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,

v.

NIGERIAN NATIONAL PETROLEUM CORPORATION,

Respondent-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
NO. 14-CV-8445

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS-APPELLANTS/CROSS-APPELLEES AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* disclose that:

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch.

The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies that supported an open world trading system, the NFTC and its affiliates now serve more than 300 member companies.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), *amici* certify that no party's counsel authored this brief in whole or in part. Furthermore, no party, no party's counsel and no person—other than *amici*, their members or their counsel—contributed money that was intended the preparation or submission of this brief.

U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber, NFTC, and NAM (collectively "*amici*") have a strong interest in the law governing international arbitration. "As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985). Consequently, "[a] substantial proportion of international commercial, financial, and investment agreements contain arbitration clauses . . . ." Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1149 (6th ed. 2018) ("Born & Rutledge"); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."). Many American companies, including *amici*'s members, employ arbitration clauses in their international dealings. Unlike forum selection clauses, international arbitration clauses enable American

companies to utilize a sophisticated treaty network governing their enforceability and the enforceability of the resulting awards. *See* Born & Rutledge at 1153. Treaties like the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 21 U.S.T. 2157, ("New York Convention") promote the transboundary capital flows essential to international commerce.

The proper construction of these treaties is especially important in cases, like this one, involving state-owned entities. State-owned entities, which might otherwise be protected by sovereign immunity, sometimes require arbitration within their own territories and under their own laws as a condition of doing business with their foreign partners. Julian D. Lew et al., *Comparative International Commercial Arbitration* ¶ 27-3 (2003). Those partners often agree to arbitration precisely to avoid the vicissitudes of litigation before the national courts of the state-owned entity. Unfortunately, in such cases, "the breaching party is not infrequently a governmental entity in whose rescue national courts are eager to graciously aid." Radu Lelutiu, *Managing Requests for Enforcement of Vacated Awards Under the New York Convention*, 14 Am. Rev. Int'l Arb. 345, 351 (2003). Proper construction of the treaties governing the enforcement of international arbitration awards helps to maintain the commerce-promoting objectives of

international arbitration and to reduce the risk of such "gracious aid" undermining trade and commerce.

To support these interests, *amici* routinely file briefs in cases implicating the construction of international arbitration treaties, including cases before this Court. *See, e.g., Corporacion Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016) ("*Pemex*").[2]

SUMMARY OF ARGUMENT

This case concerns the enforceability of an international arbitral award. There is little doubt that this award would be enforced if the tribunal had been sitting in the United States. It is the product of a reasoned decision rendered by an internationally competent panel that interpreted the parties' valid agreement and followed fair procedures. Although this award was rendered in Nigeria, there is equally little doubt that it would be enforceable in the United States absent interference by the Nigerian courts. Neither the award nor the agreement nor the underlying arbitration proceedings raise any of the concerns that might otherwise justify non-enforcement under the New York Convention.

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[2] Federal Rules of Appellate Procedure 29(a) authorizes the filing of this brief. Petitioners-Appellants/Cross-Appellees ("Petitioners") have consented, but Respondent-Appellee/Cross-Appellant ("Respondent") has not. Consequently, *amici* have filed an accompanying motion for leave to file this brief.

The only question presented in this appeal is whether to give effect to the Nigerian court's decision to set aside this otherwise enforceable award—the sort of "gracious aid" that, as Petitioners have shown, Nigerian courts routinely grant to Nigeria's state-owned entity when an arbitral tribunal renders an award contrary to Nigerian state interests. Third Amended Petition ("TAP") ¶¶ 76-80. While Article V(1)(e) of the New York Convention provides that an award *may* be denied enforcement under these circumstances, it does not mandate that outcome. It does not grant courts of the arbitral forum unbridled authority to shred an international arbitral award whenever they wish to satisfy their local interests. It certainly does not sanction them to dispense hometown justice favoring their own government at the expense of the rule of law. And even when a foreign country's judicial system indulges in such behavior, the New York Convention certainly does not obligate *this* country's courts to be complicit. *Cf. Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 111-12 (2d Cir. 2001) (citing *Banco Nacional de Cuba v. Sabbantino*, 376 U.S. 398, 488 (1964) (White, J., dissenting on other grounds) ("[N]o country has an obligation to further the governmental interests of a foreign sovereign.")). Indeed, a central purpose of the New York Convention was to discard the old rule of "*double exequatur*" that compelled an award creditor to confirm an award in the courts of the arbitral forum

before seeking enforcement elsewhere. *See* Gary B. Born, *International Commercial Arbitration* 102 (2d ed. 2014).

