiction and for failure to state a claim. The District Court found that Petitioners had sustained their burden of proving that the District Court had jurisdiction over NNPC. In what the District Court described as a "close call," however, it dismissed the Petition with prejudice pursuant to Rule 12(b)(6) without affording any merits discovery, and instead elected to afford comity to the Nigerian judgment. See Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petrol. Corp., 397 F. Supp. 3d 323 (S.D.N.Y. 2019); Judgment, SPA-51. The decision to dismiss the Petition is based on multiple legal and factual errors and should be reversed.

Petitioners, subsidiaries of Exxon Mobil Corporation (together with its subsidiaries, "Exxon") and Royal Dutch Shell plc, made a massive investment in Nigeria's oil sector pursuant to a contract with NNPC. In 1990, Nigeria set out to persuade international oil companies ("IOCs") to develop and commercialize the country's deep-sea oil resources. See Turner Decl., A-937. Extracting oil from Nigeria's offshore oil fields was one of the most technologically challenging operations in the global oil industry. See Award, A-223; TAP, A-130. To attract that massive and risky investment, Nigeria offered foreign investors (including Petitioners) favorable economic incentives, including the right to a share of the oil produced and the right to determine that share in accordance with a contractual formula. But the risks were not only geological and technical; they were also legal and political. Counterparties could not rely on the independence of Nigeria's courts, especially when the interests of a powerful state-owned entity were involved. Foreign investors therefore insisted on—and Nigeria agreed to—the right to have disputes resolved exclusively through binding, independent arbitration. See Opinion, SPA-2; TAP, A-131-32. In reliance on these terms, the IOCs, including Petitioners, committed their extensive expertise and financial resources to Nigeria's nascent offshore oil industry. See TAP, A-130-33.

After Petitioners invested more than $6 billion over the course of more than a decade to develop a deep-water oil field in Nigeria, NNPC breached its contractual obligations by taking (or "lifting") more oil than its contractual entitlement. See Opinion, SPA-2-3; TAP, A-133-35. Petitioners commenced arbitration to enforce their contractual rights, and won. See Opinion, SPA-3-4; TAP, A-136-40. Rather than abide by its promise to arbitrate, however, NNPC convinced its home courts to nullify the arbitral award. See TAP, A-140-41. The Nigerian courts dutifully shielded NNPC from liability, just as those courts have done for decades. See TAP, A-150.

The Nigerian courts vacated the arbitral tribunal's award of nearly $2 billion in damages (the "Award"), finding that, while the arbitral tribunal had the power to find that NNPC had breached the contract, the tribunal was powerless to order redress for the injury, which could only be provided by a Nigerian court. See Opinion, SPA-4-5; TAP, A-143-46. But when Petitioners pursued that judicial route, the Nigerian courts summarily dismissed Petitioners' lawsuit with prejudice, calling it an abuse of process. See Opinion, SPA-5; TAP, A-146-48.

Petitioners were not alone in the treatment they received. NNPC also took far more oil than its contractual entitlement from the other IOCs, and the IOCs responded by bringing arbitrations against NNPC that became known as the "Overlift Disputes." See TAP, A-148. These claims (including Petitioners' claim) were heard by four separate arbitral tribunals, the panelists of which included a former Acting Legal Adviser of the US Department of State and current US judge on the Iran-United States Claims Tribunal; a former Justice of the Supreme Court of the United Kingdom; a former Canadian Ambassador to the United Nations; and prominent Nigerian lawyers. Every one of those tribunals found for the IOCs and awarded them billions of dollars in damages. See TAP, A-148. And every one of those arbitral awards then faced the same fate at the hands of the Nigerian judiciary: the Nigerian courts refused to enforce the awards in a series of decisions that eviscerated the IOCs' contract rights—including their right to arbitration—and ignored applicable Nigerian precedent, all to insulate Nigeria's most important State-owned entity from paying the billions of dollars it owes. See TAP, A-148-49.

There is no dispute that Petitioners' contractual rights have been breached, that their property has been taken, and that they have suffered billions of dollars in damages. Yet there is no forum in Nigeria in which they can obtain redress. By October 2014, the limitations period for seeking recognition and enforcement of the Award in the United States was running out. Accordingly, Petitioners moved to enforce their Award in the Southern District of New York. Under the Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "New York Convention" or "Convention"), US courts must enforce a foreign arbitral award absent extraordinary circumstances. The New York Convention's strong, pro-enforcement policy reflects the determination of the United States, Nigeria, and other signatory nations that swift and certain enforcement of foreign arbitral awards is critical to international trade and commerce. Consistent with the Convention's text, history, and purpose, US courts have discretion to confirm an award that has been nullified by a foreign judgment in circumstances where enforcing the foreign judgment would be "repugnant to fundamental notions of what is decent and just" in the United States. See Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 97 (2d Cir. 2016) ("Pemex").

The District Court below concluded that the Nigerian Court of Appeal's decision—a decision that the District Court itself called "anomalous" because it found that Petitioners had been damaged by NNPC's breach of contract, but that Petitioners could not recover damages for that breach, see Opinion, SPA-46—should be granted comity because it did not offend the specific American notions of decency and justice described in Pemex. This conclusion was the product of numerous legal and factual errors.

First, in evaluating NNPC's motion to dismiss the Petition for failure to state a claim, the District Court was required to accept Petitioners' well-pleaded allegations as true and to draw all reasonable inferences in Petitioners' favor, or in the alternative, to permit discovery and hold an evidentiary hearing on the merits. It erroneously did none of those things, but nonetheless dismissed the Petition based on conclusions that contradicted Petitioners' allegations and supporting evidence.

Second, the District Court fundamentally misunderstood and misapplied this Court's teaching in Pemex. Under Pemex, the District Court was required to determine whether enforcing the Nigerian court's decision was "repugnant to fundamental notions of what is decent and just" in the United States, which includes deciding whether the Nigerian judgment "undermine[s] . . . public confidence in the administration of the law [and in the] security for individual rights . . . of private property." Pemex, 832 F.3d at 106. The District Court failed to make that determination. Instead, the District Court limited its analysis to the four factors that happened to be present in Pemex, and ignored Petitioners' broader arguments as to why enforcement of the Nigerian judgment could not be reconciled with American notions of justice and fairness. And, even in applying the four Pemex factors, the District Court committed numerous errors.

Third, the District Court should have confirmed at least the portion of the Award that all parties agree has been reinstated by the Nigerian Court of Appeal. It declined to do even that. Had the District Court confirmed the reinstated liability portion of the Award, it could (and should) also have confirmed the damages award. Doing otherwise—granting comity to a decision holding that Petitioners have contract rights that were breached and suffered significant monetary damages, but are not entitled to any remedy for their loss—is repugnant to fundamental notions of what is decent and just.

I. FACTUAL BACKGROUND

A. NNPC Solicits, and Obtains, Exxon's Investment

Nigeria began to solicit foreign investment to develop its deep-sea oil reserves in 1990. Exxon was reluctant to invest because of the political risks involved and initially declined Nigeria's offer. See Turner Decl., A-936. Nigeria responded by visiting Houston and offering more attractive contractual terms, including the promise of arbitration. See Turner Decl., A-937; TAP, A-127. Ultimately, Exxon, via its subsidiary EEPNL,[1] agreed to develop a deep offshore oil field known as "Erha." See Opinion, SPA-24-25.

Exxon's agreement to invest was memorialized in a 1993 Production Sharing Contract ("PSC"). In 1994, Petitioner SNEPCO acquired a portion of Exxon's interest in the PSC. See Award, A-234.

Under the PSC, Petitioners were solely responsible for the risk and cost of exploring for, developing, and extracting oil from Erha. See Opinion, SPA-2; Award, A-223, A-227-28. This was no simple undertaking: the Erha field is a "deep water" field, and the oil is beneath the ocean floor, more than 3,000 feet below sea level. At the time, extracting oil from Erha was one of the most expensive and technologically challenging oil operations in the world. See Award, A-223. Accordingly, Exxon bargained for contractual terms that would compensate it for that uncertain and substantial investment.

The bargain struck granted Exxon (and, subsequently, SNEPCO) a right to a share of the oil produced by the Erha field and the exclusive right to calculate and then allocate (according to a contractual formula) the oil produced from Erha into four tranches:

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[1] Once Exxon and Nigeria reached agreement on business terms, and the "bulk of negotiations" had concluded, Exxon incorporated a Nigerian subsidiary, EEPNL, to comply with Nigerian regulatory requirements. See Opinion, SPA-24, SPA-26.

- Royalty Oil, which is allocated to NNPC to cover payments to the Nigerian government for the right to extract the oil;
- Cost Oil, which is allocated to Petitioners to cover their operating costs;
- Tax Oil, which covers tax payments to the Nigerian government; and
- Profit Oil, which is calculated by subtracting Royalty Oil, Cost Oil, and Tax Oil from the total oil extracted from Erha, and is split between Petitioners and NNPC pursuant to a formula.

See Opinion, SPA-2. The PSC also gave Petitioners the exclusive right to prepare tax returns for the field to be filed with the Nigerian government. See Opinion, SPA-2. NNPC agreed to take only the oil that Petitioners allocated to it pursuant to the contractual formulas (i.e., Royalty Oil, Tax Oil, and a defined share of Profit Oil), see PSC, A-432, and to file the tax returns prepared by Petitioners, see PSC, A-460.

Aware that it was dealing with a State-owned entity and that Nigeria's laws, regulations, and policies could change in a way that might erode its contract rights, Exxon also sought, and NNPC agreed to include, a "Stabilization Clause" in the PSC. See Opinion, SPA-2; TAP, A-131. The Stabilization Clause provides that should there be a change in Nigerian law, regulation, or policy that adversely affects Petitioners' rights under the PSC, NNPC is required to agree to a modification of the terms of the PSC to compensate Petitioners for the resulting economic loss. See Opinion, SPA-2.

Finally, the parties agreed that any dispute "concerning the interpretation or performance" of the PSC would be submitted exclusively to binding, neutral arbitration. See PSC, A-446; Opinion, SPA-2. The arbitration clause was a fundamental term of the PSC. See Turner Decl., A-940. Then, as now, Exxon was of the view that the Nigerian courts could not be counted on to provide a fair forum in a dispute with NNPC, and so insisted that all disputes be arbitrated. See Turner Decl., A-940. NNPC agreed to do so. See Turner Decl., A-940. Absent NNPC's agreement to an arbitration clause, Exxon would never have entered into the deal or invested billions of dollars to develop Erha. See Turner Decl., A-941.

B. NNPC Breaches the PSC

Relying on the contractual promises in the PSC, Petitioners invested more than $6 billion and a decade of effort and expertise to explore and develop Erha. See Opinion, SPA-2. In 2006, Erha finally began to produce oil. See Opinion, SPA-2. Soon after, NNPC started to break its promises.

