No. 18-1048

In the Supreme Court of the United States

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., FKA CONVERTEAM SAS, PETITIONER

v.

OUTOKUMPU STAINLESS USA, LLC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, categorically prohibits a nonsignatory to an arbitration agreement from compelling arbitration based on the application of domestic-law agency and contract doctrines such as equitable estoppel.

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INTEREST OF THE UNITED STATES

This case concerns the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention), *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force for the United States December 29, 1970). The United States has a strong interest in matters that affect our Nation's foreign relations and, specifically, in the interpretation and implementation of the Convention. The United States is a party to the Convention and participated in its negotiation. The United States also has an interest in encouraging the reliable and efficient enforcement of arbitral clauses included in international agreements in aid of international commerce.

TREATY AND STATUTORY PROVISIONS INVOLVED

Pertinent treaty and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. The New York Convention is a multilateral treaty that establishes a regime for enforcement in Contracting States of international commercial arbitration agreements and awards. The United States acceded to the Convention on September 30, 1970, and it entered into force in the United States on December 29, 1970. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

Article II of the New York Convention specifies the circumstances when Contracting States must recognize arbitration agreements and refer the parties to arbitration in accordance with such agreements. As relevant here, Article II(1) states that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship." New York Convention art. II(1), 21 U.S.T. 2519. Article II(2) provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Id.* art. II(2), 21 U.S.T. 2519. And Article II(3) states that "[t]he court of a Contracting State, when seized of an action in a matter in

respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration." *Id.* art. II(3), 21 U.S.T. 2519.

Congress implemented the Convention in the United States through Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. 201 *et seq.* See 9 U.S.C. 201 ("The Convention * * * shall be enforced in United States courts in accordance with this chapter."). In Chapter 2, Congress provided subject matter jurisdiction in federal district courts for any "action or proceeding falling under the Convention," 9 U.S.C. 203, including actions involving international commercial arbitral agreements and awards, 9 U.S.C. 202. With respect to enforcement of arbitration agreements, the FAA provides that "[a] court having jurisdiction under [Chapter 2] may direct that arbitration be held in accordance with the agreement." 9 U.S.C. 206. And Congress further provided that Chapter 1 of the FAA, 9 U.S.C. 1 *et seq.*, which governs domestic arbitration agreements and awards, applies to actions brought under Chapter 2 "to the extent that [Chapter 1] is not in conflict with [Chapter 2] or the Convention." 9 U.S.C. 208.

In interpreting the FAA, this Court has stated "that federal law requires that 'questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration.'" *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 n.5 (2009) (citation omitted). In *Arthur Andersen*, the Court considered whether Chapter 1 categorically prohibited "those who are not parties to a written arbitration agreement" from invoking the FAA's provisions under state contract law principles entitling a nonsignatory to enforce such agree-

ments. *Id.* at 629. The Court held that Chapter 1's provisions concerning the validity and enforcement of arbitration agreements did not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Id.* at 630. Accordingly, the Court held that "a litigant who was not a party to the relevant arbitration agreement" may nevertheless invoke the FAA's provisions "if the relevant state contract law allows him to enforce the agreement" through doctrines such as "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Id.* at 631, 632 (citation omitted).

This case involves equitable estoppel. In general, under that doctrine, where "a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory," the signatory may be estopped from "cherry-pick[ing] beneficial contract terms while ignoring other provisions that do not benefit it or that it would prefer not to be governed by such as an arbitration clause." 21 Richard A. Lord, *Williston on Contracts*, § 57:19, at 200, 202 (4th ed. 2017). Put simply, a party who relies on some contractual terms as the basis for his claim may be estopped from denying the applicability to the dispute of other terms of the agreement, such as an arbitration clause.

2. Respondent Outokumpu Stainless USA, LLC (Outokumpu) operates a steel plant in Alabama. Pet. App. 3a. In 2007, Outokumpu's predecessor entered into contracts with a company referred to as Fives to purchase cold rolling mills, which are used to manufacture stainless steel. *Ibid.* The contracts defined Outokumpu as the "Buyer" and Fives as the "Seller," and stated that

"Buyer and Seller [are] also referred to individually as 'Party' and collectively as 'Parties.'" *Id.* at 4a (brackets in original) (quoting contracts); see J.A. 81. The contracts further specified that "[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise." Pet. App. 4a; J.A. 89. The contracts defined "Sub-contractor[s]" as entities "used by the Seller for the supply of any part of the Contract Equipment." Pet. App. 4a; J.A. 88. The contracts also appended a list of "mandatory" vendors that Fives could use, which included the predecessor company to petitioner GE Energy Power Conversion France SAS (GE Energy). Pet. App. 37a; see *id.* at 4a; J.A. 184-185.

The contracts contained an arbitration clause that provided that "[a]ll disputes arising between both parties in connection with or in the performance of the Contract" would be subject to arbitration. Pet. App. 4a (quoting contracts); J.A. 171. That clause specified that arbitration would take place in Germany applying German substantive law, and would proceed in accordance with the International Chamber of Commerce's Rules of Arbitration. *Ibid.*

Three weeks after signing the contracts with Outokumpu, Fives entered into a subcontractor agreement under which GE Energy would supply nine motors for the cold rolling mills. Pet. App. 5a; see J.A. 55-77. That agreement contained its own arbitration provision, providing for dispute resolution through arbitration in France. Pet. App. 5a-6a; J.A. 70-71.

3. Between 2011 and 2012, GE Energy provided the nine motors for Outokumpu's plant, which were manufactured in France and installed in Alabama. Pet. App. 5a. By June 2014, the motors began to fail. *Ibid.* In

June 2016, Outokumpu and its insurers filed suit against GE Energy in state court in Alabama, raising various tort and warranty claims, such as negligence, breach of professional design and construction warranties, and breach of implied warranties. *Id.* at 38a.