Ultimately, then, this case requires this Court to balance its obligations under an international treaty and its oft-stated policy to promote arbitration (especially international arbitration) against prudential considerations of according comity to a foreign court's judgment. For the reasons that follow, this balance should be struck in favor of enforcing the international arbitral award in rare cases, like this one, where a state-owned entity has secured a set-aside judgment in its own sovereign courts on parochial grounds far removed from internationally accepted norms. Applying that standard to this case, the Nigerian judgment does not deserve deference. Accordingly, the case should be reversed and remanded with instructions to enforce the award or, in the alternative, to conduct an evidentiary hearing.

ARGUMENT

I. This Court should enforce the arbitral award because neither comity nor the New York Convention supports deferring to a Nigerian set-aside judgement that ignores international norms and the Convention's purposes in order to protect a state-owned entity.

A. In a case arising under Article V(1)(e) of the New York Convention, a United States Court should not defer to a foreign court's judgment setting aside an arbitral award where the arbitration involved a state-owned entity, securing the set-aside judgment in its own sovereign courts, based upon parochial grounds far removed from international norms.

The New York Convention, which governs the enforceability of the arbitral award in this case,[3] imposes an affirmative obligation on contracting states: "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." New York Convention art. III. Consistent with that obligation, the Convention's implementing legislation provides that United States Courts "shall confirm the

[3] The District Court held, and the parties do not dispute, that the award qualifies as a foreign commercial award under the Convention. *See Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396, 404 n.3 (2009) (holding that the New York Convention covers commercial disputes between foreign companies).

award" unless it finds that one of the grounds set forth in the Convention warrants non-enforcement. 9 U.S.C. § 207 (1970).

Article V of the New York Convention sets forth seven limited defenses to enforcement. They constitute the "exclusive" grounds for refusing enforcement, and a reviewing court is "strictly limited" to applying these seven defenses. *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 92 (2d Cir. 2005); *Yusuf Ahmed Alghanim & Sons W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997); *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974). The grounds should be construed narrowly, and a "heavy" burden of proof rests on the party resisting enforcement. *Encyclopaedia Britannica*, 403 F.3d at 90; *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 313 (2d Cir. 1998); *Parsons*, 508 F.2d at 973. Even if the party resisting enforcement satisfies its heavy burden of proof, the court retains the power to enforce the award. *Pemex*, 832 F.3d at 106 ("[A] district court *must* enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses; if one of the defenses is established, the district court *may* choose to refuse recognition of the award.").

This case involves Article V(1)(e) of the New York Convention. Article V(1)(e) provides that a court in the jurisdiction where enforcement is sought "may"

decline to do so where the award "has been set aside . . . by a competent authority of the country in which . . . that award was made." New York Convention art. V(1)(e). Different choice-of-law regimes govern the set-aside determination and the enforcement determination. In the set-aside determination, courts of the arbitral forum apply their own law governing international arbitration; in the enforcement determination, courts of the enforcement forum apply the Convention. *Yusuf*, 126 F.3d at 21-23.[4] Under this Circuit's precedent, courts applying Article V(1)(e) should examine whether giving effect to the foreign court's set-aside judgment would be "repugnant to fundamental notions of what is decent and just" in this country. *Thai-Lao Lignite (Thai.) Co., Ltd. v. Gov't of the Lao People's Democratic Republic*, 864 F.3d 172, 186 (2d Cir. 2017); *Pemex*, 832 F.3d at 106-07.

