INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

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

Claimants

and

UNITED STATES OF AMERICA

Respondent

ICSID Case No. ARB/21/11

DECISION ON THE RESPONDENT'S OBJECTION UNDER ARBITRATION RULE 41(5)

Members of the Tribunal

Prof. Mónica Pinto (President)
Prof. Jan Paulsson (Arbitrator)
Mr. David Pawlak (Arbitrator)

Secretary of the Tribunal

Mr. Gonzalo Flores

Dated January 19, 2024

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (effective April 10, 2006)
BIT	United States-Ukraine Bilateral Investment Treaty
Claimants or Optima	Optima Ventures LLC, Optima 7171 LLC, and Optima 55 Public Square LLC
US DOJ or DOJ	US Department of Justice
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for the Settlement of Investment Disputes
(C-#)	Claimants' Exhibit
(CL-#)	Claimants' Legal Authority
(R-#)	Respondent's Exhibit
(RL-#)	Respondent's Legal Authority
Parties	Claimants and Respondent, collectively
Tr. H. [page:line]	Transcript of the hearing
Respondent or US	United States of America

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for the Settlement of Investment Disputes ("**ICSID**" or "**Centre**") on the basis of the United States-Ukraine Bilateral Investment Treaty ("**BIT**") (signed on March 4, 1994, entered into force on November 16, 1996) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force October 14, 1966 ("**ICSID Convention**" or "**Convention**").

2. The Claimants are Optima Ventures LLC, Optima 7171 LLC, and Optima 55 Public Square LLC ("**Optima**" or "**Claimants**"). The Respondent is the United States of America ("**United States**," "**US**" or "**Respondent**."). The Claimants and the Respondent are collectively referred to herein as the "**Parties**." The Parties' respective representatives and their addresses are listed above.

3. The dispute arises out of a series of measures taken by the Respondent with respect to two real estate properties in the United States, which allegedly affected the Claimants' US businesses and resulted in a loss to their investments. The first of these two properties is located at 7505 and 7171 Forest Lane, Dallas, Texas and is referred to herein as the "**CompuCom Campus**" or the "**Texas Property**." The second is located at 55 Public Square, Cleveland, Ohio, and is referred to herein as "**55 Public Square**" or the "**Ohio Property**."

4. This Decision concerns the Respondent's preliminary objections ("**Preliminary Objections**") to the Claimants' claims, filed pursuant to Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**").

II. PROCEDURAL HISTORY

5. On February 8, 2021, **Optima Ventures LLC** and **Optima 7171 LLC**, two companies incorporated in the State of Delaware, indirectly owned and controlled by nationals of

Ukraine,[1] filed with ICSID a request for arbitration under the ICSID Convention and the BIT, against the United States, concerning the Texas Property. On February 25, 2021, ICSID received a similar request for arbitration from **Optima Ventures LLC** and **Optima 55 Public Square LLC** (also a Delaware incorporated company), concerning the Ohio Property. Collectively, these are referred to as the "**Requests for Arbitration**."

6. On March 16, 2021, the Secretary-General of ICSID registered both Requests for Arbitration pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7(a) of the ICSID Rules of Procedure for the Institution of [ ] Arbitration Proceedings and notified the Parties of the registration of cases ARB/21/11 and ARB/21/12.

7. On June 11, 2021, the Parties agreed to discontinue Case No. ARB/21/12 and amend Case No. ARB/21/11 to include Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC as Claimants.

8. On June 16, 2021, the Secretary-General issued a Procedural Order Taking Note of the Discontinuance of Case No. ARB/21/12 pursuant to Arbitration Rule 43(1).[2]

9. By communication of June 16, 2021, the Centre took note that the Parties had agreed on the number of arbitrators and the method of their appointment, in accordance with Article 37(2)(a) of the Convention and Arbitration Rule 2(1). Pursuant to the Parties' agreement, the Tribunal would be comprised of three members, one appointed by each Party, and the third, the presiding arbitrator, to be appointed by agreement of the Parties. In the absence of such an agreement, the Secretary-General of ICSID would make the appointment, in accordance with the method agreed by the Parties. The Parties also agreed to derogate from nationality restrictions, as permitted by Article 39 of the Convention and Arbitration Rule (1)(3).

10. In accordance with the Parties' agreement, the Claimants appointed Professor Jan Paulsson, a national of Bahrain, France, and Sweden, as an Arbitrator. Professor Paulsson accepted his

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[1] As further described below, US citizens, Messrs. Mordechai Korf and Uriel Laber, are alleged to hold a 33.335% interest in Optima Ventures LLC. *See infra* ¶¶ 33-35.

[2] All references to Arbitration Rules in the present decision are to the ICSID Rules of Procedure for Arbitration Proceedings that came into effect on April 10, 2006.

appointment on June 21, 2021. The Respondent in turn appointed Mr. M., a US national, as an Arbitrator. Mr. M. accepted his appointment on July 30, 2021.

11. Between July 2021 and April 2022, the Parties, with the assistance of ICSID, endeavored to appoint the presiding arbitrator. As the Parties failed to reach an agreement, on June 23, 2022, the Secretary-General appointed Professor Mónica Pinto, a national of Argentina, as President of the Tribunal. Professor Pinto accepted her appointment on July 6, 2022.

12. On July 6, 2022, in accordance with Arbitration Rule 6(1), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed constituted, and the proceeding had begun on that date.

13. On July 15, 2022, the Claimants filed a proposal to disqualify Mr. M. as Arbitrator ("**Proposal**").

14. On July 16, 2022, the Centre confirmed receipt of the Proposal and informed the Parties that in accordance with Arbitration Rule 9(6), the proceeding would be suspended until a decision on the Proposal had been taken.

15. In accordance with the procedural calendar established to address the Proposal, on July 29, 2022, the Respondent filed observations on the Proposal; on August 5, 2022, the challenged Arbitrator furnished explanations in accordance with Arbitration Rule 9(3), and on August 15, 2022, both Parties filed additional observations on the Proposal.

16. On August 29, 2022, Professors Pinto and Paulsson informed the Secretary-General that they had failed to reach a decision on the Proposal. In accordance with Article 58 of the Convention and Arbitration Rule 9(4), the Proposal would be accordingly decided by the Chair of the Administrative Council.

17. On December 20, 2022, the Chair of the Administrative Council upheld the Disqualification Proposal. The proceeding remained suspended pursuant to Arbitration Rule 10(2).

18. On January 19, 2023, the Respondent appointed Mr. David Pawlak, a national of the US and Ireland. Mr. Pawlak accepted his appointment on January 23, 2023.