GE Energy timely removed the case to federal court. Pet. App. 6a; see 9 U.S.C. 205 (authorizing removal of an action if its subject matter "relates to an arbitration agreement or award falling under the Convention"). GE Energy then moved to compel arbitration under the Outokumpu-Fives contracts and to dismiss the suit, while Outokumpu moved to remand the case back to state court. Pet. App. 6a-7a.

The district court held that removal was proper because the action "relates to" an arbitration agreement in the Outokumpu-Fives contracts that "fall[s] under the Convention." Pet. App. 7a (brackets in original). The court observed that "GE Energy supplied the motors at issue as a subcontractor of [Fives]," and that the complaint had "borrow[ed] language directly from" those contracts "in alleging that GE Energy had a duty to 'properly engineer, design, manufacture, fabricate, procure, deliver, install, supervise, supply and/or commission' the motors and equipment." *Id.* at 71a (citation omitted); see *id.* at 52a.

The district court then granted GE Energy's motion to compel arbitration and dismiss. Pet. App. 36a. The court rejected Outokumpu's argument that the Convention prohibited GE Energy from compelling arbitration under the Outokumpu-Fives contracts because GE Energy had not signed those contracts. *Id.* at 42a-45a. The court concluded that GE Energy qualified as a party to the contracts under the definitions of "Seller" and "Par-

ties" in the agreements. *Ibid.*; see *id.* at 44a n.4 (observing that Outokumpu had submitted a brief in the state-court proceeding stating that "[n]ot only [Fives], but also any subcontractors of [Fives] are defined as 'sellers' and, therefore, are parties to the Contracts" (citation and emphasis omitted)). Because the court determined that GE Energy was a party to the arbitration agreement, it declined to address whether GE Energy was entitled to compel arbitration under the equitable estoppel doctrine. *Id.* at 36a n.1.

4. The Eleventh Circuit affirmed the denial of the motion to remand, but reversed the order compelling arbitration and dismissing the case. Pet. App. 1a-19a. The court concluded that GE Energy had properly removed the case under 9 U.S.C. 205 because, "[a]s alleged in the pleadings, the present lawsuit against GE Energy concerns the performance of the Outokumpu-Fives Contracts, and the arbitration agreement contained in those Contracts is sufficiently related to the instant dispute such that it could conceivably affect the outcome of this case." Pet. App. 13a.

The court of appeals further held, however, that GE Energy was not entitled to compel arbitration because it had not signed the Outokumpu-Fives contracts. Pet. App. 15a. The court observed that Article II of the New York Convention requires Contracting States to recognize an "agreement in writing" to arbitrate, Convention art. II(1), 21 U.S.T. 2519, and defines an "agreement in writing" to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties," *id.* art. II(2), 21 U.S.T. 2519. Pet. App. 14a. Based on those provisions, the court held "that, to compel arbitration, the Convention requires that the arbitration agreement

be signed by the parties before the Court or their privities." *Id.* at 16a.

The court of appeals recognized that the district court had found that GE Energy was a party to the contracts, but it emphasized that "GE Energy is undeniably not a signatory to the Contracts." Pet. App. 15a. The court stated that "[p]rivate parties—here Outokumpu and Fives—cannot contract around the Convention's requirement that the parties *actually sign* an agreement to arbitrate their dispute in order to compel arbitration." *Ibid.*

The court of appeals further found it irrelevant that a nonsignatory was seeking to compel arbitration against a signatory, rather than the other way around. Pet. App. 16a. The court recognized that, with respect to a domestic agreement, nonsignatories may be able to compel arbitration under an estoppel or third-party beneficiary theory. *Id.* at 17a (citing *Arthur Andersen*, 556 U.S. at 630-631). In the court's view, reliance on such doctrines is permissible under Chapter 1 of the FAA because it "does not expressly restrict arbitration to the specific parties to an agreement," whereas "the Convention, as codified in Chapter 2 of the FAA, only allows the enforcement of agreements in writing signed by the parties." *Ibid.* Because "Congress has specified that the Convention trumps Chapter 1 of the FAA where the two are in conflict," the court held that domestic-law doctrines allowing nonsignatory parties to compel arbitration were not available to GE Energy. *Ibid.*

SUMMARY OF ARGUMENT

The New York Convention does not categorically prohibit the application of domestic-law contract and

agency principles to permit enforcement of international arbitration agreements by a nonsignatory.

1. a. Beginning with the text, no provision of the Convention purports to define the permissible scope of arbitration agreements, including who may be deemed a "party" to such an agreement. The Convention therefore does not conflict with or override domestic-law agency and contract doctrines that concern "the scope of agreements" to arbitrate, "including the question of who is bound by them." *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009). Accordingly, a nonsignatory to an international arbitration agreement, just like a nonsignatory to a domestic arbitration agreement, can seek to enforce the agreement "through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel" in appropriate cases. *Id.* at 631 (citation and internal quotation marks omitted); see 9 U.S.C. 208.