With global oil prices increasing in 2007, the Nigerian government began to regret the contracts it had been so eager to strike with the IOCs, including Exxon, in the early 1990s. See Opinion, SPA-2. Effecting the government's policy directive to capture additional "revenue opportunities" from the PSC, NNPC demanded more oil from Erha than its contractual entitlement (i.e., NNPC "overlifted" oil). See Opinion, SPA-2-3, SPA-12-13. In particular, NNPC demanded more Royalty and Tax Oil and claimed that Petitioners were taking too much Cost and Profit Oil. See Opinion, SPA-12-13; TAP, A-134. NNPC also refused to file the tax returns that Petitioners prepared pursuant to the PSC and instead filed returns that inflated Erha's tax liability. See Opinion, SPA-3. When Petitioners objected to NNPC's contractual breaches and refused to comply with its extra-contractual demands, Nigeria threatened to shut down all production at Erha. See Atake Decl., A-179; Award, A-238. To prevent their multi-billion-dollar and thirteen-year investment from being held hostage, Petitioners acquiesced in the overlifting under protest, and commenced arbitration to recover their losses. See Award, A-238-39; see also Opinion, SPA-3.

C. Petitioners Commence Arbitration, and the Tribunal Awards Them $1.8 Billion in Contractual Damages

Petitioners commenced arbitration under the PSC on July 31, 2009 (the "Arbitration"). See Opinion, SPA-3; Award, A-210. NNPC argued that the Tribunal lacked jurisdiction to adjudicate Petitioners' contractual claims because they concerned, in part, the allocation of Tax Oil, which NNPC claimed turned the entire case into an inarbitrable tax dispute. See Award, A-247. This argument, which was ultimately rejected by the Nigerian Court of Appeal, came as a surprise to Petitioners: during the parties' negotiations, NNPC had never suggested that oil allocation disputes were inarbitrable, see Opinion, SPA-3; Turner Decl., A-940-41, and Exxon never would have entered into the PSC if NNPC had even suggested that disputes about the allocation of oil—the economic heart of the PSC—were not arbitrable, see TAP, A-132; Turner Decl., A-940-41.

The tribunal ("Tribunal") consisted of three eminent jurists with expertise in energy disputes and arbitration. Petitioners appointed Judge Charles N. Brower, a judge on the Iran-US Claims Tribunal and the Inter-American Court of Human Rights. See TAP, A-136. NNPC appointed Professor Paul Obo Idornigie, a Professor at the Nigerian Institute of Advanced Legal Studies. See TAP, A-136. Professor Idornigie and Judge Brower jointly selected L. Yves Fortier, C.C., Q.C., Canada's former Ambassador to the United Nations, as President of the Tribunal. See TAP, A-136-37.

After extensive pre-trial briefing and submission of evidence, the Tribunal held a multi-day hearing in Nigeria. See Atake Decl., A-181; Award, A-216-17; see also Opinion, SPA-3. In a well-reasoned Award dated October 24, 2011, the Tribunal rejected NNPC's arguments on jurisdiction and the merits and found for Petitioners.[2] See generally Award, A-205-322; see also Opinion, SPA-3-4. The Tribunal held that it had jurisdiction because the dispute was contractual and therefore could be—indeed, was required under the contract to be—resolved by arbitration. Award, A-254-61; see also Opinion, SPA-3.

2 Professor Idornigie dissented. See Dissenting Opinion of Professor Paul Obo Idornigie, A-323-410.

On the merits, the Tribunal concluded that NNPC had breached the PSC by overlifting Royalty and Tax Oil and by reducing the Cost and Profit Oil to which Petitioners were entitled under the PSC. See Opinion, SPA-4. The Tribunal quantified Petitioners' damages at $1.799 billion, hundreds of millions of dollars of which is attributable to NNPC's overlifting of Royalty and Cost Oil (which have nothing to do with taxation, even under NNPC's theory). See Opinion, SPA-3-4; Award, A-319-21. NNPC has never contested the Tribunal's calculation of Petitioners' damages, or the damages attributable to each of Royalty, Cost, Tax, or Profit Oil. Finally, the Tribunal held that Nigeria had changed its policy in a manner that affected the allocation of oil under the PSC, thus triggering the Stabilization Clause, and reformed the PSC to compensate Petitioners prospectively for NNPC's future overlifting on the basis of this changed policy. See Award, A-310, A-313-14.

D. NNPC and Nigeria Enlist the Nigerian Courts to Prevent Petitioners from Enforcing the Award in Nigeria

1. Nigeria Attempts Unsuccessfully to Enjoin the Arbitration; the Nigerian Courts Then Set Aside the Award

Notwithstanding its agreement to binding arbitration of all disputes "concerning" the PSC, see PSC, A-446, Nigeria wasted no time in demonstrating that it would not abide by the Tribunal's decision. Realizing that it would lose in a neutral forum, Nigeria enlisted its home courts to ensure that Petitioners would never receive the compensation the Tribunal awarded. First, even before the Award was issued, Nigeria's tax authority, the Federal Inland Revenue Service ("FIRS"), which was not a party to the PSC or the Arbitration and against which no remedy was sought, attempted to enjoin the Arbitration. See Opinion, SPA-4. The Nigerian Federal High Court (the trial court) declared that the dispute between Petitioners and NNPC was an inarbitrable tax dispute because "any determination of the issues raised in [the Arbitration] and the [A]ward . . . will also adversely affect the revenue that would accrue and/or that had accrued" to Nigeria (the "FIRS Decision"). See FIRS Decision, A-521; see also Opinion, SPA-4. The High Court expressly refused to consider Petitioners' arguments, including that the contractual dispute between Petitioners and NNPC did not purport to adjudicate any tax assessment and that it involved not only Tax Oil, but also Royalty and Cost Oil, which in no way relate to tax legislation. See FIRS Decision, A-516 (stating that there was "no need" to review Petitioners' pleadings); Atake Decl., A-190-91.[3]

Nigeria next sought to vacate the Award, and the High Court once again obliged (the "Set Aside Decision"). See Set Aside Decision, A-671. In the Set Aside Decision, the High Court sharply deviated from decades of consistent precedent and held that Nigeria's current Constitution ("1999 Constitution")—enacted six years after the PSC was signed—retroactively prohibited arbitration of

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3 While FIRS's request for an injunction was pending, the Tribunal rendered the Award, mooting the injunction request. See Opinion, SPA-4.

the parties' contractual dispute. See First Oguntade Decl., A-893, A-902-03. The High Court held that the 1999 Constitution barred the arbitration of disputes touching in any way on the subjects identified in its Section 251, including disputes related to taxation. See Set Aside Decision, A-670.

There were two obvious flaws in that holding. First, since its enactment, Section 251 of the 1999 Constitution had consistently been interpreted as allocating jurisdiction between Nigerian federal and state courts. See First Oguntade Decl., A-902-04. That provision and its predecessor versions had never been interpreted as having anything to do with arbitration. See First Oguntade Decl., A-899, A-903.

The second flaw, which follows from the first, is that disputes relating to the subjects listed in Section 251 (which include, for example, maritime and banking disputes) have been lawfully arbitrated in Nigeria for decades. See First Oguntade Decl., A-902-04. The High Court did not even address this settled line of cases, let alone explain its failure to follow precedent. See First Oguntade Decl., A-904. Nor did the Court consider Petitioners' arguments on these issues. See Atake Decl., A-192. Indeed, the High Court provided almost no reasoning of its own; instead, it physically cut and pasted the reasoning from the earlier FIRS Decision into its judgment. See Opinion, SPA-4; compare Set Aside Decision, A-669-70 with FIRS Decision, A-520-21. The High Court also ignored the fact that hundreds of millions of dollars in damages relating to Royalty and Cost Oil had no connection to taxes. The High Court simply proclaimed that "[t]he whole Award is about taxation," Set Aside Decision, A-668, and that the entire dispute was therefore inarbitrable. See Set Aside Decision, A-671. Petitioners appealed.

The High Court's rulings were so clearly erroneous that even the Nigerian appellate courts could not endorse them. But the appellate courts also could not allow a multi-billion-dollar award against Nigeria to stand. The Court of Appeal thus concocted a two-part device to insulate Nigeria from paying billions of dollars to Petitioners. First, in two separate decisions—one in the appeal from the Set Aside Decision (the "Set Aside Appeal"), and the other in the appeal from the FIRS Decision (the "FIRS Appeal")—the Nigerian Courts of Appeal accepted that:

- the parties' dispute was contractual;
- the parties' dispute was not a tax dispute;
- the Tribunal had jurisdiction to find that NNPC breached the PSC; and
- the Tribunal's liability finding should be reinstated.

See Set Aside Appeal, A-685, A-692; FIRS Appeal, A-738-39, A-745-46. Accordingly, the Court of Appeal reinstated the Tribunal's liability finding in favor of Petitioners. See Opinion, SPA-5; Set Aside Appeal, A-692 ("[T]he final award of the arbitral tribunal [shall] be restored in respect of Petroleum Profit Tax returns preparations and calculation of lifting allocation by [Petitioners].").

But, second, because the Court of Appeal well knew that, for domestic political reasons, it could not actually order Nigeria to pay the Award, see First Page Decl., A-989-95, it unveiled a novel and lawless surprise ending: although the Tribunal had exclusive jurisdiction to find NNPC liable for breach of contract, the Tribunal had no jurisdiction to order NNPC to pay damages for that contractual breach. See Set Aside Appeal, A-687, A-692.

The Court of Appeal did not even attempt to support its ruling with legal reasoning or precedent. Nor did it explain its deviation from decades of precedent or its disregard of the basic principle of Nigerian law that for every right breached there must be a remedy. The Court of Appeal simply declared that awarding damages would "in essence" "refund . . . the amount paid to" Nigeria and that the Tribunal had no power to do that. See Set Aside Appeal, A-686-87. The ruling is absurd on its face, starting with the fact that the Tribunal ordered NNPC—a massive revenue-generating oil company—not the tax authority, to pay contract damages for depriving Petitioners of the oil to which they were contractually entitled. The Court of Appeal also made no effort to explain how damages attributable to overlifting of Royalty and Cost Oil, which have nothing to do with taxes, would also constitute a tax refund. See Set Aside Appeal, A-687.

Merely shielding Nigeria from the Tribunal's award of damages was insufficient, however, because the Tribunal's Stabilization Clause holding would have had the same practical effect: requiring NNPC to compensate Petitioners for billions of dollars in losses. The Court of Appeal found a solution for that problem as well. Unable to tie the Stabilization Clause to any aspect of taxation, the Court of Appeal instead ruled that the Stabilization Clause claim was not within the scope of the dispute submitted to arbitration because it was supposedly not properly pleaded. See Set Aside Appeal, A-701. NNPC had run this argument before the Tribunal, and the Tribunal, which had sole jurisdiction over this procedural objection, had rejected it. See Atake Decl., A-193-94; TAP, A-145-46.

Nearly one year later, the same Court of Appeal reached a similar result in the FIRS Appeal. See generally FIRS Appeal, A-706-77. The Court of Appeal again agreed that Petitioners' dispute was "contractual in nature," FIRS Appeal, A-743, rejecting Nigeria's core jurisdictional argument before the Tribunal and the Nigerian Courts, explaining:

> The fact that the parties guide themselves by the provisions of the said tax legislations in determining the lifting allocation of tax oil or in making PPT [tax] returns does not render the basic contractual dispute on the obligation of a party not to lift beyond its quota of any tranche of the Crude oil including tax oil and the right to prepare PPT returns, a tax dispute.