19. On January 24, 2023, the Tribunal was reconstituted, comprising Professor Pinto as President of the Tribunal, appointed by the Secretary-General of ICSID; Professor Paulsson, appointed by the Claimants; and Mr. David Pawlak, appointed by the Respondent in accordance with Arbitration Rule 11(1).

20. On the same date, the proceeding resumed in accordance with Arbitration Rule 12.

21. On February 14, 2023, the Respondent filed its Preliminary Objections.

22. On February 28, 2023, the Tribunal held a First Session with the Parties by video conference. During the session, the Parties confirmed that the three Members of the Tribunal had been validly appointed. It was also agreed, *inter alia*, that the applicable Arbitration Rules would be those in effect as of April 10, 2006, that the procedural language would be English, and that the place of proceeding would be The Hague, the Netherlands.

23. Following the First Session, the Tribunal invited the Parties to submit a joint proposal concerning the procedural timetable for the Parties' pleadings, including with respect to the Respondent's Preliminary Objections.

24. On March 11, 2023, unable to reach an agreement, the Parties submitted their respective proposals concerning the procedural timetables for the Parties' pleadings.

25. On March 20, 2023, the Tribunal issued Procedural Order No. 1, concerning various procedural matters ("**PO No. 1**"). In Annex B to PO No. 1, the Tribunal fixed a procedural timetable for the Parties' pleadings on the Preliminary Objections.

26. On April 17, 2023, following an agreed amendment to the original timetable, the Claimants filed their Observations on the Preliminary Objections ("**Observations**").

27. On May 19, 2023, the Respondent filed its Reply to Claimants' Observations ("**Reply**").

28. On June 21, 2023, the Claimants filed their Rejoinder on Preliminary Objections ("**Rejoinder**").

29. As agreed by the Parties, on October 24, 2023, the Tribunal held a hearing on Respondent's Preliminary Objections ("**Hearing**") by video conference.

Attending the Hearing were:

Tribunal Members:

Prof. Mónica Pinto, President of the Tribunal
Mr. Jan Paulsson, Arbitrator
Mr. David A. Pawlak, Arbitrator

ICSID Secretariat:

Mr. Gonzalo Flores, Secretary of the Tribunal
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III. FACTUAL BACKGROUND

30. For purposes of the Preliminary Objections, the Tribunal summarizes the factual background of the dispute, based on the allegations set forth in the Parties' submissions on the Preliminary Objections. Consistent with the applicable legal standard,[3] this summary does not, however, constitute any finding of fact or conclusion of law on the part of the Tribunal.

31. The case submitted by the Claimants concerns a series of measures adopted by the United States Department of Justice ("**US DOJ**" or "**DOJ**") and United States courts, allegedly affecting Claimants' real estate property located in the states of Texas and Ohio, on grounds that those assets had been acquired using funds misappropriated from PrivatBank, the largest commercial bank in Ukraine, and that the property was traceable to specified unlawful activity in Ukraine.[4]

32. The Requests for Arbitration address the measures adopted by the United States regarding the Texas and the Ohio Properties, as described below.

33. The Claimants are corporations established in the United States by Ukrainian nationals Messrs. Ihor Kolomoisky and Gennadiy Boholiubov, together with US citizens Messrs. Mordechai Korf and Uriel Laber. Until December 2016, Messrs. Kolomoisky and Boholiubov owned and controlled PrivatBank.[5]

34. Messrs. Kolomoisky and Boholiubov invested in the US through Optima Ventures, a Delaware limited liability company, in which they hold a 66.67% interest, the remaining 33.335% being in the hands of Messrs. Korf and Laber.[6]

35. Messrs. Kolomoisky and Boholiubov, together with Messrs. Korf and Laber, are indirect owners of 55 Public Square (the Ohio Property) through Claimant Optima 55 Public Square,

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[3] *See infra*, Section VII.

[4] Request for Arbitration, p. 3 (Feb. 24, 2021) ("**RfA, Ohio Property**").

[5] RfA, Ohio Property, p. 4.

[6] RfA, Ohio Property, p. 5.

a Delaware limited liability company whose sole purpose is ownership of that asset. Optima 55 Public Square is a wholly owned subsidiary of Optima Ventures.[7]

36. The same individuals are also indirect owners of CompuCom Campus in Dallas (the Texas Property) through Claimant Optima 7171, a Delaware limited liability company whose sole purpose is ownership of that asset. Optima 7171 is also a wholly owned subsidiary of Optima Ventures.[8]

37. On August 6, 2020, the US DOJ filed a complaint for civil forfeiture before the US District Court for the Southern District of Florida regarding the CompuCom Campus ("**Texas Case**").[9] The complaint alleges, *i.a.*:[10]

> This is a civil action *in rem* to forfeit assets that facilitated, were involved in, and are traceable to an international conspiracy to launder money embezzled and fraudulently obtained from PrivatBank.
>
> The misappropriated funds were used to purchase [the Texas Property]...
>
> The United States seeks forfeiture of the Defendant Asset pursuant to 18 U.S.C. § 981(a)(1)(C), because the [Texas Property] is traceable to violations of U.S. law and specified unlawful activity, including violations of 18 U.S.C. §§ 1956, 1957, 2314, and 2315.
>
> The United States also seeks forfeiture of the [Texas Property] pursuant to 18 U.S.C. § 981(a)(1)(A), because the [Texas Property] was involved in one or more money laundering offenses in violation of 18 U.S.C. §§ 1956 and 1957.
>
> The specified unlawful activity includes fraud by or against a foreign bank (18 U.S.C. § 1956(c)(7)(B)(iii)); the transportation, receipt, concealment, possession, sale and disposal of misappropriated money in international commerce (18 U.S.C. §§ 2314 and 2315); and conspiracy to commit those actions.

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[7] RfA, Ohio Property, p. 5.

[8] Request for Arbitration, p. 5 (Feb. 8, 2021) ("**RfA, Texas Property**").

[9] RfA, Texas Property, p. 3; *United States v. Real Property Located at 7505 and 7171 Forest Lane, Dallas, Texas 75230*, Case No. 1:20-cv-23278, Verified Complaint (Aug. 6, 2020) (**C-0001**) ("**Complaint, Texas Case**").

[10] Complaint, Texas Case, ¶¶ 1-5 (**C-0001**).

38. The complaint further provides:[11]

> Kolomoisky and Boholiubov's conduct violated numerous provisions of the Ukrainian Criminal Code, including the following:
>
> Article 190 prohibits "Taking possession of somebody else's property or obtaining the property title by deceit or breach of confidence (fraud)."
>
> Article 191 prohibits "Misappropriation, embezzlement or conversion of property by abuse of office."
>
> Article 209 prohibits laundering the proceeds of a crime.
>
> Article 218-1 makes it illegal to drive a bank into insolvency.
>
> Article 219 makes it illegal to drive a business entity into insolvency.
>
> Article 220-2 prohibits the falsification of financial documents and reports of a financial organization.
>
> Article 222 prohibits fraud with financial resources.
>
> Article 364-1 prohibits the abuse of power by an official of a private legal entity.
>
> Kolomoisky and Boholiubov's embezzlement and fraud, and the actions they took at PrivatBank to further their scheme, violated those provisions and others.