1. Second Circuit Precedent

On three prior occasions, this Circuit has considered the scope of the Article V(1)(e) defense. The first was *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999). *Baker Marine* concerned two arbitrations between

[4] In this case, there is no dispute that the Nigerian courts constituted the "competent authority" within the meaning of Article V(1)(e). *See* Albert Van den Berg, *The New York Arbitration Convention of 1958* 350 (1981) (noting that "competent authority" generally includes courts of the arbitral forum).

three private companies and no state-owned entities. *Id.* at 195-97. Both arbitrations were sited in Nigeria. *Id*. In both proceedings, after the tribunals rendered their awards, the Nigerian courts vacated them. *Id.* One award was set aside on multiple grounds: improper award of punitive damages, award beyond scope of submission, improper admission of parole evidence and inconsistent awards. *Id*. The other award was set aside on the ground that it was unsupported by evidence. *Id*. When the award creditors sought enforcement in the United States, this Circuit declined the requested relief on the basis that they had "shown no adequate reason for refusing to recognize the judgments of the Nigerian court." *Id*. at 197. The court distinguished the facts of *Baker Marine* from a decision in another federal court (*In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.D.C. 1996)) where a sovereign government had "appealed to its own courts, which set aside the award," and sought "to repudiate its solemn promise to abide by the results of the arbitration." *Baker Marine*, 191 F.3d at 197 n.3 (citations omitted). In contrast to *Chromalloy*, *Baker Marine* reasoned, deference to the Nigerian judgments did not "conflict with United States public policy." *Id*.

This Circuit next considered Article V(1)(e) in *Pemex*, 832 F.3d 92. Unlike *Baker Marine*, but akin to the present case, *Pemex* involved an arbitration between a private company and a state-owned entity. *Id*. at 98. Moreover, the arbitration took place in the sovereign territory of the state-owned entity (*i.e.*, Mexico). *Id.*

This meant that, for purposes of the relevant international arbitration convention, Mexican courts would serve as the "competent authority." After the tribunal rendered an arbitral award in favor of the private company, Mexican courts set it aside. *Id.* at 97. Their set-aside decision relied on two intervening legal changes that were adopted while arbitration proceedings were pending—(1) a law vesting exclusive jurisdiction in cases involving public contracts in tax and administrative court and shrunk the applicable statute of limitations from 10 years to 45 days and (2) a revised public works law which ended arbitration for certain claims (such as those raised by the award creditor). *Id.* at 99. Despite the set-aside judgment, the award creditor sought enforcement in the United States. Following a "three-day evidentiary hearing," the district court enforced the award, and this Circuit affirmed. *Id.* at 100, 112. Borrowing a standard from the foreign judgment enforcement context, it found that deference to the Mexican judgment would be "repugnant to fundamental notions of what is decent and just" in this country. *Id.* at 106-07 (*quoting Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986)).

On the particular facts of that case, *Pemex* stressed four powerful considerations: (a) vindication of contractual undertakings and the waiver of sovereign immunity; (b) repugnancy of retroactive legislation that disrupts contractual expectations; (c) need to ensure legal claims find a forum and (d) prohibition against government expropriation without compensation. 832 F.3d

at 107.[5] In light of those factors this Court ultimately concluded that confirming the award was appropriate "because to do otherwise would undermine public confidence in laws and diminish rights of personal liberty and property." *Id.* at 111.

Finally and most recently, this Circuit considered Article V(1)(e) in *Thai-Lao*, 864 F.3d 172. Like *Pemex*, *Thai-Lao* involved arbitration with a sovereign government (Laos) and two claimants (one of which was an entity partly owned by the state). *Id.* at 175. Unlike *Pemex*, however, the arbitration did not take place in the sovereign party's own territory but, instead, a neutral forum (Malaysia). After the tribunal rendered an award in favor of the two claimants, the Malaysian courts, accepting a belated set-aside action by Laos, ruled that the tribunal had exceeded its powers by addressing disputes under certain contracts not governed by the arbitration clause. *Id.* Declining to enforce the award, this Circuit concluded that the Malaysian set-aside proceedings did not "rise to the level of