In concluding that a nonsignatory may never enforce a covered arbitration agreement, the court of appeals misinterpreted the Convention's provisions addressing the form of an enforceable agreement. The Convention requires Contracting States to recognize an "agreement in writing," defined to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties." Convention art. II(1)-(2), 21 U.S.T. 2519. And the Convention provides that courts in Contracting States must, "at the request of one of the parties," refer the parties to arbitration when "the parties have made an agreement within the meaning of this article." *Id.* art. II(3), 21 U.S.T. 2519. But the form provisions—which notably use non-exhaustive language in defining what qualifies as an "agreement in writing"—simply trigger a rule of presumptive validity of an agreement,

preventing a Contracting State from imposing more onerous requirements to enforce an agreement. The form provisions do not limit the scope of a valid agreement or prevent the application of domestic-law doctrines governing who may be bound by or enforce it. If a written and signed international arbitration agreement is made enforceable by or against a nonsignatory under domestic-law contract and agency principles, the Convention's terms are fulfilled.

b. The Convention's context and structure support the conclusion that a nonsignatory may seek to enforce an international arbitration agreement under domestic-law contract and agency doctrines. The Convention specifically provides that it should not be read to "deprive any interested party of any right he may have to avail himself of an arbitral award" under the domestic laws where the award is sought to be enforced. Convention art. VII(1), 21 U.S.T. 2520-2521. Courts have accordingly approved reliance on contract and agency principles to enforce arbitral awards by or against third parties who did not sign the arbitration agreement. Article II should likewise be interpreted to permit reliance on those principles to enforce the arbitration agreements themselves.

c. That interpretation further accords with the Convention's purpose to encourage the recognition of arbitration agreements and to enforce them according to their terms. The court of appeals' categorical rule that a nonsignatory may never enforce an agreement runs counter to the Convention's goal of giving effect to valid agreements to arbitrate.

d. The Convention's negotiating history reinforces the conclusion that the treaty drafters did not intend for Article II to restrict the permissible scope of arbitration

agreements. Debate about Article II focused on ensuring that Contracting States could not *decline* enforcement of valid arbitration agreements. Nothing in that history indicates that the drafters intended to restrict Contracting States from allowing a nonsignatory to compel arbitration under domestic-law contract and agency doctrines.

e. The post-ratification understanding of Contracting States confirms that the Convention does not categorically prohibit the application of those doctrines to permit a nonsignatory to enforce an arbitration agreement. Courts in other Contracting States have rejected the argument that Article II rigidly confines enforcement to signatories and have frequently applied agency and contract doctrines—including estoppel principles—to permit enforcement by a nonsignatory. Domestic legislation implementing the Convention in Contracting States further illustrates the general understanding that nonsignatories may enforce an arbitration agreement in appropriate circumstances.

f. Consistent with the practice of other Contracting States, the Executive Branch has interpreted the Convention to permit reliance on domestic-law contract and agency principles when determining whether a nonsignatory may invoke or be bound by an arbitration agreement. That interpretation "is entitled to great weight." *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (citation omitted).

2. Although the New York Convention does not categorically prohibit reliance on domestic-law contract and agency principles to determine whether a nonsignatory may compel arbitration, courts must be careful to ensure that a nonsignatory's participation is not inconsistent with the parties' consent regarding arbitration

as informed by that domestic law. The question whether a nonsignatory may enforce or be bound by an arbitration agreement will depend on the facts and circumstances of the dispute and the agreement. Among other considerations, any attempt to bind a nonsignatory sovereign nation to an arbitration agreement would raise unique concerns that support the conclusion that doctrines such as equitable estoppel and asserted third-party beneficiary status should not apply absent the sovereign's clear expression of consent.

The United States takes no position on whether it would be appropriate to apply equitable estoppel here under a choice-of-law analysis or whether estoppel would be satisfied on the particular facts of this case. The court of appeals did not consider those issues because it adopted a categorical rule that the Convention prohibits a nonsignatory from ever enforcing an arbitration agreement. The Court should reverse that categorical rule and make clear that the Convention permits the application of domestic-law contract and agency principles to determine whether a nonsignatory may enforce a valid arbitration agreement.

ARGUMENT

THE NEW YORK CONVENTION DOES NOT CATEGORICALLY PROHIBIT ENFORCEMENT OF AN ARBITRATION AGREEMENT BY A NONSIGNATORY

The court of appeals erred in interpreting the New York Convention to categorically prohibit a nonsignatory to an arbitration agreement from compelling arbitration based on the application of domestic-law contract and agency principles, such as equitable estoppel. The court's interpretation of the Convention runs counter to its text, context, purpose, drafting history, the

post-ratification understanding of Contracting States, and the Executive Branch's interpretation of the treaty. The Convention requires Contracting States to recognize and enforce arbitration agreements that satisfy its provisions as to form. But the Convention does not prohibit Contracting States from determining the scope of such agreements—including who is bound by or can enforce them—in accordance with domestic law providing for enforcement by nonsignatory parties under contract law and agency principles. Thus, just as a nonsignatory to a domestic arbitration agreement may enforce that agreement "through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009) (citation and internal quotation marks omitted), so too may a nonsignatory to an international arbitration agreement rely on those doctrines in an appropriate case.

A. The New York Convention Does Not Categorically Prohibit The Application Of Domestic-Law Doctrines That Allow Nonsignatories To Compel Arbitration

Under principles of interpretation that this Court has applied to treaties to which the United States is a party, a court begins "with the text of the treaty and the context in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). In addition, the Court considers the "overall structure" and "purpose" of a treaty. *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999). "Because a treaty ratified by the United States is 'an agreement among sovereign powers,' [this Court will] also consider[] as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellin* v. *Texas*,

552 U.S. 491, 507 (2008) (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)). And the Court has recognized that the Executive Branch's interpretation of a treaty "is entitled to great weight." *Id.* at 513 (citation omitted). These interpretive principles support the conclusion that the Convention does not require the parties before the court to have signed a written arbitration agreement if applicable domestic-law principles otherwise demonstrate that the nonsignatory parties are entitled to invoke the agreement.