FIRS Appeal, A-742. But, as in the Set Aside Appeal, the Court of Appeal held that the Tribunal had no power to order NNPC to compensate Petitioners for NNPC's contractual breaches, because doing so was in effect a tax refund. See FIRS Appeal, A-746-48; see also Opinion, SPA-5 ("[T]he Court of Appeal decided the FIRS Appeal in a separate opinion with virtually the same holding and reasoning [as the Set Aside Appeal]."). Once again, Petitioners' separate contractual claims with respect to Royalty and Cost Oil, and the Stabilization Clause, were ignored. See generally FIRS Appeal, A-706-77.

2. Petitioners Are Barred from Seeking Relief in the Nigerian Courts

In both the FIRS Decision and the Set Aside Decision, the Nigerian High Court ruled that Petitioners' "not arbitrable" action for damages should have been brought in the Nigerian courts. See FIRS Decision, A-523; Set Aside Decision, A-670-71. Petitioners disagreed but thought it prudent to follow the court's guidance, especially because the statutory limitations period governing claims in Nigeria was about to expire. See Atake Decl., A-198. Therefore, in June 2013, while the appeals of the High Court's decisions were pending, Petitioners commenced an action in the Nigerian High Court seeking compensation for NNPC's breaches of the PSC that the Tribunal had found. See Atake Decl., A-198. Because this action would have proceeded in parallel to Petitioners' ongoing appellate efforts to have the Award confirmed, Petitioners immediately moved to stay the new action, on the ground that they were not seeking double recovery and would move forward with it only if their efforts to enforce the Award ultimately failed on appeal. See Atake Decl., A-198.

The result was predictable. The High Court dismissed Petitioners' claims with prejudice, as an "abuse of Court process" (the "Substantive Decision"). Substantive Decision, A-783. The High Court found that Petitioners were attempting to "circumvent" the Court of Appeal's authority over the Award, even though Petitioners were following precisely the route prescribed by the Nigerian courts, and had additionally sought a stay. Substantive Decision, A-783.

Wherever Petitioners turned, the doors to justice in Nigeria were slammed shut.

E. Having Been Denied Access to Justice in Nigeria, Petitioners Commence an Enforcement Action in the United States

After two years of arbitration, followed by nearly a decade of litigation in the very Nigerian courts that the arbitration clause was designed to avoid, see supra at 12, 15-21, Petitioners have received none of their $2 billion Award. The Tribunal's finding that NNPC breached the PSC in multiple respects continues to stand, but it is only a fiction, because the Nigerian courts eviscerated Petitioners' right to compensation.

With the limitations period to seek recognition and enforcement of the Award in the United States nearing expiration, and with all forms of recourse in

Nigeria blocked, Petitioners' only choice was to file enforcement proceedings in the United States to seek compensation for NNPC's breaches of the contract.

II. PROCEDURAL HISTORY

A. Petitioners Seek Recognition and Enforcement of the Award, and NNPC Moves to Dismiss

On November 16, 2018, Petitioners filed the Petition to recognize and enforce the Award. See TAP, A-98-173.[4] NNPC moved to dismiss for lack of personal jurisdiction over NNPC and for forum non conveniens. In the alternative, NNPC argued that the Petition failed to state a claim because the Set Aside Appeal, not the Award, should be afforded comity. See MTD, A-1133-68.

In response, Petitioners argued on the merits that recognizing the Set Aside Appeal would be "repugnant to fundamental notions of what is decent and just" in the United States, Pemex, 832 F.3d at 107, because Petitioners did not, and would not, receive due process before the Nigerian courts. See TAP, A-159-61. Petitioners also argued that the Set Aside Appeal vitiated Petitioners' property and

[4] Petitioners commenced this action in 2014. See Petition to Confirm Foreign Arbitral Award, A-31-37. The case was then stayed pending this Court's decision in Pemex. After NNPC announced its intention to assert a jurisdictional defense, the District Court ordered limited jurisdictional discovery, which commenced in December 2016 after the stay had expired. See Tr. at 9:13-10:16, Apr. 2, 2015, ECF No. 33. Notwithstanding the limited nature of jurisdictional discovery, it took almost two years to conclude because NNPC repeatedly flouted the District Court's orders and refused to comply with its discovery obligations. See Opinion, SPA-49-50.

contractual rights, denied Petitioners a forum to bring their claims, and endorsed an impermissible retroactive application of Nigerian law. See TAP, A-162-67.

Petitioners relied on well-supported allegations detailing the fundamental injustices they suffered at the hands of the Nigerian judiciary. Petitioners' allegations also demonstrated why the Nigerian courts will not, and for political reasons cannot, rule in favor of an international oil company in a high-value dispute with Nigeria and its state-owned entities. See TAP, A-140-51. Petitioners alleged that, over nearly two decades, the Nigerian courts had never enforced an arbitral award for money damages against NNPC or ordered NNPC to pay money damages to a foreign plaintiff. See Second Hoon Decl., A-1991-92. Petitioners also alleged that:

- Nigeria's judiciary is heavily influenced and controlled by Nigeria's executive branch and lacks the political independence to render impartial judgments in a high-value dispute between IOCs and NNPC. See TAP, A-150.

- The Nigerian courts have refused to consider Petitioners' arguments and have interpreted Nigerian law in unprecedented and novel ways, sometimes contradicting their own precedent, to justify setting aside the Award (and similar awards from the other Overlift Disputes). See TAP, A-141-49.

- In the course of the above, the Nigerian courts have consistently denied Petitioners due process. See TAP, A-150.

- The Supreme Court, the only federal court in Nigeria that has not considered the Award, will not find in favor of Petitioners because it suffers from the same political influences, and engages in the same results-oriented reasoning, as the lower courts. See TAP, A-150-51.

- While the District Court proceedings were pending, the Supreme Court rubberstamped a pre-arranged "settlement" between the Nigerian federal government and three of its state governments, pursuant to which the federal government agreed to demand tens of billions of dollars of allegedly "lost revenue" from IOCs, retroactively assessed to August 2003. See TAP, A-150-51.[5]

- In any event, Petitioners' Supreme Court appeals will likely not be adjudicated for ten to fifteen years, which renders the prospect of justice so illusory as to amount to no justice at all. See TAP, A-151.

To contextualize these allegations, Petitioners submitted the expert report of Matthew T. Page, the former senior Nigeria expert for the US Department of State. See First Page Decl., A-960-61. Mr. Page's report explained why, as a political matter, the Nigerian courts cannot rule, and had not ruled, against NNPC

[5] Emboldened by NNPC's ability to overlift with impunity, and aware that Nigerian courts will not enforce an arbitral award of damages against Nigeria or its alter ego, Nigeria has demanded more than $60 billion from various IOCs, and also enacted legislation seeking unilaterally to change the contractual deals it previously struck by dramatically increasing the royalties that the IOCs are required to pay. See, e.g., Press Release, NNPC, NNPC Saves Over $3bn from Arbitrations, Nov. 5, 2019, https://www.nnpcgroup.com/News-and-Media/news/Lists/Posts/Post.aspx?List=20b7f5cf-4d4b-499e-98da-ee0bbdc39041&ID=237&Source=https://www.nnpcgroup.com%2FNews-and-Media%2FNews%2FLists%2FPosts%2FAllPosts%2Easpx&ContentTypeId=0x01100062C684CCEEAA2149BAF11615E438EC91; Malami Tells IOCs to Pay $62.1bn PSC Arrears, ThisDay, Nov. 27, 2019, https://www.thisdaylive.com/index.php/2019/11/27/malami-tells-iocs-to-pay-62-1bn-psc-arrears/.

and Nigeria in high-value disputes with foreign parties. See, e.g., First Page Decl., A-992.

In these extreme circumstances, Petitioners argued, there was no legal basis for affording comity to the Nigerian court decisions setting aside the damages portion of the Award, and that the District Court should instead confirm the Award to ensure a remedy for the contractual breaches that Petitioners have concededly suffered. See TAP, A-159-68. As of November 16, 2018, the total amount of the Award, with interest, was $2,669,405,616. See TAP, A-171.[6]

B. The District Court Dismisses the Petition

The District Court held oral argument on NNPC's motion to dismiss on February 1, 2019. See Hr'g Tr., A-2539-98. On September 4, 2019, the District Court issued its Opinion. See Opinion, SPA-1-50. The District Court correctly found that it had personal jurisdiction over NNPC both because NNPC is the alter ego of the Nigerian government and is therefore not afforded due process, and, alternatively, because NNPC had sufficient minimum contacts with the United States to satisfy constitutional due process requirements. See Opinion, SPA-6-33. The District Court also correctly declined to dismiss the Petition for forum non conveniens. See Opinion, SPA-33-36.

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6 On December 11, 2018, Petitioners also filed a motion for an order establishing facts or drawing adverse inferences, which the District Court had invited as early as July 2018. See Tr. at 16:7-9, July 19, 2018, ECF No. 153. That motion is not a part of this appeal.

The District Court then turned to the merits of the Petition. In contrast to the thorough and considered treatment of the jurisdictional issues—which were decided on a full evidentiary record after discovery—the District Court's treatment of the merits was cursory, failed to apply precedent, and contained many procedural, legal, and factual errors.

First, the District Court acknowledged that NNPC had moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), see Opinion, SPA-36, but inexplicably failed to accept Petitioners' merits-related allegations as true or to draw inferences in Petitioners' favor.

Second, the District Court erred when it assessed the competing claims to comity of the Award and the Set Aside Appeal. The District Court mechanically applied the illustrative factors present in Pemex, finding that three of the four favored NNPC, while acknowledging that it was "a close call." Opinion, SPA-39-46. By focusing solely on the specific factors present in Pemex, rather than the overarching principle of public policy articulated in Pemex and its antecedents, the District Court disregarded Petitioners' well-pleaded allegations—backed by expert testimony and other evidence—that the Nigerian courts had denied and will continue to deny Petitioners any semblance of due process. And even when evaluating the four factors present in Pemex, the District Court misapprehended this Court's reasoning in Pemex and committed reversible error.

Finally, the District Court inexplicably declined to confirm even the liability finding in the Award—which the Nigerian Court of Appeal had reinstated—and refused to award damages to Petitioners (the quantification of which NNPC has never disputed, see TAP, A-158) in order to remedy the unjust and repugnant result of Nigeria depriving Petitioners of any remedy for NNPC's breaches of the PSC. The District Court also refused to exercise its inherent power to award damages to compensate Petitioners for NNPC's breaches of the PSC—breaches that were proven in binding arbitration before an independent Tribunal and that the Nigerian Court of Appeal has twice acknowledged. See Opinion, SPA-38-39.

STANDARD OF REVIEW

This Court "review[s] the grant of a motion to dismiss under Rule 12(b)(6) de novo, construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Elias v. Rolling Stone LLC, 872 F.3d 97, 104 (2d Cir. 2017). To survive a motion to dismiss, a complaint "must contain enough facts to state a claim to relief that is plausible on its face. A claim is plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Palin v. N.Y. Times Co., 940 F.3d 804, 810 (2d Cir. 2019).