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[5] In this case, the District Court treated the four considerations set forth in *Pemex* to supply the applicable test governing all instances where a party seeks to enforce an international arbitral award that has been set aside by the courts of the arbitral forum. *Esso Exp. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.*, 397 F.Supp.3d 323, 349-50 (S.D.N.Y. 2019). *Amici* agree with Petitioners that this was error. *See* Petrs' Br. at 42-46. While the "four considerations" were "compelling" under the circumstances in *Pemex*, they did not impose an inflexible doctrinal straitjacket on future cases. This is evident from this Circuit's subsequent decision in *Thai-Lao*. *Thai-Lao* did not mechanically apply *Pemex*'s four considerations. Instead, the court conducted a case-specific analysis, drawing on a blend of policy, context, and precedent, including *Pemex*.

violating basic notions of justice such that it should ignore comity considerations and disregard the Malaysian judgment." *Id.* at 181 (citations omitted). Distinguishing *Pemex*, this Circuit noted that the Malaysian set-aside judgment did not leave the claimants without a remedy because their dispute would be rearbitrated before a different panel of arbitrators. *Id.* at 187.

Read together, this Circuit's precedents suggest that the balance between enforcement of the arbitral award and deference to the foreign set-aside judgment should depend on three considerations:

(1) Identity of the parties: Judgements in cases involving private parties (like *Baker Marine*) receive greater deference than judgments in cases involving state owned-entities (like *Pemex* or *Thai-Lao*).

(2) Situs of the arbitration: Judgments setting aside awards from arbitrations sited in neutral third-country forums (like *Thai-Lao*) receive greater deference than set aside judgments arising from arbitrations sited in the sovereign's own forum (like *Pemex*), which present a heightened risk of political interference.

(3) Grounds for the set aside: Greater deference is accorded where the ground for set aside is an internationally recognized one (like in *Thai-Lao*); relatively less deference should be accorded where the ground

for set aside is a parochial one decoupled from international norms (like *Pemex*).

These three criteria unify this Circuit's precedents interpreting Article V(1)(e).[6]

2. Purposes and Commentary

Not only do these criteria harmonize Circuit precedent, they also accord with the Convention's purposes. *See, e.g., Abbott v. Abbott*, 560 U.S. 1, 20-21 (2010) (noting that courts interpret treaties in light of their underlying purposes); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 385 (2d Cir. 2004) (same). One purpose underlying Article V(1)(e) is comity, which in this context refers to the deference to the considered judgment of a foreign country's court. *See Thai-Lao*, 864 F.3d at 186 ("The annulment of an arbitral award in the primary jurisdiction should therefore be given significant weight."); *Pemex*, 832 F.3d at 106 ("[D]iscretion is constrained by the prudential concern of international comity."). But comity is a prudential consideration, not an "inexorable command." *MacArthur v. San Juan County*, 497 F.3d 1057, 1067 (10th Cir. 2007). For this reason, courts do not defer to foreign judicial acts, judgments or otherwise, when deference would offend some important aspect of United States public policy. *See* Born & Rutledge, at

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[6] This rule also comports with *Spier v. Calzaturificio, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999). That case, like *Baker Marine*, involved a dispute between two private companies.

552-53, 1013, 1123-37 (discussing the importance of forum public policies in cases involving issuance of antisuit injunctions, discovery disputes and enforcement of foreign judgments). Consequently, where there is cause for concern about hometown justice in the sovereign's own courts, comity considerations weaken. *See* Restatement (Third) of U.S. Law of Int'l Comm. Arb. § 4.14 cmt. d. (2019).

Strong public policy considerations counterbalance the deference accorded to foreign set-aside judgments. One is the strong "emphatic federal policy in favor of arbitral dispute resolution," a policy that "applies with special force in the field of international commerce." *Mitsubishi*, 473 U.S. at 631; *see also Encyclopaedia Britannica*, 403 F.3d at 91. This policy advances a central goal of arbitration: to settle disputes efficiently and avoid long and expensive litigation. *See Telenor*, 584 F.3d at 405. Arbitration pursuant to a treaty like the New York Convention triggers a second, closely related policy, namely the "pro-enforcement bias" informing the treaty. *Parsons*, 508 F.2d at 973. This pro-enforcement bias is reflected in doctrines such as the narrow construction of the Article V defenses and the imposition of the burden of proof on the party resisting enforcement. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 391 n.6 (2d Cir. 2011). Such policies are naturally stronger when set-aside judgment rests on a nation-specific parochial ground that threatens to undermine the treaty's pro-enforcement purposes. By contrast, they understandably weaken as the set-aside ground more

closely approximates an internationally accepted ground for non-enforcement; in such cases, deference to the set-aside judgment does not thwart the treaty's purposes.