1. The court of appeals "h[eld] that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." Pet. App. 16a. But no provision of the Convention purports to define who may properly be considered a "party" to an arbitration agreement entitled to enforce it in court—let alone to limit that category only to those who signed the agreement. See, *e.g.*, 1 Gary B. Born, *International Commercial Arbitration* § 10.01[C], at 1412 (2d ed. 2014) ("[T]he New York Convention refers only to the basic principle that international arbitration agreements bind their parties, without addressing the question of how an arbitration agreement's parties are determined."). Nor does the Convention address whether equitable estoppel or other doctrines may be applied to determine whether a nonsignatory may be bound by or enforce a covered agreement. Dorothee Schramm et al., *Article II*, *in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary On the New York Convention*, at 62, 64 (Herbert Kronke et al. eds., 2010) (Schramm) ("[I]t is not infrequent for arbitration proceedings to involve parties who did not sign th[e] instrument, or who signed it in a different name. . . . The national law governing

the arbitration agreement determines whether and under which conditions the non-signatory is bound by the arbitration agreement and is thus a proper party to the arbitration."). The Convention therefore does not displace ordinary principles of contract law and agency that function to identify "which non-signatories may be held to be parties to—and consequently both bound and benefitted by—an arbitration agreement." Born § 10.01, at 1406.

The Convention's silence on whether nonsignatories may be deemed to be parties or otherwise entitled to enforce an arbitration agreement resolves this case. Congress provided that "Chapter 1 [of the FAA] applies to actions and proceedings brought under [Chapter 2]" in the absence of a conflict with the Convention, 9 U.S.C. 208, and this Court has interpreted Chapter 1 to permit enforcement of arbitration agreements based on "'traditional principles' of state law [that] allow a contract to be enforced by or against" nonsignatories "through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,'" *Arthur Andersen*, 556 U.S. at 631 (citation omitted). Those "background principles of state contract law" concern "the scope of agreements" to arbitrate, "including the question of who is bound by them." *Id.* at 630. Because the Convention does not restrict the permissible scope of international arbitration provisions, it does not conflict with the application of doctrines governing when a nonsignatory may enforce those agreements. See Restatement of the Law: The U.S. Law of International Commercial and Investor-State Arbitration § 2.3(b) (Proposed Final Draft Apr. 24, 2019) (approved by the membership of the American Law Institute at the May 2019

Annual Meeting, https://www.ali.org/projects/show/international-commercial-arbitration/) ("Upon request, a court enforces an international arbitration agreement against or in favor of a nonsignatory to the agreement to the extent that the nonsignatory: (1) is deemed to have consented to such agreement, or (2) is otherwise bound by or entitled to invoke the agreement under applicable law.").

The court of appeals reached a contrary conclusion by relying on the Convention's requirement that Contracting States "recognize an agreement in writing under which the parties undertake to submit to arbitration," Convention art. II(1), 21 U.S.T. 2519, and its definition of "[t]he term 'agreement in writing'" to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties," *id.* art. II(2), 21 U.S.T. 2519. Those provisions addressing an arbitration agreement's form "establish a rule of presumptive validity applicable to those agreements" that satisfy those provisions and "preclude[] Contracting States from requiring additional or more demanding formal requirements under national law." Born §§ 4.04[A][1][b][i], at 494, and 4.06[A][1], at 618. The Convention thereby sets a uniform international standard guaranteeing that written arbitration agreements that are signed will be valid and enforceable—but it does not limit the scope of those agreements or prevent the application of domestic-law doctrines governing who may properly be deemed to be bound by them. See Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* ¶ 2.42 (6th ed. 2015) ("The requirement of a signed agreement in writing * * * does not altogether exclude the possibility that an arbitration agreement concluded

in proper form between two or more parties might also bind other parties.").

It would be anomalous to interpret the Convention's provisions regarding the form of an arbitration agreement to restrict the permissible scope of an arbitration agreement, because those form provisions serve different functions. One "purpose of [the written-form provision] is to ensure that a party is aware that he is agreeing to arbitration." Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, at 171 (1981). Written-form provisions also serve an evidentiary function by "provid[ing] a readily-verifiable evidentiary record of the parties' agreement to arbitrate," including their agreement on "critical issues such as the arbitral seat, institutional rules, language, number of arbitrators and the like." Born § 5.02[A][1], at 661-662. "In cases where there is concededly a valid agreement to arbitrate between some parties," as established by compliance with the form provisions, "the question whether that agreement extends to another party is more closely akin to determining the scope of the agreement than to determining whether any agreement has been formed or whether an agreement is valid." *Id.* § 10.01[E], at 1417.

In addition to prescribing the form of an agreement that Contracting States must recognize as valid, the Convention provides that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration." Convention art. II(3), 21 U.S.T. 2519. Outokumpu contends that "the term 'the parties' should have the same meaning every time Article II uses it," and that "[t]he logical

reading of the Article II text is that 'one of the parties' requesting arbitration must be a 'party' to—a signatory of—the arbitration agreement." Resps. Br. in Opp. 21, 23. But the context of the provisions makes clear that when the Convention uses the term "party," it sometimes refers to parties to an arbitration agreement, see, *e.g.*, Convention arts. II(1), V(1)(a), 21 U.S.T. 2519, 2520; sometimes refers to the litigants in court seeking to compel arbitration, *id.* art. II(3), 21 U.S.T. 2519; and sometimes refers to the individuals or entities who participated in arbitration or who are seeking to enforce an arbitral award, see, *e.g.*, *id.* art. V(1), 21 U.S.T. 2520. To be sure, sometimes the only "parties" involved are those who signed the arbitration agreement. But in other cases, background principles of contract law and agency demonstrate that a nonsignatory to an agreement should be deemed a "party" or otherwise bound by or entitled to enforce the agreement. In such a case, the Convention's use of the term "party" should not be read to confine the scope of the agreement by binding, and limiting enforcement to, only its signatories.