This Court reviews a district court's grant of comity to a foreign judgment setting aside an arbitral award for abuse of discretion. See Pemex, 832 F.3d at 100. A district court abuses its discretion when "(1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 169 (2d Cir. 2001). The abuse of discretion standard of review therefore "incorporates de novo review of questions of law" and "clear error review of questions of fact." United States v. Legros, 529 F.3d 470, 474 (2d Cir. 2008).

A district court commits an error of law when, inter alia, it applies the wrong legal principle, see Parker v. Time Warner Entm't Co., 331 F.3d 13, 21 (2d Cir. 2003), or misapplies a controlling precedent, see Williams v. Citigroup Inc., 659 F.3d 208, 214 (2d Cir. 2011). A district court's determination of an issue of foreign law is erroneous when it is either incorrect or insufficiently supported by evidence of foreign law. See Carlisle Ventures, Inc. v. Banco Español de Crédito, S.A., 176 F.3d 601, 605 (2d Cir. 1999). All such errors are "review[ed] without deference." Zervos, 252 F.3d at 168.

SUMMARY OF ARGUMENT

The enforcement of foreign arbitral awards is governed by the FAA, which incorporates the New York Convention. 9 U.S.C. § 201, SPA-53. There is a "strong public policy in favor of international arbitration" in the United States, Encyc. Universalis S.A. v. Encyc. Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005), and "the principal purpose underlying American adoption and implementation of [the New York Convention], was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts," Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). As a result, US courts must recognize and enforce a valid arbitral award. See Zurich Am. Ins. Co. v. Team Tankers A.S., 811 F.3d 584, 588 (2d Cir. 2016).

This "pro-enforcement bias," Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974), also applies to the treatment of awards that have been annulled at the seat of arbitration. Both the New York Convention and the FAA permit the enforcement of awards annulled by foreign courts. Accordingly, a district court facing a petition to confirm an annulled award must resolve the following question: "Which is to be given primacy, the award or the nullifying judgment?" Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 962 F. Supp. 2d 642, 643 (S.D.N.Y. 2013) ("Pemex SDNY"). Where a foreign court's decision setting aside an award is "repugnant to fundamental notions of what is decent and just in the United States," this Court directs a district court to recognize the arbitral award and not the decision setting it aside. Pemex, 832 F.3d at 106-07.

Faced with this choice, in what it termed "a close call," Opinion, SPA-46, the District Court chose to give comity to the Set Aside Appeal. The District Court did so notwithstanding Petitioners' detailed allegations that:

- Petitioners did not, and could not, receive due process before the Nigerian courts, which had never—over the course of two decades—ordered NNPC to pay damages to an international oil company;

- Enforcing the Set Aside Appeal would leave Petitioners with an acknowledged multi-billion-dollar harm but no forum in which they could obtain a remedy;

- The Nigerian courts vitiated Petitioners' long-established, contractually-bargained-for expectations that all contractual disputes with NNPC would be subject to binding arbitration and that any breaches would be remedied by an enforceable award of damages; and

- In ruling against Petitioners, the Nigerian courts applied the law retroactively in order to shield Nigeria's alter ego and primary revenue-generating instrumentality from a multi-billion-dollar liability.

See TAP, A-153-68. The District Court committed several reversible errors of law and fact, the correction of any one of which should lead this Court to reverse.

First, even though it was adjudicating a motion to dismiss—which requires all of Petitioners' well-pleaded allegations to be taken as true and all reasonable inferences to be drawn in Petitioners' favor, see Elias, 872 F.3d at 104—the District Court did not accept Petitioners' merits-related allegations as true. In fact, the District Court accepted as true some of NNPC's factual assertions over Petitioners' allegations. The District Court also made a series of factual findings (some of which are clearly erroneous, as discussed below) on this motion to dismiss, without permitting Petitioners to take discovery on the merits or holding an evidentiary hearing to adjudicate the factual issues in dispute.

Second, the District Court erred as a matter of law when applying this Court's decisions in Pemex and Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986). The District Court ignored the central holding in Ackermann, which instructs courts to ask whether the foreign proceedings comported with "fundamental notions of what is decent and just" before granting them comity, 788 F.2d at 841, and misapplied Pemex, treating the four factors that happened to be present in that case as the exclusive grounds for confirming an annulled award. See Opinion, SPA-40. Because the District Court limited its analysis in this way, it disregarded the critical, well-pleaded allegations in the Petition that the Nigerian courts had denied due process to Petitioners, and that this denial is repugnant to American notions of decency and justice. Even though this due process claim was a central pillar of Petitioners' argument that recognizing the Set Aside Appeal would be "repugnant to fundamental notions of what is decent and just" in the United States; the District Court simply ignored it. See Pemex, 832 F.3d at 107; Ackermann, 788 F.2d at 841.

Even in its highly circumscribed analysis, the District Court committed a series of clear legal and factual errors in applying the four factors considered by this Court in Pemex. For example, the District Court distinguished Pemex from this case by stating that, in Pemex, the Mexican government disputed the tribunal's jurisdiction only after it received an unfavorable award in the arbitration, while here, NNPC had contested the Tribunal's jurisdiction from the outset. See Opinion, SPA-41-42, SPA-44. This is clear error in at least two ways. First, in Pemex, as here, the Mexican government contested the tribunal's jurisdiction from the beginning. See Pemex SDNY, 962 F. Supp. 2d at 646-47. Second, even putting that factual error to the side, the District Court offers no legal or logical basis for why the distinction it draws makes any legal difference. A baseless jurisdictional argument—which, moreover, effectively denies Petitioners any venue in which to assert their contractual rights, in clear violation of US policy—does not become any more worthy of a US court's imprimatur just because it was asserted early. Comity should not be accorded to a foreign judgment that nullifies contractual rights, denies a remedy for rights that it recognizes have been violated, and effects a taking of property "without compensation for the benefit of the government." See Opinion, SPA-46; see also U.S. Const. amend. V.

Third, the District Court committed reversible error by failing to recognize and enforce the liability portion of the Award. The parties agree that the Nigerian courts reinstated the Award's liability holding. The District Court was therefore required to recognize and enforce the liability holding, and its failure to do so is legal error. See Zurich, 811 F.3d at 588; New York Convention, art. V, SPA-52; 9 U.S.C. § 207, SPA-55. The District Court compounded its error by recognizing the "anomalous" Nigerian Court of Appeal decision that set aside Petitioners' damages and left Petitioners with a finding that their rights had been violated, but no remedy. Further, the District Court erred by failing to exercise its inherent powers to award Petitioners the uncontested damages that flow from the Award's reinstated liability holding. The District Court provided no legal basis for refusing to exercise its inherent powers; it simply cited the size of the Award, which reflects the grave harm suffered by Petitioners, and ceased its analysis. But a victim should not be denied relief without a semblance of due process because it has suffered a "massive" harm, Opinion, SPA-38, as opposed to a smaller one.

Petitioners respectfully request that this Court reverse the District Court's Opinion and Judgment and confirm the Award or, in the alternative, reverse and remand to the District Court for merits discovery on Petitioners' allegations and further appropriate proceedings.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPLY THE APPROPRIATE STANDARD TO NNPC'S 12(b)(6) MOTION

In dismissing the Petition, the District Court committed reversible error by failing to accept Petitioners' factual allegations as true and to draw all reasonable inferences in Petitioners' favor, as it was required to do. See Elias, 872 F.3d at 104, 106; Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 128 F.3d 59, 66 (2d Cir. 1997) (under Rule 12(b)(6), plaintiff's "allegations must be accepted as true" and "[t]he district court's failure to do so was error"); but cf. Productos Mercantiles E Industriales, S.D. v. Faberge USA, Inc., 23 F.3d 41, 46 (2d Cir. 1994) (where no consensus among the parties and the court to apply Rule 12(b)(6) pleading standard, petition not subject to notice pleading). The District Court's error is particularly egregious because the parties agreed—and the District Court endorsed the procedure—that what was before the court was a motion to dismiss, and what was required of Petitioners at this stage was only to allege facts sufficient to make a "prima facie" case. Hr'g Tr., A-2597.

It was undisputed below that the 12(b)(6) standard governed NNPC's motion to dismiss.[7] NNPC styled its motion as one under Rule 12(b)(6). See Notice of Motion, A-1131 (NNPC "will move this Court . . . pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6)."); MTD, A-1139. Petitioners responded by highlighting that the 12(b)(6) standard required the District Court to "construe the pleadings and affidavits in the light most favorable to [Petitioners], resolving all doubts in [their] favor." See Opp'n, A-1887. NNPC did not object or suggest otherwise. Reply, A-2388-404.

The District Court was also clear that NNPC's motion was governed by the standards applicable to Rule 12 motions. For example, in the course of resolving one of the parties' discovery disputes, the District Court affirmed that there were documents that NNPC had not produced in jurisdictional discovery that would be relevant to Petitioners' merits arguments, and that Petitioners could seek those documents if they survived NNPC's motion to dismiss. See Order at 6, May 15, 2017, ECF No. 111 ("Of course, many . . . documents may be relevant to Esso's substantive claims against NNPC, but Esso needs to surmount the jurisdictional hurdle before seeking those documents."). Similarly, at oral

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7 Immediately after appearing in the District Court in January 2015, NNPC requested a pre-motion conference on its "proposed motion to dismiss this action pursuant to Rule 12(b)(1), 12(b)(2) and 12(b)(6)." See Letter Mot. at 1, Jan. 30, 2015, ECF No. 16. From that point forward, Petitioners and NNPC proceeded as though the merits of the dispute would be evaluated under a 12(b)(6) standard on NNPC's motion to dismiss.

argument, Petitioners, NNPC, and the District Court all acknowledged that Petitioners needed to make only a prima facie case to survive NNPC's motion, after which they could seek additional discovery as to the merits of their allegations. See Hr'g Tr. at 50:3-9, A-2588 (Petitioners: "[W]e were expecting a motion to dismiss. So we expected that we would be facing a pleadings standard burden with respect to dismissal of the petition. And so if there are more issues that arose, we would have another opportunity in discovery to explore that."); Hr'g Tr. at 59:19-21, A-2597 (The Court: "At this stage doesn't Esso just need to make a prima facie showing [regarding the merits]?" NNPC: "Yes, your Honor. But that is not a prima facie showing."). And, because NNPC was the moving party, NNPC was given the last word with respect to the parties' written submissions, see, e.g., Reply, A-2388-404; Second Oditah Decl., A-2418-28, and the first word at oral argument, Hr'g Tr. 2:23-24, A-2540.