Although the subject is one of great debate, numerous commentators endorse the view that awards set aside on parochial grounds should be enforceable in order to effectuate the New York Convention's purpose. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (noting that commentators can inform judicial interpretation of treaties); *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003) (same). For example, in his seminal and oft-cited treatise on international commercial arbitration, Gary Born explains:

> [W]here a court in the arbitral seat annuls an award based upon local public policy or nonarbitrability rules, or based upon a substantive review of the merits of the parties' underlying dispute (or some other local basis for review), this should generally have no preclusive effect on foreign courts that are considering whether to recognize the award under the Convention. The fact that one state's local public policy or nonarbitrability rules may be offended by an award is in no way a reason for another state necessarily to refuse to recognize the award; likewise, the fact that a legal system provides for substantive review of arbitral awards made in locally-seated arbitrations, notwithstanding

the parties' agreement to resolve their disputes by arbitration, should be irrelevant for recognition decisions in foreign jurisdictions.

Born, at 3642. Other commentators endorse this view.[7]

3. Precedent In Other Circuits

Finally, the rule proposed here is consistent with the decisions in other circuits interpreting Article V(1)(e). For example, just like in *Thai-Lao*, courts have declined to enforce awards in arbitrations involving states or state-owned entities where a neutral tribunal (other than the courts of the sovereign) set aside the award. *See Getma Int'l v. Republic of Guinea*, 862 F.3d 45, 49 (D.C. Cir. 2017) (award set aside by court of supranational jurisdiction for Western and Central African States); *Gulf Petro Trading Co. v. Nigerian National Petroleum Corp.*, 288 F.Supp.2d 783, 793-94 (N.D. Tex. 2003) (award involving Nigerian state-owned entity set aside by Swiss courts). Courts have been more willing to

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[7] *See, e.g.,* Manu Thadirkkaran, *Enforcement of Annulled Awards: What is and What Ought to Be?*, 31 J. Int'l Arb. 576, 602 (2014); Robert C. Bird, *Enforcement of Annulled Awards: A Company Perspective and Evaluation of a New York Convention*, 37 N.C. J. Int'l L. & Comm. Reg. 1013, 1043 (2012); Christopher Koch, *The Enforcement of Arbitral Awards Annulled in their Place of Origin*, 26 J. Int'l Arb. 267, 289 (2009); Pierre Lastenhouse, *Why Setting Aside an Arbitral Awards is Not Enough to Remove it from the International Scene*, 16 J. Int'l Arb. 25, 43, 45-47 (1999); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulments,* 6 Asia Pacific L. Rev. 1, 2 (1998).

enforce awards rendered in such cases where, as in *Pemex*, the sovereign's own courts set aside the award on parochial grounds. *See Chromalloy*, 939 F.Supp. at 909. *Chromalloy*, just like *Pemex*, involved an arbitration between a private company and sovereign that took place in the sovereign's own territory (Egypt). *Id.* at 908. Following an unfavorable award, the Egyptian government secured a set-aside judgment from its own national courts that relied upon a parochial ground (that the arbitrators had misapplied Egyptian law). *Id.* at 911-12. Faced with this scenario, the District Court in the United States, just like this Circuit in *Pemex*, enforced the award despite the Egyptian set-aside judgment. *Id.* at 914.

This rule also comports with the D.C. Circuit's decision in *TermoRio*. *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007). *TermoRio* (like *Chromalloy, Pemex* and this case) involved arbitration between a private company and a state-owned entity sited in the sovereign's own territory (Colombia). *Id.* at 929. But, in *TermoRio*, the Colombian courts set aside the award on the ground that the agreement in that case was invalid (subject to a set of rules incompatible with Colombian law). *Id.* at 930. That ground for set aside—an invalid agreement—distinguished that case from *Getma*, *Pemex* and *Chromalloy*. It closely resembles the ground for non-enforcement set forth in Article V(1)(a) of the New York Convention. In relevant part, Article V(1)(a) provides that an award can be denied enforcement where the arbitration agreement "is not valid." New

York Convention art. V(1)(a). More critically, Article V(1)(a) sets forth a default choice-of-law rule tying the invalidity ground to "the law of the country where the award was made" (i.e., the arbitral forum). *Id.* Thus, denying enforcement in *TermoRio* struck the appropriate balance between deference to the set-aside judgment and the pro-enforcement goals of the treaty. Since the ground for set-aside closely resembled one for denying enforcement under the applicable treaty, deference to the set-aside judgment did not significantly undermine the treaty or its underlying purposes.