Notably, the Convention's use of the term "party" mirrors the similarly varied use of the term "party" in Chapter 1 of the FAA. Like the Convention, the FAA sometimes uses the term "party" to refer to the parties to an arbitration agreement, 9 U.S.C. 9 ("[i]f the parties in their agreement have agreed"); sometimes refers to the litigants seeking to enforce the agreement in court, 9 U.S.C. 3 (court shall grant a stay "on application of one of the parties"); and sometimes refers to the individuals who participated in an arbitration, 9 U.S.C. 9 ("any party to the arbitration may apply"). In *Arthur Andersen*, this Court observed that the reference to "parties" in the FAA's stay provision "refers to parties

to the litigation rather than parties to the contract." 556 U.S. at 630 n.4. And while the stay provision requires that the claims be "referable to arbitration under an agreement in writing," 9 U.S.C. 3, this Court reasoned that "[i]f a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled." *Arthur Andersen*, 556 U.S. at 631. So too here, if a written and signed international arbitration agreement is made enforceable by or against a nonsignatory under domestic-law contract or agency principles, the Convention's terms are fulfilled.

It would be particularly unwarranted to interpret Article II of the Convention to restrict enforcement of an arbitration agreement to those who signed the agreement, because the definition of the term "agreement in writing" uses non-exhaustive language, stating that it "shall *include*"—but is not textually *limited to*—"an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Convention art. II(2), 21 U.S.T. 2519 (emphasis added); see, *e.g.*, *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.") (citation omitted). Because the signature of the parties is not an unalterable prerequisite to a valid "agreement in writing" within the meaning of the Convention, Article II(2) cannot sensibly be read to limit the scope of those entitled to enforce an agreement to only the signatories.

In line with that understanding, a recommendation issued by the United Nations Commission on International Trade Law (UNCITRAL), which is responsible

for promotion of the Convention and its effective implementation and uniform interpretation, proposes that Article II(2) should "be applied recognizing that the circumstances described therein are not exhaustive." *Report of the United Nations Commission on International Trade Law on the work of its 39th Session, 19 June – 7 July, 2006*, Annex II, at 62, U.N. Doc. A/61/17, GAOR 61st Sess., Supp. No. 17 (2006) (*UNCITRAL Report*). The Restatement likewise provides that "Article II(2)'s list of writings" should be understood "as illustrating, not exhausting, the documentation that meets the Convention's requirements as to form," based on "the FAA provisions that implement the Convention[], the plain meaning of 'include' * * * , international trends, and sound policy." Restatement § 2.4 cmt. b. Thus, while an "agreement in writing" clearly includes signed, written agreements, it does not by its terms exclude written agreements intended to encompass nonsignatories who are, as a matter of domestic law, properly deemed parties to the agreement or are otherwise bound by or entitled to enforce it.[1]

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[1] Some courts and commenters have interpreted Article II(2) of the Convention to impose minimum form requirements that must be satisfied for Contracting States to apply the Convention's rule of presumptive validity of an agreement. See, *e.g.*, *Sen Mar, Inc.* v. *Tiger Petroleum Corp.*, 774 F. Supp. 879, 882-883 (S.D.N.Y. 1991); van den Berg 178-180. The "better view is that Article II(2) is nonexclusive, and that other types of 'written' agreements may satisfy Article II(1) and thus fall within the Convention's protections." Born § 4.06[A][3], at 619; *id.* § 5.02[A][2][f], at 675 (describing how that interpretation is "more consistent" with "the Convention's pro-arbitration objectives," was endorsed by UNCITRAL, and is "the result reached in better-reasoned commentary and national court decisions") (footnote omitted). In any event, this case involves a written, signed arbitration agreement that satisfies Article II(2)'s

2. The context and structure of the Convention further demonstrate that Article II does not limit a nonsignatory's ability to compel enforcement of an arbitration agreement in accordance with domestic law. With respect to enforcement of an arbitral *award*, the Convention expressly provides that the Convention should not be read to "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Convention art. VII(1), 21 U.S.T. 2520-2521. The Convention accordingly sets a floor that requires Contracting States to recognize awards under specified circumstances, but it does not establish a ceiling preventing broader recognition of awards in accordance with domestic-law principles. See, *e.g.*, *Commissions Imp. Exp. S.A.* v. *Republic of the Congo*, 757 F.3d 321, 328 (D.C. Cir. 2014) (the Convention "expressly preserves, under Article VII, arbitral parties' right to rely upon domestic laws that are *more favorable* to award enforcement than are the terms of the Convention"). And in proceedings governed by the Convention, courts have approved reliance on background principles of contract and agency law to determine "whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability, or any other legal principle concerning the enforcement of awards or judgments." *CBF Indústria de Gusa S/A* v. *AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017).

Although Article VII of the Convention does not expressly mention arbitration agreements in addition to

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form provisions, and the question therefore is not whether the agreement is presumptively valid but rather who may enforce it.

awards, "it would seem contrary to the pro-enforcement bias of the Convention that the [more-favorable-right] provision, which aims at making enforcement of awards possible in the greatest number of cases possible, would not apply also to the enforcement of the arbitration agreement." van den Berg 87; see *id.* at 86 (concluding that "[t]he omission of an express mention of the arbitration agreement in Article VII(1) must be deemed unintentional"). Notably, Article VII(2) abrogated a prior treaty governing enforcement of arbitration agreements, signaling that the drafters intended Article VII(1) to "include[] the enforcement of the arbitration agreement." *Id.* at 87. And UNCITRAL has recommended that Article VII "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement." *UNCITRAL Report* 62. In any event, whether or not Article VII formally applies to agreements, the more-favorable-right provision illustrates the Convention's broad aim to remove obstacles to the effectuation of arbitration agreements and awards. Interpreting Article II in light of Article VII's more-favorable-right provision thus further demonstrates that the Convention does not prohibit enforcement of an arbitration agreement by a nonsignatory who is entitled to compel arbitration under domestic-law contract and agency principles.