The District Court, however, failed to take Petitioners' well-pleaded factual allegations on the merits of the Petition as true. Instead, the District Court either overlooked Petitioners' allegations entirely or, even worse, accepted NNPC's factual assertions—all without giving Petitioners an opportunity to take merits discovery or even to supplement the record. Petitioners' well-pleaded allegations, which the District Court disregarded, were—on their face—sufficient to overcome NNPC's 12(b)(6) motion. For example, the District Court accepted as true NNPC's allegations that:

- NNPC had not agreed to arbitrate this dispute, see MTD, A-1164 (alleging that the "prohibitions of arbitration in the Nigerian Petroleum Profits Tax Act" were "in effect when the parties entered the PSC"), despite Petitioners' allegations that "at the time the parties entered into their contractual arrangement, all parties understood that disputes concerning the interpretation and implementation of contractual rights—such as those at issue here—could and would be adjudicated by an independent arbitral tribunal empowered to award compensation . . . . In subscribing to the PSC, NNPC agreed that such a dispute would be arbitrated," TAP, A-166. See Opinion, SPA-41 ("[T]he Agreement does not clearly call for this dispute to be arbitrated.").

- Petitioners could have brought their dispute in the Nigerian courts because "Petitioners continue to pursue multiple avenues of recourse in Nigeria," MTD, A-1165, despite (i) Petitioners' allegations that their action seeking compensation for NNPC's violations of the PSC was summarily dismissed with prejudice, and (ii) the exclusive arbitration clause in the PSC, which, under the Nigerian Court of Appeal's decisions, obliges Petitioners to arbitrate the merits of allocation disputes, see TAP, A-146-47, A-165. See Opinion, SPA-45 ("Esso knew that NNPC contested the Arbitral Panel's jurisdiction and could have pursued its claims through litigation [in the Nigerian courts].").

- Petitioners could achieve relief in the Nigerian courts, see MTD, A-1165 (alleging that this case is not like Pemex because "Petitioners here continue to pursue multiple avenues of recourse in Nigeria"), despite Petitioners' allegations that "given the stakes involved, the courts cannot, as a matter of political reality, rule against the national oil company and in favor of Petitioners," TAP, A-161. See Opinion, SPA-45 ("[Esso] has multiple appeals pending and could still achieve confirmation of the Award" in Nigeria).

Further, the Opinion made no mention of many of Petitioners' well-pleaded due process allegations, which, when accepted as true, further demonstrate that the Set Aside Appeal was "repugnant to fundamental notions of what is decent and just in the United States." These allegations include that:

- Nigeria's judiciary is heavily influenced and controlled by Nigeria's executive branch. See TAP, A-150.
- The Nigerian Supreme Court "suffers from the same political influences, and engages in the same results-oriented reasoning, as the lower courts." TAP, A-150.
- The Nigerian Supreme Court rubberstamped a "settlement" between the Nigerian federal government and three Nigerian states that purports to oblige the federal government to recover over $60 billion from the IOCs, based on retroactive assessments, while refusing to permit the IOCs to be heard on the issue. See TAP, A-150-51.
- NNPC has continued to overlift without compensating Petitioners for doing so. See TAP, A-140.
- "[T]he Nigerian courts have come to the aid of NNPC—as they are compelled to do as a practical and political (but not legal) matter—by refusing to enforce a single [arbitral] award [against NNPC], including Petitioners' Award." TAP, A-141.
- "The Nigerian courts reached a decision clearly designed to achieve one result: to save NNPC—and, effectively, Nigeria—from having to pay the Award." TAP, A-160.

The District Court's failure to accept Petitioners' well-pleaded allegations materially affected the analysis that the District Court performed—all without giving Petitioners a fair chance to establish the merits of their Petition.

Unlike the two years of jurisdictional discovery that took place, and the voluminous evidence Petitioners put before the District Court in support of their jurisdictional allegations, Petitioners had no opportunity to seek merits discovery. In the absence of discovery, Petitioners were entitled to the benefit of the deferential pleading standard of Rule 12(b)(6) to test their allegations at this stage of the proceeding. As a matter of law, the District Court's failure to apply the proper pleading standard requires reversal. See Elias, 872 F.3d at 106, 111.

II. THE DISTRICT COURT MISCONSTRUED AND MISAPPLIED PEMEX

In determining whether to confirm an arbitral award annulled by a foreign court, a district court must decide "[w]hich is to be given primacy: the award or the nullifying judgment." Pemex SDNY, 962 F. Supp. 2d at 643. This is a question of comity, which is "the recognition which one nation allows within its territory to the . . . acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." Hilton v. Guyot, 159 U.S. 113, 164 (1895). Where, as here, the nullifying judgment is "repugnant to fundamental notions of what is decent and just" in the United States, the judgment may not be given comity in US courts and the award should be enforced. Pemex, 832 F.3d at 106; see also Ackermann, 788 F.2d at 841.

The District Court committed reversible legal error by misapplying the law as set out in Pemex. First, the District Court misapprehended this Court's core holding in Pemex: a court considering enforcement of an annulled arbitral award must, on the totality of circumstances before it, determine whether affording comity to the foreign judgment setting aside the award would be "repugnant to fundamental notions of what is decent and just" in the United States, Pemex, 832 F.3d at 106. See infra at Section II.A. The District Court instead expressly and erroneously limited its analysis to the four non-exclusive factors that happened to be present in Pemex, as established under the facts and circumstances presented in that case, thus effectively limiting Pemex to its facts. Second, even when considering the four factors present in Pemex, the District Court so misapplied this Court's reasoning in that case that reversal is required. See infra at Section II.B.

A. The District Court Misconstrued and Misapplied the Central Holding in Pemex

In Pemex, this Court held that a district court has discretion to enforce an annulled award "to vindicate fundamental notions of what is decent and just," Pemex, 832 F.3d at 107, when "to do otherwise would undermine public confidence in laws and diminish rights of personal liberty and property," Pemex, 832 F.3d at 111. In applying that standard to the facts in Pemex, this Court found that four considerations present in that case justified the district court's enforcement of an award nullified by the Mexican courts: (i) the vindication of contractual rights, (ii) the repugnance of retroactive application of the law to cancel existing contract rights, (iii) the need for every claim to find a forum, and (iv) the prohibition on government expropriation without compensation. See Pemex, 832 F.3d at 107-11.

Pemex does not suggest—and certainly does not hold—that those four factors were the only wrongs that could constitute an affront to American notions of decency and justice. The District Court, however, erroneously interpreted Pemex to limit its analysis to just those four factors: "the Second Circuit instructs courts to weigh four considerations." Opinion, SPA-40 (emphasis added). In so doing, the District Court failed to apply this Court's overarching holding that, in evaluating whether to give effect to a foreign judgment nullifying an arbitral award, courts should consider whether doing so would violate basic notions of decency and justice. The touchstone, as this Court affirmed in Pemex, is "fairness to litigants." Pemex, 832 F.3d at 106. The District Court missed the forest for the trees.

1. The District Court Incorrectly Limited the Holding of Pemex to the Factors Present in that Case

It has been this Court's consistent guidance, both before and after Pemex, that a district court should apply the decency and justice standard when deciding whether to recognize a foreign judgment. See Thai-Lao Lignite (Thai.) Co., Ltd. v. Gov't of Lao People's Democratic Republic, 864 F.3d 172, 184 (2d Cir. 2017) (a district court may refuse to recognize a foreign judgment "to vindicate fundamental notions of what is decent and just in the United States"); Ackermann, 788 F.2d at 841 ("A judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just . . . ."). This analysis is also favored by the Restatement (Fourth) of Foreign Relations Law §§ 483, 484 (2018) ("Restatement"), which counsels courts to look at the due process a party received in a foreign court when determining whether to enforce a foreign judgment.

The decency and justice standard has a long history in American jurisprudence, and in this Court. See Hilton, 159 U.S. at 202; Ackermann, 788 F.2d at 841. Throughout the many years that courts have applied this standard to determine whether a foreign judgment should be given comity, they have never limited the inquiry to the four factors considered in Pemex. To the contrary, the law governing the recognition of foreign judgments requires courts to consider whether, in the totality of the circumstances, the foreign judgment was rendered by an impartial judiciary and is compatible with fundamental principles of fairness. See Hilton, 159 U.S. at 202 (recognition is appropriate only when "likely to secure an impartial administration of justice between the citizens of its own country and those of other countries"); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410 (9th Cir. 1995) ("It has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process."); Restatement §§ 483, 484 (2018) (identifying twelve bases which may cause a court to decline to extend comity to a foreign judgment). The District Court failed to consider this general principle, and instead reduced Pemex to a mechanical box-checking exercise.

Among the most common factors considered in deciding whether to enforce a foreign judgment is whether the foreign proceedings were fair and provided due process to litigants. In Thai-Lao, this Court considered whether the petitioners had received due process in the Malaysian court proceeding that resulted in the set aside of an award, see 864 F.3d at 187—a factor not included in the four Pemex factors, but which Petitioners have alleged here. In Ackermann, this Court considered whether the foreign proceedings were "fair[] to litigants." 788 F.2d at 842; see also Restatement § 484(h) (where foreign proceeding is not compatible with fundamental principles of fairness, recognition is not warranted). In DeJoria v. Maghreb Petrol. Expl., S.A., the Fifth Circuit denied recognition to a foreign judgment resulting from a proceeding that lacked due process. 935 F.3d 381, 395-96 (5th Cir. 2019), as revised (Aug. 16, 2019), petition for cert. filed (Dec. 16, 2019). And in Compañía de Inversiones Mercantiles SA v. Grupo Cementos de Chihuahua SAB de CV, the district court observed that evidence of irregularities in the foreign judicial process can be sufficient to question the legitimacy of a decision setting aside an award. Mem. Op. & Order at 20 n.9, No. 1:15-cv-02120 (D. Colo. Mar. 25, 2019), ECF No. 93; see also Restatement §§ 483

Cmt. B (a judgment should not be recognized when rendered by courts that "systematically discriminate on the basis of . . . nationality"), 484(g) ("judgment rendered in circumstances that raise substantial doubt about the integrity of the rendering court" constitutes basis to deny recognition to a foreign judgment); 484 n.9 (due process violated when a proceeding "disable[s] one side from vindicating its legal interests").

This risk of unfairness or bias is particularly strong where, as here, the private plaintiff's adversary is the government (or an alter ego of the government), "whose rescue national courts are eager to graciously aid." Thai-Lao Lignite (Thai.) Co., Ltd. v. Gov't of Lao People's Democratic Republic, 997 F. Supp. 2d 214, 227 (S.D.N.Y. 2014); Pemex SDNY, 962 F. Supp. 2d at 657 ("[N]ational sovereignty runs strong, and sometimes results in judicial interventions, and even nullifications, of arbitration proceedings and awards."); Sangeorzan v. Yangming Marine Transp. Corp., 951 F. Supp. 650, 654-55 (S.D. Tex. 1997); see also Linda Silberman & Nathan Yaffe, The US Approach to Recognition & Enforcement of Awards After Set-Asides: The Impact of the Pemex Decision, 40 Fordham Int'l L.J. 799, 810 (2016) ("[C]oncerns about local bias and parochialism at the situs cannot be entirely disregarded where a state-owned entity is involved and that state was the only realistic place of arbitration."). Ignoring the risks faced by American investors forced to litigate against a sovereign in its home courts "impose[s] upon

American citizens doing business abroad an undue risk . . . that, ironically, . . . undermine[s] the very processes of transnational legal relations that the doctrines of comity and res judicata seek to promote." Ackermann, 788 F.2d at 844. The risk is manifest here: for two decades, the Nigerian courts had never once ordered NNPC to pay damages to an international counterparty. See, infra at 51.