B. The set-aside judgment in this case, obtained by a Nigerian state-owned entity, rendered in Nigerian court, and resting on parochial grounds is not entitled to deference.

Applying the foregoing rule in this case, the Nigerian judgment is not entitled to deference. First, NNPC is a state-owned entity. *Esso Exp. & Prod. Nigeria Ltd.*, 397 F.Supp.3d at 330.

Second, the arbitration was sited in Nigeria's territory, giving rise to the set-aside action in the Nigerian courts. Moreover, the record developed by Petitioners demonstrates that, in this case, considerations of hometown justice are especially weighty. Nigerian courts literally have found a basis to set aside every single arbitral award rendered against NNPC. TAP ¶¶ 78-79. Indeed, the United States

Department of State itself has expressed concerns over governmental influence in civil cases before the Nigerian courts. TAP ¶ 78, n.27.

Third, the set-aside judgments rest on parochial grounds divorced from internationally accepted norms. Begin with the judgment of the Nigerian High Court. In relevant part, that court held the award to be unenforceable on the ground that the damages payment would reduce amounts received by the Nigerian fisc and, thus, was not arbitrable. TAP ¶ 66. This set-aside judgment, as the District Court found, was a "copy/paste" of parts of a decision in a parallel proceeding declaring that the tribunal lacked jurisdiction to decide a "tax dispute." *Esso Exp. & Prod. Nigeria Ltd.*, 397 F.Supp.3d at 331; TAP ¶ 64.

The non-arbitrability of the dispute under the domestic law of the arbitral forum represents an especially weak ground upon which to defer to the set-aside judgment. It cannot be squared with Article V(2)(a) of the New York Convention. Article V(2)(a) provides that a court may deny enforcement when the case concerns a subject matter not capable of settlement by arbitration. Critically, though, that provision (unlike others such as Article V(1)(a)) ties the non-arbitrability determination to the law of the enforcement forum, *not* the law of the arbitral forum. As the Supreme Court and this Circuit have repeatedly noted, a robust arbitrability doctrine now prevails in the United States, especially in the

international setting. *See Mitsubishi*, 473 U.S. at 614; *Scherk*, 417 U.S. at 506; *Parsons*, 508 F.2d at 975. As the Supreme Court explained in *Mitsubishi*:

> If [international tribunals] are to take a central place in the international legal order, national courts will need to shake off the old judicial hostility to arbitration and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. 473 U.S. at 638 (citations, quotations and footnotes omitted).

Although *Mitsubishi* offered these observations in the context of the arbitrability of antitrust disputes under United States law in an international proceeding, its reasoning applies equally in this context. Blind acceptance of a foreign court's non-arbitrability determination as the basis for refusing to enforce an international arbitral award undermines that "international policy favoring commercial arbitration" just as much as declining to enforce an arbitration agreement due to a lingering judicial hostility about surrendering jurisdiction over a statutory claim. Thus, deferring to a foreign court's parochial non-arbitrability determination is not consistent with the choice-of-law regime set forth in Article V

and undermines important, countervailing United States policies favoring the arbitrability of disputes. *See generally*, *Mitsubishi*, 473 U.S. at 638; *Scherk*, 417 U.S. at 520 n.15.