3. That interpretation of the Convention also "accords with its objects and purposes." *Abbott* v. *Abbott*, 560 U.S. 1, 20 (2010). "The goal of the Convention, and the principal purpose underlying American adoption

and implementation of it, was to *encourage* the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added).

The Convention thus should be interpreted in accordance with the "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); see Schramm 48 (concluding that it would be "overly formalistic and even counterproductive to deny the validity of [an] arbitral clause solely on Article II grounds"). As this Court has recognized when interpreting Chapter 1 of the FAA, the federal policy favoring arbitration "cannot possibly require the disregard of state law *permitting* arbitration by or against nonparties to the written arbitration agreement." *Arthur Andersen*, 556 U.S. at 630 n.5. The Convention likewise does not override such laws, which would put international agreements at a disadvantage compared to similar domestic agreements. See Restatement § 2.4 cmt. b (observing that "no compelling policy supports maintaining more rigorous writing standards for international arbitration agreements than for agreements falling under FAA Chapter 1"); see also Convention art. III, 21 U.S.T. 2519 (prohibiting Contracting States from "impos[ing] substantially more onerous conditions * * * on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforce-

ment of domestic arbitral awards"). While the application of domestic-law contract and agency principles will not necessarily lead to a uniform *outcome* in all cases, it will lead to a uniform *approach* to enforcement of arbitration agreements, in accordance with the Convention's purpose.

The Eleventh Circuit's contrary rule, interpreting the Convention to categorically prohibit enforcement of an international arbitration agreement by a nonsignatory, is also in tension with the Convention's objective of giving effect to an arbitration agreement's terms. Cf. *Volt Info. Sciences, Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (observing that the FAA's "primary purpose" is to "ensur[e] that private agreements to arbitrate are enforced according to their terms"). If domestic-law contract and agency principles establish that the signatories must be deemed to have consented to a nonsignatory's enforcement of an arbitration agreement in appropriate circumstances, and the nonsignatory then seeks to compel arbitration in accordance with that understanding, the Convention should not be interpreted to stand in the way of enforcement. See, *e.g.*, Restatement § 2.3 Reporters' Note a (observing that "the general proposition that nonsignatories can be bound by or invoke an arbitration agreement" is "practically and logically necessary to give effect to parties' agreements to arbitrate," and that courts may permissibly "rely on a range of ordinary contract, agency, and related principles" to "determine the parties' intent with respect to nonsignatories").

4. The Convention's negotiating history reinforces the conclusion that Article II was not intended to restrict the permissible scope of an arbitration agreement

or dictate who may enforce it. As this Court has recognized, "[i]n their discussion of [Article II], the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk*, 417 U.S. at 520 n.15 (citing G. W. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958*, at 24-28 (1958)).

In particular, the negotiating history reflects the drafters' intent to impose duties on Contracting States to enforce arbitration agreements that satisfied the form provisions triggering the rule of presumptive validity. See Haight 21-28. For example, "[t]he United Kingdom delegate felt strongly * * * that these provisions for the recognition of agreements were necessary" to prevent Contracting States from "kill[ing] an arbitration before it was even born by permitting litigation in their courts in spite of agreements to arbitrate." *Id.* at 25. And the drafters "appeared unwilling to qualify the broad undertaking not only to recognize but also to give effect to arbitral agreements" through the Article II(3) provision on compelling arbitration. *Id.* at 28. Nothing in this history indicates that Article II of the Convention was intended to regulate the scope of arbitration agreements or displace domestic-law doctrines concerning who is bound by or may enforce a valid agreement.

5. The "postratification understanding" of Contracting States, *Zicherman*, 516 U.S. at 226, further confirms that the Convention does not categorically prohibit a nonsignatory from enforcing an international arbitration agreement pursuant to contract and agency doctrines such as assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, or estoppel.

In cases arising under the Convention, "disputes over the identities of the parties to international arbitration agreements, and the application of non-signatory doctrines, have been left almost entirely to national courts, arbitral tribunals and commentary." Born § 10.01[C], at 1412. In resolving those disputes, foreign courts have often invoked domestic-law contract and agency principles—including principles of estoppel—to enforce international arbitration agreements between signatories and nonsignatories. See *id.* §§ 10.01[D], at 1412-1414, 10.02[A]-[P], at 1419-1484; see also *id.* § 10.02[K], at 1473 (observing that the estoppel doctrine is particularly well-recognized "in common law jurisdictions" and that civil law jurisdictions apply "similar conceptions * * * under rubrics of good faith, abuse of right, or *venire contra factum proprium*").

For example, the Federal Supreme Court of Switzerland recently rejected the argument that Article II of the Convention prohibits a nonsignatory from enforcing an arbitration agreement. See Bundesgericht [BGer], Case No. 4A_646/2018 (Apr. 17, 2019), ¶ 2.4 (English translation) (rejecting argument that Article II prohibits applying "a valid arbitration agreement to third Parties that do not meet the formal requirement").[2] The

[2] The State Department's official English translation of this case is on file with the Solicitor General's Office.