Limiting the public policy inquiry to the four factors present in Pemex is not only contrary to well established law in this Circuit governing the enforcement of foreign judgments, but also clashes with the "emphatic federal policy in favor of arbitral dispute resolution," Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985), which "applies with particular force in international disputes," Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 654 (2d Cir. 2004); see also Encyc. Universalis, 403 F.3d at 90. Parties engaged in international commerce frequently choose international arbitration to avoid the risk of bias posed by litigating in the home jurisdiction of their counterparty. See Scherk, 417 U.S. at 516 (arbitration clauses "obviate[] the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties"); see also S.A. Mineracao Da Trindade-Samitri v. Utah Int'l Inc., 745 F.2d 190, 193 (2d Cir. 1984); Gary Born, International Commercial Arbitration 73-75 (2d ed. 2014) ("One of the central objectives of international arbitration agreements is to provide a neutral forum for dispute resolution, detached from either the parties or their respective home state governments.”).

Petitioners alleged below that the Nigerian proceedings were fundamentally unfair to Petitioners and denied them due process. See TAP, A-160-61. Petitioners also alleged that they suffered specific injustices much like those inflicted on the petitioners in Pemex. See TAP, A-161-67. These allegations together formed the basis for Petitioners’ argument that the Nigerian Court of Appeal’s decision was repugnant to fundamental notions of American justice. The District Court, however, ignored Petitioners’ fairness and due process allegations, and instead analyzed only the four specific factors present in Pemex. That was error, and alone justifies reversal.

2. Had the District Court Correctly Applied Pemex’s Central Holding, It Would Have Recognized and Enforced the Award

Had the District Court properly applied Pemex and this Court’s other holdings, Petitioners’ well-pleaded allegations would certainly have satisfied the Pemex standard for showing that enforcing the Set Aside Appeal would be repugnant to fundamental principles of decency and justice. The District Court failed to do so. The District Court did not evaluate whether the Nigerian court decisions setting aside the Award (i) were “repugnant to fundamental notions of what is decent and just” in the United States, Pemex, 832 F.3d at 107, (ii) would "undermine public confidence in laws and diminish rights of personal liberty and property," Pemex, 832 F.3d at 111, or (iii) were rendered by a judicial system that failed to "provide impartial tribunals" or under "circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment," Restatement §§ 483, 484. Failing to consider the evidence by reference to these fundamental principles underlining the Pemex line of cases warrants reversal.

It has been black letter law for more than a hundred years that foreign legal proceedings that deny a party due process and give a state a home-court advantage should be denied comity. See Hilton, 159 U.S. at 202; Bank Melli, 58 F.3d at 1410. This is especially true where, as here, the foreign state uses the power of its judiciary to assist it in escaping its own contractual obligations. See DeJoria, 935 F.3d at 392-94 (no comity where Moroccan court manipulated proceedings to guarantee outcome favorable for Moroccan royal family); Pemex, 832 F.3d at 109-10 (no comity where Mexico used its judicial and legislative powers to allow a state-owned entity to escape its contractual obligations).

The Ninth Circuit's decision in Bank Melli is instructive. There, the Ninth Circuit affirmed the district court's refusal to enforce an Iranian judgment because the Iranian courts could not provide a fair forum for the defendant. In reaching that decision, the Ninth Circuit relied on State Department reports noting the lack of judicial independence in Iran, as well as a declaration of a former State Department official declaring that Iranian judges are "subject to continuing scrutiny and threat of sanction and cannot be expected to be completely impartial." Bank Melli, 58 F.3d at 1412.

The same is true here. The interest of the Nigerian government in this case is indisputable. The District Court found that NNPC is the alter ego of the Nigerian government. See Opinion, SPA-20. The two entities share bank accounts, see Opinion, SPA-18, the Nigerian President appoints—and can remove at will—NNPC's board members and senior personnel, Opinion, SPA-14-15, and the contractual breach at issue in the arbitration was made at the instruction of the Nigerian government, see Opinion, SPA-13, which funds over 75% of Nigeria's national budget through oil and gas receipts from NNPC, see TAP, A-148; First Page Decl., A-967.

Petitioners alleged with specificity that the Set Aside Appeal reached a predetermined result given the highly political nature of the dispute and NNPC's status as a powerful and lucrative state-owned entity, and because Nigerian courts cannot, as a political matter, render a multi-billion-dollar judgment against Nigeria. See TAP, A-140-48, A-160-61; Opp'n, A-1907-09. These allegations—which were made without the benefit of merits discovery—were supported by two declarations. Matthew Page, a leading expert on Nigeria who previously served as the State Department's Nigeria subject matter expert, explained that the Nigerian judiciary was incapable of providing an impartial tribunal in Petitioners' dispute with Nigeria. For example, Mr. Page stated:

> As a political matter, the courts could not, and therefore predictably did not, enforce the Petitioners' arbitration award . . . . It is inconceivable that a judge operating within the political parameters of Nigeria's judicial system as it has existed over the past decade and as it exists today would provide due process to an IOC in a case involving the government and NNPC.

First Page Decl., A-991, A-993; see also First Page Decl., A-993-94 (listing red flags that signal a compromised judiciary, which are present in Petitioners' case). A retired Justice of the Nigerian Supreme Court and Nigeria's current High Commissioner to the United Kingdom (a post equivalent to Ambassador), Justice George Adesola Oguntade, echoed this conclusion: "I cannot help but think that the amounts at stake in the overlifting disputes, and the political pressures surrounding them, have been determinative of the outcome in each of these cases." First Oguntade Decl., A-917; see also First Oguntade Decl., A-916-17 (describing how the Nigerian courts have engaged in "extreme results-oriented decision-making").

These opinions are consistent with substantial secondary sources Petitioners relied on below, all of which highlight the lack of independence of the Nigerian judiciary, including:

- US State Department Reports, First Page Decl., A-984-85;
- Publicly-available US diplomatic cables, First Page Decl., A-985;
- A report by the International Commission of Jurists, a respected non-governmental organization, First Page Decl., A-986;
- Writings of Nigerian academics, First Page Decl., A-987;
- Publications by Nigerian civil society, in particular the Nigerian Bar Association, First Page Decl., A-987-88; and
- United Nations reports, First Page Decl., A-988.[8]

The lack of independence of the Nigerian courts is confirmed by an empirical analysis of Nigerian court decisions. A systematic review of the largest repository of Nigerian case law from 2000-2018 did not yield a single case where a Nigerian court either (i) ordered NNPC to pay damages to a foreign company, or (ii) enforced an arbitral award for monetary damages against NNPC. Opp'n at 25, A-1908; Second Page Decl., A-1931-32; Second Hoon Decl., A-1991-93.[9]

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[8] Studies on the Nigerian judiciary that have become available since the District Court issued its decision further confirm Petitioners' allegations. See, e.g., Centre for Democracy & Development & Open Society Initiative for West Africa, Justice on Trial: Courts & Commissions in West Africa, 6 W. Africa Insight 4, 8 (2019) ("[T]he process and quality of judicial preferment has become unduly politicised, eroding the judiciary of any pretension to independence or integrity.").

[9] This survey also showed that NNPC succeeded in approximately 88% of all cases in which it has been sued for damages. Second Page Decl., A-1931; Second Hoon Decl., A-1992-93. In the few reported cases that it lost over this two-decade period, NNPC had been ordered to pay damages, in

Combined, these allegations were more than sufficient to survive NNPC's dismissal motion.

The District Court, however, failed to acknowledge or discuss any aspect of this consistent and extensive evidence in its consideration of the merits, let alone accept the allegations as true.[10] See Elias, 872 F.3d at 104. Instead, the District Court found that Petitioners had alleged only that they were denied due process due to the extensive delays they were experiencing in the Nigerian courts, and otherwise treated Petitioners' due process allegations as disconnected from the Pemex analysis. And in rejecting Petitioners' Pemex arguments, the District Court relied on Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194 (2d Cir. 1999), see Opinion, SPA-46, a case whose only similarity to the facts Petitioners allege is that it concerns Nigeria. Baker Marine involved a dispute between private parties that did not implicate the partiality and due process issues that are evident here, where Petitioners are litigating against a State-owned entity in its own courts. See Baker Marine, 191 F.3d at 197 (noting that "Baker Marine has made no contention that the Nigerian courts acted contrary to Nigerian law").

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aggregate, of less than $1 million. Second Page Decl., A-1931; Second Hoon Decl., A-1993.

10 In addition, had Petitioners known that the District Court was in fact evaluating the merits of the parties' positions (not simply testing allegations in the Petition), they would have submitted additional evidence that Petitioners never had a chance at a fair process in Nigerian courts. Petitioners also would have requested merits discovery.

Because the District Court failed to consider Petitioners' well-pleaded and supported due process allegations, and because it misconstrued and misapplied the principles elucidated in this Court's decision in Pemex, this Court should reverse or, in the alternative, remand for discovery and additional fact finding.

B. The District Court Also Misconstrued and Misapplied the Specific Factors Considered by the Pemex Court

Petitioners' due process allegations alone are sufficient to demonstrate that enforcing the Set Aside Appeal instead of the Award would be "repugnant to fundamental notions of what is decent and just" in the United States. Pemex, 832 F.3d at 106-07; Bank Melli, 58 F. 3d at 1410; DeJoria, 935 F.3d at 392, 395-96. Petitioners additionally alleged, however, that the factors present in Pemex were also present here. The District Court's rejection of that argument also rests on multiple legal and factual errors that require reversal.

1. The District Court Erroneously Found that the Parties' Contractual Undertakings Were Not Eviscerated by the Set Aside Appeal

As this Court made clear in Pemex, where a State-owned entity has "consented to arbitration and to the enforcement of arbitral awards," it cannot later escape its contractual obligations by arguing that the matter it agreed to arbitrate is not, in fact, arbitrable. Pemex, 832 F.3d at 107. Permitting a party to do so "shatters . . . investment-backed expectation[s]," "impair[s] one of the core aims of contract law," and "undermine[s] the public interest" including "public confidence in the administration of the law" and "security for individual rights of . . . private property." Pemex, 832 F.3d at 106, 108.

The evils of which this Court warned in Pemex are on full display here. When it was to Nigeria's benefit—when it wanted to persuade Exxon to extract the country's otherwise unreachable oil reserves—Nigeria agreed to arbitrate any dispute "concerning the interpretation or performance of this Contract." PSC, A-446. Sixteen years later, after Petitioners had invested billions of dollars in Erha and a dispute arose over Nigeria's attempt to take far more oil than its contractual entitlement, Nigeria reneged. Then, for the first time, Nigeria claimed that the contractual dispute was not arbitrable because, if Petitioners prevailed, Nigeria would have to pay Petitioners damages—and the payment of contractual damages by a state-owned entity must somehow amount to a tax refund. See Award, A-246-50. The Nigerian courts endorsed Nigeria's change of heart, freed it from its agreement to arbitrate any remedy for its contractual breaches, and thereby "shatter[ed Petitioners'] investment backed expectation" that any disputes concerning NNPC's performance of its PSC obligations would be arbitrated. Pemex, 832 F.3d at 108. The first Pemex factor is thus satisfied.