39. On August 18, 2020, the Respondent filed a notice of *lis pendens* in Dallas County, thereby giving notice to persons with an interest in the Texas Property of the pending litigation.[12]

40. On September 4, 2020, the DOJ obtained an *ex parte* pre-trial restraining order in the Texas Case (with respect to the CompuCom Campus), which restricted the Claimants' ability to "'transfer, sell, assign, pledge, distribute, encumber, attach or dispose[] of in any manner' the CompuCom Campus 'unless approved in writing by [Respondent].'"[13]

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[11] Complaint, Texas Case, ¶¶ 64-73 (**C-0001**).

[12] Preliminary Objections, ¶ 39; Observations, ¶ 16.

[13] Observations, ¶ 18, *citing Ex Parte* Restraining Order (Sep. 4, 2020) (Texas Case) (**R-0056**); *see also* RfA, Texas Property, p. 4; Tr. H. 130.

41. On October 5, 2020, Optima Ventures, Optima 7171, as well as Messrs. Korf and Laber, filed claims to contest the forfeiture and requested a jury trial for the Texas Case.[14] In their claims, Optima Ventures and Optima 7171 "reserve[d] any and all defenses and objections, including as to this Court's jurisdiction over the subject of this action, including that such claims should be submitted to arbitration pursuant to the [BIT]".[15]

42. On October 12, 2020, the Claimants jointly filed a motion to vacate the *ex parte* order.[16]

43. On December 22, 2020, the Claimants notified the Respondent that "a contract to sell the 55 Public Square property had been executed. One week later, on December 30, 2020, the United States filed a complaint for civil forfeiture against 55 Public Square" ("**Ohio Case**"), containing allegations similar to those presented in the Texas Case.[17]

44. In its complaint in the Ohio Case, the US "asserts that the United States may forfeit all of Claimants' interests in 55 Public Square. The United States [ ] inserted itself into the sale arrangements, and ... conditioned the sale of the property upon the deposit of the net sale proceeds into the account of the United States Marshals Service."[18]

45. Also on December 30, 2020, the DOJ issued a Press Release concerning the Ohio Case, referring to the Texas Case, under a headline reading, "Justice Department Seeks Forfeiture of [ ] Commercial Property Purchased with Funds Misappropriated from PrivatBank in Ukraine.[19]

46. On January 19, 2021, the Claimants Optima Ventures and Optima 55 Public Square, as well as Messrs. Korf and Laber, filed claims to contest the forfeiture and requested a jury trial for

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[14] Preliminary Objections, ¶ 40.

[15] Verified Claim of Optima Ventures LLC, ¶ 7 (Oct. 5, 2020) (Texas Case) (**R-0059**); Verified Claim of Optima 7171 LLC, ¶ 6 (Oct. 5, 2020) (Texas Case) (**R-0058**).

[16] Preliminary Objections, ¶ 40; Claimants' Motion to Vacate *Ex Parte* Restraining Order (Oct. 12, 2020) (Texas Case) (**R-0067**).

[17] RfA, Ohio Property, pp. 3-4; *United States v. Real Property Located at 55 Public Square, Cleveland, Ohio*, Case No. 1:20-cv-25313, Verified Complaint (Dec. 30, 2020) (**C-0011**) (**Complaint, Ohio Case**).

[18] RfA, Ohio Property, p. 4, *citing* Complaint, Ohio Case (**C-0011**).

[19] Preliminary Objections, ¶ 41; Observations, ¶¶ 24, 25; US DOJ Press Release (Dec. 30, 2020) (**C-0012**).

the Ohio Case.[20] In presenting their claims, Optima Ventures and Optima 55 Public Square "reserve[d] any and all objections and defenses, including as to this Court's jurisdiction over the subject of this action, including that such claims should be submitted to arbitration pursuant to the [BIT]."[21]

47. On February 11, 2021, the US District Court for the Southern District of Florida granted an unopposed motion for an interlocutory sale of the Ohio Property, subject to the terms of a purchase agreement providing for, *i.a.*, the Ohio Property to be sold to an unaffiliated entity "for the purchase price of $17 million," and the satisfaction of various creditors.[22]

48. On February 12, 2021, the sale of 55 Public Square took place pursuant to the order of the District Court and the proceeds of $587,365 were deposited with the US Marshals Service.[23]

49. The Claimants maintain that, as of February 2021, the *ex parte* restraining order in the Texas Case remained *sub judice* with no hearing scheduled, the *lis pendens* remained on file in Texas, and the press release remained published on the DOJ's website.[24]

50. In developments following the submission of the Requests for Arbitration, on May 13, 2021, the US District Court granted a stay in the Texas and Ohio Cases, consistent with the Parties' requests.[25] In a subsequent joint status report, both Parties confirmed that they "continue to agree that a stay is appropriate."[26]

51. On September 22, 2021, the US District Court granted the DOJ's motion for the sale of the Texas Property for $23,250,000, requiring, *i.a.*, that "the proceeds … be used to pay debts

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[20] RfA, Ohio Property, ¶ 87; Verified Claim of Optima 55 Public Square, LLC (Jan. 19, 2021) (Ohio Case) (**R-0069**); Verified Claim of Optima Ventures LLC (Jan. 19, 2021) (Ohio Case) (**R-0070**).

[21] Verified Claim of Optima 55 Public Square (Ohio Case), ¶ 7 (**R-0069**); Verified Claim of Optima Ventures LLC (Ohio Case), ¶ 7 (**R-0070**).

[22] Order Granting Unopposed Mot. for Interlocutory Sale, ¶ 5 (Feb. 11, 2021) (Ohio Case) (**R-0073**).

[23] RfA, Ohio Property, p. 4.

[24] Observations, ¶ 26; US DOJ Press Release (Dec. 30, 2020) (**C-0012**); *see also* US DOJ Press Release (Aug. 6, 2020) (concerning, *i.a.*, the Texas Property) (**R-0048**).

[25] Preliminary Objections, ¶ 44; Omnibus Order, ¶ 1 (May 13, 2021) (**R-0080**).