Even if non-arbitrability of the dispute under foreign law might, in some circumstances, supply a basis for deferring to a foreign court's set-aside judgment, the particular ground of non-arbitrability is especially weak in this case. The underlying basis for the Nigerian High Court's judgment was that the award, if enforced, could somehow harm the Nigerian government's fisc. In effect, then, the Nigerian court was attempting to effectuate Nigerian tax law. Deferring to that determination collides with other fundamental principles of United States law. Under the revenue rule, United States courts do not accord comity to the tax laws and tax judgments of foreign countries. *Pasquantino v. United States*, 544 U.S. 349, 361 (2004). Underpinning the revenue rule is an important principle that "[t]he tax judgments of one nation may be used to attain what other nations consider odious ends." *Attorney General of Canada*, 268 F.3d at 113 (citations omitted). And although Respondent formally does not seek to enforce a tax judgment in this country's courts, *amici* do not rely upon the revenue rule for that reason. Rather, the principles underlying the revenue rule simply supply a reason why, under these particular circumstances, this Court need not defer to a foreign court's non-arbitrability doctrine predicated on its tax laws.

The puzzling and unprecedented decision of the Nigerian Court of Appeal, designed to shield Respondent, fares no better. That court reinstated the liability portion of the award but set aside the damages portion on the ground that it would be akin to granting Petitioners a tax refund. TAP ¶ 69. The Nigerian appellate decision could be read several ways. It could simply represent a more clever version of the High Court's non-arbitrability determination—that awards of damages (though not the claim itself) are somehow non-arbitrable. If that is the case, this judgment should not be accorded any deference for the same reasons noted above with respect to the judgment of the Nigerian High Court.

In the alternative, instead of a non-arbitrability ruling, the Nigerian appellate decision might be read as a determination that the tribunal somehow lacked the authority to award damages. If that is the case, it flies squarely in the face of strong United States public policies concerning a tribunal's authority. Elsewhere, the Supreme Court and this Circuit have emphasized that the strong federal policy favoring arbitration requires resolving doubts about the scope of arbitrable issues in favor of arbitration, including the construction of contract language governing the tribunal's remedial authority. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Mitsubishi*, 473 U.S. at 627 ("Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."); *Chevron*, 638 F.3d at 393; *Telenor*, 584

F.3d at 406; *Parsons*, 508 F.2d at 977. For example, in *Parsons*, the award debtor sought to bar enforcement of an award on the ground that various categories of damages exceeded the arbitrator's authority under the contract. *Parsons*, 508 F. 2d at 977. Rebuffing this effort, this Circuit enforced the award, reasoning that the Convention "does not sanction second-guessing of the arbitrator's construction of the parties' agreement," including the tribunal's remedial authority, and that denying enforcement on that ground would "usurp the arbitrator's role." *Id*. at 976-77. Here, deferring to the Nigerian appellate court's judgment would constitute precisely the kind of "second-guessing" of the tribunal that, according to *Parsons*, the Convention does not tolerate. In contrast, enforcing the award "would comport with the enforcement-facilitating thrust of the Convention." *Id*. at 977.

Even if the rationale underpinning *Parsons* does not supply a sufficient reason to enforce the award, this case presents an additional one: the strong public policy giving effect to the parties' *agreement* to vest an arbitral tribunal with the authority to determine the scope of its remedial authority. In this case, the arbitration took place pursuant to Nigeria's 1990 Arbitration and Conciliation Act which contains language indistinguishable from language that this Circuit previously has interpreted to vest arbitrators with broad power to determine scope of their authority. *Compare* 1990 Arbitration and Conciliation Act of Nigeria art.

12(1), *with* UNCITRAL Model Arbitration Rules art. 23(1). *See Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71-74 (2d Cir. 2012); *Chevron*, 638 F.3d at 394. Just like in *Schneider*, failing to enforce the tribunal's award "would entail an enormous waste of resources contrary to the purposes of the New York Convention" which "does not sanction second-guessing the arbitrator's construction of the parties' agreement." 688 F.3d at 73-74 (citations omitted).

CONCLUSION

Amici believe that the record contains sufficient evidence from which a court can conclude that the arbitral award should be enforced and that the Nigerian set-aside judgment is not entitled to deference. To the extent this Court disagrees, *amici* agree with Petitioners that the case should, at a minimum, be remanded for an evidentiary hearing.

Respectfully submitted,

/s

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

Pursuant to Federal Rule of Appellate Procedure, I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it contains 5,537 words, as determined by the word count function of Microsoft Word, excluding parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

January 17, 2020

/s
Peter B. Rutledge