The District Court erroneously concluded otherwise, holding that "it is at least arguable" that the parties' dispute is an inarbitrable "tax dispute" that fell outside the arbitration clause. Opinion, SPA-40. The District Court also attempted to distinguish Pemex on the erroneous basis that "unlike the respondent[] in Pemex," NNPC had "maintained" its jurisdictional objection "from the outset of the arbitration." Opinion, SPA-40-41. These errors require reversal for three reasons.

First, it is not "at least arguable" that the parties' dispute is an inarbitrable "tax dispute." The Nigerian courts themselves rejected this argument. The trial courts vacated the Tribunal's award but the appellate courts reversed, holding, in two separate decisions, that the Parties' dispute was an arbitrable contract dispute. The Nigerian Court of Appeal ruled that the parties' dispute is "contractual in nature," not a "tax dispute," and was "within the jurisdiction of the Arbitral Tribunal." FIRS Appeal, A-742-43, A-751; see also Set Aside Appeal, A-692 ("[T]he final award of the arbitral tribunal [shall] be restored in respect of Petroleum Profit Tax returns preparation and calculation of lifting allocation by the [Petitioners]."). The District Court missed, or misapprehended, these holdings.

Second, even if the District Court had lingering doubts as to the scope of the arbitration clause in the PSC—which submitted all disputes "concerning" the parties' "performance of [the PSC]" exclusively to arbitration, PSC, A-446—any doubts "should [have been] resolved in favor of arbitration" under the strong US policy in favor of arbitration. Haviland v. Goldman, Sachs & Co., 947 F.2d 601, 604 (2d Cir. 1991). There is no legal basis for the District Court's conclusion that the parties' dispute was, even "arguably," "a non-arbitrable tax dispute," Opinion, SPA-40, a conclusion based on a clear misreading of Nigerian law and misapplication of US law.

Third, the District Court's attempt to distinguish Pemex—on the basis that there, unlike here, the respondent did not initially challenge the arbitral tribunal's jurisdiction—is erroneous as a matter of fact and law. The respondent in Pemex contested the arbitral tribunal's jurisdiction from the very inception of the arbitral proceedings, as NNPC did here. See Pemex SDNY, 962 F. Supp. 2d at 646-47 ("[T]he ICC Tribunal was formed [on] December 1, 2004. PEP promptly attacked the arbitrators' jurisdiction . . . ."). The District Court's factual finding on this point is thus clearly erroneous.

The District Court's reasoning is also without legal foundation. The District Court cited no precedent to support the finding that objecting to a tribunal's jurisdiction later, rather than earlier, is somehow more violative of basic notions of American justice. See Yukos Cap. S.A.R.L. v. OAO Samaraneftegaz, 963 F. Supp. 2d 289, 296, 299 (S.D.N.Y. 2013) (objecting to an arbitral tribunal's jurisdiction from the start of a proceeding, including failing to appear at the arbitration, is not a reason to enforce foreign judgment over arbitral award). Indeed, if accepted, the District Court's reasoning would eviscerate the first Pemex factor. In Pemex, this Court emphasized the importance of contractual rights, including contractual agreements to arbitrate, being "enforced." See Pemex, 832 F.3d at 107-08. If, as the District Court found, all that is required for a State's alter ego to prevail on the first Pemex factor is for it to assert early and often that the dispute is inarbitrable, the factor will lose all weight. Every party seeking to escape arbitration will make that argument—whether meritorious or not.

Moreover, not only have the Nigerian courts stripped Petitioners of their contractual right to arbitrate, but they have also stripped Petitioners of the right to have the PSC modified to compensate them for the change in Nigerian fiscal policy by throwing out their Stabilization Clause arguments on procedural grounds that the Tribunal had considered and rejected. See supra at 20. These takings—of procedural and substantive contractual rights, and of huge volumes of oil—"without compensation for the benefit of the government," Opinion, SPA-46, further reinforce the injustice of recognizing the Set Aside Appeal.

For all of these reasons, the first Pemex factor is plainly satisfied, and the District Court erred in finding otherwise.

2. The District Court Erroneously Found that Petitioners Have a Forum in Which to Bring Their Claims

The District Court also erred in its application of the second Pemex factor when it found that Petitioners have a forum in Nigeria in which to bring their claims. The Nigerian courts have done everything in their power to ensure that Petitioners have no forum in Nigeria. They have set aside the Award, finding that only the courts (not the Tribunal) could give Petitioners the relief they sought, and then barred Petitioners' access to those courts. See Set Aside Appeal, A-684-87 (finding that the Tribunal had no jurisdiction to order NNPC to pay damages for its breach of contract); FIRS Appeal, A-741-50 (same); Substantive Decision, A-783-84 (dismissing Petitioners' claim, filed in Nigerian courts, with prejudice as an abuse of process); TAP, A-164. This is precisely what Pemex prohibits. 832 F.3d at 110 (inability to have claims heard "magnifie[d] the injustice" foreign investor experienced because decision left foreign investor "without a remedy to litigate the merits of the dispute that the arbitrators had resolved in [its] favor").

The District Court nonetheless found that this factor favored NNPC because (i) Petitioners have appeals pending in Nigeria, (ii) NNPC had always objected to the Tribunal's jurisdiction, and (iii) Petitioners have obtained declaratory relief in Nigeria. See Opinion, SPA-45-46. The District Court was mistaken, factually and legally, as to each of these points.

First, in light of the Petition's detailed, well-pleaded allegations that Petitioners will not obtain relief in the Nigerian Supreme Court, and the supporting evidence Petitioners proffered but which the District Court did not consider, there is no basis to conclude that Petitioners will receive a fair hearing in the Nigerian Supreme Court. See, e.g., TAP, A-150 ("The Nigerian Supreme Court, unfortunately, suffers from the same political influences, and engages in the same results-oriented reasoning, as the lower courts."), A-161 ("The only viable explanation for the various holdings of the Nigerian courts is that they are the product of a judiciary that lacks independence, and that given the stakes involved, the courts cannot, as a matter of political reality, rule against the national oil company and in favor of Petitioners."); First Page Decl., A-994 ("I understand that the Petitioners have appealed to the Nigerian Supreme Court, but I believe that these appeals will be futile—the Supreme Court will not enforce the Petitioners' arbitration award for the same reason that the lower courts did not enforce it."); Second Hoon Decl., A-1992 ("[A] review of Nigerian case law has not identified a single case where a non-Nigerian company was awarded damages against NNPC . . . [or] where an arbitral award for monetary damages was enforced against NNPC."). On a motion to dismiss, Petitioners' well-pleaded allegations, backed by expert declarations, State Department and United Nations reports, and statistical data, must be accepted as true. See DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010).

Moreover, under the District Court's logic, Petitioners are in a no-win situation: if they do not appeal the Nigerian court decisions, NNPC will argue that they have not exhausted their remedies in Nigeria and cannot obtain relief in the United States; if they do appeal, NNPC will claim that they have a forum, even though that forum will never accord them due process. And if they wait for the

Nigerian appeals to be decided before bringing an action in the United States, the three-year statute of limitations in the FAA to enforce an arbitral award will bar a claim in the United States. See Tr. 7:17-20, Mar. 20, 2015, ECF No. 33 (NNPC: "We are talking about the possibility of ten, 12, 15 years" to resolve Petitioners' appeals). The District Court acknowledged this, observing that "if Esso loses its Nigerian appeals, it can no longer bring a claim in Nigeria and it will be left without a forum to recover damages for conduct which Nigerian courts have held NNPC liable," Opinion, SPA-45, but nonetheless decided that this Pemex factor favored NNPC. (The District Court also refused Petitioners' alternative request for a stay.)

Second, the District Court's attempt to distinguish Pemex again fails. The District Court held that this factor favored NNPC because Petitioners "knew that NNPC contested the Arbitral Panel's jurisdiction and could have pursued [their] claims through litigation." Opinion, SPA-45. But that is no distinction at all—there were objections to the arbitral tribunal's jurisdiction in Pemex as well, as noted above. See Pemex SDNY, 962 F. Supp. 2d at 646-47; see also supra at 56. Moreover, that reasoning defies logic as it would effectively require a party to waive its bargained-for right to arbitrate any time its counterparty objected to arbitration. If a respondent's refusal to abide by its contractual commitment to arbitrate can force its counterparty to litigate a dispute in the very courts that they bargained to avoid, then arbitration clauses have no value and the federal policy in favor of arbitration is meaningless. See Mitsubishi, 473 U.S. at 625 ("The liberal federal policy favoring arbitration agreements, manifested by [the FAA], is at bottom a policy guaranteeing the enforcement of private contractual arrangements . . . ."); Pemex, 832 F.3d at 107 (arbitral clauses should be enforced). And, in any event, Petitioners did try to pursue their claims through litigation in the Nigerian courts, with predictable results: dismissal with prejudice as an abuse of process. See Substantive Decision, A-783-84; see also supra at 21-22.

Finally, the District Court justified its conclusion on this second Pemex factor by stating that the decisions of the Nigerian Court of Appeal "essentially function as a declaratory judgment." Opinion, SPA-45. There are two fundamental flaws with this reasoning.

First, the supposed declaratory relief that Petitioners have now received is, at most, only prospective: the relief purports to direct NNPC to comply with the terms of the PSC. But that prospective, declaratory relief does not compensate Petitioners for their historical damages (with interest, now more than $2.6 billion) that they are owed for NNPC's past overlifting. Petitioners will never have a forum in which to seek redress for that harm, and so this Pemex factor also is satisfied. See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."); Streck v. Bd. of Educ. of the E. Greenbush Cent. Sch. Dist., 408 F. App'x 411, 415 (2d Cir. 2010) (where there is a right, the court must provide a remedy); Hishon v. King & Spalding, 467 U.S. 69, 78-79 (1984) (where a party states a prima facie case, it is "entitled to [its] day in court" to seek compensation).

The second flaw is that the supposed declaratory relief is meaningless, and NNPC itself has proved the point by persisting in overlifting billions of dollars in oil with utter impunity. See TAP, A-140 (NNPC has not complied with prospective obligations); Opp'n, A-1906 ("The passage of time has also proven prospective declaratory relief to be meaningless, as NNPC continues to violate the Award and the PSC with impunity by continuing to overlift."). To seek redress for that post-Award harm, Petitioners would—according to the structure that the Nigerian courts have designed, and which the District Court has now endorsed—have to: (i) commence arbitration to obtain a decision on the merits (the PSC requires all contractual disputes to go to arbitration, PSC, A-446); (ii) obtain recognition of that Award from the Nigerian courts; and then (iii) commence a second Nigerian court action to seek damages on the arbitration award. Petitioners would then be left to hope that, this time around, the second action is not dismissed with prejudice as an abuse of process, and that, contrary to their consistent decisions over two decades, the Nigerian courts will actually find in favor of an international company and against the government. This would be a journey in fantasy, as NNPC itself appreciates: NNPC continues to overlift notwithstanding the declaratory relief granted by the Tribunal and approved by the Nigerian courts. See TAP, A-140.