[26] Preliminary Objections, ¶ 44; Joint Status Update, ¶ 5 (Sep. 10, 2021) (**R-0081**).

owed on the Property," and the remaining amount be held in escrow pending further order of the Court.[27]

IV. FORFEITURE PROCEEDINGS

52. The Respondent explains the mechanism of civil forfeiture proceedings as follows.

53. As explained in the US House of Representatives Report for draft legislation that eventually became the Civil Asset Forfeiture Reform Act of 2000, the United States allows for forfeiture of property in part to "make [ ] it more difficult for international criminals to use the United States as a haven for the profits from their crimes."[28] The United States Code, at 18 USC § 981 *et seq.*, and Supplemental Rule G of the Federal Rules of Civil Procedure set out the procedures for federal civil forfeiture cases, as summarized below.[29]

54. As an initial step, the DOJ files a forfeiture complaint, verified under penalty of perjury, alleging that a property is subject to civil forfeiture pursuant to statutory authority. The case is filed *in rem*, meaning that it is a case to condemn specific property as proceeds of crime, and not a case against any person. Civil forfeiture does not depend on an underlying criminal indictment or conviction.

55. When seeking a judgment of forfeiture of real property, the government provides notice of the case in multiple ways. Any person or entity with an interest in the property may file a claim, effectively intervening in the case that is otherwise filed with respect to property. That person or entity is termed a "claimant" and acts much like a defendant in any civil case.

56. Either before or after filing a civil forfeiture complaint, the government may seek a pre-trial temporary restraining order to enjoin dissipation of the defendant property. A court may

[27] Preliminary Objections, ¶¶ 45, 46; Order Granting Unopposed Motion for Interlocutory Sale, ¶¶ 3, 5 (Sep. 22, 2021) (**R-0083**).

[28] Preliminary Objections, ¶ 17.

[29] Preliminary Objections, ¶¶ 19-22.

issue such an order, including on an *ex parte* basis, "to preserve the property, to prevent its removal or encumbrance, or to prevent its use in a criminal offense."[30]

57. A court also may approve the sale of an asset pre-trial, called an "interlocutory sale," if, for example, the property is "at risk of deterioration" or "subject to a mortgage or to taxes on which the owner is in default."[31] Following a sale, funds are held in an interest-bearing escrow account maintained by the US pending the outcome of the litigation. Any temporary restraining or interlocutory sale order may be challenged by a claimant, including through a hearing on such motions at the court's discretion, and interlocutory appeal.

58. As in any civil case, the matter then proceeds to discovery, further motions, and a trial, where it is the government's burden to prove its case by a preponderance of the evidence. Any forfeiture judgment is subject to appeal to a federal circuit court panel, and from there, if granted, a full *en banc* circuit court, and to discretionary review by the US Supreme Court.

59. Any claimant who prevails in a civil forfeiture case is entitled to the return of the claimed property, with interest if the funds were held in escrow, as well as reimbursement by the government of legal fees incurred in litigation.

V. THE DISPUTE

60. The Claimants allege violations of the following BIT provisions:[32]

- Article II(3)(a) concerning fair and equitable treatment ("**FET**"), which provides:

  > Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

- Article II(3)(b) concerning arbitrary treatment, which provides:

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[30] Preliminary Objections, ¶ 20 *citing* Fed. R. Civ. P., Title 28, Appendix, Rule G(7)(a) (**R-0014**).

[31] Preliminary Objections, ¶ 21 *citing* Fed. R. Civ. P., Title 28, Appendix, Rule G(7)(b) (**R-0014**).

[32] Tr. H. 94-95. *See also* RfA, Texas Property, § IV; RfA, Ohio Property, § IV. For purposes of this Decision, the Tribunal reviews the claims and defenses of the Parties as listed at the Hearing, and associated arguments. *Cf. Emmis International Holding, B.V., et al. v. Hungary*, ICSID Case No. ARB/12/2, Rule 41(5) Decision, ¶ 63 (Mar. 11, 2013) (tribunal limits its review to "remaining unresolved questions left for its decision") (**RL-0010**).

> Neither Party shall ... impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Article 3 [*sic*] VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

- Article II(7) concerning effective means of redress, which provides:

> Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

- Article III concerning expropriation, which provides, in pertinent part:

> 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization [ ] except: for public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2) [*sic*]. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier....

61. The Claimants further allege that the US has improperly exercised its statutory and judicial authority with respect to foreign property. According to the Claimants, the US conduct thereby violated the international law doctrines of prescriptive jurisdiction and adjudicatory comity, which the US has adopted. The Claimants point to BIT Article VIII, which provides:[33]

> This Treaty shall not derogate from:
>
> (a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;
>
> (b) international legal obligations; or

[33] *See generally* Observations, § III.B; Rejoinder, ¶¶ 130 *et seq.*; Tr. H. 207-208, 213-214. The Claimants maintain that this position is presented to support the claims for breach of Articles II and III of the BIT, and not as an independent claim. *See* Rejoinder, ¶¶ 56 *et seq.*; Tr. H. 92 *et seq.* Therefore, the Tribunal does not consider BIT Article VIII as a basis for an independent claim or objection. *Cf.*, Preliminary Objections, ¶ 12.

(c) obligations assumed by either Party, including those contained in an investment agreement or [ ] authorization, that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

62. The Claimants summarize the theory underlying their BIT claims as follows:[34]

> Essentially, Claimants' case is that the civil forfeiture actions brought by the United States invoke its international responsibility because they violate the limits international law places on the United States' ability to prescribe outside of its jurisdiction and because it is a politically motivated conduct that's leveled false allegations targeting high-profile Ukrainian citizen Ihor Kolomoisky.
>
> [...]
>
> The alleged crime was allegedly committed by Ukrainian citizens violating Ukrainian law with the Ukrainian bank with Ukrainian victims. Despite the crime allegedly being a multi-billion-dollar fraud that necessitated the nationalization of Ukraine's largest private bank, ... the Ukrainian Government has not charged anyone with any crime over these issues....

63. The Claimants thus posit, *i.a.*, that "the utilization of the United States judicial system by the [DOJ] to encumber and expropriate Ukrainian investments, based upon alleged criminal conduct and losses within the territory of Ukraine, constitutes unlawful expropriation, insofar as it exceeds the limits of prescriptive jurisdiction and ... prescriptive comity."[35] The Claimants argue that these principles, according to international law, largely depend on determinations of reasonableness, a threshold that corresponds to the FET standard.[36]

64. According to the Claimants, the result of the US measures (the forfeiture actions, press release, *lis pendens*, and *ex parte* order) is that their assets were frozen and rendered

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[34] Tr. H. 91:20-92:17. *See also* RfA, Texas Property, Introduction and Factual Background, p. 6, ¶ 25; RfA, Ohio Property, Introduction and Factual Background, ¶ 31.