Court reasoned that the form specifications in Article II(2) apply only to the initial signing of the contract and do not limit the ability of nonsignatory third parties to enforce the contract under domestic law, including Swiss law providing that an arbitration agreement may encompass a nonsignatory who performs the contract. *Ibid.* (concluding that "[t]he wording 'signed by the Parties'" in Article II(2) should "be understood as meaning that the arbitration agreement must be signed by the (original) parties to the agreement when the agreement is concluded," with no additional requirement that a nonsignatory "meet any additional formal requirement" in order to enforce or be bound by an arbitration clause pursuant to domestic-law principles); see also Nathalie Voser & Luka Groselj, *Switzerland: Extension Of Arbitration Agreement To Non-Signatory Upheld Under New York Convention (Swiss Supreme Court)*, Mondaq (June 28, 2019) (summarizing decision).

Courts in other Contracting States likewise have concluded that the Convention's form provisions in Article II do not bar application of domestic-law doctrines that govern when a nonsignatory may invoke or be bound by an arbitration agreement. See, *e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. III ZR 371/12 (May 8, 2014) (German-language text of decision and English-language summary prepared by the German Arbitration Institute available at http://www.disarb.org/en/47/datenbanken/rspr/bgh-case-no-iii-zr-371-12-date-2014-05-08-id1603) (decision by the German Federal Court of Justice concluding that the form provisions in Article II would not prevent applying an arbitration clause to a nonsignatory under domestic-law doctrines); Phillippe Pinsole, *A French View on the*

Application of the Arbitration Agreement to Non-signatories, *in The Evolution and Future of International Arbitration* (Stavros Brekoulakis et al. eds., 2016) ¶ 12.33, at 214 (providing English translation of Paris Court of appeal cases) (international arbitration clauses encompass "all parties directly involved in the performance of the contract and in the disputes to which they may give rise, once it has been established that their situation and their activities allow to presume that they were aware of the existence and scope of the arbitration clause, even if they did not sign the contract containing it").

Domestic legislation implementing the Convention in Contracting States also illustrates the general understanding that the Convention does not categorically prohibit nonsignatories from enforcing an arbitration agreement. Some Contracting States have expressly authorized courts to compel arbitration when requested by any "person claiming through or under" a party to an international arbitration agreement—indicating that the request may come from a nonsignatory. *E.g.*, *International Arbitration Act*, ch. 143A, s. 5 (Sing.); *International Arbitration Act 1974* (Cth.) pt II, s. 7.4 (Austl.). Peru's national legislation governing international arbitration agreements provides that such agreements "comprise[] all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement" and "those who seek to attain any rights or benefits from the contract, pursuant to its terms." Cecilia O'Neill de la Fuente & José Luis Repetto Deville, *Main Features of Arbitration in Peru*, 23 ILSA J. Int'l & Comp. L. 425, 431 (2017)

(providing English translation of Peruvian Arbitration Law Article 14). And UNCITRAL's Model Law on International Commercial Arbitration, which is intended to be consistent with the Convention and has been adopted by dozens of Contracting States, contains no language confining the right to enforce an arbitration agreement only to those who signed the agreement. See *UNCITRAL Model Law on International Commercial Arbitration*, 1985, Ch. II, Arts. 7 & 8 (amended 2006).[3] The post-ratification common practice of Contracting States in implementing the Convention through judicial decisions and domestic legislation thus weighs against interpreting Article II to restrict enforcement of arbitration agreements to signatories.

6. Consistent with the practice of other Contracting States, the Executive Branch has previously taken the position that the Convention does not prohibit courts from determining that "non-signatories may be bound by an agreement to arbitrate under 'ordinary principles of contract and agency,' including '(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.'" Gov't Amicus Br. at 11, *AMCI Holdings, Inc.*, *supra* (No. 15-1133) (citation omitted); see *id.* at 14 (stating that under Chapter 2 of the FAA, courts may "compel participation in arbitration by entities that have not signed an arbitration

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[3] Similarly, in the United States, Congress empowered courts to "direct that arbitration be held in accordance with the agreement," with no limitation based on who signed the agreement. 9 U.S.C. 206; see *Sourcing Unlimited, Inc.* v. *Asimco Int'l, Inc.*, 526 F.3d 38, 45 (1st Cir. 2008) (finding nothing "in the language of Chapter 2 to suggest that a party seeking an appeal from an order denying international arbitration must have signed a written arbitration agreement firsthand").

agreement when they are nonetheless bound to the agreement for a valid legal reason"). "In the view of the United States," that interpretation of the Convention "is consistent with judicial decisions on the interpretation and enforcement of both domestic and international arbitration agreements, as well as the text and purpose of the Convention and its implementing legislation, the FAA." *Id.* at 9. The Executive Branch has also taken the position that the Convention "sets a 'floor,' but *not* a 'ceiling,' for enforcement of arbitral awards," with no "obligation on a Contracting Party to deny recognition to an arbitral agreement or arbitral award" even if it "is not required to be enforced under the Convention." Gov't Amicus Br. at 7, 9, *Commissions Imp. Exp.*, *supra* (No. 13-7004).

It is "well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott*, 560 U.S. at 15 (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)); *ibid.* (noting Court's deference in *Sumitomo* to "the Executive's interpretation of a treaty as memorialized in a brief before this Court"). That principle stems both from the fact that the Executive, as the Branch constitutionally responsible for negotiating and enforcing treaties, is in the best position to explain the intent of the treaty parties, *Sumitomo*, 457 U.S. at 185; see U.S. Const. Art. II, § 2, Cl. 2, and from the recognition that the "Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation[s]," *Abbott*, 560 U.S. at 15. This "well-established canon of deference" provides further confirmation that the Convention does not categorically prohibit enforcement of arbitration agreements by a nonsignatory. *Ibid.*

B. The Application Of Domestic-Law Contract And Agency Doctrines That Allow A Nonsignatory To Compel Arbitration Turns On The Parties' Consent As Informed By Those Domestic Laws

As described, the New York Convention does not prevent Contracting States from providing for a nonsignatory to enforce an arbitration agreement in accordance with domestic-law contract and agency principles. Courts considering whether a nonsignatory may enforce or be bound by an arbitration agreement, however, must take care to ensure that the nonsignatory party's participation is not inconsistent with the parties' consent regarding arbitration, as informed by those domestic laws.