Requiring Petitioners to pursue unattainable justice would achieve the opposite of engendering "public confidence in the administration of law or . . . the security for individual rights of . . . private property." Pemex, 832 F.3d at 106. It is no redress at all, and it is totally inconsistent with the principles laid down by this Court in Pemex.

3. The District Court Erroneously Found that Petitioners' Contractual Rights Were Not Retroactively Cancelled

The District Court also erred in its application of the third Pemex factor: the retroactive application of law to cancel contractual rights. The repugnance of the retroactive vitiation of contract rights is "deeply rooted in [Supreme Court] jurisprudence, and embodies a legal doctrine centuries older than our Republic." Pemex, 832 F.3d at 108 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)) (alteration in original). "It is therefore understatement to observe that [r]etroactivity is not favored in the law." Pemex, 832 F.3d at 108 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).

As in Pemex, when Petitioners commenced arbitration, they "had every reason to believe that [their] dispute with [NNPC] could be arbitrated."

Pemex SDNY, 962 F. Supp. 2d at 657-58. As in Pemex, the respondent had "signed an agreement stating that disputes" concerning the performance of the PSC "would be arbitrated," and no law prohibited the arbitration of oil allocation disputes. Pemex SDNY, 962 F. Supp. 2d at 657. As in Pemex, anomalous decisions that departed from decades of past precedent and were issued by the Nigerian courts after the dispute was pending, and long after the PSC was signed, resulted in Petitioners being unable effectively to arbitrate their dispute. See Pemex, 832 F.3d at 108-09. Finally, as in Pemex, the sequence of events and circumstances of the Nigerian courts' decisions resulted in a retroactive application of the law that is incompatible with US public policy. See Pemex, 832 F.3d at 108-09. The District Court's rejection of Petitioners' retroactivity argument was error for at least two reasons.

First, the District Court, once again, erroneously distinguished Pemex on the basis that, allegedly unlike Pemex, NNPC always objected to arbitrating the dispute. See Opinion, SPA-44-45. As explained above, however, the District Court's reading of Pemex was clearly erroneous. See, e.g., supra at 56. And the fact that in Pemex the law was rendered retroactive by legislation, and here it was accomplished by the Nigerian courts' wholesale abandonment of decades of precedent, is of no moment. The result is the same: the retroactive evisceration of the contractual right to independent arbitration—a fundamental change in law disrupting Petitioners' decades-long "settled expectation[]" that disputes concerning the performance of the PSC would be arbitrated. See Landgraf, 511 U.S. at 265. In any event, it is not NNPC's position that controls the retroactivity analysis; rather, it is the decisions by the Nigerian judiciary. Until long after the PSC had been signed and this dispute had arisen, nothing in Nigerian constitutional, statutory, or decisional authority would have put Petitioners on notice of the anomalous distinction that the Tribunal would be able to adjudicate NNPC's liability, but not award Petitioners damages. That NNPC consistently denied that the Tribunal had jurisdiction (as respondents in arbitral and judicial proceedings so commonly do) does not make the Nigerian courts' application of the law any less retroactive.

Second, the District Court drew inapposite analogies to inapplicable US cases. The decisions of the Nigerian courts here—which have invented ways to deny foreign litigants justice and insulate Nigeria from large damages awards—are the opposite of the seminal decisions of the US Supreme Court that expanded individual rights to prevent government abuses. See Opinion, SPA-44 (citing Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954) (government cannot segregate schools); Miranda v. Arizona, 384 U.S. 436 (1966) (government cannot obtain convictions based on statements made without full warnings of constitutional rights); Gideon v. Wainwright, 372 U.S. 335 (1963) (government must provide counsel for indigent criminal defendants); Mapp v. Ohio, 367 U.S. 643 (1961) (government cannot use evidence seized during an illegal search in criminal prosecution)). These decisions, which neither party cited below, expand the constitutional rights of private litigants, and thus enhance "public confidence in . . . security for individual rights." Ackermann, 788 F.2d at 841. The lawless Set Aside Appeal, on the other hand, retroactively destroyed Petitioners' contract rights, the evil from which Pemex seeks to protect contracting investors in foreign ventures. The District Court's effort to draw an analogy between landmark cases protecting individual rights and the decisions of the Nigerian courts here turns Pemex's retroactivity factor on its head. The District Court committed clear error in finding that Petitioners' contract rights were not retroactively voided.

III. THE DISTRICT COURT FAILED TO RECOGNIZE AND ENFORCE THE REINSTATED LIABILITY FINDING IN THE AWARD OR EXERCISE ITS INHERENT POWER TO AWARD DAMAGES

Finally, the District Court committed reversible legal error in failing to recognize and enforce the portion of the Award that the Nigerian Court of Appeal reinstated. The New York Convention makes confirmation mandatory unless certain narrow defenses are proved. See New York Convention, art. V, SPA-52; 9 U.S.C. § 207, SPA-55; Zurich Am. Ins. Co. v. Team Tankers A.S., 811 F.3d 584, 588 (2d Cir. 2016) (under the New York Convention, a valid arbitral award must be confirmed). The party opposing enforcement has the heavy burden of proving the existence of one of these grounds for non-recognition. See Encyc. Universalis, 403 F.3d at 90.

Below, both parties agreed that the liability finding in the Award had been reinstated by the Nigerian courts. See Opinion, SPA-38. The District Court was therefore required to confirm the liability finding of the Award, as Petitioners requested. See, e.g., Zurich, 811 F.3d at 588; see also Teco Guat. Holdings, LLC v. Republic of Guat., No. 17-102 (RDM), 2019 WL 4860819, at *1 (D.D.C. Oct. 1, 2019) (recognizing and enforcing portion of award that was not annulled); Tidewater Inv. SRL v. Bolivarian Republic of Venez., No. 17-cv-01457, 2018 WL 6605633, at *1, *7 (D.D.C. Dec. 17, 2018) (same); TAP, A-157-58. The District Court's failure to do so is reversible legal error. See Encyc. Universalis, 403 F.3d at 89.

The District Court also erred by declining to provide a remedy for NNPC's adjudicated breach of Petitioners' contractual rights, a result that is itself "repugnant to fundamental notions of what is decent and just" in the United States. Pemex, 832 F.3d at 97. Since the founding of the Republic, it has been "a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded . . . every right, when withheld, must have a remedy, and every injury its proper redress." Marbury, 5 U.S. at 163 (quoting 3 William Blackstone, Commentaries 23, 109); see also

Hishon, 467 U.S. at 78-79 (every party due their day in court); Streck, 408 F. App'x at 415 (in enacting a statute, "Congress did not intend to create a right without a remedy"). And the United States is not unique in this respect—Nigerian courts too have recognized the principle that where a right is violated, there must be a remedy. See Thomas v. Olufosoye, [1986] 1 NWLR 669, 689 (recognizing ubi jus ibi remedium, or "where the law gives a right, it also gives a remedy"). As noted above, see supra at 18-19, the Nigerian Court of Appeal has reinstated the portions of the Award that find NNPC liable for breaching Petitioners' rights under the PSC, and so there is no dispute that Petitioners have suffered a harm and that the competent adjudicatory body found NNPC liable for that injury. But the Nigerian courts—in a clear departure from settled Nigerian law—have made it impossible for Petitioners to obtain a remedy for that harm, erasing both the damages that the Tribunal awarded for NNPC's past breaches and the adjustments to the PSC that the Tribunal made pursuant to the Stabilization Clause for NNPC's future breaches. See Set Aside Appeal, A-686-87, A-692, A-701. The law of this Circuit does not, and should not, countenance such a result. See Pemex, 832 F.3d at 97; see also Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 110 (2d Cir. 2007) ("For when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach.") (internal quotations omitted).

Finally, this Court should reverse the District Court's decision that it could not exercise its inherent powers to award damages simply because of the magnitude of harm that NNPC has inflicted on Petitioners. The District Court recognized that where, as here, an arbitration tribunal issues a liability finding that is enforceable under the New York Convention, a court has "the inherent authority to fashion appropriate relief" to effectuate that finding of liability. Opinion, SPA-39. There is ample support for that principle, including in Pemex itself, where this Court affirmed the district court's exercise of its inherent power to add $106 million in damages to an arbitral award. Pemex, 832 F.3d at 111-12; see also Seed Holdings, Inc. v. Jiffy Int'l AS, 5 F. Supp. 3d 565, 591 (S.D.N.Y. 2014) (augmenting arbitral damages award to provide interest). Indeed, as the District Court below recognized, the FAA authorizes it to augment a tribunal's damages award to "promote justice between the parties." Opinion, SPA-39 (quoting 9 U.S.C. § 11).

The District Court provided no principled explanation for its refusal to exercise its "inherent authority to fashion an appropriate relief" here; it simply observed that awarding Petitioners the damages sought would be "a bridge too far" given the large sum at issue. Opinion, SPA-39. The District Court thus found that

Petitioners were correct as a matter of law and that the District Court had authority to provide Petitioners the relief they sought, but declined to remedy the injustice because of the sheer magnitude of Petitioners' loss. If anything, the magnitude of Petitioners' loss provided an even more compelling reason for the District Court to act, as it reflects the grave prejudice that Petitioners have suffered at the hands of the Nigerian courts. If a court has the power to grant the relief requested, the fact that the injury suffered and therefore the relief sought is in the billions of dollars, as opposed to the hundreds of millions, see Pemex, 832 F.3d at 111-12, should make no difference. The District Court's refusal to act in these circumstances therefore "cannot be located within the range of permissible decisions." Zervos, 252 F.3d at 168-69. Its approach leads to the absurd result where a defendant becomes immunized for its wrongdoing simply by causing greater damage to its victim. Cf. Contemp. Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977) (party that has caused damages cannot escape liability because amount of damages is uncertain). Petitioners should not be left uncompensated because the losses inflicted on them reached a "different dimension." Opinion, SPA-39. The opposite is true: greater injury should be all the more reason for a US court to exercise its inherent authority. And here, the amount of the Award was determined by the Tribunal, and NNPC has never challenged that quantification. See supra at 15.

Separately, and at the very least, there is a sizeable part of the Award dealing with Royalty and Cost Oil that has nothing whatsoever to do with taxation, even under NNPC's argument. See supra at 15. The District Court should therefore have given effect to at least that part of the Award, as Petitioners requested. See Opp'n, A-1907. The District Court provided no reason for failing to do so, which is another reversible abuse of discretion. See Pemex, 832 F.3d at 112.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the Opinion and Judgment below and enter judgment for Petitioners, or, in the alternative, remand to the District Court for further proceedings.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that:

1. This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Local Rule 32.1(a)(4)(A), as modified by this Court's January 3, 2019 Order, ECF No. 73, granting Petitioners-Appellants-Cross-Appellees permission to file an oversized brief of not more than 17,000 words, because this brief contains 16,721 words, as determined by the word count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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