[35] RfA, Texas Property, ¶ 71; RfA, Ohio Property, ¶ 72. *See also* Observations, § II.D (*citing*, *i.a.*, Complaint, Texas Case, ¶¶ 16, 64-73 (**C-0001**)); Rejoinder, ¶ 132 (*citing*, *i.a.*, Restatement (Third) of Foreign Relations Law § 431 (1987) (**CL-0182**)).

[36] *See* Observations, ¶¶ 224-225 (*citing Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, ¶ 309 (Mar. 17, 2006) (**CL-0123**), 218-219 (*citing Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 253 (Jan. 14, 2010) (The minimum standard of treatment under the BIT "'should not operate as a ceiling, but rather as a floor.'") (**CL-0072**)).

unusable, resulting in violations of Articles II(3)(a), II(3)(b), II(7), and III of the BIT.[37] The Claimants assert that the US thereby removed "Claimants' ability to manage their Investment," and forced "a quick sale of the properties" as "the only viable path forward."[38]

65. The Claimants further submit that "the *ex parte* procedures employed by the United States to seize control of the CompuCom Campus and mandate the transfer of the sale proceeds to the United States Marshals Service constitutes violation of both customary international law's minimum standards and due process and Article 14 of the International Covenant on Civil and Political Rights," in breach of Articles II(3) and III(1) of the BIT.[39]

66. The Claimants request that the Tribunal:

(1) Declare that the US breached its obligations under the US-Ukraine BIT;

(2) Order the US to pay the Claimants compensation for damages, of approximately $23,250,000 (Texas Property) and $587,365.74 (Ohio Property);

(3) Order the US to pay interest on all amounts awarded, from the date of the Award until full payment of the Award;

(4) Award such other and further relief as it deems appropriate.[40]

VI. PRELIMINARY OBJECTIONS

67. In its Preliminary Objections, the Respondent contends that, even if the facts as pled by the Claimants were true (which the US denies), the Claimants' claims are without foundation.[41] The US lists three principal objections, maintaining that the Claimants cannot establish any

[37] Tr. H. 94-95; *see also supra*, ¶ 60.

[38] Tr. H. 130:3-17, 202:2-19.

[39] RfA, Texas Property, ¶¶ 78, 84.

[40] RfA, Texas Property, ¶ 105; RfA, Ohio Property, ¶ 94.

[41] Preliminary Objections, ¶ 15.

of their BIT claims on the existing factual record as a matter of law.[42] Therefore, the US concludes, the claims manifestly lack legal merit pursuant to Arbitration Rule 41(5).[43]

68. Each of the Preliminary Objections is summarized briefly in the subsections that follow.

VI.1 First Objection

69. The Respondent's First Objection is that, prior to submitting this dispute to arbitration, Claimants failed to abide by the six-month cooling-off, or waiting period contained in Article VI of the BIT, which provides, in pertinent part:

> 1. "[A]n investment dispute is a dispute … arising out of or relating to … (c) an alleged breach of any right conferred ... by this [BIT] with respect to an investment."
>
> 2. In the event of an investment dispute, the parties ... should initially seek a resolution through consultation.... If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
>
> (a) to the courts or administrative tribunals of the ... Party to the dispute; or
> (b) in accordance with any applicable, previously agreed ... procedures; or
> (c) in accordance with the terms of paragraph 3.
>
> 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company [ ] may choose to consent in writing to the submission of the dispute for settlement by binding arbitration....

70. According to the US, the earliest that a dispute under the BIT could have arisen with respect to the Texas Case was October 5, 2020, when the Claimants contested the forfeiture case in US District Court and reserved an objection pursuant to the BIT.[44] The Claimants filed their claims only four months from that date, and a mere 36 days after their similar US District

[42] Tr. H. 86-87. The US alternatively had suggested a "fourth" objection by separating its arguments concerning comity from those concerning prescriptive jurisdiction. Tr. H. 12-13. However, the Tribunal's Analysis as set forth in Section VIII below does not turn on any such characterizations.

[43] *See generally* Tr. H. 10 *et seq.*

[44] *See* Preliminary Objections, ¶¶ 11, 57. *See also supra*, ¶ 41.

Court filing in the Ohio Case on January 19, 2021, which is the earliest date, the US maintains, that a dispute could have arisen with respect to that case.[45]

71. The US states that, in both cases, the Claimants filed their Requests for Arbitration without attempting to seek a resolution through consultation and negotiation,[46] and that, because it was not aware of the existence of a BIT dispute, the US could not seek its resolution.[47]

72. The US refers to, *i.a.*, *Murphy v. Ecuador*, in which the tribunal held that a dispute under the BIT applicable in that case could arise only once the claimant had alleged and notified Ecuador of a treaty breach, and that the BIT's waiting period ran from that date.[48]

73. The US maintains that the waiting period of Article VI is a mandatory and jurisdictional requirement that bears on the consent to arbitrate disputes under the BIT. As such, it may not be circumvented due to, *e.g.*, a particular set of facts of a given case.[49]

74. In response, the Claimants argue that, under the terms of Article VI, an arbitration may be filed six months from the date on which a dispute arises, which occurs upon "'an alleged breach of any right conferred or created by'" the BIT, excluding any requirement of formal notice to the respondent.[50] The Claimants add that, in any event, the US knew or should have known that the Claimants would oppose the civil forfeiture proceedings, and therefore, the US had constructive notice of the dispute with the Claimants.[51]

75. To support their position, which they contend is consistent with the BIT's plain language, the Claimants rely on the *Link-Trading v. Moldova* tribunal's application of an allegedly

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[45] *See* Preliminary Objections, ¶¶ 11, 61. *See also supra*, ¶ 46.

[46] Preliminary Objections, ¶ 11.

[47] Tr. H. 33:1-3.

[48] Respondent's Objections, ¶ 56, *citing Murphy Exploration and Production Co. Int'l v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶ 103 (Dec. 15, 2010) (**RL-0017**).

[49] *See generally* Preliminary Objections, § IV.A.

[50] *See generally* Tr. H. 111 *et seq.*; Rejoinder, ¶ 14; Observations, ¶ 86.