1. "[I]nternational commercial arbitration is fundamentally consensual in nature," Born § 10.01, at 1406, and the Convention specifically refers to the agreement of the parties to "undertake to submit to arbitration," Convention art. II(1), 21 U.S.T. 2519; see *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (observing that arbitration is a "matter of consent, not coercion") (citation omitted). Domestic-law doctrines that permit nonsignatories to enforce an arbitration agreement often "provide a basis for concluding that an entity is in reality a party to the arbitration agreement * * * because that party's actions constitute consent to the agreement, notwithstanding the lack of its execution of the agreement." Born § 10:01[D], at 1414. Thus, "nonsignatories may be bound by or entitled to invoke an arbitration agreement to the extent that they may be deemed to have assented to the arbitration agreement under ordinary principles of contract law, as well as other legal doctrines that operate legally to bind parties." Restatement § 2.3 cmt. a; see *ibid.* ("Despite the

multiplicity of theories for finding that a nonsignatory is bound or may invoke an arbitration agreement, the primary purpose of each inquiry is to discern the intent of the parties.").

2. a. In any given case, the question whether a nonsignatory may enforce or be bound by an arbitration agreement will depend on the circumstances of the dispute and the agreement. Thus, while domestic-law principles of contract and agency "provide[] the structure for evaluating particular contractual language and factual settings," courts must in each case examine "the parties' intentions and the legal consequences of those intentions." Born § 10.01[E], at 1414. In all cases, "[a] party who attempts to compel arbitration must show that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope." *InterGen N.V.* v. *Grina*, 344 F.3d 134, 142 (1st Cir. 2003). Thus, in situations in which courts have applied doctrines such as "incorporation by reference, assumption, veil piercing/alter ego and estoppel," the "court[s] ha[ve] found an agreement to arbitrate" based on "the totality of the evidence support[ing] an objective intention to agree to arbitrate," *Sarhank Grp.* v. *Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005), with a particular focus on the "context of the case," *Sourcing Unlimited, Inc.* v. *Asimco Int'l, Inc.*, 526 F.3d 38, 46 (1st Cir. 2008) (deeming it "significant" that "[t]he party who is a signatory to the written agreement requiring arbitration is the party seeking to avoid arbitration").

b. In conducting that analysis, any effort to bind a nonsignatory sovereign nation to an arbitration agree-

ment would raise special concerns. In international disputes, the analysis of consent by a sovereign encompasses additional considerations, reflected in principles of sovereign immunity, that support the conclusion that a sovereign cannot be bound to resolve a dispute through litigation or arbitration in the absence of express consent. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia & Herzegovina v. Yugoslavia (Serbia & Montenegro)*), 1993 I.C.J. 325, 342 (Sept. 13) (Order) (requiring an "unequivocal indication of a voluntary and indisputable acceptance" of consent to International Court of Justice jurisdiction) (internal quotation marks omitted); see also *Fireman's Fund Ins. Co.* v. *United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/02 /01, Decision on the Preliminary Question ¶ 64 (July 17, 2003) ("[T]he Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement [with a State].").

Notably, in suits involving the U.S. Government, this Court has previously recognized "that equitable estoppel will not lie against the Government as it lies against private litigants." *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 419 (1990); see *Heckler* v. *Community Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant."). Similarly, with respect to third-party beneficiary principles, this Court has recognized that "the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government." *Armstrong* v. *Exceptional*

Child Ctr., Inc., 135 S. Ct. 1378, 1387 (2015); see also, *e.g.*, *Kremen* v. *Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) ("When a contract is with a government entity, a more stringent test [than otherwise] applies: Parties that benefit are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. The contract must establish not only an intent to confer a benefit, but also an intention to grant the third party enforceable rights.") (citations, ellipses, and internal quotation marks omitted). In the context of international disputes as well, doctrines such as equitable estoppel and asserted third-party beneficiary status should not provide a basis to compel arbitration against a sovereign absent a clear expression of consent.

3. In the lower court proceedings in this case, the parties disputed whether nonsignatory GE Energy could enforce the arbitration agreement with Outokumpu under principles of equitable estoppel. The United States takes no position on the question whether equitable estoppel provides an available basis to seek enforcement of that arbitration agreement under a choice-of-law analysis, or whether, assuming estoppel principles could apply, they would support GE Energy's effort to enforce the arbitration agreement based on the particular facts of this case.

The court of appeals did not consider those questions because it erroneously concluded "that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." Pet. App. 16a. This Court should reverse that categorical rule and clarify that the Convention does not bar the application of domestic-law doc-

trines that allow an arbitration agreement to be enforced by or against a nonsignatory where the applicable law provides for enforcement of an otherwise valid agreement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, provides in pertinent part:

* * * * *

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award

is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

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Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927[1] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

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[1] 27 LNTS 157; 92 LNTS 301.

2. 9 U.S.C. 3 provides:

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

3. 9 U.S.C. 201 provides:

Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

4. 9 U.S.C. 202 provides:

Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely

between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

5. 9 U.S.C. 206 provides:

Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

6. 9 U.S.C. 208 provides:

Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.