[51] Tr. H. 115:13-116:9.

similar provision to find that the dispute in question arose on the date of the implementation of the law that formed the basis of the claimant's claims under the applicable BIT.[52]

76. The Claimants also argue that, because of a clear nexus between the Requests for Arbitration, and the evident reluctance of the US to resolve the BIT claims, the Claimants did not need to wait six months from the date a dispute arose with respect to the Ohio Property to file their second Request for Arbitration, pertaining to the Ohio Case.[53]

77. Moreover, the Claimants submit that the MFN provision in the BIT authorizes them to import shorter waiting periods from other US BITs[54] (which the Respondent disputes). The Claimants also allege that the waiting period is not jurisdictional and may be set aside where the Respondent shows no interest in resolving the dispute.[55]

VI.2 Second Objection

78. For its Second Objection, the US generally argues that the Claimants' claims are inchoate because there has been no final action by the US District Court in the underlying civil forfeiture proceedings with respect to the Texas and Ohio Properties. According to the US, it is well-established that judicial finality is a substantive element of an international delict with respect to judicial measures. Thus, the US maintains that the Claimants' claims are grossly premature and unripe and cannot constitute a breach of Article II or III of the BIT as a matter of law.[56]

79. The US further submits that the Claimants failed to use the available and adequate remedies (as noted above in Section IV) to contest the civil forfeiture proceedings.[57] The US adds that

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[52] Observations, ¶¶ 95 *et seq.*, *citing Link-Trading Joint Stock Co. v. Moldova Dep't of Customs Control*, UNCITRAL, Award on Jurisdiction, ¶¶ 2, 8.6 (Feb. 16, 2001) (**CL-0019**).

[53] Observations, ¶ 106.

[54] Tr. H. 117:12-18 (*citing* BIT, Article II(1)).

[55] Tr. H. 123:14-125:14.

[56] Preliminary Objections, ¶ 13.

[57] *See*, *e.g.*, Tr. H. 51:16-52:22 (*citing Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, ¶ 20.30 (Sep. 16, 2003) ("'an international tribunal may deem that the failure to seek redress from national authorities

Claimants even requested a stay of the civil forfeiture proceedings in order to bring this Arbitration.[58] There can be no permanent or irreversible taking of any asset when the impugned actions are inchoate, the US contends.[59]

80. The US additionally posits that judicial acts can only breach the BIT if there has been a denial of justice,[60] which does not occur where claims are inchoate.[61] The US further contends that Claimants' effective means claim under BIT Article II(7) cannot be established on the existing record and, moreover, is subsumed in the denial of justice claim.[62]

81. On their side, the Claimants submit that they have made a "colorable" claim of breach of the BIT, which is all that is required for the Tribunal to dismiss the Preliminary Objections.[63] The Claimants allege that the civil forfeiture proceedings and associated circumstances (such as the press release) resulted in a diminution in the value of the Texas and Ohio Properties that is sufficiently permanent and significant to support a finding of breach of Articles II and III of the BIT.[64]

82. For example, the Claimants state that a taking may be compensable pursuant to Article III of the BIT where, *i.a.*, the effect of the measures concerned has had a significant and lasting effect on the investment at issue, regardless of whether a court has issued a final judgment formalizing the taking.[65] According to the Claimants, this standard is met by the US measures, which "froze" the Texas and Ohio Properties and any associated assets.[66]

disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies, but because the very reality of conduct tantamount to [a treaty breach] is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction'") (**RL-0032**)).

[58] Tr. H. 12:6-19, 24:5-11.

[59] Tr. H. 65:12-13, 68:12-14.

[60] Tr. H. 50:12-18.

[61] Tr. H. 51:3-5.

[62] *See generally* Tr. H. 57 *et seq.*

[63] *See generally* Tr. H. 126 *et seq.*

[64] Tr. H. 134:8-135:4.

[65] Tr. H. 126:19-133:6.

[66] Tr. H. 107:10-15; 130:3-131:3; 202:12-19.

83. With respect to their claim concerning arbitrary treatment, the Claimants point to the language of Article II(3)(b) that "a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts ... of a Party[,]" relying on, *i.a.*, the interpretation of this provision in *Lemire v. Ukraine*.[67]

84. The Claimants maintain that they have not made a denial of justice claim (so as to implicate a requirement of exhaustion of local remedies).[68] On the other hand, the Claimants assert an effective means claim pursuant to BIT Article II(7) on the grounds that US courts cannot provide a suitable remedy,[69] which situation this Tribunal is able to address.[70]

VI.3 Third Objection

85. In its Third Objection, the US argues that the principles of comity and prescriptive jurisdiction cannot bar the US from pursuing the measures complained of in this case.[71] The US asserts that adjudicatory comity is an affirmative defense in US court (not a claim), which the Claimants had raised prior to the issuance of the stay in the Texas and Ohio Cases. The lack of a decision on this issue in US Court, according to the US, prevents the Claimants from relying on the doctrine of adjudicatory comity in this BIT case.

86. The US further contends that the doctrine is merely discretionary (allowing a court to decline to hear a case being adjudicated in a foreign court) and therefore cannot support a finding of a violation of a treaty provision such as BIT Article II or III. The US adds its position that

[67] Tr. H. 136:12-139:22 (*citing Lemire*, Decision on Jurisdiction and Liability, ¶ 277 (whether or not a Party "has exercised ... the right to judicial review ... is irrelevant in an investment arbitration deciding whether the measure is arbitrary or discriminatory") (**CL-0072**)).

[68] Tr. H. 141:12-13.

[69] Tr. H. 148:5-13 & 149:18-20.

[70] Tr. H. 150:3-4.

[71] *See generally* Reply, ¶¶ 75 *et seq.*; Tr. H. 80:6-81:18.

US courts will not apply this doctrine when "the Executive Branch has already made a determination to proceed with the case despite any alleged foreign policy implications."[72]

87. The US considers that the Claimants' prescriptive jurisdiction argument is frivolous because, according to the US, it does not challenge any US law as such.[73] Further, the US submits that Article II(3)(a) concerning FET is not a conduit for enforcing every rule of international law but rather addresses only breaches of the minimum standard of treatment under customary international law, which does not include putative violations of the supposed customary international law rules on prescriptive jurisdiction.[74]

88. According to the Respondent, a presumption against extraterritoriality — pursuant to which the legislation of the US Congress is presumed to apply only within the territorial jurisdiction of the US — is inapplicable in the present case[75] because the Congress clearly specified that the federal money laundering statutes apply to activities undertaken outside the US.[76]

89. The Respondent adds its position that the US did not engage in any actions inconsistent with the municipal law principles of adjudicatory comity or prescriptive jurisdiction.[77]

VII. APPLICABLE LEGAL STANDARD

90. Arbitration Rule 41(5) provides:

> Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its

[72] Reply, ¶ 78 (*citing United States v. Baker Hughes Inc*., 731 F. Supp. 3, 6 (D.D.C. 1990) (**R-0108**)).

[73] *See generally* Tr. H. 75 *et seq*.

[74] Preliminary Objections, ¶ 14.

[75] Reply, ¶ 72.

[76] Reply, ¶ 73, 74.

[77] Reply, ¶ 71. The Claimants' arguments as regards adjudicatory comity and prescriptive jurisdiction are summarized above at paragraphs 61-63.

> first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

91. The rationale behind Arbitration Rule 41(5) is to allow for the early dismissal of claims that manifestly lack legal merit, to avoid the need for the parties to expend time and resources arbitrating unmeritorious claims.[78] Rule 41(5) objections may pertain either to jurisdiction or the merits of a dispute.[79] They should be legal – not factual – objections.[80]

92. The Tribunal considers that, in light of other ICSID Convention provisions like Articles 36(3) – permitting the Secretary-General not to register requests for arbitration dealing with disputes that are *manifestly* outside the jurisdiction of the Centre – and 52(1)(b) – which includes as a ground for annulment that the tribunal has *manifestly* exceeded its powers – and applicable cases, the word "manifestly" as used in Rule 41(5) points to something obvious, clear or self-evident, that is discernable without the need for an elaborate analysis.[81]

93. The Parties appear to agree with this general principle, as evidenced by their citations to cases in which the principle was endorsed, such as *Trans-Global v. Jordan*,[82] *PNG v. Papua New Guinea*,[83] and *Mainstream v. Germany*.[84] As stated by the *Mainstream* tribunal – following the *Trans-Global* tribunal – the respondent must establish its objection clearly and obviously, with relative ease and dispatch. Thus, the exercise of the tribunal in finding a

[78] *See* ICSID, *Manifest Lack of Legal Merit - ICSID Convention Arbitration* (**RL-0004**); Preliminary Objections, ¶ 50.

[79] *Grynberg et al. v. Grenada*, ICSID Case No. ARB/10/6, Award ¶ 6.1.1 (Dec. 10, 2010) (**RL-0005**); *Brandes Investment Partners v. Venezuela*, ICSID Case No. ARB/08/3, Rule 41(5) Decision, ¶ 52 (Feb. 2, 2009) (**RL-0006**).

[80] *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/07/25, Rule 41(5) Decision, ¶ 97 (May 12, 2008) ("the adjective 'legal' in Rule 41(5) is clearly used in [contrast] to 'factual' given [its] drafting genesis") (**RL-0008**).

[81] ICSID, *Updated Background Paper on Annulment*, ¶ 83 (May 5, 2016). *See also*, *e.g.*, *Mainstream Renewable Power, Ltd. et al. v. Germany*, ICSID Case No. ARB/21/26, Rule 41(5) Decision, ¶ 86 (Jan. 18, 2022) (**CL-0002**)).

[82] *Trans-Global*, Rule 41(5) Decision, ¶¶ 88, 92 (**RL-0008**) (*cited in* Preliminary Objections*,* ¶ 52).

[83] *PNG Sustainable Development Program Ltd. v. Papua New Guinea*, ICSID Case No. ARB/13/33, Rule 41(5) Decision, ¶ 88 (Oct. 28, 2014) (**CL-0001**) (*cited in* Observations ¶¶ 1-6, 205).

[84] *Mainstream*, Rule 41(5) Decision, ¶¶ 81-82 (**CL-0002**) (*cited in* Observations ¶¶ 3-4).

"manifest" lack of legal merit, even if complicated, or multifaceted, in light of the arguments of the parties and the circumstances of the case, ultimately should never be difficult.[85]

94. As to the scope of the phrase "without legal merit", the Respondent posits that if the facts asserted fail to trigger a legal claim, then the Rule 41(5) standard is satisfied.[86] The Claimants maintain that a colorable legal claim, or a "tenable arguable case" cannot be summarily dismissed under Rule 41(5) due to a lack of certainty that the claim is meritless.[87]

95. Accordingly, in line with the text of Rule 41(5), the positions of the Parties, and applicable sources as cited herein, the Tribunal considers that, as a general matter, a claim that is tenable, arguable, colorable, or debatable, on the facts asserted,[88] should survive a Rule 41(5) objection. As explained by the *Trans-Global* tribunal, such an arguable case generally will be said to exist where the issues concerned are reasonably susceptible to legal argument.[89]

96. As articulated in *PNG*, "Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to

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[85] *Mainstream*, Rule 41(5) Decision, ¶ 82 (**CL-0002**); *Trans-Global*, Rule 41(5) Decision, ¶ 88 (**RL-0008**).

[86] Preliminary Objections, ¶ 52 (*citing Almasryia for Operating & Maintaining Touristic Construction Co., LLC v. Kuwait*, ICSID Case No. ARB/18/2, Rule 41(5) Decision, ¶ 33 (Nov. 1, 2019) (**RL-0009**); *Emmis*, Rule 41(5) Decision, ¶ 26 (**RL-0010**)).

[87] Observations, ¶ 4 (*citing PNG*, Rule 41(5) Decision, ¶¶ 88, 89 (**CL-0001**); *Mainstream*, Rule 41(5) Decision, ¶¶ 83, 84 (**CL-0002**); *MOL Hungarian Oil and Gas Co. Plc v. Croatia*, ICSID Case No. ARB/13/32, Rule 41(5) Decision, ¶ 46 (Dec. 2, 2014) (**CL-0004**)).

[88] This principle is consistent with the approach of prior tribunals, which have expressed that, so long as the facts presented are reasonably plausible to the tribunal, they should be accepted for purposes of determining whether the claim concerned is manifestly lacking in legal merit at the Rule 41(5) stage. *See*, *e.g.*, *Trans-Global*, Rule 41(5) Decision, ¶ 105 ("although the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith", "a tribunal should [not] otherwise weigh the credibility or plausibility of a disputed factual allegation") (**CL-0003/RL-0008**); *Mainstream*, Rule 41(5) Decision, ¶¶ 95, 99 (Rule 41(5) largely requires the tribunal to accept the facts as pled) (**CL-0002**). This principle is also consistent with the Parties' positions in this case, which generally concern legal arguments as applied to the facts as alleged by Claimants. *See*, *e.g.*, *supra*, ¶¶ 67, 94 (US position); Tr. H. 125 *et seq.* (Optima position).

[89] *See Trans-Global*, Rule 41(5) Decision, ¶¶ 84, 90 (**CL-0003**/**RL-0008**). *See also*, *e.g.*, *Eskosol S.p.A. in Liquidazione v. Italy*, ICSID Case No. ARB/15/50, Rule 41(5) Decision, ¶¶ 118 *et seq.* (March 20, 2017) (question not subject to "settled jurisprudence" on a disputed issue of fact is unsuitable for dismissal pursuant to Rule 41(5)) (**CL-0005**); *PNG*, Rule 41(5) Decision, ¶¶ 93 *et seq.* ("disputed, and [ ] complex, legal and factual issues [ ] cannot properly be resolved within the expedited Rule 41(5) procedure") (**CL-0001**).

uncontested facts."[90] As stated in *Mainstream*, to succeed under Rule 41(5), a "Respondent must be able to show the Tribunal that the claim was lost before it left the start line."[91]

97. This Tribunal, accordingly, undertakes its analysis in light of the foregoing principles, in view of the arguments of the Parties and the record of the case, as summarized above.

VIII. THE TRIBUNAL'S ANALYSIS

98. The Respondent filed its Preliminary Objection on February 14, 2023. As indicated above,[92] that filing took place within 30 days from the re-constitution of the Tribunal. Thus, the Preliminary Objections have been timely filed, and it is undisputed that the Parties have not agreed to another expedited procedure for making preliminary objections. Therefore, these requirements of Rule 41(5) have been met.

99. After careful analysis and deliberation, although the Respondent has presented several significant issues which the Claimants will have to address in due course, the Tribunal finds that the Preliminary Objections do not meet the required threshold for summary dismissal pursuant to Rule 41(5). In rendering this Decision, the Tribunal shares the view of the *Trans-Global* tribunal that, to avoid any possible misconception that it has prejudged the merits of the claims (which is not the case), the less it says here, the better.[93]

100. As indicated in the text of Rule 41(5), this Decision is without prejudice to any positions or arguments of the Parties that may be pursued outside of the Rule 41(5) procedure.[94]

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[90] *PNG*, Rule 41(5) Decision, ¶ 89 (**CL-0001**).

[91] *Mainstream*, Rule 41(5) Decision, ¶ 96 (**CL-0002**).

[92] *See generally supra*, § II.

[93] *Trans-Global*, Rule 41(5) Decision, ¶ 107 (**CL-0003**/**RL-0008**).

[94] *See supra*, ¶ 90 ("The decision of the Tribunal shall be without prejudice to the right of a party to [object] pursuant to paragraph (1) [jurisdictional objections] or to object, in the course of the proceeding, that a claim lacks legal merit.").

VIII.1 First Objection

101. As explained above in Section VI.1, the First Objection points to the waiting period provided for in the BIT, which, in the Respondent's contention, was not honored by the Claimants with the result that this Tribunal is deprived of jurisdiction in this case.

102. In the view of the Tribunal, the Respondent's objection may not be upheld under Rule 41(5). Questions concerning the issue of precisely when a BIT "dispute" arose in connection with the Texas and Ohio Cases involve the weighing of factual allegations and a legal interpretation of BIT provisions and other sources invoked by the Parties. Such issues are not suitable for resolution pursuant to Arbitration Rule 41(5), which is meant only for the application of "genuinely indisputable rules of law to uncontested facts."[95]

103. Further, the determination of nature of the waiting period set forth in Article VI of the BIT as mandatory and jurisdictional (or not), and whether it may be bypassed by virtue of the application of the BIT's MFN provision, requires a review of extensive Party arguments and sources on those subjects, and the resolution of unsettled or debatable issues of law, which in the circumstances of this case the US has not established would be appropriate in the context of a proceeding under Arbitration Rule 41(5).[96]

104. Therefore, the Tribunal finds that the First Objection should be dismissed.

VIII.2 Second Objection

105. As explained above in Section VI.2, the Second Objection raises a series of contested issues regarding the substantive elements of claims arising under Articles II and III of the BIT. Whereas the US argues that the claims are "inchoate" and therefore not actionable under the BIT, the Claimants maintain that their BIT claims are ripe for resolution.

106. These arguments include issues concerning the extent to which finality or exhaustion of remedies is required to establish claims of breach with respect to conduct involving judicial

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[95] *PNG*, Rule 41(5) Decision, ¶ 89 (**CL-0001**).

[96] *See generally supra*, ¶¶ 91-96.

measures, what remedies are available to a claimant in a forfeiture proceeding under US law, and the magnitude and duration of loss that is required to establish an expropriation.

107. The Tribunal's resolution of such issues, in turn, requires the complex interpretation and application of disputed treaty provisions,[97] including a legal determination of what conduct constitutes arbitrary treatment under Article II(3)(b) and the denial of effective means of redress under Article II(7) in light of the statutory framework concerning US forfeiture proceedings, and the content of the FET standard under Article II(3)(a).

108. The claims also implicate a determination of contested facts,[98] such as the extent of the factual predicate for the forfeiture proceedings, the extent to which Claimants did, or were entitled to, seek redress under applicable United States law, and the cause and extent of the Claimants' loss, if any, with respect to the Texas and Ohio Properties.

109. The resolution of such issues is not obvious, or self-evident from the existing Arbitration record, but rather requires further submissions, argument, and analysis of unsettled or debatable, and complex, matters of law and contested facts.[99] Indeed, the Parties' positions reveal that these issues are reasonably susceptible to argument, thus disqualifying Claimants' claims arising under Articles II and III of the BIT from being dismissed under Rule 41(5).[100]

110. Therefore, the Tribunal finds that the Second Objection should be dismissed.

VIII.3 <u>Third Objection</u>

99. As described above in Section VI.3 (and paragraphs 61-63), the Third Objection concerns the principles of prescriptive jurisdiction and adjudicatory comity as matters of domestic and international law, calling for an interpretation of a variety of sources of law, as well as

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[97] *See supra*, ¶¶ 95-96.

[98] As described in Section VI.2 above.

[99] *See generally supra*, ¶¶ 91-96.

[100] *See supra*, ¶ 95.

a review of the factual basis for the US forfeiture proceedings and related measures, and, potentially, legislative and judicial measures and associated facts in Ukraine.

100. These questions cannot be dispatched easily as required by the criteria under Rule 41(5).[101] Rather, in the words of the *PNG* tribunal, they involve, "novel, difficult [and] disputed legal issues,"[102] as well as contested facts. Indeed, the issues raised do not appear to have been addressed previously by an ICSID tribunal and may require the resolution of complex matters of first impression, which cannot properly be resolved in a Rule 41(5) procedure.[103]

101. Accordingly, the Tribunal finds that the Third Objection should be dismissed.

IX. COSTS

111. Pursuant to Article 62(1) of the ICSID Convention and Rule 47 of the Arbitration Rules, the Tribunal has discretionary power in its award to decide the amount and allocation of legal and arbitration costs recoverable by one party against the other party.

112. At this stage, the Tribunal takes note of the Parties' positions and requests with respect to costs and reserves its assessment as to costs for a later phase of the Arbitration.

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[101] *See supra,* ¶ 93.

[102] *PNG*, Rule 41(5) Decision, ¶ 89 (**CL-0001**).

[103] *See supra*, ¶¶ 95-96.

X. OPERATIVE PART

113. In light of the above considerations and for the reasons set forth above, the Tribunal decides:

   (1) The Respondent's Preliminary Objections under Rule 41(5) are hereby dismissed.

   (2) The issue of costs is reserved for a later stage of the proceeding.

On behalf of the Tribunal

[signed]

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Prof. Mónica Pinto
President of the Tribunal